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Hans-W. Micklitz · Geneviève Saumier
Editors

Enforcement and Effectiveness of Consumer Law

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Enforcement and Effectiveness of Consumer Law

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Enforcement and Effectiveness of Consumer Law

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1 The Broader Window

Since the famous declaration of President Kennedy in 1962, consumer policy and consumer law have undergone an amazing and unforeseen development. Today it could be regarded as a separate branch of the legal system not only in the Western World, the EU and the United States, but all over the world, independent from the political and economic regime. Regional organisations such as the OECD and later the EU had spearheaded the development long before the United Nations kept the ball rolling via the adoption of the UN Guidelines in 1985. As society changed, so has consumer law, from the consumption society to the service society and from there to the information society. Today one might go as far as to speak of a second generation of consumer laws which are more and more focusing on services and lately on digitisation and even sustainability, overshadowing the classical and more traditional focus on consumer products.

The amount of laws, regulations and soft-law instruments has increased to a degree that is easy to underestimate, in particular if one takes an international perspective. Certainly, there are key players that could be identified which have left a deep imprint on consumer law and consumer legislation: in the initial phase this was certainly the United States who channelled the newly emerging policy via the OECD to Europe and beyond. Gradually and in particular after the adoption of the Single European Act in 1985, which granted the EU new powers, the European

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Commission and the EU took over the driver's seat and shaped the consumer law of the 1990s and early 2000. The United Nations for their part formulated the Consumer Guidelines which were greened in the 1990s and digitised just recently in 2016. The financial crisis after Lehmann Brothers pushed the World Bank into a prominent position in particular with regard to issues of consumer over-indebtedness and more broadly with consumer finance.

All this is to say that consumer law and consumer policy enjoy public attention nationally, regionally and internationally. Needless to say there are differences between the countries and between the regional and international organisations. The true challenge of today is not so much anymore that there is no consumer law, but that the existing body of consumer law is *properly enforced*. Taking all the national, regional, international hard and soft rules together, one might gain the impression that there is too much law and that the various laws, even within regional organisations such as the EU, but certainly within the countries themselves, are more often than not the result of legal activism in response to policy problems than deeper reflection on how the new laws fit together with older initiatives, whether or not some coherence is needed between the old service and the new service contracts, or between the analog and the digital world—and above all by whom and with what resources the new laws should be enforced. This is not only a concern of lawyers and legal systems that subscribe to the idea of coherence and consistency. At some point, the sheer quantity of laws and regulations becomes an issue in itself for each and every institution which is in charge of devising the law, of applying it to concrete individual infringements or to the mass phenomena of societies in the twenty-first century.

Enforcement is the bid of the day. Consumer policy enjoys or suffers—depending on the viewpoint—from problems that all social policies experience, where law and legal institutions are set into motion to address societal conflicts. Consumer law is open-ended. It does not have clear boundaries and its potential achievements reach far into the economy, into politics, into society. From a strict legal point of view, it is not only the open-ended character, the many general clauses that pose particular problems in practice. The problem starts with considerable confusion over legal concepts. What does enforcement exactly mean? What is the difference between enforcement and implementation? Where is the borderline between individual and collective action? What does collective really mean? What is collective in collective actions? Where is the difference between collective and public litigation? The list can easily be prolonged when it comes to those institutions who are in charge of enforcing the law. In liberal democracies there is a basic understanding on the role and function of independent courts. This understanding is currently shattered by growing tendencies even in established democracies to politically influence the courts and judges. Agencies are mushrooming. But what is an agency, in comparison to a ministry? What does it mean when European law claims that agencies have to be 'independent'—from what? Alternative dispute settlement covers all sorts of activities reaching from mediation to arbitration, without there being a common understanding not even in the European Union. Last but not least, what are consumer and business organisations? Are there minimum requirements for

consumer organisations to be named a consumer organisation or in the same vein as a business organisation? This report shies away from clarifying these legal concepts. This would have been a book in itself and one might wonder whether such an attempt is of any practical relevance. Therefore the language remains rather 'loose', although it is certainly inspired by the cultural and legal background of the two general rapporteurs. It is a biased Western democratic understanding that transpires through the analysis. Clarifications are added only whenever there might be a risk of misunderstanding.

What we can see, however, is that enforcement is transforming in all sorts of directions, away from courts to regulatory agencies, away from courts and agencies into Alternative Dispute Settlement bodies, away from statutory bodies to hybrid public-private intermediaries,[1] with consumer law and consumer policy being at the forefront of the development.[2] Without forestalling the results of the comparison of the national reports, it might be fair to point to the parallels between mushrooming consumer laws and regulations and mushrooming consumer enforcement institutions. Where there is a lack of coherence and consistency in the substantive law, effective enforcement is difficult to achieve, let alone knowing that effectiveness is one of the most complicated issues to 'measure', quite contrary to economic efficiency. Again we do not intend to engage into a debate of what effectiveness means. Like each and every court or administrative body, we take it for granted that the law must be 'effective'. If it is not effective, if it cannot be implemented at all, law remains law in the books not far away from mere politics. This is again a rather loose understanding, but we stick to it as clarifying how to measure effectiveness without raising issues far beyond the purpose of the exercise here undertaken. However, we do not engage into the ongoing debate on the economic efficiency of consumer laws. This will have to be left for another occasion. Taking the twofold constraints on terminology and the limits of empirical research around the world into account, the reports and the general report cannot be more than a first step that fills the consumer laws and regulations with some life and that shows where 'the action is' after decades of intensive law-making—to borrow from the famous title of the article written by David Trubek over 30 years ago.[3]

2 The General Report

This report seeks to draw a general picture of the enforcement of consumer law and the effectiveness of regulatory regimes of consumer protection across a number of countries. It is based on national reports from 37 jurisdictions representing most of

[1] Micklitz and Wechsler (2016).
[2] Cafaggi and Micklitz (2009).
[3] Trubek (1984), p. 575.

the world's regions[4] and one report from the European Union as an example of the most advanced supranational model of consumer law. These reports provide answers to a series of 12 questions drafted by the general rapporteurs (the questionnaire is included as an Appendix 2 to this report). The questionnaire did not try to define consumer law. Instead, it refers pragmatically to contract law, tort law, product liability, standard contract terms (boilerplates), commercial practices and different enforcement mechanisms designed to secure consumer rights. The questionnaire afforded national rapporteurs the opportunity to present their national regime of consumer protection with particular emphasis on enforcement mechanisms, including administrative and judicial means and alternative methods for resolution of consumer disputes. In addition to the provision of objective (verifiable) information concerning existing legislative and regulatory sources and available data on consumer education, complaints and disputes, rapporteurs were invited to provide a subjective assessment of the overall effectiveness of consumer law enforcement in their respective jurisdictions and to identify areas where reforms might be needed. This general report will identify common themes, where they exist, and underline original or unique characteristics that are revealed by the reports. It should be noted that half of the national reports are from countries that are part of the European Union (and two are from EU accession candidate countries).[5] Significant harmonization of substantive law, as well as some procedural mechanisms, exists within the EU that come close to minimum standards on European procedural consumer law. This will be taken into account in identifying common themes so as not to overstate any appearance of an organic consensus having emerged. On the other hand, two continents of the world are underrepresented, Asia and Africa. Therefore, quite necessarily, the general report is somewhat biased.

One of the questions sought to obtain data on the number of consumer complaints and disputes in reporting countries, including data on resolution of these disputes pursuant to different mechanisms, administrative, judicial or alternative methods for resolution of consumer disputes. Many rapporteurs indicated that it was difficult to answer this question because of the absence of any official or even unofficial data in these areas,[6] or because the data available did not distinguish between consumer

[4]Reports were received from the following countries: *Argentina*, *Australia*, Belgium, *Brazil*, *Bulgaria*, *Canada* (*Quebec*), *Chile*, *Croatia*, *Czech Republic*, *France*, Finland, *Greece*, Hungary, India, *Italy*, *Japan*, *the Netherlands*, *New Zealand*, Norway, Paraguay, *Poland*, *Portugal*, *Romania*, Serbia, *Slovenia*, *South Africa*, *Spain*, *Sweden*, *Turkey, United Kingdom*, Uruguay, the United States, *Venezuela* and Vietnam. Following the Montevideo Congress, three further reports were received from *Hong Kong*, the *People's Republic of China* and *Singapore*. A list of rapporteurs is included as an Appendix 1 at the end of this general report. Of these 37 reports, 27 country reports (those in *italics* above) and the EU report were revised by their authors for publication purposes and are included in this compilation. Reports not published in this compilation but referred to in this general report are available on request from the authors (see Appendix 1 with the full list of authors and their email addresses).

[5]Serbia and Turkey.

[6]For Argentina, the only statistics available were from a 2005 OECD report; in Australia, there is no national data but some state data was provided; Belgium does not compute data on the number of

disputes and other types of disputes. Other rapporteurs were able to provide extensive and detailed data from official sources,[7] much of which is accessible online. It seems trite to say that, absent useful data, it is difficult to assess the effectiveness of enforcement mechanisms where effectiveness might, at minimum, be measured in terms of the time to resolution of disputes. Moreover, trends in dispute numbers and types, and shifts between redress mechanisms cannot be examined in the absence of data. This is all more problematic at times where policy makers, legislators and ministries advocate the need for evidence-based policy.

3 Common Themes

State interest in consumer protection is a constant across all of the jurisdictions surveyed (save one[8]), whether these are characterized by long-established or more recently-emerged market economies.[9] The primary importance of consumer protection is occasionally reflected in a state's constitution, although that is the case in only ten reporting countries.[10] One of those countries is Spain, said to have influenced, directly or indirectly, legal developments in four of the others, all in South America. External influence is mentioned in all reports, with recurring references to the 1985 UN Guidelines on Consumer Protection (as amended in 1999 and 2016),[11] and to the European Union consumer legislation, even in a number of non-Member states[12] and with regard to particular rules such as product liability far beyond the borders of the European Union.

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complaints or disputes; in Brazil, Greece, New Zealand, Norway and the U.K., data is available for (some) administrative procedures but not judicial proceedings; Quebec, Croatia, Japan, Paraguay, Serbia and Vietnam have data about complaints but not disputes; no data was available for the Czech Republic or the United States.

[7]These include, with widely varying degrees of detail: Bulgaria, Chile, China, Hungary, India, the Netherlands, Portugal, Romania, South Africa, Spain, Sweden (for administrative dispute resolution), Turkey and Uruguay.

[8]Venezuela is unique in having moved away from a market economy since 2007 with the result that consumer protection has given way to market control by the State. As a result, there are no longer any consumer laws in the traditional sense in Venezuela—the planned economy has transformed the economic and legal landscape. As a result, the Venezuela Report provides an interesting historical record of previously existing consumer law and enforcement mechanisms. It will not, however, be the source of examples of existing mechanisms in the remainder of this report.

[9]These include most recently Vietnam but was mentioned as being of importance in assessing the state of consumer protection in the reports from the Czech Republic, Romania and Serbia.

[10]Argentina, Brazil, Bulgaria, Paraguay, Poland, Portugal, Spain, Turkey, Venezuela and Vietnam.

[11]Interestingly, the report from Finland indicates that the UN Guidelines were not influential because Finnish law already displayed a high level of protection.

[12]As noted, Serbia and Turkey have followed EU consumer law in support of their accession projects. However, the influence of EU law was also mentioned by Chile, Japan, South Africa and Uruguay.

The aim of the questionnaire was to identify the ways in which consumer protection is put into effect. The responses present a wide variety of approaches to the enforcement of consumer law and equally distinct evaluations of their effectiveness.[13] Moreover, the great majority of rapporteurs concluded that more work is needed to improve the enforcement and effectiveness of consumer law in their respective countries. This confirms, from the outset, that there is no miracle recipe that can be proposed in order to achieve success in this area. Reviewing the national reports does allow for the identification of approaches that appear to hold promise and that may be transferable despite different legal systems, societies, cultures and traditions.

A review of the 37 reports reveals current themes across much of the world. Close to half of the reports indicate that substantive consumer law has been significantly updated or reformed in the past 10 years, two of which in 2016.[14] Many legislators are particularly concerned about consumer protection in the financial services area—this is undoubtedly fallout from the 2008 financial crisis that exposed consumers' ever increasing vulnerability to indebtedness.[15] New or revised legislative protections have been adopted in Poland and in the United States, are being formally proposed in Brazil, Chile and Québec, and are being discussed by policy makers in Croatia, Romania, Spain and Turkey. A second common theme that emerges from the reports is the focus on consumer information and education as a means to achieve consumer protection. Knowledge about substantive rights, institutional structures and redress mechanisms is mentioned in many reports as both a policy objective and a significant challenge. Very few countries report that consumer literacy is being taught in schools,[16] but several report the increasing development of media campaigns, websites and workshops by public agencies and consumer associations. A third theme, noticeable across numerous reports, is the high costs and delays associated with judicial proceedings instituted by consumers. This may explain the increasing interest in the development of non-judicial mechanisms of dispute resolution in a number of countries,[17] although such mechanisms are already well

[13]The OECD conducted an interesting qualitative analysis of the effectiveness of five different approaches in 2006. See its report "Best practices for consumer policy: Report on the effectiveness of enforcement regimes".

[14]Australia (2011), Bulgaria (2006), China (2013), Czech Republic (2015), Croatia (2014), France (2016), India (2015—the report indicates that the reform legislation has not yet been adopted but that this should occur), Italy (2014), Japan (2013), New Zealand (2013), Paraguay (2013), Poland (2016), Serbia (2014), South Africa (2008), Spain (2007), Turkey (2013), Vietnam (2010).

[15]The Chinese report specifically refers to the increased attention given to the financial sector after 2008, with significant new regulation at that time and again in 2015 and 2016. Singapore reports that the consumer legislation was amended to apply to financial products and services in 2008.

[16]Only China, Croatia, Finland, Greece, Norway and Spain report that some form of consumer education is part of mandatory school curriculum.

[17]A number of these are countries in the European Union which are obligated to introduce "alternative dispute resolution" as a result of the Directive 2013/11/EU on alternative dispute resolution for consumer disputes complemented by Regulation 254/2013/EU on Consumer Online

implanted in a few countries.[18] These themes will be explored further throughout this report.

The main body of the report is divided into four sections. The first and longest section does not follow directly upon the format of the Questionnaire, seeking instead to address issues that cut across questions I–V and VIII–X. This section discusses the general design of enforcement mechanisms and is itself sub-divided into subsections dealing with enforcement by administrative authorities (Sect. 4.1), enforcement by courts (Sect. 4.2) and alternative methods for resolution of consumer disputes (Sect. 4.3). Collective redress is also addressed within those subsections. This section forms the core of the analysis. The remaining sections deal with the issues canvassed in questions VI, VII and XI, respectively, the roles of consumer organizations and of private regulation in the enforcement of consumer law and the external relations and cooperation arrangements of states and consumer organizations. The report on the national jurisdictions closes with a conclusion that examines the overall assessment that rapporteurs were invited to provide in the final question of the questionnaire. The final section then reconnects the overall findings to the broader frame in which enforcement of consumer law has to be embedded.

4 The General Design of the Enforcement Mechanism

In all reporting jurisdictions, the enforcement of consumer law can be structured along the lines of the traditional public and private divide. Regarding the former, because the source of consumer law in all reporting states is legislation, whether specific or general, some form of public enforcement of that law is envisaged, particularly with regard to the protection of health and safety. This may be undertaken by a public agency charged with this or by public prosecutors generally charged with enforcing public laws. Enforcement in this sense can involve administrative fines imposed for commission of prohibited practices and orders to cease such practices. These orders might be within the authority of an administrative agency, or require proceedings before a court. Such proceedings are sometimes considered to involve collective redress in the sense that all consumers, in a particular market or dealing with a specific business, will benefit from it. Not surprisingly, it would appear that the effectiveness of this type of public enforcement is directly connected to the extent of a given public agency's powers of intervention in the market *ex ante* and its ability to render binding orders against merchants and service providers.

Public enforcement may also be understood to include direct involvement by the public administration in the resolution of consumer disputes with merchants, or in

Dispute Resolution Regulation. These will be discussed further in the section dealing with alternative dispute resolution.

[18] In the Netherlands and Sweden.

the provision of public dispute resolution services organized and funded from public resources. Alternatively, public enforcement could also be understood to include any means by which a publically-funded actor or agency can be called upon to assist consumers seeking to invoke rights against merchants or service providers.

Private enforcement, on the other hand, is typically effected by individual consumers making claims before the courts. Occasionally, individual consumers may launch claims on behalf of other consumers before courts or administrative bodies, which may be described as private "collective" enforcement. Private collective enforcement may also invoke the role of consumer organisations, which differ widely across jurisdictions. In the European Union, Member States are free to entrust either public bodies or private consumer organisations with the enforcement of EU law. The powers of the consumer organisations, however, remain limited and always bound to instituting judicial or administrative actions.

Before turning to consider these mechanisms in more detail, it is worth noting at the outset that in the vast majority of jurisdictions, private individual enforcement is considered to be the least effective means of enforcing consumer law, largely due to the high costs and delays associated with judicial proceedings.[19] It is not surprising, therefore, that in many countries, non-judicial means of private dispute resolution are being deployed in an effort to address existing weaknesses in private enforcement. Whether the same holds true with regard to collective enforcement very much depends on the role and position of consumer organisations in the respective countries. In Austria and Germany, consumer organisations benefit from public funding and they must be regarded as a functional substitute to a public consumer agency.

4.1 Enforcement by Administrative Authorities

All national rapporteurs report the existence and involvement of administrative agencies in the enforcement of consumer law. What distinguishes them is largely based on three main elements: the independence or autonomy of the administrative agency within the national government,[20] the nature and scope of its enforcement powers and the extent to which it provides dispute resolution services to individual consumers.

[19]The Council of Europe's European Commission for the Efficiency of Justice has recently published its sixth report on European judicial systems, covering 45 European countries. It provides extensive data on budgets and personnel of unique assistance in assessing the performance of those systems. See http://www.coe.int/t/dghl/cooperation/cepej/default_en.asp.

[20]Independence of agencies is complex issue in particular in comparison to the independence of courts. See in general Ottow (2015).

4.1.1 The Independence or Autonomy of the Administrative Agency Within Government

Administrative agencies dealing with consumer issues are organized in a variety of ways within governments. They are occasionally exclusively dedicated to that task[21] but are more often a subdivision within a broader body dealing with other aspects of the economy such as competition.[22] In a few countries, authority to deal with consumer issues is distributed across various regulatory agencies.[23] In most instances, the administrative authority dealing with consumer issues is not an independent body[24]; instead, it typically functions either within a government ministry or, if it is a separate entity, it remains subject to ministerial oversight. These distinct institutional models do not appear to be directly linked to greater or lesser effectiveness of consumer law amongst the reporting countries.[25]

However, the dispersion or duplication of enforcement across various bodies, or between different levels of government (central, regional, local) can complicate the landscape. This is more common in federal and regional states where authority over consumer law and its enforcement can be divided or shared between central and regional bodies. Brazil's model involves the combination of a federal government agency within the ministry of justice, charged with insuring coordination among the autonomous regional or municipal bodies, whose powers do not derive from federal but local legislation, even though the substantive law being enforced is federal law.[26] In Australia, where competence in consumer matters is divided between the federal level and the state and territories, a uniform *Australian Consumer Law* was enacted in 2011 precisely in order to eliminate "divergence, duplication and complexity".[27] However, enforcement activities continue to be entrusted jointly to both levels of government. In Germany, public enforcement, as far as it exists, faces the difficulty of federal states where the enforcement powers are within the competence of the region/state/lander. The Spanish report indicates that the distribution of enforcement

[21]Such as Brazil, Bulgaria, Québec, Greece, Hungary, India, Japan, New Zealand, Paraguay, Portugal, Romania, South Africa, Sweden, Turkey, Uruguay.

[22]Such as Argentina, Australia, Belgium, China, France, Finland, Hong Kong, Italy, Netherlands, Poland, Singapore, Slovenia, United Kingdom, United States, Vietnam.

[23]Such as Croatia, Czech Republic, Norway, Spain.

[24]In all cases, agencies function using public funds and their existence is derived from legislation or government decrees. Still, greater autonomy and independence can be assessed in terms of the extent to which an agency operates at arm's length from other organs of government and, in particular, on how its management is appointed. Taking these elements into consideration, it would appear that agencies are significantly independent in Australia, Italy, Paraguay, South Africa and the United States.

[25]Although the Uruguay report raises the lack of independence of the administrative unit responsible for enforcement as one of the key problems in that country.

[26]Substantive consumer law is provided by the comprehensive Código de Defesa do Consumidor of 1990; the federal coordinating body (Secretaria Nacional do Consumidor) was created by federal decree in 2012.

[27]See Australian Report answer to Q.I(9).

powers amongst the various levels of government involves complex constitutional issues which inevitably cause confusion for consumers in addition to creating conflicts between the various agencies.

There is significant diversity in the roles assigned to administrative agencies dealing generally with consumer law issues. Some jurisdictions report that these agencies are involved to some extent in the development of policy, participating in the identification of problem areas and in the elaboration of legislative solutions. In Argentina, Finland, France, Japan, Quebec, Poland, Portugal, Romania, South Africa, Sweden and the United States, the mandate of the main administrative consumer agency explicitly refers to its role in the legislative or rule-making process.[28] All agencies exercise enforcement responsibilities, the nature and scope of which is considered in the next section.

In a significant number of countries, including those where a general consumer agency exists, there are specific agencies charged with oversight or regulation of particular markets of relevance to consumer protection. Numerous reports mention that distinct bodies exist in areas such as telecommunications, financial services, banking, energy, water, transport, food and pharmaceutical safety. In many cases, these agencies pre-date the creation of a general consumer protection agency, but in others, they have developed in areas of emerging regulatory concern or have been transformed to better reflect existing markets. Interestingly, these sectoral agencies are sometimes more independent than the general agencies;[29] they also vary greatly in the extent to which they participate in the enforcement of consumer law as opposed to mainly market regulation. This is often directly related to the role these agencies may play in responding to consumer complaints against businesses in their particular industries, as will be discussed further below. The European Union is gradually but steadily not only promoting the establishment of sectoral agencies within the Member States, but also obliging them not only to monitor and survey the respective market, but to protect the collective interests of consumers. This move towards consumer protection yields difficulties in those countries where regulatory agencies are traditionally in charge of controlling the functioning of the respective markets alone.

4.1.2 The Nature and Scope of Its Enforcement Powers

The greatest diversity amongst administrative agencies relates to the nature and scope of their enforcement powers.[30] As a starting point, one may ask how agencies

[28] Admittedly, because the reports focus on enforcement, some rapporteurs may not have mentioned the legislative involvement of agencies in their countries.

[29] This is often the case with national or central banks where they have supervisory powers over the banking industry (in Bulgaria, Croatia, Hungary, Italy) but it is also the case in other sectors, such as non-banking financial services in Quebec, Sweden and South Africa.

[30] For EU Member States, there are strong harmonizing influences of course. The latest proposals from the Commission include suggested minimum powers for national consumer authorities

identify where and when to intervene in the consumer market. Are agencies merely responding to external pressures, such as consumer complaints, media reports or ministerial directives? Or are they engaged in self-directed identification and investigation of particular industries or problems? Once an infringement of substantive law is identified, does the agency act directly against the violator or does it refer the issue to another body for prosecution? The national reports indicate that multiple combinations of these powers and their deployment can be found.[31] In Belgium, the main authority has investigatory powers, can issue warnings or negotiate settlements but has no authority to institute injunction proceedings before the court. In Quebec, the agency has the power to determine its own surveillance agenda but was only recently granted the power to institute injunction proceedings itself without having to refer the case to a state prosecutor. In Slovenia, the agency has the power to issue injunctions itself, having first determined through its own investigation that a violation has occurred.[32] The Bulgarian report notes that the relevant agency relies mainly on consumer complaints when deciding where to intervene, lacking any enforcement agenda of its own.

The power to impose sanctions directly is often said to depend upon whether an agency exercises merely administrative functions or also judicial or quasi-judicial functions. It appears that few agencies exercise the latter. Only Bulgaria, China, France, Hungary, Italy, Serbia, Spain, the Netherlands and Turkey are reported to have agencies that have the power to impose fines against merchants found to have violated consumer law. While such administrative fines are referred to in many other reports, they appear to depend on orders made by courts,[33] whether proceedings are instituted by an agency directly or through a separate public prosecutor's office.[34] As noted above, this is also the case for injunctive relief whereby the agency seeks to intervene in the operations of a particular merchant (to suspend a licence, temporarily close premises, cease an unlawful practice, eliminate an unfair trade term from a standard form contract, etc.).[35] In many jurisdictions, such enforcement measures require judicial proceedings often before courts exercising administrative jurisdiction.[36] Even where agencies have powers to intervene directly, these are typically subject to review by a judicial body on application by the targeted party. In Poland,

including "take-down" procedures for websites involved in cross-border selling. See the proposed Consumer Protection Co-Operation Regulation, COM (2016) 283 final of May 2016.

[31]The Swedish report indicates: "Investigations are initiated as a follow-up on consumer or competitor complaints, upon notification by public authorities, consumer organisations or ex officio by [the agency]."

[32]Any such injunctive order is then subject to review by a court.

[33]This is the case in Croatia and Sweden.

[34]This appears to be the case in Brazil, Quebec and Japan.

[35]Many rapporteurs refer to these enforcement measures as "collective redress" because the effects benefit consumers generally as opposed to providing relief for an identified aggrieved consumer or group of consumers. This will be discussed further in the section on collective redress.

[36]The report from the United States indicates that the Federal Trade Commission, responsible for consumer law enforcement, can seek an order from an administrative law judge and then seek

the agency[37] has extensive enforcement powers but its decisions are subject to appeal before a special District Court in Warsaw.[38] In Argentina, sanctions imposed by the administrative agency can be challenged before a federal court of appeals in administrative matters.[39] Within the European Union, administrative decisions taken by administrative bodies must be subject to judicial review.

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.[40] Instead, this form of collective redress is typically used by the public authority to obtain judicial declarations regarding unfair commercial practices or unfair contract terms.[41] It is a stop-order mechanism, prohibiting the continued use of incriminated commercial practices and contract terms. The possibility for parties other than public authorities to institute collective redress procedures will be considered in other sections of this report.

4.1.3 The Extent to Which It Provides Dispute Resolution Services to Individual Consumers

Beyond their role in enforcing consumer law directly against merchants, agencies may also be involved in responding to, or even resolving, complaints made by individual consumers against specific business parties for which the individual consumer is seeking personal redress pursuant to rights granted under substantive law. While all countries report the opportunity of seeking such redress from civil courts,[42] several, but not all,[43] provide individual consumers with alternative methods for resolution of consumer disputes either under the auspices of the agency

penalties from a federal court in case of non-compliance with the order. On the other hand, in Croatia, proceedings by the agency are before the commercial courts.

[37]The power is granted to the President of the Office of Competition and Consumer Protection (UOKiK).

[38]Although the UOKiK decisions are administrative in nature, the appeal lies before a civil court. That court delivered 113 judgments in 2014, maintaining the original administrative decision of the agency in 75% of those cases. In 2013 and 2014, the agency rendered 326 and 277 decisions, respectively, concerning infringements of collective consumer interests. In 2013, 77 decisions were rendered on appeal, with 12 modifying the original decision and 6 annulling it.

[39]There are no statistics on how often this occurs or what the results are.

[40]This appears to be available only in Brazil, Chile, Finland and Portugal.

[41]In some cases these orders may then be relied upon by consumers to obtain individual relief in separate proceedings where the violation of consumer law has also caused damages. This appears to be provided for in Argentina, China, Croatia, Czech Republic, France, Hungary, Portugal and Serbia. In others, the possibility of follow-up compensation is not clearly available: Turkey and Uruguay.

[42]This will be explored in more detail in a later section of the report.

[43]In some countries, the administrative agency does not engage in any dispute resolution for individual consumers. This is the case notably in Australia, France, Quebec and the United States.

itself or through affiliated or separate administrative bodies. In most cases these mechanisms have the advantage of being free and quick, thereby providing more effective and accessible means of redress to consumers than what is available using civil proceedings. In many cases, however, these mechanisms are voluntary and do not lead to results that are binding on the merchant, thereby giving the consumer a potentially less effective outcome than could be achieved in court. The sheer diversity of approaches evidenced in the reports cannot be done justice in this general report. However, a few examples can serve to illustrate that diversity as well as highlight the complexity of some of these systems.[44]

In Finland, consumer disputes are addressed either to the Consumer Ombudsman or to Consumer rights advisors, both of which are state officials who report to the main administrative agency.[45] The proper avenue depends upon the type of complaint and each body is mandated to redirect the consumer to the proper channel. Where an individual consumer is seeking damages from a business, the second route is the appropriate one. Consumer rights advisors provide information to the consumer and offer mediation between them and the particular business involved. If the dispute cannot be solved through mediation, it can be referred to the Consumer Disputes Board, an independent state body whose members represent consumers and business. There is no fee required but each party must cover its own costs. The process is mainly written and the Board cannot hear witnesses. Moreover, its decisions are recommendations and therefore not binding, although there is 80% compliance, and a list of non-compliant businesses is published every 3 months.[46] In 2014, the Consumer Disputes Board resolved over 4800 disputes and the average processing time was 9 months.[47]

In South Africa, the National Consumer Commission was originally mandated to resolve individual complaints after its creation in 2011. Lack of resources led it to require that consumers with complaints first approach provincial consumer protection authorities or accredited industry ombud schemes.[48] The latter are largely consensus-based and the consumer retains the right to refer back to the NCC if dissatisfied with that process. Provincial consumer protection authorities will assess the merit of a consumer's complaint and try to negotiate resolution with the suppliers. If that is not successful, it will argue the case on behalf of the consumer before an administrative consumer tribunal (set up under provincial law). Orders from these tribunals are not equivalent to court judgments; non-compliance is rather

[44]The Argentina report discusses no less than three separate avenues for redress organized under the aegis of the central agency, each one seemingly also involving several different instances or processes.

[45]This is the Finnish Competition and Consumer Authority.

[46]Despite this process, a dispute settled by the Board can still be brought before a court.

[47]The Finnish report notes that delays are increasing because the Board is overburdened; moreover, as an ADR body under the EU directive, it should normally provide handling times of no longer than 90 days.

[48]These currently exist for consumer goods and services and for the motor industry and more should be in the process of being accredited.

treated as a criminal offence. These tribunals are often more accessible than ombud schemes that typically only operate in one major city. The Consumer Protection Act requires that consumers exhaust their remedies available under national law prior to being entitled to bring proceedings before an ordinary court. Statistics from the NCC reveal that in 2014/2015, it received 5242 complaints and resolved 5751 disputes. For the same period, 80% of complaints were resolved on average of 14 days, largely due to significant referrals to accredited ombuds, who themselves resolved disputes in less than 60 days on average.

In Greece, the General Secretariat of Consumer Affairs is not competent to resolve disputes. Instead, a separate and independent authority, the Consumer Ombudsman, supervised by the same ministry, receives consumer complaints and intervenes with businesses to seek consensual settlement. If a settlement is reached, it is submitted to a court to be declared enforceable. If no settlement is reached, the Ombudsman can make a recommendation which, if not complied with, may give rise to sanctions (but not imposed by the Ombudsman). The Consumer Ombudsman also supervises municipal "committees of amicable settlement" composed of three members (a lawyer, a business representative and a consumer representative) who can render non-binding decisions. In 2014, over 5000 disputes were initiated and over 80% were resolved. The average time to resolution is under 90 days and the procedure is free.

These examples refer to the role played by the main consumer authority in a given country. All of the countries report sectoral administrative agencies, many of which are competent to receive complaints directly from consumers and to offer dispute resolution support. In other countries, independent public ombudsman schemes are set up for the purpose of resolving consumer disputes. Both of these models appear to be common in areas such as telecommunications, financial services and energy.[49] In other words, the fact that a country's main consumer agency is not empowered to provide redress to individual consumers does not mean that other public bodies, in the same country, are not so empowered. A few examples in the field of financial services can illustrate the range of available models.

In the Netherlands, there is a designated consumer complaint commission for financial services (Kifid), created in 2007, financed and regulated by the Ministry of Finance. It provides different stages of dispute resolution: mediation through an Ombudsman service, and if that fails, a decision can be obtained from a commission (but it is only binding if the trader has agreed in advance to be bound), and an appeal mechanism from those decisions. Since 2015, an online service is also available. In 2014, the number of complaints and resolutions was as follows—Ombudsman: 4755 and 3511; commission: 657 and 761; appeal: 82 and 54.[50]

[49]The United Kingdom's Financial Ombudsman Service is authorized to render binding decisions.

[50]The number of resolutions does not refer back to the number of complaints in the same year. The statistics, which are quite detailed in the Dutch report, also indicate that for the same year there were over 2500 complaints declared inadmissible.

In the United Kingdom, the Financial Ombudsman Service is a statutory dispute resolution scheme, independent from, but cooperating with the financial services regulator.[51] Consumers are required to first seek to resolve their dispute directly with the business, who is given 8 weeks to respond. Failing resolution, consumers can then make their complaint online or in writing to the FOS, who also provides assistance with that process. Businesses covered by the Financial Services and Markets Act are obliged to respond to the FOS in writing. The FOS rarely conducts hearings; instead, it determines the position of the parties based on written documents and telephone conversations. These exchanges are usually sufficient to allow the parties to reach an agreement. If not, the Ombudsman's decision can order for compensation or direct a business to act in a particular manner to redress the situation or even to apologize; its decision is not based strictly on legal rules but is to accord with what is "fair and reasonable". The decision is binding on the business if it is accepted by the consumer and there is no appeal available.[52] The consumer is not obliged to accept the FOS decision and can choose to bring the matter to court. In 2014/2015, the FOS investigated close to 330,000 complaints and resolved almost 450,000 (90% informally by consent), most in less than 3 months.[53] The service is free to consumers.

While these public enforcement mechanisms can provide effective, timely and inexpensive means for consumers to resolve their disputes with business, no country has made them the exclusive avenue for redress. Indeed, all of the reports indicate that consumers can immediately or eventually seek remedies before courts, whose signal advantage is to render binding and enforceable judgments to the successful party. The following section will discuss the variety of ways in which consumers' claims are dealt with before courts, including a discussion of opportunities for collective redress of individual claims. The subsequent section will deal with the alternative methods for resolution of consumer disputes.

4.2 Enforcement by Courts

Of the 37 reporting jurisdictions, only two—Brazil and Turkey—are stated to have a specialised civil court for consumer claims.[54] Turkey's system of consumer courts[55]

[51]Its enacting legislation is the Financial Services and Markets Act 2000 that also created the Financial Conduct Authority, responsible for consumer protection in the financial services market, including supervision and promotion of competition in that market. Its board of directors is appointed by the FCA.

[52]Except for the option of seeking judicial review typically limited to ensure that natural justice was respected or that the FOS did not act outside its sphere of competence.

[53]This data is available on the FOS website.

[54]Argentina was supposed to have one but the 2014 law creating it was never implemented and has been found to be unconstitutional.

[55]This is a two-tiered system depending on the value of the claim. Smaller claims go to the Consumer Arbitration Board, which is not presided by judges but whose decisions can be appealed

appears to provide timely resolution at no cost to consumers and is heavily used.[56] In Brazil, the consumer code provides for the establishment of chambers specialized in consumer law in the courts, allowing for specialisation of judges and their "mobilization for the consumerist cause".[57] Despite this, it may take up to a year to get a decision and consumers are required to be present at two judicial hearings.

In most of the other countries, consumer claims are likely to be directed to a general small claims division where the value of the claim is below a stated amount. The majority of these do not have procedures or tariffs that are distinct for consumers compared to other litigants, although there are a few exceptions. In Chile, small consumer claims are directed to a tribunal of general jurisdiction[58] but the consumer protection statute provides that a simplified procedure will apply and that no fee will be charged unless the claim is deemed to be reckless. In France, the Code de la consommation[59] specifies that the consumer can be exempted from the costs of enforcement of any favourable judgment whereas in Romania there are no fees for consumers.[60] In Vietnam, consumers are exempt from fees related to civil proceedings.[61] In China, some local courts have established special procedures to simplify litigation of consumer claims.[62]

In some of these small claims instances, legal representation is not required, such as in Belgium, Chile, France, India and Uruguay, whereas in Quebec and Hong Kong, lawyers are prohibited in those cases, which can significantly reduce the cost of access but may also affect the quality of justice received. Finally, some form of legal aid is available to consumers in a large number of countries but not in all.[63]

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to the Consumer Court, presided by a single judge, who also sits in first instance on claims of higher value.

[56]The "no cost" reference merely means that there are no filing fees; consumers remain responsible for any legal costs they might incur. With regard to the number and types of disputes, the Turkish report provides detailed official statistics. For the period 2005–2015, over a million claims were initiated in the consumer courts and more than 570,000 were decided. For the Consumer Arbitration Boards, where smaller value claims are brought, the numbers are even greater. In 2015 alone, over three million were claims were made there.

[57]Brazilian Report, answer to Question IV(2).

[58]The report indicates that this instance (Juzgados de Policía Local), while not a "court" in the ordinary sense, has exclusive jurisdiction for claims under the equivalent of approx. 650 US$ and operates under the supervision of the Court of Appeal.

[59]A newly revised Code is in force since 1 July 2016.

[60]The Spanish report states that there are no fees for natural persons but that is not limited to consumers and in Uruguay any claimant can be exempted from fees on a needs basis, which will include consumers.

[61]The Vietnam report also refers to a simplified procedure available for consumer claims but notes that these have not be properly implemented and therefore do not benefit consumers.

[62]For example, the Intermediate Court of Chengdu City in Sichuan Province established travelling courts to reach consumers where they live; similarly in Anyang (Henan Province), consumers are given priority for filing and pleading their cases.

[63]Availability is typically dependant on a means test. Those countries where state legal aid is not available for civil claims include the U.K. and the U.S. In Quebec, legal aid is not excluded but is

Where it is available, it is usually dependant on need although two reports indicate that assistance is a constitutional guarantee.[64] EU law obliges Member States to introduce legal aid schemes but only in case of cross-border claims.

Several reports indicate that the civil route for individual consumer redress is not effective because of the cost involved or the long delays expected.[65] In other countries, the quality of justice itself is reported to be an issue. In Uruguay, a comprehensive consumer law was enacted in 2000 but many judges ignore it and continue to apply the 1868 Civil Code that does not offer the requisite protections to consumers. A similar lack of judicial awareness of consumer law is reported in Serbia as well. In Bulgaria, there is little public trust in judicial institutions and consumers prefer to rely on public enforcement rather than sue in civil courts. Much of the reservation dates back to prejudices related to the corruption claimed to be present in the judiciary.

As noted above, many court systems include special instances or procedures for small claims and these are often said to be very relevant to individual consumer claims. In the EU there is a particular mechanisms for small claims, however, its practical impact is said to be limited.[66]

Another particularity of consumer claims is that they can also affect a large portion of the population when it is dealing with the same telecom company, energy provider, national bank, etc. In other words, misleading advertising, unfair contract terms or defective products affect more than one consumer at a time. Despite this reality, most reports indicate that avenues for collective redress for individual interests are underdeveloped although many new initiatives are reported. The question of collective redress has been much discussed in legal literature and there is a wealth of comparative research, particularly in the EU.[67] This general report will merely highlight some of the newer examples of collective redress discussed in the reports.

The first distinguishing feature regarding collective redress relates to its scope and purpose. Procedures to allow individual consumers to obtain damages from a business within a single collective action are not common among the 37 reporting countries. The best known, and most extensive, is the United States class action procedure that allows one consumer to bring a claim on behalf of all similarly-situated consumers to seek compensation for damages caused by a breach of substantive rights by a business.[68] The U.S.-style class action is particular in that it

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very unlikely for civil cases. Other sources for legal assistance are discussed later in the section on consumer organizations.

[64]This is said to be the case in Argentina and Brazil although the latter report indicates that it is based on need as well.

[65]Long delays are mentioned in reports from Australia, Quebec, Greece, Italy, Poland, Serbia, Slovenia and South Africa.

[66]See Regulation (EC) No 861/2007 setting up a European Small Claims Procedure.

[67]See the material available on http://ec.europa.eu/consumers/solving_consumer_disputes/judicial_redress/index_en.htm.

[68]While this might be a right conferred by consumer legislation, it can also be a claim in contract or tort.

functions on an "opt-out" basis, meaning that all consumers with similar claims are covered by the action without prior consent although they are given an opportunity to exclude themselves. In the EU there is no agreement on whether a US type class action is needed as a common standard. The Recommendation on Collective Redress of the European Commission therefore favours an opt-in solution.[69] Australian and Quebec law provide essentially the same vehicle as the U.S. to address claims common to groups of consumers.[70] The report from Portugal indicates that collective actions for damages can be instituted there on an opt-out basis and can be brought by an individual consumer even without a direct interest. The UK has most recently introduced an opt-out mechanism, but it is too early to assess its implications for collective enforcement. It is the "opt-out" feature that is largely objected to in other countries and that may explain why different models are still preferred.[71]

One model adopted in 2014 in Belgium provides for a collective action in damages for consumer disputes arising from contractual breaches or violations of consumer regulations listed in the legislation. This action cannot be instituted by an individual consumer but must instead be taken by an organization recognized according to conditions imposed by the legislation. The procedure involves a first assessment of admissibility by the court. The legislation provides that the court will determine whether the action proceeds on an opt-in or opt-out basis although it does not specify the basis on which that determination is to be made.[72] While any resulting settlement or judgment is binding on "all consumers forming part of the group", the scope of the redress will depend on whether it functions on an opt-in or an opt-out basis. Only one action has been declared admissible so far and the court declared that it would be an opt-in proceeding, without explaining why.[73]

In Chile, a form of collective redress was created in 2004 but expanded in 2011 allowing the consumer authority or consumer associations to institute an action which, if declared admissible, invites the express participation of interested consumers. Once a judgment is rendered, it is considered to have *erga omnes* effect such that consumers can make a claim for compensation pursuant to that judgment, but it

[69]EU report, the recommendation is not binding though. Member States may go beyond or they may simply stay away from taking action.

[70]Equivalent results can be obtained under the Brazilian model that also allows from compensation of consumers similarly-situated where, they all contracted with the same business who overcharged them. In such a case, a judgment can be rendered declaring the overcharge to be wrongful and ordering reimbursement to all consumers. Such actions are most often brought by public prosecutors but the law also allows them to be brought by consumer organizations. Unlike the U.S. and Quebec models, individual consumers cannot institute these actions on behalf of all similarly affected consumers.

[71]The reports from Argentina and Romania suggest a model closer to an opt-out system but insufficient detail is provided to allow for inclusion of these two in the text.

[72]The law specifies that where physical or moral injury are involved, the group must be on the opt-in model.

[73]The action was brought by the consumer association Test-Aankoop against Thomas Cook for flight delay; the report states that there are three other actions on the horizon.

must be done within 90 days. This appears to be a popular procedure as there were 60 cases initiated in the last 3 years.

France has also recently enacted in 2014 a new group action that can be brought by recognized consumer associations to obtain a ruling on the business' liability to consumers which then enables consumers to claim reparation in a separate process or to be compensated directly in the case where common and identical damages are appropriate. So far eight claims have been started but only two cases have been decided.

Japan adopted a collective redress mechanism for "mass consumer damages" in 2013 that will come into force in October 2016. It is to be brought by consumer organizations and is only available for pecuniary damages, not physical or moral. The court will first determine liability and then a simplified procedure will be in place to allow consumers to make their claim for individual compensation.

The Netherlands have chosen a quite unique way. The parties to a conflict, business and consumer organisation or civil organisation have to settle the case before they can go to court and seek approval by the judge. The legislation covers all sorts of conflicts and has been successfully applied in financial services. It is in principle open to companies and consumer organisations from outside the Netherlands, as long as the parties agree on the Netherlands as the place of jurisdiction.

As noted in the previous section on public enforcement, many countries have similar vehicles that can allow for a judgment declaring the business to be liable and then providing for individual compensation claims on an opt-in basis or indirectly in a separate process.[74] Other countries do not provide any mechanisms that facilitate collective redress of a compensatory nature.[75] All in all, it seems as if injunctions provide for a kind of minimum standard around the world, where as collective compensation in whatever legal form, be it a damage claim, skimming off, or unjust enrichment remains the exception to the rule.

[74]Opt-in models exist in Bulgaria, Sweden, Italy, New Zealand. In other cases, a court declaration of liability is considered to have *erga omnes* or *res judicata* effect such that individual consumers can rely on this as the basis for an individual claim before civil courts or in a second phase of the collective process. This seems to be the case in, Argentina, China, Croatia, Hungary, the Netherlands (which also has a unique court-approved collective settlement model), Poland, and the U.K. The report from Bulgaria discusses a 2006 reform that introduced a collective action for damages that follows a two-phase approach and looks like an opt-out system. The reports indicates that it is only exceptionally used because it is procedurally overly complex and has unresolved cost implications.

[75]As indicated in the reports from the Czech Republic, Serbia, Singapore, Slovenia (although a test case procedure is available), Turkey and Uruguay. The South Africa reports indicates that its courts seem open to the expansion of the representative action although this has occurred in the human rights field and not yet in the consumer field.

4.3 Enforcement by Alternative Mechanisms for Resolution of Consumer Disputes

The review of public enforcement mechanisms has already revealed that many state authorities provide alternative mechanisms for resolution of consumer disputes. The agency itself may engage in direct negotiations with the business in response to a consumer complaint or may have more formal conciliation, mediation or arbitration processes within its organization. In other cases, autonomous bodies are set up by law to provide extra-judicial dispute settlement processes either for consumer claims generally or in specific sectors of the consumer market. Such alternative mechanisms can also be offered by consumer associations, trade organizations,[76] private ADR institutions or individuals. These various models appear in different configurations and combinations in the reporting countries. Despite these divergent approaches, a significant number of reports indicate that ADR is increasingly considered as a means of providing effective and efficient enforcement of consumer law. Moreover, regulation surrounding the private provision of such services is also increasing. In 2014 the European Union adopted a common scheme for alternative dispute resolution (ADR) and online dispute resolution (ODR).[77] Thereby the European Union has established a new layer of law enforcement outside and beyond courts and administrative bodies. Member-States have an obligation to provide ADR and ODR services to consumer. The precise structure of these services is left to individual states but the system must be voluntary and non-binding for the consumer; whether it is binding on the traders is not prescribed. EU Member States must designate accredited bodies, whether public or private, and ensure that their procedures are transparent, just, effective and fair. All of the reports from EU states indicate that these recent requirements have been implemented or are in the process of being implemented. Starting in 2017, the Chinese consumer authority (SAIC) launched a free online dispute resolution platform, showing that the trend toward state-sponsored ODR is only beginning.

In addition to the design and sources of ADR, differentiation across countries may also arise from the relationship between these ADR mechanisms and judicial proceedings. In some countries, an attempt to settle a dispute, whether informally or via a formal ADR process, is a pre-condition to seizing the civil courts. In the EU, this practice has led to a decision of the European Court of Justice who tied its approval to the opportunity that access to court must remain open. In Quebec, the new Code of Civil Procedure, in force since 1 January 2016, requires that parties must "consider" ADR prior to seizing civil courts. A pilot project imposing mandatory mediation in consumer claims prior to accessing the small claims procedure has been set up for a 3 year period in two judicial districts. In South Africa, access to courts is also dependant on the consumer having exhausted administrative redress mechanisms

[76]These are common in certain sectors such as financial services and telecommunications.

[77]Directive 2013/11/EU on alternative dispute resolution for consumer disputes; Regulation 254/2013/EU on Consumer Online Dispute Resolution.

that include ombudsman schemes. In Norway, Italy, Singapore, Slovenia and Uruguay, a prior conciliation or mediation process must precede court actions in certain circumstances. Even the Turkish system can be understood in this sense because the smallest value claims must be instituted before the public Consumer Arbitration Board although appeals are then lodged before the consumer court.

One should also distinguish between national and cross-border consumer litigation. Whether the alternative methods for resolution of consumer disputes are to be turned into promising means depends on the nationally available alternatives. The starting position is entirely different in cross-border litigation. Going to court involves complicated questions of jurisdiction, applicable law and, in case it comes to a judgement, of cross-border enforcement. Even within the EU, which might look rather homogenous from the outside, the degree of complexity might easily deter consumers from going to court. Overall, the number of court cases in cross-border litigation in the EU remains rather low, in particular in case of low value claims. That is why the alternative methods for resolution of consumer disputes might very well be the only alternative in cross-border consumer issues. Therefore, the 2016 EU-imposed online platform for dispute resolution established under the EU Online Dispute Resolution Regulation has to be closely watched in the next few years and may well influence non-EU states seeking new ways to improve access to effective enforcement mechanisms for consumers. Here the EU is competing with the initiative undertaken by UNCITRAL, which is advocating for consumer arbitration in cross-border issues.

Finally, many countries report that contract clauses seeking to impose an ADR process to the exclusion of courts are considered to be unfair and therefore unenforceable.[78] The main exception to this is the United States, where consumers can be limited to arbitration if the contract so specifies.[79] In the Czech Republic, an amendment to the arbitration legislation in 2012 placed strict requirements on arbitration agreements in consumer contracts and on the conduct of the arbitral proceeding.[80]

[78]This is reported for Brazil, France, Portugal, Quebec, Romania, U.K. (for disputes less than 5000 pounds Sterling). In Vietnam, such clauses are not prohibited but the consumer can always choose the administrative or judicial route.

[79]The US reports indicates that several attempts to reverse this by legislation have failed. This difference in treatment of arbitration in consumer cases has led to an impasse in the UNCITRAL Working Group III on Online Dispute Resolution. See http://www.uncitral.org/uncitral/commission/working_groups/3Online_Dispute_Resolution.html.

[80]Including that the arbitrator must be accredited, apply substantive consumer law and give reasons.

5 Consumer Organizations and Enforcement of Consumer Law

The status of consumer organisations varies widely among the reporting jurisdictions, from the stringency of requirements for their recognition, to the scope of their competencies, to the number and size of the organisations themselves. However, most countries reported at least some form of official recognition of their consumer organisations, bringing with it standing to bring proceedings against businesses for infringing consumer law, authorisation to provide ADR between consumers and businesses, or the right to advise government bodies on ways to improve consumer legislation or its application. The few that reported little or no role for consumer organisations within their legal framework tended to have other ways for consumers to contribute, often through a public consumer authority.[81] The EU has laid down minimum requirements for consumer organisations that are entrusted with the action for injunction in the field of unfair commercial practices and unfair contract terms. They have to be able to defend 'the legitimate interests' of consumers. Whilst Member States remain free to define the details, they have to notify those consumer organisations to the European Commission which are given standing in cross-border litigation. In implementing the respective EU Directive, many Member States seized the opportunity to make the registration procedure mandatory also for actions for injunctions within their territories alone.

Japan stands out for the sheer number of its consumer organisations, with more than 150 at the regional/national level and almost 2500 in all, though the vast majority only provide information or act as buying associations and have no official powers.[82] Meanwhile, Chile boasts 106 registered organisations with power to initiate legal actions, represent consumers, and act as ADR providers. India, Portugal, the United Kingdom, and the United States reported "numerous" consumer organisations, without giving specific numbers. At the other end of the spectrum, Finland, New Zealand, Paraguay, and Uruguay each reported only one consumer organisation; however, these do all enjoy standing to bring actions on behalf of consumers.[83] Norway has no general consumer organisation, but several sectoral groups such as a tenants' association. Unfortunately, it is clear that not all reporting countries share the same definition of "consumer organisation," which makes it difficult to draw conclusions from these statistics.[84]

[81] New Zealand, Norway, Sweden, Venezuela.

[82] Recently, some organisations have been certified to defend consumers' collective interests; two organisations act as government consultants on consumer affairs.

[83] Finland's consumer organization has fairly limited standing: it can only bring an action in the Market.

[84] This is certainly due, in part, to the differences in legal frameworks in the reporting countries; where consumer organisations play a more central role, their definition will usually be narrower. The Chinese report indicates that the "consumer organisations" are quasi-governmental, making them quite distinct from such organisations in other countries.

Broadly speaking, consumer organisations benefit from three types of state-regulated power, as well as a number of unregulated competencies. One type of power is standing to initiate legal actions, usually public interest actions seeking injunctions or other administrative sanctions. In countries with collective redress schemes, consumer organisations are often authorised to bring those actions as well. This is true for the vast majority of the EU Member States, in China and in Quebec. In two countries (Poland and Greece), organisations can even sue on behalf of individual consumers[85]; in Belgium, they can also represent consumers seeking compensation in criminal cases. A second type of power is a right of consultation with state bodies on legislative or enforcement decisions, which may take the form of an obligation to consult on the part of the legislator,[86] the ability to file proposals for state consideration,[87] or standing to initiate proceedings against a regulator for failing to enforce consumer law.[88] Finally, many consumer organisations are authorised to provide some form of ADR between consumers and traders.[89] Two countries are standing out: Austria and Germany, where consumer organisations are fully financed by the state and are granted the sole institutions which have standing in collective actions.[90]

The unregulated competencies of consumer organisations may include providing information and advice to consumers, testing and reviewing products, lobbying for improved consumer protection, providing litigation support, and investigating and publicising infringements (serving like watch dogs of the market). A number of organisations operate magazines, newspapers, or television or radio stations in order to reach more consumers.[91]

Funding for consumer organisations comes mostly from private individuals (through membership fees or donations) and from discretionary public grants or contract work, but in at least two jurisdictions, the state is *required* to contribute.[92] Consumer organisations all over the world suffer from insufficient resources. If consulted, they would argue that they could be much more efficient if they had

[85]Interestingly, in Greece, consumers can still bring actions in their own name even if an organisation has already sued on their behalf.

[86]Croatia, Romania, Spain.

[87]Belgium, Czech Republic, India, Japan. Certain organisations in the U.K. are also authorised to file "super-complaints" with the Competition and Markets Authority. The Hong Kong report indicates that the Consumer Council frequently presents proposals to government, most recently on sustainable consumption and electricity.

[88]France, Italy, Turkey.

[89]Argentina, Canada (Quebec), Chile, Czech Republic, Hong Kong, Portugal, Singapore, Uruguay. Organisations in Belgium and Turkey participate in the establishment of ADR entities, though they do not provide ADR themselves.

[90]There are no country reports. However, the authors of the general report felt free to introduce this information to the best of their knowledge.

[91]E.g., Fair Go (New Zealand), Which? (U.K.).

[92]Portugal (where the requirement has constitutional status), Serbia. In China, consumer organisations are state-funded but they are also set up by government.

greater resources. However, this is not the full story. The role and function of consumer organisations cannot be disconnected from the particular economic and political background in which they are operating. In Austria and Germany, publicly funded consumer organisations serve as substitutes for consumer agencies. Where public funding is not available, or limited, or subject to a bid (like in Switzerland or in Turkey), the societal role depends on the degree to which the civil society is ready to engage into financing. Usually citizens will support consumer organisations financially if they have a direct benefit. These can be information and advice service or support in organised collective litigation, like in Italy.

Common requirements for official recognition of consumer organisations, where relevant, are impartiality and non-partisanship, independence (both in terms of policy and finances), non-profit status, alignment of its objectives with those of consumer protection, and/or continuous operation for one or more years. In the EU these minimum requirements can by and large be deduced from the two EU directives on unfair contract terms and unfair commercial practices. Organisations in Serbia must also have management with adequate professional qualifications. Alternatively, recognition may be ad-hoc, at the discretion of the appropriate state authority. Consumer organisations are often established as non-profits or as cooperatives, and may be recognised charities as well.

Several countries have national umbrella organisations that allow consumer organisations to coordinate their efforts.[93] Internationally, Consumers International co-ordinates their activities. The most important achievement of CI (at the time IOCU—International Organisation of Consumers Union) is the adoption of the United Nations Guidelines on Consumer Protection in 1985. The then President of IOCU Lars Broch was given the mandate by the UN secretariat to develop the first draft. The intellectual leadership of IOCU allowed for developing a rather powerful international recommendation. In 2016 the UN Guidelines were amended and updated. Four umbrella groups operate at the EU level, representing national organisations in Brussels. The most important one is BEUC, Bureau Européen des Organisations des Consommateurs, where all consumer organisations of the Member States are represented. BEUC co-ordinates the positioning of consumer organisations in EU law making. Here the addressee is the European Commission, European Council and the European Parliament. More recently, however, BEUC has co-ordinated the litigation activities of the national consumer organisations. This does not mean that the members of BEUC are obliged to participate. Quite the contrary is true. Participation remains entirely voluntary. BEUC has no legal status within the EU legal system. Representation of consumer organisations is neither foreseen in the EU Treaties nor has BEUC been given standing via secondary European law. It is funded via the European Commission and via its member organisations.

A more recent success story of BEUC is the co-ordinated action of 11 national consumer organisations against one of the most famous World companies, Apple.

[93] Australia, Finland, France, Germany, Greece, South Africa.

The Apple case commenced in 2012 and it represents one of the biggest pan-European consumer law cases. It dealt with the question of guarantee for diverse Apple's products offered for sale online and the Apple stores throughout Europe. What was particularly problematic was the information provided by Apple regarding the Apple One-Year Limited Warranty and the AppleCare Protection Plan which represent two forms of commercial guarantee without and with remuneration. On the ground of the content and way it provided the information on these two commercial guarantees, as well as from the manner of Apple's commercial behavior, Apple was found to be breaching the rules on mandatory, 2 year legal guarantee set up by the rules of Directive 1999/44/EC on consumer sales and the rules on fairness of commercial practices as established by Directive 2005/29/EC on unfair commercial practices. The outcome of this case was that Apple modified the information provided on its websites, changed its commercial behavior and, in case of certain involved jurisdictions, had to pay imposed fines.[94]

Although the EU only indirectly lays down minimum requirements for national legislation around consumer organisations, it does stipulate standing in national and cross-border disputes. In the latter case, organisations that would have standing in the consumer's home state will automatically have standing in the jurisdiction of the dispute (within the EU). However, Member States are not under an EU obligation to grant consumer organisations standing. They are free to choose between agencies and/or consumer organisations as consumer law enforcers. On the other hand, the action for injunction provides for a minimum standard in all Member States. Such a common platform paved the way for the organisation of co-ordinated law enforcement.

NGOs other than consumer organisations also play a role in most legal frameworks, especially in the provision of legal aid and information, lobbying, and in relation to specific sectors.

Overall, consumer organisations are clearly important participants in the enforcement of consumer law. Though more and more governments are taking consumer protection seriously and implementing effective state-based frameworks, the model of private advocacy through voluntary associations that consumer organisations represent remains relevant. The degree to which their impact on law enforcement is felt, however, differs widely.

6 Private Regulation

Private regulation schemes play an increasingly important role in the regulation of the market and behaviour of market players today. They provide a way for business communities to hold their members accountable in their relations with consumers.

[94]For details see M. Durovic, The Apple Case Today, Factual and Legal Assessment, EUI Working Papers 2016/3.

Because these schemes are mostly funded by contributions from member businesses, they allow governments to conserve resources, which are often scarce when it comes to the enforcement of consumer law. They may impose more stringent requirements than businesses would readily accept from government agencies, because adherence is usually voluntary and businesses are more likely to feel that they have a voice in the development process. Business communities have better access to specialised expertise than government agencies or consumer organisations do. This is particularly true with regard to the development of technical standards for goods and for services. Standards play an ever growing role in the organisation of the economy, not only with regard to measuring and weighing, but today with regard to health, safety, environmental protection and more recently financial services.[95] Finally, dispute settlement procedures based on private regulation may lead to solutions much more quickly than court or public agency procedures would. This is particularly true for countries where access to court is difficult, costly or ineffective.[96]

On the other hand, private regulation suffers from a perceived lack of legitimacy, since consumers may question the ability of traders to effectively police themselves without involving consumer organisations in the making and the enforcement of the rules. Also, private regulation is generally ineffective at sanctioning rogue traders whose business models are indifferent to establishing goodwill and instead rely on predatory practices, since sanctions are mostly based on reputation.[97] In heavily regulated sectors such as telecommunications, energy or financial services industries, private regulation regimes form an integral part of the sectoral regulation. This implies that a business is supposed to co-operate with the executive or the regulatory agencies in charge. However, this is not true for consumer organisations, which have no legal status that allows them to participate in the development of private regulation. If any, they benefit from an observer status that is granted to them on a give and take basis.

Private regulation takes a variety of forms, from the development and enforcement of codes of conduct or rulebooks, to the elaboration of safety standards, to the establishment of dispute resolution systems.[98] In most cases, these regimes are organised vertically by industry or sector. A recent trend is the increased use of third-party certification to differentiate businesses with certain practices from the broader industries in which they operate,[99] though these practices tend to center on societal benefits rather than on consumer rights directly. In addition, public bodies may seek the cooperation of private bodies in building their own frameworks,

[95]This has a particular impact in the area of product safety and quality assurance.

[96]In the UK consumers are not going to court as the costs are prohibitive. In Italy access to court is easy, however, the judiciary takes 5–10 years till the judgment.

[97]E.g., revocation of association membership or publication of non-compliance.

[98]Including internal complaints mechanisms, mediation, and arbitration regimes.

[99]E.g., organic, sweatshop-free, recycled materials, etc.

leading to hybridised systems.[100] Industries where private regulation tends to be particularly active include advertising, insurance, banking, telecommunications, and professional services (lawyers, accountants, architects, etc.). In some instances, private regulation may actually run afoul of competition legislation, as was the case regarding certain advertising rules for lawyers in Italy.

Nine countries reported that private regulation had little or no impact on their consumer protection frameworks.[101] Mostly, these were countries that converted relatively recently to market or mixed economies or whose economies are either weak or rapidly developing, factors which may limit the growth of well-entrenched trade associations. However, with its robust, well-developed mixed economy, Norway stands out from this group, especially given that its immediate neighbor and fellow Nordic model economy Sweden reported a well-developed ecosystem of private regulation with a high degree of implication in consumer protection—to the point that its government has been criticised for leaning too heavily on private schemes and leaving consumers vulnerable to the increasing activities of rogue traders. The remaining reporting countries displayed a wide variety of private regulation instruments, each with its own peculiarities.

Although adherence to private regulation is usually voluntary, the EU reported that in certain circumstances within its purview, non-compliance with voluntary codes of conduct may nevertheless represent an unfair commercial practice under the provisions of EU Directive 2005/29/EC on unfair commercial practices, and be subject to sanction as such. Prior to the adoption of this Directive, the role, relevance and content of codes of conduct in the national systems of EU Member States for protection of consumers from unfair commercial practices, differed significantly. This is why one of the aims of this EU Directive has been to encourage the traders of different business sectors to adopt codes of conduct and also to harmonize the standards of fair trading towards consumers throughout the European Union. However, so far the respective provisions of this EU Directive have not gained major importance. The extent to which this may be true in other jurisdictions is unclear. An acid test for EU member states and other countries that allow for challenging voluntary compliance in courts might be VW Dieselgate. Volkswagen has adopted a Code of Conduct that promotes inter alia environmental protection. One might argue that through non-compliance, Volkswagen has misled its customers and in such a manner has also breached the rules of EU Directive 2005/29/EC on unfair commercial practices.[102]

Apart from private regulation properly speaking, businesses may also participate in the enforcement of consumer rights by using competition law to recover from competitors who have accrued unfair advantage by infringing consumer law. Such

[100]In industries where business associations have sufficient lobbying power, the reverse may also occur: that a private body seeks to impose their vision of an optimal regulative scheme on a public body.

[101]Brazil, India, Norway, Paraguay, Serbia, Slovenia, Uruguay, Venezuela, Vietnam.

[102]Beckers (2017), pp. 475–516.

actions may be a more effective deterrent than individual consumer actions, since the amounts involved are likely to be much higher. Unfortunately, this aspect of enforcement is only briefly mentioned in one report,[103] so it's impossible to speak about its general availability or effectiveness at this point. The increasing importance of private enforcement in anti-trust injuries results from a policy shift in the European Union. Since the adoption of Regulation 1/2003, the European Union is advocating private enforcement as a supplement to public enforcement. After lengthy and complicated discussions the EU adopted in 2014 the Directive on Antitrust Damages. Contrary to preparatory documents, the final version does not allow for collective actions, but limits private enforcement to individuals who have suffered from antitrust injuries.

Overall, private regulation has the potential to increase the efficiency of consumer rights enforcement, providing straightforward avenues for dispute resolution and creating reputational incentives for compliance that prevent infringements from arising in the first place, thereby allowing government resources to be focused on the more egregious cases. However, these reports indicate that governments must be careful to maintain a controlling hand on private regulation to prevent it from overshadowing public regulation. In other words, private schemes should be a tool among many in the consumer law enforcement framework, rather than a way for traders to avoid being subject to more binding rules.

7 External Relations

Nearly all reporting jurisdictions are members of at least one international organisation with some degree of common consumer policy, and many have bilateral or multilateral agreements with other countries that include consumer protection components, while many individual agencies participate in international enforcement networks. The effects of these arrangements vary widely in scope: some are limited to encouraging information sharing and the communication of best practices, while others bind members to implement specific legislation or provide for a certain treatment of cross-border disputes. In addition, domestic consumer organisations may themselves be members of international networks, allowing them to share resources and concentrate lobbying efforts at the international level.

Sixteen of the reporting countries are Member States of the European Union.[104] With its supranational status, the EU is certainly the most stringent international organisation in terms of the commitments it requires of its member states. Despite its

[103] Belgium.

[104] Two others, Serbia and Turkey, are currently candidates for membership; Norway, as a member of the European Economic Area, is bound by most substantive, but not procedural, EU consumer legislation. UK voters recently voted in favour of leaving the EU, but the formal process of withdrawal has not yet begun. The EU currently comprises a total of 28 Member States.

somewhat shaky competence, in practice the EU has been able to legislate in the field mostly through its competency in internal market regulation. The result has been a high level of harmonisation of consumer law throughout the EU, although enforcement mechanisms remain diverse. The reason is that the EU treaties leave enforcement to the Member States. Most Member States' reports cite EU legislation as a major influence on their domestic frameworks, in particular several newer members who have established or significantly improved consumer protection as part of the accession process. EU legislation in the area of cross-border transactions has been especially important, since it ensures that any consumer involved in a dispute with a business entity based in another Member State will have access to the protections afforded in that consumer's home state. Since 2004, the Member States are obliged to designate one national public authority in charge of cross-border law enforcement. Under the auspices of the European Commission, the designated authorities of the 28 Member States are co-operating in the resolution of cross-border consumer conflicts. The results are quite mixed. However, the current proposal to considerably enhance the co-operation mechanisms, not least through the granting of powers to initiate collective compensation, indicates the weakness of the current system. The European Commission also operates the European Consumer Centre Network (ECC-Net) in partnership with Member States, providing free advice and information relating to cross-border transactions, as well as Rapex and RASFF, rapid alert systems to prevent the circulation of dangerous non-food and food products respectively, and PROSAFE, a coordination group for market surveillance officers. Other EU-funded organisations include the European Association for the Co-ordination of Consumer Representation in Standardisation AISBL (ANEC) and the European Consumer Debt Network (ECDN). Since 1986, the EU has turned into the driving force behind the development of consumer law in Europe, from contract to tort, from telecommunications to financial services, from energy to transport. However, gradually the EU has changed the outlook of consumer law. Historically, consumer law in Europe was very much linked to the rise of the welfare state in the 1960s and 1970s. At that time the emphasis laid on consumer protection through law. Nowadays the EU is promoting consumer law not necessarily insisting on 'protection'. Consumers are supposed to play an active role in European markets. On the dark side of this kind of thinking are the effects of two judgments of the European Court of Justice that have *prevented* at least two countries from implementing more stringent product liability laws than are required under the EU directive on product liability.[105] However, whilst the product liability directive is under review now, the much more far reaching corrective measure at the EU level is the discovery of the vulnerable consumer that needs particular protection in contrast to the average circumspect and responsible consumer.

Twenty-two reporting countries are members of the Organisation for Economic Co-operation and Development (OECD),[106] which includes a Committee on

[105]See ECJ, judgment of 25/4/2002, case C-52/00 Commission v. France, ECLI:EU:C:2002:252; ECJ, judgment of 25/4/2002, case C-154/00 Commission v. Greece, ECLI:EU:C:2002:254.

[106]The OECD has a total of 35 members.

Consumer Policy charged with developing policy guidelines and providing for the exchange of information between members. Five reporting countries are members of the South American trade bloc Mercosur,[107] which has attempted to set up a consumer protection framework through its Technical Commission N° 7. However, the enforceability of its resolutions is dependent on the passing of a Common Regulation for Consumer Protection, which has not been achieved in the 20 years of the Commission's existence. Therefore, Member States remain autonomous in the regulation of goods and services marketed in their territories.

All the reporting countries situated in the Americas, of which there are eight, are members of the Organisation of American States (OAS). With expertise from the Inter-American Juridical Committee, OAS members are negotiating an Inter-American Convention that may include a jurisdiction agreement on consumer protection in relation to cross-border transactions. The OAS also oversees the Consumer Safety and Health Network (CSHN), which allows its members to cooperate to prevent the circulation of unsafe products, especially through the Inter-American Rapid Alerts System (SIAR).

Other relevant international partnerships include the Association of Southeast Asian Nations (ASEAN) and the South African Development Community (SADC), as well as cooperation agreements between Australia and New Zealand and between China, Japan and South Korea. Participation in other international organisations such as the UN or the WTO, though lacking direct implications for consumer law, can certainly influence a country's trade policies and thereby affect consumer interests. Also, the World Bank has played a major role in the development of consumer protection in the area of financial services, especially after 2008 global financial crisis.

The consumer agencies of 25 reporting countries are members of the International Consumer Protection and Enforcement Network, which provides for the sharing of information about cross-border commercial activities affecting consumers and encourages international cooperation in enforcement. FIN-NET fills a similar role, but in relation to EEA financial services out-of-court dispute resolution schemes.

Fourteen countries reported having consumer organisations among the more than 240 members of Consumers International (CI), an umbrella group championing consumer rights internationally. Many European organisations are members of BEUC, the EU-level umbrella group. The Trans-Atlantic Consumer Dialogue (TACD) provides a forum for communication between US and EU consumer organisations.

Unfortunately, it is all but impossible to estimate with any precision the impact of these diverse organisations, agreements, and networks on the enforcement and effectiveness of consumer law.[108] Other than the special case of the EU, the effects

[107] Also known as Mercosur; members are Argentina, Brazil, Paraguay, Uruguay, Venezuela. Chile is an associate member, but is not bound by Mercosur agreements.

[108] The authors of the report have tried hard to receive answers to their questionnaire from international, regional organisations and networks. In the end all our efforts failed, which is a

of domestic legislative frameworks probably play a greater role, but international structures certainly influence those frameworks and help to establish global standards for consumer protection.

8 Self-Assessment of Effectiveness

The final question in the questionnaire invited rapporteurs to reflect on the overall effectiveness of consumer enforcement mechanisms in their jurisdiction, to highlight strengths and weaknesses and indicate where reforms might be required. Not surprisingly, many rapporteurs believe that insufficient resources are one of the causes of identified weaknesses. On the other hand, many rapporteurs also consider that their overall assessment is positive, particularly with respect to administrative and alternative methods for resolution of consumer disputes. Many countries that have joined or that are in the process of joining the European Union as Member States have reported improvement in enforcement of consumer law as a consequence of the impact of EU Consumer Law.

Most reports decry the lengthy delays and high costs of judicial proceedings in consumer matters. This is particularly important in the jurisdictions where enforcement is directed and focused on courts. However, there are exceptions to the rule. In some Member States of the EU, courts are the true holders of individual enforcement and are regarded by their stakeholders as the best of all options to enforce consumer rights.

The increasing development of methods alternative to judicial dispute resolution for consumer claims is seen as responding to the inadequacies of court enforcement. The alternative methods for resolution of consumer disputes are then considered by many to be a promising avenue, compensating for the deficiencies in access to court. Still, in many countries, these developments are relatively new and insufficiently developed and used in practice. Capacity and expertise have not yet built up and consumers and traders may remain unaware or skeptical of these new options unless they are widely publicized, easily accessible and designed in such a manner to guarantee legality.

All in all, there seems to be a growing trend towards enforcement through consumer agencies, in whatever institutional design, as a catch-all body or as a body being entrusted with consumer law in between others. The mushrooming of regulatory agencies in sectoral fields has encouraged many EU Member States to merge regulatory agencies across sectors (telecom, energy) or across fields of law (competition, consumer law) or even sectors and fields. Co-operation between public agencies stands on firm legal ground in the EU only. Outside and beyond the EU, the OECD plays a key role in co-ordinating enforcement activities. The difficulty is that

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pity, as only those belonging to the different organisations and institutions have access to the information which would be needed to answer our questionnaire.

in both institutions, the EU and the OECD, co-operation mechanisms lack transparency and accountability. It is hard to overlook and to assess from the outside the effectiveness of these forms of co-operation.

Private regulation plays a different role in the respective countries, depending on legal culture and tradition and the degree of the development of the economy. What matters, however, is the increasing role of private regulation in the enforcement of consumer law beyond the state and beyond the EU. Whether codes of conduct, dispute settlement bodies or corporate social responsibility, internationally operating companies have embedded their business activities into all sorts of private regulation. There is no binding legal framework internationally for such type of private regulation and its potential enforcement. If there are rules internationally on CSR for instance, these rules are non-binding. They may nevertheless provide for a framework against which private business regulation can be measured. In theory, this is the perfect place for consumer organisations, which are not bound to any territorial restrictions and which could turn their relatively weak legal status—they are usually not anchored in the national legal systems—into a strength. In practice this is more the exception than a general rule. The by far more important enforcers of private regulation are traders and business organisations. In the last decade, numerous studies have been undertaken on private regulation and enforcement beyond the state. The problem is that the potential effectiveness can only be measured with regard to the particular business sector that has been investigated. This does not allow for generalisations. All that we know for sure is that international business is much more concerned with what should better be termed compliance than enforcement. The key reason might very well be that in our globalised and fully digitalised world serious infringements of consumer law will not remain undiscovered.

Finally, none of the 37 jurisdictions has developed an integrated approach that fully interconnects the various avenues of enforcement: individual and collective, administration, courts and consumer ADRs. For sure there are differences. In the United Kingdom, consumer organisations benefit from a super-complaint procedure that allows them to push agencies into action. Consumer ADRs overall do not and should never exclude access to courts. But due to the lack of sound statistics, which is, partially, the consequence of confidentiality of consumer ADRs, nobody knows what kind of cases are decided via consumer ADRs and what kind of conflicts are reaching courts. The still rather patchy picture of consumer law enforcement, despite the insights gained from 37 national reports, supports a call to advocate for such an integrated approach.

9 Lessons to Be Learned

The comparison of the 37 jurisdictions allows for drafting general conclusions beyond and despite the tremendous differences in the legal, political and economic systems they reflect. The purpose here is not to show what would and could be

possible within the existing regulatory regimes, but to highlight the major findings out of the analysis of the law in action across the world.

1. Most of the jurisdictions suffer from an insecure data basis. There are only a few countries which allow to seriously quantify court judgments, administrative actions or ADR decisions. It seems as if governments overall are not ready to invest into having a solid basis for political initiatives, proposals or actions. The famous language of 'evidence-based policy-making' seems to remain a catch-word, with not much substance behind. This statement holds independent of the country concerned, the legal system, the political system, the size or reach of the economic order. Even in the few cases where countries have such statistics, they are hard to compare as there is no common ground, no policy beyond the particular country to provide for a basis for cross-border exchange. This is even true with regard to the EU, where one would expect a common data basis, if any.
2. Enforcement is first and foremost a matter for the respective country. Enforcement is and remains national. There is a certain move towards an approximation of consumer laws around the world. Setting aside details and using the consumer rights in the Kennedy declaration as a benchmark, or even the more sophisticated UN Guidelines, all countries abide by the need (1) to protect consumers against the marketing of goods which are hazardous to health or life, (2) to protect consumers against fraudulent, deceitful, or grossly misleading information, advertising, labeling, or other practices, and to be given the facts needed to make an informed choice, (3) to assure, wherever possible, access to a variety of products and services at competitive prices[109]; and in those industries in which competition is not workable and government regulation is substituted, an assurance of satisfactory quality and service at fair price, (4) to assure that consumer interests will receive full and sympathetic consideration in the formulation of government policy, and fair and expeditious treatment in its administrative tribunals.[110] The true and much deeper differences are to be found in the degree to which consumer laws and regulations are enforced. There is no similar tendency of approximation in the procedural laws, in the remedies and in the institutions. By now there is no comparator available which would allow to check and to compare the effectiveness of consumer laws. However, 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.
3. Enforcement of consumer law goes along with de-judicialisation and de-juridification, this seems to be the common trend. These 'deficiencies', if they are to be classified as such, are overall compensated by what has been termed

[109] Save Venezuela, in its current situation.

[110] See the Kennedy speech at http://www.presidency.ucsb.edu/ws/?pid=9108.

agentification (the rise of agencies, sector or policy wise) and out-of-court dispute resolution (mediation, conciliation, sometimes consumer arbitration). Somewhat overstated, one might argue that the enforcement of consumer law is getting closer to 'managing compliance' than to strictly applying the law. The long term effects are obvious: the knowledge necessary for the enforcement of consumer law, previously found in court judgments, is now increasingly located in regulatory actions and ADR decisions. Yet while judgments are generally publicly available, regulatory actions and ADR decisions are not. Access is only possible if the agencies and ADR bodies are under an obligation to disclose at least the essence of their action, in short when they are held accountable to the public at large.

4. As enforcement is organised within each and every jurisdiction separately and disconnected from even neighbouring countries, there is overall a lack of co-operation. If any, co-operation across the borders is best developed in the EU, through networks of judicial co-operation, through networks of regulatory agencies, through networks of consumer and business organisations. The intensity differs considerably. Judicial co-operation takes place, but it is not organised in open fora. Administrative co-operation, to the contrary, seems rather developed and much more visible. In theory, non-governmental organisations are the born players to organise transborder enforcement. In practice, co-operation is a challenging task, even if the national consumer organisation might be tied together via a common concern against one and the same tortfeasor, for instance Dieselgate. Beyond Europe, co-operation is organised via the OECD, but not via the United Nations. By and large the scenario does not seem to differ much from what can be said about the state of affairs in the EU.
5. None of the country reports refers to the potential that lies in the digitisation of our societies and our economies. Digitisation is about to intrude into enforcement itself, not only via smart contracts, but much more importantly via the use of digital technologies to improve law enforcement. However, it seems as if digitisation is not yet on the radar of those institutions which are in charge of enforcement, courts, regulatory agencies and consumer or business organisations. What about webcrawlers to discover infringements of consumer laws, what about artificial intelligence and consumer algorithms[111] that change the market for consumers through e.g. personalised advertising but that could also be made use of to develop digital tools for e.g. the control of standard terms?[112] Enforcement in the future will take different forms and it is likely that states will have less of a monopoly over the means of enforcement. Whether that leads to more effective consumer law remains to be seen.

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[111] Gal and Elkin Koren (2017), pp. 309–353.

[112] Micklitz et al. (2017).

Appendix 1: List of Rapporteurs

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Appendix 2: Questionnaire

Montevideo IACL 2016 Thematic Congress
The Questionnaire on:
Enforcement and Effectiveness of Consumer Law
Hans-W. Micklitz/Geneviève Saumier
16.7.2015

The Questionnaire represents a basis for drawing a general picture of the enforcement of consumer law and the effectiveness of regulatory regimes of consumer protection throughout the World. The final report will assess all of the given explanations of the enforcement mechanisms envisaged by national legislation and provide general observations and concluding remarks. The general observations and concluding remarks will be based on the answers to the Questionnaire provided by the national rapporteurs from a number of countries whose efforts are highly appreciated. For the purpose of the objectivity of the final report, national rapporteurs are kindly asked to provide with each answer the clarification whether the given answer is an objective fact that is as such supported by adequate evidence or rather whether it is represents a personal assessment or view of the rapporteur.

Consumer law has no clear borders. What springs to mind is contract law, tort law, product liability, standard contract terms (boilerplates) and commercial

practices. However, food safety and product safety regulation are equally belonging to the core of consumer law.

Consumer law is based on the distinction between the consumer and the trader/merchant. It is not easy to define either category. What is more important in the questionnaire that we focus on b (business) 2 (to) c (consumers). However, sometimes legal rules are only meant to be set into motion by the consumer not by the trader, for instance in the recent EU rules on Alternative Dispute Settlements. This has to be taken into account. In online dispute the distinction between b and c becomes blurred. Here it might be necessary to include c to c.

I. National legal framework for consumer protection

The purpose of this section is to get a full understanding of the legal design of the regulatory system of consumer protection and its particularities in a given country, its constitutional structure (federation or federal state), the division of powers between the centre and the periphery.

1. *What is your country and what is its total population?*
2. *Does you country have a national consumer policy? What are the main goals of that policy?*
3. *Are consumers in your country educated about their rights? How aware are they of the existence of consumer rights?*
4. *What is the principal legal framework for consumer protection in your country? Is it a separate and independent legal act or is it part of some other legislation (e.g. part of the Civil Code, part of the Competition Act, etc.)? What are its main features?*
5. *Are there any other sources that are relevant for consumer protection (e.g. Law on Civil Procedure, Code Civil, Law on Advertising, Trade Law, etc.)? Which are these other sources?*
6. *Does your country have any strategic plan(s) in the area of consumer protection? What are the main characteristics of that/those plan/s?*
7. *How old is your national tradition of consumer protection? When did it start developing?*
8. *Which regulatory model has inspired the development of your national regime of consumer protection (e.g. has it been influenced by the UN Guidelines on Consumer Protection? Has it been influenced by the consumer policy and the documents issued by any other international organisation/institution such as the World Bank, or the OECD? Has it been influenced by EU Consumer law and policy? Has it been influenced by US Consumer law and policy? etc.)?*
9. *What is the current focus of consumer policy in your country? Has there been a shift in the consumer policy? If so, of what nature?*

II. The general design of the enforcement mechanism

The general design of the enforcement mechanism is of essential importance for the effective enforcement of consumer law. There are several different models of enforcement that countries may accept as pillars for the enforcement of

consumer law. Particularly important are judicial mechanisms (before a court) and administrative mechanisms (before an administrative authority). The purpose is to clarify the basic distinction and to highlight the enforcement design in the respective country.

1. *What is the main authority in your country in charge of enforcement of consumer law (e.g. a court, administrative agency or something else)?*
2. *What is the basis for that authority? Is it established by statute or otherwise?*
3. *What is the structure of that authority? Who are its members and how are they appointed?*
4. *What are the main characteristics and competencies of the authority (e.g. power to perform investigations, to adopt preliminary measures, etc.)?*
5. *Are consumers aware of the existence of the main authority and the manner in which it may enforce their consumer rights?*
6. *Are there any particular enforcement mechanisms and authorities developed especially for specific sectors (e.g. energy, telecommunications, etc.)? Which are those and what are their main characteristics?*

III. Number and characteristics of consumer complaints and disputes

In this Questionnaire, a consumer complaint refers to any problem the consumer was faced with, whereas a consumer dispute refers to any kind of consumer problem that was referred for resolution to the available enforcement authority in the country.

1. *Are there official statistics on the number of consumer complaints?*
2. *Are there official statistics on the number of consumer disputes?*
3. *How many consumer disputes have been initiated in 2015?*
4. *How many consumer disputes have been resolved in 2015?*
5. *How many consumer disputes were initiated in the last three years?*
6. *How many consumer disputes were resolved in the last three years?*
7. *How many consumer disputes were initiated in the last ten years?*
8. *How many consumer disputes were resolved in the last ten years?*
9. *What are the main causes/types of consumer complaints and disputes?*
10. *How long does a consumer dispute typically take to be resolved (the average time)?*

IV. Courts and the enforcement of consumer law

The purpose of this section is to understand the role of the courts in the enforcement of consumer law in your country. This section is intentionally placed after the one on consumer complaints and disputes since first insight into the disputes themselves are needed before the manners in which they are resolved which include both the courts and the administrative authorities, can be examined.

1. *What is the structure of the judicial system in your country? What are its main characteristics?*

2. *Which court(s) is/are competent for consumer disputes in your country (e.g. general court, commercial court, etc.)? Is there a specialised court in charge of consumer disputes in your country (e.g. a kind of a consumer court)? Please describe its main characteristics.*
3. *What are the conditions under which a consumer may address his consumer problem to the court?*
4. *Is there a specialised (civil law) procedure before the court for consumer disputes?*
5. *Is there a specialised court tariff/taxes (or their exemption) for consumer disputes?*
6. *Is a free legal aid offered to consumers who are faced with financial difficulties? Under what conditions is the free legal aid offered?*
7. *What percentage of consumers are satisfied with the outcome and timing of a consumer dispute before the court?*
8. *What percentage of traders/merchants are satisfied with the outcome and timing of a consumer dispute before the court?*
9. *What are the main advantages of the judicial enforcement of consumer rights in your country?*
10. *What are the main shortcomings of the judicial enforcement of consumer rights in your country?*

V. Specialised agencies and the enforcement of consumer law

The purpose of this section is to understand the role of the specialised administrative authorities in the enforcement of consumer law in your country. These questions are more specific than the ones in Part II, which were of a general nature. In addition, these questions do not deal with ADR or ODR mechanisms, which are left for Part X below.

1. *Is there a specialised agency or other form of non-judicial institution in your country in charge of enforcement of consumer law? Which one is it? What is its legal nature and what are its main characteristics?*
2. *What is the legal basis for the establishment and the operation of that agency? Is this agency an independent institution?*
3. *How is the agency organised?*
4. *Is it centralised or it has branches in diverse regions/cities of your country?*
5. *Is the agency exclusively in charge of enforcement of consumer law or does it also deal with other areas of law (e.g. competition law, food law, environmental law, etc.)?*
6. *How long does a consumer dispute before the specialised agency or other form of non-judicial institution typically last for (the average time)?*
7. *What percentage of consumers are satisfied with the outcome and timing of a consumer dispute before a specialised agency or other form of non-judicial institution?*
8. *What percentage of traders/merchants are satisfied with the outcome and timing of a consumer dispute before a specialised agency or other form of non-judicial institution?*

9. *What are the main advantages of the enforcement of consumer rights before a specialised agency or other form of non-judicial institution in your country?*
10. *What are the main shortcomings of the enforcement of consumer rights before a specialised agency or other form of non-judicial institution in your country?*

VI. The role of consumer organisations in enforcement of consumer law

The purpose of this section is to understand the role of consumer organisations in the enforcement of consumer law in your country.

1. *How many consumer organisations exist in your country?*
2. *Do consumer organizations have seat outside your capital city (i.e. do you have one centralised organisation or are these organizations decentralised)?*
3. *Are there mandatory legal conditions for the establishment and operation of a consumer organisation in your country (e.g. impartiality, independence, qualification of the management, number of members, etc.)? How are these set?*
4. *What are the competences of consumer organisations in your country? How are they organised (i.e. what is their institutional structure)?*
5. *What is the role of consumer organisations in the enforcement of consumer law (e.g. they may initiate collective redress, represent consumers before the court, etc.)?*
6. *Do any other NGOs (besides consumer organisations) play a role in the enforcement of consumer law (e.g. free legal aid)?*

VII. Private regulation and enforcement of consumer law

Private regulation includes a wide set of rules developed by private bodies (typically associations of traders/merchants for particular or all sectors), and not the State, in different forms (codes of conduct, rulebooks, standards. . .) through which they regulate their activities in the market. Private regulation plays an important role in protecting consumers in the market and it may also play a significant role in effective enforcement of consumer law.

1. *How relevant is private regulation in your country for consumer protection? What kind of private regulation (in what area) is the most relevant?*
2. *Are there any rules developed by private regulation that are relevant in your country for the enforcement of consumer law? What are these rules?*
3. *What is the role of private regulators (the traders/merchants themselves) in enforcing consumer law (e.g. do private regulators themselves organize proper enforcement, can they initiate any kind of proceedings, etc.)?*

VIII. Enforcement through collective redress

Collective redress, as a type of redress which involves a group of persons involved in the action against a trader, is a notion that does not have a homogenous meaning, but includes diverse types of redress which may be classified in four major categories: the representative action, the group action, the model or test case and the US style class action. The significance of collective redress is rising today since it has been demonstrated that it represents an effective means of

enforcement of consumer law that overcomes most of the shortcomings of traditional individual enforcement.

1. *Does your country recognise any form of collective redress? Which one? Since when?*
2. *What are the main characteristics of the form of collective redress in your country? What is the procedure of its initiation? Is it often used in practice?*
3. *How many cases of collective redress have been recorded in 2015?*
4. *How many cases of collective redress occurred in the last three years?*
5. *How many cases of collective redress occurred in the last ten years?*

IX. Sanctions for breach of consumer law

The existence of adequate sanctions envisaged for breach of consumer law represents a necessary pre-requisite for the effective application and enforcement of consumer law. These sanctions may include different forms of penalties, such as pecuniary fines, imprisonment, prohibition of business activities for certain periods of time or for good, pecuniary damages, civil law sanctions, etc.

1. *What are the envisaged sanctions for the breach of consumer law in your country?*
2. *Which piece of legislation defines the applicable penalties?*
3. *What is the most common form of sanction in practice?*
4. *How satisfactory is the application of the sanctions in practice?*
5. *Does breach of consumer legislation lead to criminal liability? Are there cases that can lead to the imprisonment of traders/merchants or their representatives?*

X. Alternative mechanisms for the resolution of consumer disputes

The alternative mechanisms for the settlement of consumer disputes (both the public and the private ones) typically represent the most desired manners of settlement of consumer disputes since they are arguably faster, cheaper, more accessible, more discrete and simpler than regular procedures before a judicial or administrative institution. Therefore, alternative means of settlement of consumer disputes are the most effective instruments and the trend toward their increased use is noticeable throughout the World.

1. *Does your country have an alternative mechanism for the resolution of consumer disputes ("ADR mechanism")? Which form(s) (e.g. ombudsman, consumer arbitration, conciliation, mediation, etc.)?*
2. *How was the ADR mechanism(s) established (e.g. by law, initiative of traders/merchants, initiative of consumers, etc.)?*
3. *What are the main features of your national ADR mechanism(s)? Are they publicly or privately run/operated?*
4. *What are the requirements for the ADR entities (bodies) in charge of resolving the disputes (e.g. independence, impartiality, etc.)?*
5. *How many consumer disputes have been resolved by the ADR mechanism(s) in 2015?*

6. *How many consumer disputes were resolved by the ADR mechanism in the last three years?*
7. *How many consumer disputes were resolved by the ADR mechanism in the last ten years?*
8. *What percentage of consumers are satisfied with the outcome and timing of the ADR?*
9. *What percentage of traders/merchants are satisfied with the outcome and timing of the ADR?*
10. *Is the ADR mechanism promoted by the State as the most effective means of enforcement of consumer law?*

XI. External relations and cooperation of the State, enforcers and consumer organisations

Participation in diverse international and regional organisations as well as in networks may have an important role in the improvement of effective enforcement of consumer law, in particular in case of cross border transactions where a trader and a consumer are in different countries. Examples of international and regional organisations include the OECD, European Union, ASEAN, whereas examples of networks relevant to the enforcement of consumer law are International Consumer Protection and Enforcement Network (ICPEN) and London Action Plan.

1. *Is your country part of any regional or international organisation of states that has a common consumer policy? Which one(s)?*
2. *Has this regional or international organisation developed common consumer legislation that your country has accepted? In which area? What are the main characteristics of that common consumer policy?*
3. *Is your country part of any regional or international network of enforcers of consumer law? Which one(s)? What are its main characteristics?*
4. *What are the effects of the participation in that/those network(s) to the enforcement of consumer law in your country?*
5. *Does you country have any bilateral/multilateral agreements with other country/countries on the enforcement of consumer law?*
6. *Does your national legal system contain any particular rules on cross-border enforcement?*
7. *Are consumer organisations in your country part of any regional or international network? What are the main characteristics of that network?*

XII. Final questions

Your opinion about the enforcement mechanism of consumer law, in particular about its effectiveness, in your country is very appreciated, as well as your views on the current developments in the enforcement apparatus of consumer law.

1. *How would you assess the existing system of consumer protection in your country? In what respect is it effective? What are its main shortcomings?*

2. *Is the existing system of consumer protection in your country currently undergoing any kind of reform (e.g. legislation modifications, institutional changes, etc.)? What kind of reform?*
3. *Is the enforcement mechanism in your country currently undergoing any kind of reform? What kind of reform?*
4. *What do you see as the main advantages of your national system of enforcement of consumer law (it provides high levels of consumer protection, it is accessible and easy to be used, etc.)?*
5. *What are the main shortcomings in the enforcement of consumer law in your country (e.g. the lack of institutional capacities, complicated procedure, hardly accessible enforcement mechanisms, etc.)? In that respect, what should/could be changed, added or improved?*
6. *Do you notice any kind of shift when it comes to enforcement policy in your country (e.g. a shift from the court to the administrative bodies; from protection in the area of sales of good to provision of services; from consumer safety to protection in the area of financial services; from the judicial resolution of consumer disputes to out-of-court resolution of consumer disputes; etc.)*
7. *What is your personal opinion of the enforcement of consumer law in your country: is it effective? How would you assess it? Could you grade its effectiveness on the scale from 1 (absolutely unsatisfactory) to 10 (absolutely satisfactory)?*

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Part II
National Reports

Argentina: Enforcement and Effectiveness of Consumer Law

Pedro Aberastury and Estela B. Sacristán

1 Introduction

Consumer protection, in Argentina, seems to be a work in progress. As a young field of study, it dates back to the year 1993, when the first law for the protection and defence of consumers was passed. After that first legislative decision, consumers found their way to be included in the text of the Constitution of the Argentine Nation on occasion of the 1994 constitutional reform. Subsequent amendments to the 1993 law, as well as civil laws dealing with consumers' rights, were passed in recent years. All these changes can be seen as a continuous legislative work aiming at a harmonization between the interests at stake, sometimes inspired by local case law and other times impulsed by the tangible need, among the inhabitants, of an effective, enforceable system of protection as consumers.

The resulting system is somewhat complex but sincere, aiming at a conciliation of interests and eventual full access to judicial redress no matter how small the claim may be. But, at the same time, and from a methodological—and prior—point of view, the system is protective, as we shall see, and, therefore, there seem to be no incentives for consumers to be proactive; rather, they rely on the defence provided by the legal framework or the case law.

In order to take a glimpse into the consumer protection system in Argentina, it seems appropriate to provide, in the very first place, some objective data that can

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help the reader get a full understanding of the physical and political reality that underlies said system.

1.1 Physical and Political Environment

Argentina is a country that has a total population—according to the census that was performed in 2010 of 40,117,096 inhabitants inside the national territory. Those inhabitants are located mostly in the Pampean and Metropolitan areas, where 66.3% of the national total is to be found.[1] Besides, Argentina's mainland surface area comprises 2,780,400 km^2 (1,073,518 square miles), thus rendering a population density of 14.4 inhabitants per km^2.

Argentina offers a national consumer policy that that relies on several axioms. The consumer is considered as an entity entitled to protection, or as someone deserving defence against the other party. This protection or defence goal can be seen in the Constitution of the Argentine Nation, especially in Section 42, after the 1994 constitutional amendment: "consumers [. . .] have the right to the protection of [. . .]".[2]

According to said Section 42, the main constitutional goals are: (1) recognizing consumers and users of goods and services; (2) protecting their: (a) right to the protection of their health, safety, and economic interests; (b) right to adequate and truthful information; (c) their freedom of choice and equitable and reliable treatment; (3) assuring: (a) their education for consumption, (b) the defense of competition against any kind of market distortions, (c) the control of natural and legal monopolies, (d) the control of quality and efficiency of public utilities, and (e) the creation of consumer and user associations.

Local governments, i.e., the provinces and the Autonomous City of Buenos Aires, within their powers, also perform duties related to Section 42 of the Constitution of the Argentine Nation, especially enforcement duties.

Consumers in Argentina enjoy access to education about their rights. For instance, at the national level of government, there are training courses, delivered

[1]INDEC – Instituto Nacional de Estadísticas y Censos (2014), Preguntas frecuentes, http://www.indec.gov.ar/preguntas.asp (last accessed 14/1/2017).

[2]Section 42: "As regards consumption, consumers and users of goods and services have the right to the protection of their health, safety, and economic interests; to adequate and truthful information; to freedom of choice and equitable and reliable treatment. The authorities shall provide for the protection of said rights, the education for consumption, the defence of competition against any kind of market distortions, the control of natural and legal monopolies, the control of quality and efficiency of public utilities, and the creation of consumer and user associations. Legislation shall establish efficient procedures for conflict prevention and settlement, as well as regulations for national public utilities. Such legislation shall take into account the necessary participation of consumer and user associations and of the interested provinces in the control entities." According to the translation of the *C*onstitution of the Argentine Nation, http://www.parliament.am/library/sahmanadrutyunner/argentina.pdf (last accessed 14/1/2017).

by the Consumer Education and Training Area of the Dirección Nacional de Defensa del Consumidor, Subsecretaría de Comercio Interior, Secretaría de Comercio, Ministerio de Producción, Presidencia de la Nación. Teachers and schools often can contact that Area's webpage to download courses or teaching materials.[3]

ONG's, especially consumers' associations, play an important role in providing courses and teaching materials, and useful information for users and consumers.[4]

The awareness about consumer rights has been increasing among citizens and residents.[5] At the local level, this awareness is enhanced by means of campaigns that are held both by the Government and the ONG's, and by means of education goals. For example, in the Autonomous City of Buenos Aires, the Consumer Education Program (Programa Educación en el Consumo),[6] held since 2001, is aimed at teachers, school managers, parents and students of public and private schools of all levels, striving to promote reflection on consumers' rights and duties.

Underlying all these political and educational efforts, there is a pivotal constitutional provision: Section 42 of the Constitution of the Argentine Nation, already transcribed,[7] as well as various laws, including Law 24.240 (Consumers' Defence Law) and its amendments, and the new Civil and Commercial Code (which is, from the formal point of view, a law). These are the main sources we can now lay our eyes on.

1.2 Relevant Sources for Consumer Protection

Apart from Section 42 of the Constitution of the Argentine Nation, Section 43 of said Constitution must also be stressed because it establishes a summary judicial remedy for consumers and consumers' associations, allowing for collective actions or lawsuits.[8]

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[3]See: Dirección Nacional de Defensa del Consumidor (2014), Educación, https://www.argentina.gob.ar/produccion/consumidor/derechos (last accessed 14/1/2017).

[4]Ibidem.

[5]Shaver and An (2014), p. 43.

[6]See Buenos Aires Ciudad, Programa Educación en el Consumo, http://www.buenosaires.gob.ar/defensaconsumidor/programa-de-educacion-para-el-consumo (last accessed 14/1/2017).

[7]See footnote 2.

[8]See footnote 2 to Section 42. Section 43 says: "Any person shall file a prompt and summary proceeding regarding constitutional guarantees, provided there is no other legal remedy, against any act or omission of the public authorities or individuals which currently or imminently may damage, limit, modify or threaten rights and guarantees recognized by this Constitution, treaties or laws, with open arbitrariness or illegality. In such case, the judge may declare that the act or omission is based on an unconstitutional rule. This summary proceeding against any form of discrimination and about rights protecting the environment, competition, **users and consumers**, as well as about rights of general public interest, shall be filed by the damaged party, the ombudsman and the associations which foster such ends registered according to a law determining their requirements and organization forms" (emphasis is added), according to the translation of the *C*onstitution of the Argentine

Now, at the infra-constitutional or formally legislative level, there are various laws that protect the consumer: Law 19.511 (Argentine Metrical System Law), passed in 1972 and subsequently amended; Law 20.680 (Supply Law, a law that vests in the Executive Branch the power to fix maximum and minimum prices), passed in 1974 and subsequently amended especially by Law 26.991 (New Regulation of Production and Consumption Relations), passed in 2014; Law 22.802 (Fair Trading Law), passed in 1983 and subsequently amended; Law 24.240 (Consumers' Defense Law), passed in 1993 and subsequently amended, especially in 2014 by Law 26361; Law 25.065 (Credit Cards Law), passed in 1999 and subsequently amended; Law 26.992 (Observatory for Pricing and Availability of Consumables, Goods and Services), passed in 2014; Law 26.993 (Consumer Conflict Resolution Law), passed in 2014, that creates a service of previous conciliation in the consumer relations (COPREC).[9]

The Civil and Commercial Code, Law 26.994, enacted in 2014,[10] also includes Consumer Law regulations in many of its articles or sections. They will be reviewed *infra*, at Sect. 6.3.

Local governments, within their powers, perform duties related to Section 42 of the Constitution of the Argentine Nation, especially enforcement duties, and have passed laws to achieve this aim.

1.3 Present and Future, in the Light of a Young Tradition

Today, the government seems to be continuing with the objectives set by previous governments in the field of consumer protection. The Dirección Nacional de Defensa del Consumidor, Subsecretaría de Comercio Interior, Secretaría de Comercio, Ministerio de Producción, Presidencia de la Nación (the national agency in charge of the consumers' protection), proclaims the policy of consumer defence as part of an inclusive country project, in which all the inhabitants are entitled to "access consumption". Under this policy, and from the consumers' defence viewpoint, a culture of rights is fostered, which culture is believed to be strengthened by a community that is informed, that knows about its rights and that exercises those rights. In this way, community participation and consumers' education are facilitated.[11]

We may currently feel familiar with all of these goals. But they can be said to be the result of a real revolution that took place in the twentieth century: a revolution that changed the way contracts are perceived.

Nation, http://www.parliament.am/library/sahmanadrutyunner/argentina.pdf (last accessed 14/162017).

[9] All these laws may be found at http://www.infoleg.gob.ar.

[10] See http://www.infoleg.gob.ar/infolegInternet/verNorma.do?id=235975.

[11] Ibidem, footnote 3, above.

In the 1930s and 1940s, in Argentina, there was a change in the concept of contract. The best example on this is Risolía's doctoral thesis, on sovereignty and crisis of the contract under the Argentine Civil law.[12] In his thesis, Risolía analysed the irruption of new forms of contracting, especially the ones in which one of the contracting parties' free will was not precisely free.

In the 1960s, the Civil Code then in force—basically, the one drafted by Vélez Sársfield by the end of the nineteenth century—was massively amended. This amendment included provisions to protect the weakest contracting party; to obtain a remedy if *rebus sic stantibus* clause was altered; to obtain protection against abuse of rights.

The resulting new contract foundations reached a maturity that allowed for the application of the 1968 Civil Code amendments, as well as for critical government intervention in private contracts (e.g., by means of the Supply Law 20.680, passed in 1974, allowing for the official fixing of maximum prices).

Finally, in the 1993, Law 24.240 (Consumers' Defense Law) was passed. And then, in 1994, the Constitution of the Argentine Nation was amended to guarantee the protection of the consumers' rights, both from the substantive (Section 42) and the procedural (Section 43) points of view. The enactment of the new Civil and Commercial Code did not betray this trend; quite the contrary, as we shall see below (Sect. 6.3).

Argentina has always been open to Comparative Law and both the development of the concept of contract and the consumer protection system can be traced in European juridical orders.

1.4 French or Spanish Influence?

The influence that is evident, both in Law 24.240 (Consumers' Defense Law) and in Section 42 of the Constitution of the Argentine Nation is French in the sense that the consumer protection has been codified. But that is the only point of comparison for neither Sections 42—nor 43—of the Constitution of the Argentine Nation nor Law 24.240 are comparable to the French *Code de la Consommation*.

The most evident influence in the wording of Section 42 of the Constitution of the Argentine Nation is the 1978 Constitution of the Kingdom of Spain. A comparative table can be drawn as follows:

Spanish Constitution, Section 51[a]	Constitution of the Argentine Nation, Section 42
"1. The public authorities shall guarantee the protection of consumers and users and shall, by means of effective measures, safeguard their safety, health and legitimate financial interests.	"As regards consumption, consumers and users of goods and services have the right to the protection of their health, safety, and economic interests;

(continued)

[12] Risolía (1946).

Spanish Constitution, Section 51[a]	Constitution of the Argentine Nation, Section 42
2. The public authorities shall make means available to inform and educate consumers and users, shall foster their organisations, and shall provide hearings for such organisations on all matters affecting their members, under the terms to be established by law.	to adequate and truthful information; to freedom of choice and equitable and reliable treatment. The authorities shall provide for the protection of said rights, the education for consumption, the defense of competition against any kind of market distortions, the control of natural and legal monopolies, the control of quality and efficiency of public utilities, and the creation of consumer and user associations. Legislation shall establish efficient procedures for conflict prevention and settlement, as well as regulations for national public utilities. Such legislation shall take into account the necessary participation of consumer and user associations and of the interested provinces in the control entities."
3. Within the framework of the provisions of the foregoing clauses, the law shall regulate domestic trade and the system of licensing commercial products."	

[a]The English version of The Spanish Constitution may be found at http://www.boe.es/legislacion/constitucion.php (last accessed 14/1/2017)

Nevertheless, all this Comparative Law influence has developed, in Argentina, in a certain direction: the focus, ever since the Constitution of the Argentine Nation was amended in 1994, has been on taking for granted that the consumer is always the weakest party in the consumer relation, deserving protection. This has been enhanced by a recent greater concern towards consumers' access to information in a growing scenario of transparency and fair play. For example, an official system to compare prices of goods sold at supermarkets is currently being designed.[13] Also, private publications are available.[14] We believe greater access to information will diminish the amount of cases brought before the administrative branch—and, subsequently or in an originary manner, the judicial branch—to be solved.

[13]Jueguen, Francisco (2016), Cómo funcionará el monitoreo informático de precios oficial, La Nación, 5 May 2016, http://www.lanacion.com.ar/1895547-como-funcionara-el-monitoreo-informatico-de-precios-oficial (last accessed 14/1/2017).

[14]For example, in the case of pharmaceutical products, we can consult Precios de Remedios, http://www.preciosderemedios.com.ar (last accessed 14/1/2017).

2 Administrative Enforcement Mechanism

Under Law 24.240 (Consumers' Defense Law), Section 41, the main authority in charge of consumer law is an administrative agency: the Secretaría de Comercio.

2.1 Overview

The Secretaría de Comercio is an agency within the Ministerio de Producción, which belongs to the Executive branch of government. The Secretaría de Comercio has two Subsecretarías: one devoted the Foreign Commerce, and one devoted to Internal Commerce. The latter is the Subsecretaría de Comercio Interior.

There is a Dirección Nacional de Defensa del Consumidor within the latter. That Dirección exercises its duties by administrative delegation. Therefore, from the bureaucratic point of view, the Dirección Nacional is not very outstanding. Nevertheless, its powers are relevant pursuant to the effective application or enforcement of Law 24.240.

The authority of the Secretaría de Comercio is established in Law 24.240 (Consumers' Defence Law), especially Sections 41–44. The Secretario de Comercio is appointed by the Executive Power, a power of appointment that is vested on the President of the Nation under the Constitution of the Argentine Nation, Section 99.7.

2.2 Federalism

At the same time, and bearing in mind the federal organization adopted in Argentina, under Law 24.240 (Consumers' Defence Law), the Consumers' Defence Law shall be applied both at the national and at the provincial levels, and in the Autonomous City of Buenos Aires.

Both provinces and the Autonomous City of Buenos Aires are local enforcement authorities of Law 24.240 (Consumers' Defence Law).

2.3 Powers

Under Law 24.40, Section 43, the Secretaría de Comercio Interior has an important role to play in the Consumer Law universe. Among others, it has the following powers: Proposing regulations to the Law 24.240 and designing policies aimed at the consumers and users' protection for a sustainable consumption protecting the

environment; taking part in their implementation by means of appropriate rulemaking[15]; keeping a national registry of consumers and users' associations; receiving and processing the concerns and complaints submitted by consumers or users; decreeing inspections and expert inquiries related to the enforcement of the law; requiring reports and opinions from public and private entities in relation to the matter of this law; decreeing, *ex officio*, or at the prior request of the party, that hearings be held, with the participation of the injured complainants, the presumed offender, witnesses and experts. Some of these powers may be subject to delegation from the national orbit to the local level.

2.4 A Consumers' Viewpoint

The exact name of the main authority and the manner in which it may enforce their consumer rights may not be so widely known and this can be verified by consulting the different social networks that hold pages devoted to receiving consumers' complaints: many consumers complain through social networks without knowing the name of the administrative authority that is in charge of handling their complaints.

However, at the national level, a website has been created by the Secretaría de Comercio so that consumers and users can electronically file-in, for free and with no professional counsel, their complaint, and agree on a date for a hearing. The system is subject to an economic limitation,[16] and is aimed at the valuable goal of reaching amiable transactions, thus diminishing the administrative (and, eventually, judicial) caseload.

Consumers seem to be effectively conscious of the existence of consumer associations that protect them. At the same time, consumer associations are subject to strict requirements set forth in Law 24.240 (Consumers' Defence Law).[17] This is due to the fact that, under Law 24.240 (Consumers' Defence Law), consumer associations, registered under Law 24.240, Section 43.b), receive governmental funds to perform their duties.[18]

There is a notorious use of social networks to pose informal complaints, bypassing the administrative agency and the consumer associations. At the same

[15]These regulations represent the exercise of a pouvoir réglementaire.

[16]See Sect. 4.2 below.

[17]Under Law 24.240, Section 56, the organizations aimed at the defence, information and education of the consumer, must request official authorization to operate as such. They will be considered legal as far as they fulfil the following various duties set forth in the laws and bylaws. Under Law 24.240, Section 57, in order to obtain recognition as a consumers' association, each civil association must meet special conditions. See Sect. 5.2 below.

[18]See, for example, Resolución 73/2014, issued by the Secretaría de Comercio, http://www.infoleg.gob.ar/infolegInternet/anexos/230000-234999/230713/norma.htm (last accessed 14/1/2017).

time, companies are using social networks to improve communication and prevent consumer claims.[19]

There seems to be a lot to be done in the field of information disclosure: the only figures that could be located, covering administrative claims at the national level, correspond to the year 2005, and a very recent attempt at the publication of figures resulting from national statistics covering informal requests and complaints before the Administration, by means of a hotline, will be mentioned further on.[20] As a result of the publication of an OECD report, we can see that, in 2005, in Argentina, under Law 24.240 (Consumers' Defence Law), there were 355 cases sanctioned by the administrative authority.[21] And, as a result of the first attempts at publicizing informal complaints, we can learn that, during 2016, there were 235.676 requests and complaints.[22]

2.5 *Specific Sectors That Have Their Own Enforcement Mechanisms*

In Argentina there is a set of industrial activities that have been subject to *publicatio* by Congress. Going through a *publicatio* decision means that the specific activity at stake is subject to the *service public regime*. The *service public regime* consists, basically, in having the specific activity subject to two requirements: the provider will be under a duty to serve, and will not be allowed to charge any free market price; instead, an officially fixed price or rate (*tarifa)*, set after a ratemaking administrative procedure, will be the only income the provider will receive from the user. This is the case of electricity transmission and distribution,[23] natural gas transportation and distribution,[24] water and sewerage services,[25] among others.

Each *service public* has its own special laws and regulations (regulatory framework). For example, Law 24.065 regulates electric transmission and distribution duties and rights. Each regulatory framework includes regulations in order to handle complaints by users of the network. They include, as a duty, the exhaustion of

[19]This is the case, for instance, of electricity supply interruptions due to scheduled maintainance works.

[20]See footnote 48, below.

[21]See OECD-Organization for Economic Co-operation and Development and Inter-American Development Bank (2006), Competition Law and Policy in Argentina, https://www.oecd.org/daf/competition/Argentina-CompetitionLawPolicy.pdf (last accessed 14/1/2017), p. 19.

[22]See footnote 48, below.

[23]Law 24.065, Section 1, http://www.infoleg.gob.ar/infolegInternet/anexos/0-4999/464/texact.htm (last accessed 14/1/2017).

[24]Law 24.076, Section 1, http://www.infoleg.gob.ar/infolegInternet/anexos/0-4999/475/texact.htm (last accessed 14/1/2017).

[25]Law 26.221, Section 2, http://www.infoleg.gob.ar/infolegInternet/anexos/125000-129999/125875/norma.htm (last accessed 14/1/2017).

remedies system[26] by which the user has to complain to the company, and then to the regulatory agency, and then the judicial instance would be available. This is all asserted as a matter of principle, because there are some cases in which the user—or an association representing him—may file a lawsuit directly before the Judiciary branch, as we saw *supra*, Sect. 1.2.

Apart from this, there are activities that were subject to *publicatio* at the time of the privatization of the relevant network and then they reached the stage of deregulation, becoming a free activity in an open competition environment.[27] The regulatory framework used to include and currently includes regulations in order to handle complaints by users of the network, and they are similar to the ones described above. Again, this is all asserted as a matter of principle, because there are some cases in which the user—or an association representing him—may file a lawsuit directly before the Judiciary branch.

3 Enforcement of Consumer Law Before the Judicial Courts

In order to review the manner in which consumers can have access to the judicial system, it is appropriate to briefly review the way the judiciary is organized in Argentina.

As it was suggested in Section 1.1, Argentina is organized as a federal republic, composed of various provinces. There are two judicial orders: the federal judicial order, and the local or provincial judicial order (including, as a local judiciary, that of the Autonomous City of Buenos Aires). The federal judiciary consists in first instance federal judgeships, appellate federal courts of appeals, and a federal Supreme Court (*Corte Suprema de Justicia de la Nación*).

The local or provincial judicial organization varies from province to province. Each province has a Supreme Court of Justice, which is the highest judicial organ in the local or provincial sphere. Under Law 48, Section 14, judicial cases litigated in a province start and end within the judiciary system of that province. Only by exception may the case, that started in a province, be brought to the highest court of the country, i.e., the Corte Suprema de Justicia de la Nación, after the local Supreme Court of Justice has issued its ruling.

The main characteristics of the Argentine judicial system are: constitutional judicial review can be exercised by any judge or court of law independently from

[26]For example, the ENRE-Ente Nacional Regulador de la Electricidad (National Electricity Regulatory Entity), created by Law 24.065, publishes an accesible manual for electricity distribution users so that they get to know their rights and how to file-in their complaints, http://www.enre.gov.ar/web/web.nsf/Files/manual%20usuarios%20ENRE.pdf/$FILE/manual%20usuarios%20ENRE.pdf (last accessed 14/1/2017).

[27]See Decree 764/2000, http://servicios.infoleg.gob.ar/infolegInternet/anexos/60000-64999/64222/texact.htm (last accessed 14/1/2017).

the sphere it belongs to (federal or local); the case or controversy requirement is to be fulfilled; standing to sue is also required; there is no case or controversy if there is unripeness or mootness; certain questions, such as political questions, are exempt from judicial review; there are typical individual lawsuits, and class actions; the Constitution of the Argentine Nation, Section 43, has established a summary judicial proceeding for constitutional rights violations to be brought by individuals or by consumer associations or other collective litigants such as the National Ombudsman (*Defensor del Pueblo de la Nación*); each province must guarantee the local administration of justice.

3.1 Consumer Disputes

Consumer disputes can be posed before the Administration or before the judicial courts; or, directly before the judicial courts.

The administrative mediation system (*Sistema Nacional de Arbitraje de Consumo* or SNAC),[28] created by Law 26.993 is a voluntary mediation system that is currently in force, and it aims at reconciling the opposing parties. Within the system, some disputes are excluded (e.g., claims against commercial airlines), some are included (e.g., medical insurance), and it is viable only if the firm has previously registered in the system. In case there is no agreement, the judicial justice is available (at the national level, the ordinary Commercial courts or the Federal Court of Appeals for Civil and Commercial Litigation—*Cámara Nacional de Apelaciones en lo Civil y Comercial Federal*, CNACyCF). In general, this system aims at satisfying consumers' pecuniary claims. In the provinces, this system is implemented by local mediation centers, and then the local judicial courts will be available. As it was stated in Sect. 2.5, certain services, that are declared *service public*, have their own mediation system to be held before the specialized regulatory agency. Therefore, if someone suffers damages in an electrical appliance due to over voltage, the damages claim for the destructed appliance will be filed in before the service provider and then before the regulator.

The choice of the reviewing court depends on the subject matter. Sanctions are typically reviewed by the *Cámara Nacional de Apelaciones en lo Contencioso Administrativo Federal*—CNACAF because they are the result of an administrative proceeding in which due process should be guaranteed and they represent the sanctioning decision of a national agency. Other matters, such as the judicial claim based on service interruption (based, in itself, on contested billing, for instance) or wrongful provision of a service (e.g., refusal of the medical insurance company to cover certain expenses), are reviewed by the *Cámara Nacional de Apelaciones en lo Civil y Comercial Federal*—CNACyCF. Finally, any damage suffered by a

[28]Sistema Nacional de Arbitraje de Consumo, https://www.argentina.gob.ar/sistema-nacional-de-arbitraje-de-consumo (last accessed 14/1/2017).

consumer in a typical private consumer relation will belong in the ordinary national Commercial courts[29] or their similar ones in the provinces.

Currently, there are no judicial courts exclusively devoted to consumer disputes. Under Section 53, Law 24.240 (Consumers' Defence Law), the rule will be the adoption of a summary judicial proceeding, unless the judge decides that an ordinary judicial will better serve the consumer's protection. A typically summary proceeding, legislated in Section 43 of the Constitution of the Argentine Nation and in the various administrative litigation laws (both federal and provincial), is the *acción de amparo*, which may be filed in together with an injunctive relief petition, either before a federal judgeship or a provincial judgeship. The *acción de amparo*, as a rule, is not subject to the exhaustion of administrative remedies, though it will be subject to the case or controversy requirements; it may be impulsed to challenge the decision of an administrative agency, or the decision of a private party. The Constitution of the Argentine Nation, Section 43, allows for judicial review on constitutional grounds within an *acción de amparo,* and this review may be exercised both by a federal or a provincial judgeship or court.

Section 53 of Law 24.240 (Consumers' Defence Law) guarantees free or gratuitous justice and, under said Section 53, this benefit will cease in case the defendant shows evidence of the consumer's solvency or ability to pay judicial expenses. At the same time, consumer associations, under Section 56 of Law 24.240 (Consumers' Defence Law), must provide legal aid to consumers who contact them independently from the financial situation of the consumer. Unfortunately there are no publications regarding consumer satisfaction in the field of consumer disputes before judicial courts.

The main advantages of the system of consumer access to justice may be assessed in the light of the principles that judicial courts usually apply in Consumer Law cases. A typical principle that is applied is that of *in dubio pro consumer*, which means that, in case of doubt, the most favourable decision for the consumer shall be adopted.[30] This principle is currently included in Section 1095 of the new Civil and Commercial Code in force, and has been subject to objections in the field of *service public*.[31]

The CNACAF has adopted the *in dubio pro consumer* principle, interpreting that "the protection of the weakest party in the consumer relation is based on a 'presumption of legitimate ignorance'".[32]

[29] An example of the National Commercial Court of Appeals consumer defence case law can be seen at http://www.pjn.gov.ar/Publicaciones/00020/00034853.Pdf (last accessed 14/1/2017).

[30] Argentine Supreme Court of Justice of the Nation, Banco de la Nación Argentina c/Monti, Aldo Horacio s/cobro de pesos, dated 11 November 2003, record B. 3885. XXXVIII, Fallos:326:4541 (2003); Caja de Seguros S.A. c/Caminos del Atlántico S.A.C.V., dated 21 March 2006, record C. 745. XXXVII, Fallos:326:695 (2006). All of them may be found at www.csjn.gob.ar (last accessed 14/1/2017).

[31] Sacristán (2004), pp. 449–463.

[32] CNACAF, Sala II, Ombú Automotores S.A. c/Secretaría de Comercio e Inversiones—Disp. DNCI N° 220/97, record 23.921/1998, dated 4 March 1999.

3.2 *Main Shortcomings of the Judicial Enforcement of Consumer Rights in Argentina*

In a scene in which it is relatively easy to litigate before the judicial courts, perhaps the main shortcomings relate to the distribution horizon of all the costs involved in cases that shall be governed by the principle of *in dubio pro consumer*.

This distribution horizon has been facing, basically ever since 1994, the creation of a case law that does not seem to hesitate before consumer claims, and a body of administrative legislation or regulations—dictated under *pouvoir réglementaire*—that have followed suit.

Regarding liberalized or free market business activities, costs derived from judicial rulings that protect—or perhaps over protect—the consumer shall, hypothetically, be transferred to final prices paid by the rest of the consumers of that firm. As to activities that have been declared *service public*, subject to officially fixed rates—which have, in turn, suffered the freezing set forth by Section 8 of the Emergency Law 25561 passed in January 2002, currently in force until December 2017, the distribution of the costs derived from consumer claims becomes crucial.

4 Specialised Agencies and the Enforcement of Consumer Law

In Argentina, the specialised agency in charge of enforcement of consumer law is the Dirección Nacional de Defensa del Consumidor, an agency stemming from Section 42 of the Constitution of the Argentine Nation and Law 24.240. It has wide powers[33] that include, essentially, coordinating the consumer protection system.

The Dirección Nacional has three sectors: one devoted to consumer advocacy; another one in charge of the National System of Consumer Arbitration (SNAC); and a Dirección de Protección Jurídica del Consumidor, a bureaucratic agency in charge of the effective legal protection of the consumers.[34] The Dirección Nacional has its head office at Avenida Julio A. Roca 651 (1322), Ciudad Autónoma de Buenos Aires, Argentina and it has branches all over the country, in the different provinces. In addition to this, there are centers of personalized assistance to the consumer and a toll-free line of Consumer Information. Regarding claims, they may be posed online, at http://www.consumoprotegido.gob.ar.

[33] According to Decree 1070/2014, http://servicios.infoleg.gob.ar/infolegInternet/anexos/230000-234999/232058/norma.htm (last accessed 14/1/2017).

[34] See the Organigrama at https://www.argentina.gob.ar/sites/default/files/defensaconsumidor_organigrama_0.pdf (last accessed 14/1/2017).

4.1 Administrative Proceedings

Consumer disputes, before the Dirección Nacional, take between 6 months and a year on average to be solved, depending on the proceeding. The Dirección Nacional has two different proceedings for dispute resolutions: the Prior Conciliation Service on Consumption Relations (COPREC), and the National System of Consumer Arbitration (SNAC).

The COPREC establishes three instances: a first obligatory pre-judicial instance in which there is a conciliation between the consumer and the claimed company or companies in which an enrolled conciliator takes part. In case the parties do not reach an agreement, there is a Consumption Relations Audit (to repair the direct damage for an amount up to 15 minimum wages (approximately US$ 7.100). The Judicial Jurisdiction of Consumption (for the full reparation of damage up to 55 minimum wages (approximately US$ 26.000[35]), has not been implemented.

The SNAC handles consumption cases at the request of a consumer. It is necessary to file in the corresponding arbitration form before the SNAC. The consumer will be called for a conciliation hearing, within 15 days, and the hearing will be presided by a mediator. If the company is not a member of the SNAC, once the arbitration request has been filed, the claimed company is notified so that, within 5 days, it can accept or reject the requested arbitration. If the claimed company does not accept the requested arbitration, the file will be sent to the competent authority to be solved. If arbitration is accepted or if the company is a member of the SNAC, an arbitration (administrative) tribunal shall be established. The claimed company shall be given 10 business days to present the case and provide evidence. After the expiration of the deadline, a hearing date is set.. In case an agreement is reached, an arbitration award will be issued, subject to subsequent approval. If one of the parties does not attend the hearing or an agreement is not reached, the tribunal will go on to make a resolution by passing an arbitration award which has binding effect and enforceability: it can be enforced before a judicial court in case of non-compliance.

4.2 Outcomes of the Administrative Proceedings

Unfortunately it is not easy to locate, online, statistics reflecting consumers' or merchants' satisfaction, apart from the statistics published by the Government of the Autonomous City of Buenos Aires, related to the amount of complaints that are

[35]See Infobae, El salario mínimo, vital y móvil sube a $8.060, http://www.infobae.com/2016/05/19/1812812-el-salario-minimo-vital-y-movil-sube-8060/ (last accessed 14/1/2017). The rate of exchange between ARS and US$ maybe consulted at Dolar Hoy, http://www.dolarhoy.com (last accessed 14/1/2017).

administratively and judicially handled[36] and some national level statistical information that has begun to be published very recently related to requests and complaints filed in before the national Administration.[37] Nonetheless, the advantages of the enforcement of consumer rights before a specialised agency are evident: SNAC is an extra-judicial arbitral mechanism that, at the same time, is voluntary, agile and free of charge. The role of the COPREC can also be stressed, for it allows for the conciliation of disputes below approximately US$ 26.000.

However, there are a number of shortcomings that can be observed in the system. For instance, consumers have expressed difficulties in having access to the website www.consumoprotegido.gov.ar and in uploading documents; an online help desk or a link to frequently asked questions is most needed; there seems to be a substantial lag between the complaint filing date and the date for the scheduled conciliatory hearing; the quantity of registered conciliators seems to be insufficient.

5 Consumer Organisations and Enforcement of Consumer Law

According to an official webpage, www.consumidor.gov.ar, the consumers' associations registered in Argentina vary in number along the different jurisdictions.[38] For example, 35 may be found in the province of Buenos Aires; 1 may be found in the province of Córdoba. Considering that there are 23 provinces in Argentina, there is a high number of provinces that have no registered consumers' associations.

[36]See: Dirección General de Estadística y Censo – Ministerio de Hacienda GCBA (2015), Anuario Estadístico – Ciudad de Buenos Aires, http://www.estadisticaciudad.gob.ar/eyc/wp-content/uploads/2016/10/anuario_estadistico_2015.pdf (last accessed 14/1/2017), especially pp. 343–345.

[37]Ministerio de Producción – Presidencia de la Nación, Telefonía móvil, bancos y electrodomésticos encabezaron el ranking de reclamos de los consumidores en 2016, http://www.produccion.gob.ar/telefonia-movil-bancos-y-electrodomesticos-encabezaron-el-ranking-de-reclamos-de-los-consumidores-en-2016/ (last accessed 16/1/2017) is an official publication that was released on 14 January 2017. Its text provides interesting figures at the national level and shows a decision to publicly disclose statistics: "The Dirección Nacional de Defensa del Consumidor produced the 2016 statistics on requests and complaints posed by consumers and users. The sectors that gathered the most requests were mobile communications, banks and financial entities and electric home appliance purchases and technical repair services. Complaints through the consumer defence hotline: (. . .) 235.676 requests were received from January through December 2016. (. . .). Complaints before the COPREC: (. . .) 35.007 complaints were received (. . .). Complaints before the SNAC: (. . .) Between January and December 2016, 1.113 requests for arbitration were filed in. (. . .)."

[38]See Registro Nacional de Asociaciones de Consumidores, https://www.argentina.gob.ar/produccion/consumidor/asociaciones (last accessed 15/1/2017).

Nevertheless, an association, registered in a given province, may have branches in other provinces.[39] This is due to the fact that, according to the bylaws,[40] consumer organizations which are set up as non-profit civil associations with legal capacity under Law 24.240, Sections 55 and 56 among others, are authorized to operate in the national jurisdiction.

5.1 Anatomy of the Consumers' Associations

A consumers' and users' association is defined as any organization constituted by private individuals, independently from all economic, commercial or political interests, aimed at guaranteeing and providing protection and advocacy for consumers and at promoting information, education, representation and respect of their rights. Law 24.240, Section 57, requires that, in order to be recognized as a consumer organization, "the non-profit civil associations shall comply with general requirements, as well as the following special conditions: a) they shall not be able to participate in political party activities; b) they shall be independent from all type of professional, commercial and productive activities; c) they will not be allowed to receive donations or contributions from commercial or industrial companies or private, state, national or foreign suppliers of services; they will not be allowed to include advertisements in their publications".

On the other hand, and in the field of authorization to operate, Law 24.240, Section 56 establishes that "[t]he organizations that have as a main objective the defense, information and education of the consumer, will have to request authorization to the competent authority to operate as such." It will be understood that they comply with such objective when they devote themselves to: (a) ensuring enforcement of laws; (b) proposing the enactment of legislation or legal or administrative measures aimed at

[39]This is the case of Acción del Consumidor, Adelco, a consumers' association that has *filiales* in Santa Fé, Santo Tomé and Tucumán, according to Acción del Consumidor, Autoridades y filiales, http://www.adelco.org/index.php/autoridades-y-filiales/ (last accessed 14/1/2017).

[40]Resolution 90/2016, which repealed the old Resolution 461/1999. The former may be found at: http://servicios.infoleg.gob.ar/infolegInternet/anexos/260000-264999/261225/norma.htm (last accessed 14/1/2017). Resolution 90/2016, Section 1, establishes that: "The consumers' associations that are incorporated as civil associations (. . .) shall fulfil the following requirements in order to act at the national level once they are registered or re-registered before the National Registry of Consumers' Associations: a) Possess physical premises (. . .); b) count on physical means of dealing with consumers' and users' requests, at the association's premises, at least three days a week and for fifteen hours per week. c) Own their own internet domain (. . .). d) Count on means of communication with the consumers, such as fixed or mobile telephone lines, e-mail address, social network, etc. e) Own an active banking account at the Banco de la Nación Argentina (. . .)." And Section 5 sets forth the conditions under which the association may remain at registered before the registry: "a) The fulfilment of the duties set forth in Section 1. b) Annual updating of all the information required (. . .) to be submitted to the Enforcement Authority, in accordance with the regulations guiding the submittal of accounting statements (. . .). c) Adequate notice, to the Enforcement Authority, regarding meetings (. . .) under the same requirements established by the laws for civil associations. d) Submittal of the association's Annual Management Report (. . .)."

protecting or educating consumers; (c) cooperating with various bodies for the improvement of consumer legislation or the like; (d) receiving complaints from consumers and promoting friendly solutions; (e) defending and representing consumer interests before the courts or competent authorities; (f) advising consumers on consumption matters; (g) performing and disclosing market research studies, quality control studies, price statistics, and provide any other information of interest for consumers; (h) promoting consumer education; among other objectives.

Besides, Law 24.240, Section 58, states that "[c]onsumers' organizations shall be enabled to make complaints, deriving from breach of this Law, on behalf of consumers of goods and services before manufacturers, merchants, agents or corresponding suppliers of service." Finally, Law 24.240, Section 55, states that "[t]he consumer associations registered as legal entities have legal standing to sue when consumer interests are objectively affected or threatened (. . .)." Therefore, they have a legally established standing to sue.[41]

5.2 The Role of Consumers' Associations

Consumers' associations can be appraised as legal instruments that operate not as a defence but as a balance factor, as opposed to the alternative methods regulated by Law 24.240. In this way, those associations guarantee a system by which consumers may access and participate in the socioeconomic market.

Consumers' association stand as an undoubted means of assuring equality and social reliability. Under law 24.240, Section 57, consumers' associations cannot participate in partisan politics, must be independent from all type of professional, commercial and productive activities; and cannot accept donations or contributions arising from said activities.

It can be said that the recognized consumers' associations, as objective, impartial and modest entities, play an important mediation role. They deal with the complaints under an imperative of prevention, clarifying misunderstandings and ending unrest; they approach the substantive issue with due respect and understanding towards the parties and, bearing in mind the transparency principle, they achieve, in most of the cases, immediate satisfactory agreements.

By promoting friendly solutions between consumers and the liable ones, a consumers' association is cost-saving at the administrative stage. At the same time, judicial costs are avoided because the long lags the judicial organization assures, and its costs, are bypassed.

Finally, and from the point of view of professional counsel, a consumers' association—the same as any other inhabitant of Argentina—does not need legal counsel in

[41] Apart from consumers' associations, the Defensor del Pueblo de la Nación (an organ established by the Constitution of the Argentine Nation in the sphere of the Legislative Branch of government) has legal standing to sue under Law 24.240, Section 52.

order to file in a claim before the Administration.[42] And, at the judicial stage, free legal aid is always available, for example, through the Buenos Aires Lawyers Bar.[43] Both guarantees facilitate the effective participation not only of consumers but also of consumers' associations before the Administration and before the Judiciary.

6 An Ordre Public Law and Its Private Regulation and Enforcement

In Argentina, in the area of economic rights, and from a general viewpoint, it can be said that the irruption of the recognition of consumption relations meant irrupting in the existing system: the Law 24240 principles shall always prevail, as stated by its Section 3, since said Law is an *ordre public* law. This feature implies that private conventions that oppose Law 24.240 shall automatically be passed over or ignored.

At the same time, there seems to be an agreement, among authors, in the sense that the interpretation of the Law 24.240 shall always be guided towards the consumers' protection (*in dubio pro consumer* principle). This finding arises not only from the legislators' intent but also from the wording of Law 24.240, Section 3: "In case of doubt regarding the interpretation of the principles that this Act sets forth, the most favorable one for the consumer shall prevail." Therefore, Law 24.240 shall always be construed for the consumer and not against him.

This apparent airtight system does not hinder the application of other norms or principles that sometimes balance the imbalanced system.

6.1 Ethical Standards

Companies endeavor to apply ethical guidelines of consumption. In some fields—e.g., banking entities,[44] associations of companies of direct sale[45]—there are Codes

[42]Law 19.549 (Administrative Procedure Act), Section 1(i), http://servicios.infoleg.gob.ar/infolegInternet/anexos/20000-24999/22363/texact.htm (last accessed 14/1/2017).

[43]See Colegio Público de Abogados de Capital Federal, Reglamento del Consultorio Jurídico Gratuito, http://www.cpacf.org.ar/files/reglamentos/reglamento_consultorio_juridico_gratuito.pdf (last accessed 14/1/2017).

[44]Santander, *Código General de Conducta*, http://www.santander.com/csgs/StaticBS?blobcol=urldata&blobheadername1=content-type&blobheadername2=Content-Disposition&blobheadername3=appID&blobheadervalue1=application%2Fpdf&blobheadervalue2=inline%3Bfilename%3D837%5C944%5CCódigo+General+de+Conducta.pdf&blobheadervalue3=santander.wc.CFWCSancomQP01&blobkey=id&blobtable=MungoBlobs&blobwhere=1278708790053&ssbinary=true (last accessed 14/162017), Section 20.

[45]Cámara Argentina de Venta Directa, Código de Éica, http://www.cavedi.org.ar/page.php?language=sp&section=codigo-de-etica&action=prefacio (last accessed 14/1/2017).

of Conduct, and some of them regulate relations between the company and the consumer clients.

6.2 Construing Law 24.240 in the Light of Other Laws

Regarding consumption, Law 24.240 can be construed by means of an integration of legislation. In this way, Law 24.240 can be interpreted in the light of Law 22.802 (Fair Trading Law), or in the light of Law 25.156 (Antitrust Law), among others. The same happens when Law 24.240 is interpreted together with any other general or special law which is, in turn, applicable to consumption relations.

In the field of liability for goods or services, Law 24.240, Section 40, establishes strict and joint liability of the whole marketing chain. The only cause of liability exclusion would be the duty to prove that the cause of the damage has been external, beyond the control of the party. An exception to this principle is the case of the carrier who can bypass liability upon a showing that the damage or defect of the thing was not caused in the course of transport.

6.3 Law 24.240 and the New Civil and Commercial Code

The Civil and Commercial Code, Section 7, regulates the temporary effectiveness of the laws in general: "The laws shall be applied to the consequences of the existing juridical relations and situations". Besides, the Civil and Commercial Code, Section 7, states that "The new supplementary laws shall be inapplicable to the contracts that are being executed, excepting the norms that are more favorable to the consumer in the consumption relations." Therefore, the new Civil and Commercial Code is certainly to be applied to many consumption relations.

Apart from these two important Civil Law regulations, the following rules may be found in the new Civil and Commercial Code:

1. Sections 11 and 14 regulate the dominant position on the market and collective rights, respectively.
2. Sections 984 to Section 989 regulate the so-called standard-term contracts.
3. Section 1073 to Section 1075 regulate *contratos conexos* (connected contracts), and said Sections may be applicable to consumption contracts.
4. Later on, the Civil and Commercial Code regulates consumer contracts: (1) one chapter, on consumption relations, norms the so-called consumption relation and the consumer (Section 1092), the consumer contract (Section 1093), the interpretation and preferential application of norms (Section 1094) and the interpretation of consumer contracts (Section 1095). (2) A second Chapter, on consent formation, covers abusive practices (Section 1096 to Section 1099) and information and advertising aimed at consumers (Section 1100 to Section 1103). (3) A third

Chapter prescribes about contracts entered into off-commercial premises (section 1104); distance contracting (Section 1105); use of electronic media (Section 1106); information regarding electronic media (Section 1107). (4) A fourth Chapter covers unfair contract terms (Section 1117); control of clauses included in a consumption contract (Section 1118); general interpretation rules (Section 1119); abusive legal situations (Section 1120); limitations (Section 1121); and the judicial control of abusive clauses (Section 1122).

5. The Civil and Commercial Code regulates banking contracts (Section 1384 to Section 1389), including banking contracts between banks and consumers and users.
6. Finally, Section 2100 and Section 2111 of the Civil and Commercial Code, regulate the consumption relations arising from time-shares and private cemeteries.

7 Enforcement Through Collective Redress

In the field of consumption, the so-called "collective incidence legal action" has been regulated since 1993 when Law 24.240 was enacted. Currently, collective incidence legal actions are regulated in Law 24.240, Section 54 in particular:

> To reach a conciliatory agreement or transaction, previous notice must be served at the office of the Public Prosecutor -unless this office is, in itself, the plaintiff filing in the collective incidence legal action-, in order to decide regarding the adequate consideration of consumers' or aggrieved users' interests. The judicial approval will require a reasoned judicial decision. The agreement will have to be respectful of the possibility, for individual consumers or users, to **opt-out** from the effects of judicial solution adopted for the case.
>
> The judicial decisions favorable to the claim will have the force of *res judicata* for the defendant and for all the consumers or users that are in similar conditions, except for those who expressly opt-out before the judicial decision is issued, under the terms and conditions the judge establishes.(. . .) (emphasis added)

The effects of the judicial decision are general, unless certain consumers or users decide to opt-out. The effective opting-out possibility is, at the times these lines are written, a pending matter of regulation.[46]

[46]See: Sacristán (2016), pp. 199–213, regarding a Supreme Court judicial decision that blocked a natural gas production, transportation and distribution price increase for the natural gas users throughout Argentina (excepting the ones entitled to social rates).

8 Sanctions for Breach of Consumer Law

Law 24.240 sets forth different kinds of sanctions. The most frequent ones, established in Section 47 of said law, consist in fines plus publication of a notice (regarding the sanction applied) in a main nationally distributed newspaper.

Besides, there can be punitive damages under Section 52 bis. The wording of Section 52 bis has caused many objections.[47] The amount established in Law 24.240, Section 47.b. is that of ARS 5 million (approximately US$ 350,000). The punitive damages regulated in Law 24.240, Section 52 bis and Section 47.b can be construed in the light of the criteria set forth in Law 24.240, Section 49, i.e., damage, position in the market, valuation of the benefit obtained, seriousness of risks or social damages and their generalization, recidivism.

9 ADR and Consumer Disputes

In Argentina, ADR mechanisms, as applied to consumer relations, are mostly overseen by the SNAC (National System of Consumer Arbitration).[48] Its jurisdiction encompasses consumption relations defined by Law 24.240, and its powers may be exercised throughout the whole national territory.

The SNAC is regulated by Decree 1070/2014,[49] which empowers it to manage the national registry of consumer associations, the registry of institutional arbitrators and the registry of public offers of endorsement to the SNAC; receive and assess the arbitration requests filed in by consumers; intervene in arbitration agreements; take part in arbitrator appointment, making the draw of arbitrators; take action in the matter of notifications, follow up and control of filings, deadlines, evidence production and record closing; keep the register of arbitration awards and adjudications; produce statistics.

In order to perform its duties, the SNAC acts under these principles[50]: willfulness (parties opt for these proceedings as a method of disputes resolution); gratuity (arbitration proceedings are free for both parties, and no professional counsel is needed); simplicity and speed (arbitral proceedings last up to 120 business days, even if parties may agree on an extension); confidentiality (there is privacy and

[47]Stiglitz and Pizarro, even if expressing that the amendment "deserved praise", considered that the legal norm meant "spoiling" the legal acceptance of the institution, that will become nothing but a source of juridical insecurity and possible inequality. See Stiglitz and Pizarro (2009), pp. 949–960.

[48]See Sect. 4.1 above.

[49]Decree 1070/2014, http://servicios.infoleg.gob.ar/infolegInternet/anexos/230000-234999/232058/norma.htm (last accessed 14/1/2017).

[50]Ministerio de Producción – Presidencia de la Nación (2016), Sistema Nacional de Arbitraje de Consumo, http://www.produccion.gob.ar/sistema-nacional-de-arbitraje-del-consumo/ (last accessed 14/1/2017).

confidentiality on the arbitral procedure and the corresponding arbitration award; parties may agree on the publication of the award); impartiality and balance between the parties (there is one arbitrator for each party, plus a third arbitrator; strict qualification and solvency requirements are established; among other requirements); binding effect and enforceability (the award is binding and can be enforced before a judicial court in case of non-compliance by any of the parties).

It may be affirmed that the SNAC supplements the role judicial courts play, making the whole of the consumer protection more complete, and has been conceived to recompose the deteriorated relations between suppliers of goods and services and consumers or users. By means of the arbitration proceeding, the parties to a consumption relation can settle their differences, with similar effects to the ones obtained at the judicial courts, quickly and in an agile fashion.

10 External Relations and Cooperation of the State, Enforcers and Consumer Organisations

Argentina is a member of the regional integration entity Mercado Común del Sur (MERCOSUR).

In 1994, one of its organs—the Common Market Group (GMC)—passed Resolution 126/1994, which established that, until a common regulation for consumer protection is enacted, each State Member shall apply its own consumer protection legislation to the goods and services which are marketed in its territory.

By means of Directives 1/1995, 17/1996 and 18/1996, various Technical Committees were created within the MERCOSUR Trade Commission (CCM). The Technical Commission N° 7 (CT N° 7), devoted to consumer protection, was set up with the fundamental mission of drafting a Bill for a Consumer Regulation for the MERCOSUR.

So far, the GMC, by recommendation of CT N° 7, has issued several Resolutions on consumers protection:

- Resolution 123/1996, defining fundamental concepts regarding Consumer Protection Law;
- Resolution 124/1996, establishing a Bill of Consumer Basic rights;
- Resolution 125/1996, setting forth concrete guidelines to achieve the effective health and safety protection of consumers;
- Resolution 126/1996, stating the criteria to which advertising of goods and services aimed at consumption will have to adjust;
- Resolution 127/1996, later replaced by Resolution 42/1998, establishing the conditions and scope that every contractual guarantee of goods has to comply with.

However, these Resolutions are not in force because their enforceability was conditioned to the enactment of "Common Regulation for Consumer Protection", which was never passed.

On 17 December 1996, the CMC subscribed, in Fortaleza (Brazil), the Protocolo de Santa María sobre Jurisdicción Internacional en Materia de Relaciones de Consumo (Santa Maria Protocol on International Jurisdiction on Consumption Relations).[51] But during the XXV Meeting of the Trade Commission of MERCOSUR, held in Montevideo, on 9 and 10 December 1997, the Santa María Protocol was rejected. This led to both Resolution GMC 123/1996 and the Santa Maria Protocol to lose legal value.

In 2002, under the new Protocolo de Olivos (Olivos Protocol),[52] MERCOSUR created a Permanent Review Arbitral Tribunal.

In the LXIII Ordinary Meeting of CT N° 7, which took place in Rio de Janeiro on 18 and 19 August, 2010, there was an agreement on a "Bill on Applicable Law to International Consumer Contracts".

Also, in 2003, Argentina and Uruguay suggested using the Santa Maria Protocol as a model of a future Inter-American Convention.[53] Consumer Law has been included in the agenda of the Séptima Conferencia de Derecho Internacional Privado (CIDIP VII).[54]

11 Concluding Remarks

The Argentine experience in the field of consumer protection, so far, seems to be positive as it has allowed consumers to have protection tools in small claims disputes. Besides, the orderly functioning of governmental entities and arbitral tribunals make it possible to receive and handle complaints from affected consumers. In general, the design renders a relatively simple, speedy and cost-saving resolution of possible Consumer Law disputes, as opposed to having to face a long judicial process.

The existence of governmental agencies empowered to deal with the possible conflicts and to protect the consumer has been a serious step to provide Constitution of the Argentine Nation, Section 42, with legal effectiveness. More recently, and with the aid of the internet, consumer claims have been facilitated.

[51]See MERCOSUR/CMC/DEC N° 10/96 – Protocolo de Santa María sobre Jurisdicción Internacional en Materia de Relaciones de Consumo, https://sociedip.files.wordpress.com/2013/12/protocolo-de-santa-marc3ada-sobre-relaciones-de-consumo.pdf (last accessed 14/1/2017).

[52]See Protocolo de Olivos para la Solución de Controversias en el Mercosur, http://www.mercosur.int/innovaportal/file/722/1/cmc_2002_protocolo_de_olivos_es.pdf (last accessed 14/1/2017).

[53]Rojo (2012), pp. 1–18 and fn. 12.

[54]See Organización de los Estados Americanos (2014), Derecho Internacional Privado, http://www.oas.org/dil/esp/cidipvii_home.htm (last accessed 14/1/2017).

The most significant input in the protection of consumers arose from the enactment of Law 24.240, in the year 1993; its subsequent amendments, together with the enactment of the new Civil and Commercial Code, Law 26.994, in 2014,[55] show a tremendous legislative concern towards Consumer Law.

Developments of law, case law and texts of authority have allowed for the consumer to be accepted as a "new vulnerable one" in the new Civil and Commercial Code. This characterization was deemed necessary to protect consumers in free markets, and users of public services. Public service providers act under a natural monopoly, and the application of Law 24.240 to them has been accepted by most of the Constitutional Law scholars.[56]

In general, there seems to have been a great advance in consumer protection in the recent years, but a difficulty lies in how to define the consumption relation appropriately so that it can be applied to the cases specifically considered, without stretching it to cover simply any kind of contract. For instance, there has been an attempt to extend the concept of consumption relation to airline passengers but most of the authors consider that the airline passenger is not a consumer but a party to an air transportation contract, instead.

Our personal opinion is that, since 1993, the year in which Law 24.240 was passed, there has been a great advance in the matter of consumer protection.

Undoubtedly, consumers, in Argentina, enjoy protection. Were we asked to numerically rate the consumer protection system, both from an administrative and a judicial viewpoint, we would risk giving grade of 6 over 10[57] to consumer satisfaction in Argentina.

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[55]Law 26.994, http://www.infoleg.gob.ar/infolegInternet/verNorma.do?id=235975 (last accessed 14/1/2017).

[56]Against this position: Sacristán (2011), pp. 925–937.

[57]This grading is, in a way, related to the number of complaints published by the government of the Ciudad Autónoma de Buenos Aires, Dirección General de Estadística y Censo – Ministerio de Hacienda GCBA (2015), Anuario Estadístico – Ciudad de Buenos Aires, http://www.estadisticaciudad.gob.ar/eyc/wp-content/uploads/2016/10/anuario_estadistico_2015.pdf (last accessed 14/1/2017), pp. 343–345, and its total population (around 2.8 million inhabitants).

Sacristán EB (2016) Amparo colectivo en la Argentina: opt-in, opt-out o tal vez nada, Revista Argentina de Derecho de la Energía, Hidrocarburos y Minería, Buenos Aires, Ábaco, N° 11, pp 199–213

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Enforcement and Effectiveness of Consumer Law in Australia

Gail Pearson

1 Introduction

The Australian system is predicated on persuasion for corporate compliance through self-regulatory mechanisms, breach reporting and strategic regulatory intervention.[1] A consumer in dispute with a business may register a complaint with the business or the regulator, and has the option of internal dispute resolution, external dispute resolution schemes such as Ombudsmen, an administrative Tribunal or a Court. The regulator can take independent enforcement action, initiate representative proceedings, and can also intervene in existing proceedings. In the Australian multi-regulator framework and with multi dispute options, it may sometimes be difficult for a consumer to know precisely how to proceed. Consumer law is administered by ten regulators (two national and eight State or Territory) plus separate specialist regulators for certain safety and telecommunications issues. However the agencies operate a 'no wrong door' approach which eventually leads consumers to the appropriate regulator.[2] There is a general view that the multi-regulator model works well but is not flawless.[3] In addition to confusion about where to go to resolve a dispute, there are issues of how fast the matter will be resolved and in some venues

[1] On risk based compliance and enforcement see Australian Government Productivity Commission, Consumer Law Enforcement and Administration Research Report, Overview and Recommendations, March 2017, p. 7.

[2] Australian Government Productivity Commission, Consumer Law Enforcement and Administration Research Report, Overview and Recommendations, March 2017, pp. 9 and 155.

[3] Australian Government Productivity Commission, Consumer Law Enforcement and Administration Research Report, March 2017, p. 65 f.

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whether compensation will actually be paid. The system is currently being assessed from different perspectives and the various reports (discussed later) indicate that in general it works reasonably well though there is definitely room for improvement to enable consumers to resolve their disputes and meet their legal needs.

2 National Legal Framework for Consumer Protection

Australia is an island continent, a large desert ringed by a sliver of fertile coastline. It has a population of over 24 million,[4] of whom a high proportion have at least one parent born overseas. There are short of a million indigenous Australians.[5] Its neighbouring country across the Tasman Sea is New Zealand.

Australia is a Federation of six states and two territories. Each State and the Federal government of the Commonwealth of Australia has its own Constitution.[6] Responsibility for developing and implementing consumer policy in Australia is shared between the Australian government and the States and Territories. This is a multi-regulator, rather than a one regulator model. Ministers with responsibility for consumer affairs meet through the Council of Australian Governments (COAG) Legislative and Governance Forum on Consumer Affairs Forum (CAF) to consider consumer affairs and fair trading matters of national and trans-Tasman significance, where possible, develop a consistent approach to those issues.[7] CAF operates according to its Charter,[8] the Intergovernmental Agreement for the Australian Consumer Law[9] the Mutual Recognition Act 1992 (Cth), requested by the territories,[10] and the Trans-Tasman Mutual Recognition Act 1997 (Cth).[11] CAF is linked to Consumer Affairs Australia and New Zealand (CAANZ) which is a body representing Australian and New Zealand consumer affairs agencies.

Each State and Territory consumer agency has responsibility for consumer policy within its State or Territory. The national consumer policy framework aims to "improve consumer wellbeing through consumer empowerment and protection, to

[4]See http://www.abs.gov.au/ausstats/abs@.nsf/Web+Pages/Population+Clock?opendocument.

[5]See http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/3238.0Media%20Release02001%20to%202026?opendocument&tabname=Summary&prodno=3238.0&issue=2001%20to%202026&num=&view.

[6]Commonwealth of Australia Constitution Act, https://www.legislation.gov.au/Details/C2013Q00005.

[7]See http://consumerlaw.gov.au/consumer-affairs-forum/.

[8]See http://consumerlaw.gov.au/files/2016/04/CAF_Charter_2015-17.pdf.

[9]*I*ntergovernmental Agreement for the Australian Consumer Law 2009, http://consumerlaw.gov.au/files/2015/06/acl_iga.pdf.

[10]See http://www.austlii.edu.au/au/legis/cth/consol_act/mra1992221/.

[11]See https://www.legislation.gov.au/Details/C2015C00470.

foster effective competition and to enable the confident participation of consumers in markets in which both consumers and suppliers trade fairly."[12]

The national consumer policy was put in place following an inquiry and 2008 report of the Australian Productivity Commission, Review of Australia's Consumer Policy Framework.[13] This report addressed the relationship between a national market and a national generic consumer policy.

Consumers in Australia are educated about their rights and aware of the existence of consumer rights. Consumers also have access to redress through bodies at the national and state and territory level. In 2010–2011 there was a national Consumer Survey of consumer and business awareness of consumer law rights and obligations which showed very good awareness but room for improvement especially as regards the vulnerable.[14] This exercise was repeated in 2016 and showed increased awareness and a greater likelihood that consumers would take action to resolve any problems.[15]

The principal legal framework for consumer protection is the Australian Consumer Law (ACL), complemented by the Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act). This legislative framework preserves the late twentieth century bifurcation of consumer protection between financial services (including consumer credit) and the rest, following an inquiry into the financial system,[16] despite a subsequent Productivity Commission recommendation for a new national generic consumer law for all consumer transactions including financial services.[17]

The Australian Consumer Law (ACL) is the uniform Commonwealth, state and territory consumer protection law that commenced on 1 January 2011. Generally, it does not apply to financial services.[18] The full text of the ACL is set out in Schedule 2 of the Competition and Consumer Act 2010 (Cth) (previously the Trade Practices Act 1974). The ACL includes prohibitions against misleading or deceptive conduct and unconscionable conduct; a national unfair contract terms law covering standard form consumer and small business contracts; a national law guaranteeing consumer rights when buying goods and services (other than financial services); a national product safety law and enforcement system; a national law for unsolicited consumer agreements covering door-to-door sales and telephone sales; simple national rules for lay-by agreements; and penalties, enforcement powers and options for consumer redress. Some but not all of these provisions are echoed for financial services in the

[12]Ministerial Council of Consumer affairs meeting 15 August 2008.

[13]Australian Government Productivity Commission No 45, Review of Australia's Consumer Policy Framework, vol. 1 and 2, 2008, http://www.pc.gov.au/inquiries/completed/consumer-policy.

[14]See http://consumerlaw.gov.au/australian-consumer-survey/first-consumer-survey/.

[15]See http://consumerlaw.gov.au/australian-consumer-survey/.

[16]Commonwealth of Australia, Financial System Inquiry Final Report (Wallis) 1997.

[17]Australian Government Productivity Commission No 45, *R*eview of Australia's Consumer Policy Framework, vol 1, p. 64, Recommendation 4.2.

[18]Competition and Consumer Act 2010 (Cth), section 131A.

ASIC Act. There are further conduct and disclosure rules relevant for consumers in the Corporations Act 2001 (Cth) and the National Consumer Credit Protection Act 2009 (Cth). The later contains responsible lending provisions. There is other specialist legislation relevant to consumers in fields such as home building, telecommunications and safety.[19]

The text of the ACL is the law of both the Commonwealth of Australia and the Australian States via an application model whereby a State law applies Schedule 2 to its jurisdiction.[20] In relation to Commonwealth law, by reason of the Commonwealth Constitution, Schedule 2 applies to conduct of or by corporations or comes under another head of power.[21] The States do not have such constraints. State legislation which applies Schedule 2 includes the Australian Consumer Law and Fair Trading Act 2012 (VIC) and the Fair Trading Act 1987 (NSW). The application legislation refers to persons within this jurisdiction.[22] The ACL text as applies from time to time applies within the jurisdiction as a law of the jurisdiction.[23] This means that as the ACL text changes, so does the law of the relevant jurisdiction without the need for further change. However, there is provision for future changes not to necessarily apply in the State jurisdiction.[24]

The ACL is not intended to cover the field and other laws may operate concurrently.[25] The State sale of goods legislation continues to operate and relevantly the regime of implied terms in contracts for the sale of goods. Some but not all state legislation has special provisions for consumer contracts for the sale of goods which prevent the exclusion of the implied terms in a consumer sale.[26]

Strategically, consumer protection is located as part of the enterprise to sustain a competitive economy, promote economic cooperation between Australia and New Zealand, and ensure the multi-regulator model works for both enforcement and access to justice. This has also meant the incorporation of protections for small business into the consumer law framework.

[19]For an account of the specialist safety regulators and the interaction of regulators see Australian Government Productivity Commission, Consumer Law Enforcement and Administration Draft Report, December 2016, p. 135 f.

[20]Competition and Consumer Act 2010 (Cth), section 130. The previous national model was template legislation in the Trade Practices Act 1974 (Cth) now repealed and the State Fair Trading Acts. Over time, these diverged from each other.

[21]Competition and Consumer Act 2010 (Cth), section 131(1). For other Commonwealth heads of power which support the ACL and which do not require a corporation see Competition and Consumer Act 2010 (Cth), sections 6(2) and 6(3A).

[22]See e.g. Australian Consumer Law and Fair Trading Act 2012 (VIC), section 12. Other legislation is Fair Trading (Australian Consumer Law) 1992 (ACT), Consumer Affairs and Fair Trading Act (NT), Fair Trading Act 1989 (Qld), Fair Trading Act 1987 (SA), Australian Consumer Law (Tasmania) Act 2010, Fair Trading Act 2010 (WA).

[23]Australian Consumer Law and Fair Trading Act 2012 (VIC), section 128.

[24]Australian Consumer Law and Fair Trading Act 2012 (VIC), section 9.

[25]Competition and Consumer Act 2010 (Cth), section 131C.

[26]See Sale of Goods Act 1923 (NSW), section 64.

When the Intergovernmental Agreement for the Australian Consumer Law was entered into in July 2009, it included provision for a review of the ACL within 7 years of commencement of the ACL, which was January 2011. This review is completed. An issues Paper, Interim Report and Final Report have been published.[27] This was undertaken by the Australian Treasury, under the auspices of Consumer Affairs Australia and New Zealand. This is not the only review of consumer law which is occurring. The ACL review is concentrated primarily on the adequacy of laws. The Productivity Commission has undertaken reviews of Access to Justice and specifically of Consumer Law Enforcement and Administration.[28] This Review reported in 2017. In addition a number of Parliamentary and other reviews (including a current Royal Commission into banking misconduct) have examined regulator performance or aspects of consumer protection, specifically as regards financial products and services.[29]

The national tradition of consumer protection has evolved from state based money lending and sales legislation through various iterations. The earliest national framework was the Trade Practices Act 1974 (Cth) (repealed). Of particular note are the sui generis unconscionability statutes and jurisprudence. Australia has drawn on various traditions as its consumer law has evolved. As a common law country its earliest legislation echoed that of the UK. This has continued with unfair contract terms rules. The Trade Practices Act was influenced by US law, particularly as regards false representations and EU law with respect to safety rules. The process of law reform in Australia involves consideration of national jurisprudence and policy and international comparisons. Rules are formulated or adapted rather than adopted. Australian individuals and agencies have contributed to the United Nations Guidelines on Consumer Protection, but it would be fair to say they have had little influence on policy and legislative developments.

Taking a long view, there has been a shift in focus from grafting the consumer onto law regulating certain types of transactions, such as sale of goods; to overcoming shortcomings in the law of obligations via statutory changes in product liability and manufacturer's liability; to rejection of regulation of the consumer contract in some instances as seen in the introduction of new consumer guarantees which create a statutory right similar to but conceptually different from an implied contractual term. Alongside this, there has been a retention of private dispute resolution for some transactions but sustained regulatory intervention via regulator initiated litigation for others. In Australia there is a strong focus on regulatory efficiency and reduction of red tape for business and this is reflected in the drive to make a seamless consumer law that eliminates duplication.

[27] See http://consumerlaw.gov.au/review-of-the-australian-consumer-law/about-the-review/.

[28] Australian Government Productivity Commission, Consumer Law Enforcement and Administration Issues Paper July 2016; Draft Report December 2016, Research Report March 2017 http://www.pc.gov.au/inquiries/current/consumer-law/draft.

[29] JPC Performance of ASIC 2014; Australian National Audit Office ASIC, Managing Compliance with Fair Trading Obligations Australian Competition and Consumer Commission Report No 23, 2016, https://www.anao.gov.au/sites/g/files/net2446/f/ANAO_Report_2015-2016_23.pdf.

3 The General Design of the Enforcement Mechanism

The way in which consumer laws are enforced is closely linked to the regulatory architecture and to the Court and Tribunal structure. There is no single consumer protection agency and no single venue for resolving consumer disputes. The Australian Competition and Consumer Commission (ACCC) has responsibility for all competition matters. It is responsible for the administration and enforcement of the ACL. The State Fair Trading agencies are also involved in day to day administration of the ACL and may also prosecute or take other legal action as required. The Australian Securities and Investments Commission (ASIC) is responsible for regulating financial markets and for enforcing laws to protect consumers and retail clients in those markets. There is a high level Memorandum of Understanding (MOU) between the agencies.[30] In general cooperation works reasonably well but difficulties may arise as in the example of delay in banning unsafe products identified by the States but which is a Commonwealth Ministerial responsibility.[31]

Both the ACCC and ASIC were established by statute and replaced earlier agencies with similar functions. The Australian Competition and Consumer Commission was established in 1995 with the amalgamation of the Australian Trade Practices Commission and the Prices Surveillance Authority to administer the Trade Practices Act 1974. With the repeal of the TPA, the authority of the ACCC is now established under Part II of the Competition and Consumer Act 2010.[32] The Australian Securities and Investments Commission was set up in 1989 to replace the Australian Securities Commission.[33]

Both the ACCC and ASIC operate through a structure that provides for a Chair and for other Commissioners or Members. The Chairperson and Commissioners or Members are appointed by the Governor-General who exercises the powers of the Head of State. They must meet certain statutory requirements as the Governor-General must, in the case of the ACCC, be satisfied that they have "knowledge of, or experience in, industry, commerce, economics, law, public administration or consumer protection", consider if the person has "knowledge of, or experience in, small business matters"; take into account the jurisdiction the person comes from; and in any case at least one of the commissioners must have knowledge of or experience in consumer protection.[34]

The ACCC is deemed to be a body corporate, with perpetual succession; shall have an official seal; may acquire, hold and dispose of real and personal property for

[30]For an account of agreements for the operation of the multi regulator model see Australian Government Productivity Commission, Consumer Law Enforcement and Administration Draft Report, December 2016, p. 64 f.

[31]Australian Government Productivity Commission, Consumer Law Enforcement and Administration Draft Report, December 2016, p. 98.

[32]Competition and Consumer Act 2010 (Cth), Part 11.

[33]Australian Securities and Investments Commission Act 2001 (Cth), section 261.

[34]Competition and Consumer Act 2010 (Cth), section 7(3).

and on behalf of the Commonwealth of Australia, and may sue or be sued in its corporate name.[35] Any money received by the Commission is also received for and on behalf of the Commonwealth of Australia.[36]

Like the ACCC, ASIC is also a body corporate with similar powers.[37] ASIC's liabilities are Commonwealth liabilities.[38] Its Members are also appointed by the Governor-General and it is led by a Chairperson and Deputy Chair.[39] In the ASIC case, the Minister nominates Members and must be confident they have knowledge or experience in one or more of the following: business, company administration, financial markets, financial products and services, law, economics or accounting.[40] There is no explicit requirement that an ASIC Member, also known as a Commissioner, have knowledge or experience in consumer or retail client protection.

The objective of the Competition and Consumer Act is "to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection."[41] The ACCC's key competencies and priorities are: maintaining and promoting competition and remedying market failure; protecting the interests and safety of consumers and supporting fair trading in markets; enforcing compliance with the Competition and Consumer Act 2010 using a range of enforcement remedies, including court-based outcomes, court-enforceable undertakings and administrative resolution; business and consumer education; market analysis and research.[42] The legislation refers specifically and in detail to the functions of dissemination of information, law reform and research.[43]

ASIC's role is to monitor and promote market integrity and consumer protection in the Australian financial system and in the payments system.[44] In contrast with the ACCC, ASIC has powers under a range of additional Acts. These include but are not limited to the Insurance Contracts Act 1984 (Cth), the Life Insurance Act 1995 (Cth), the Superannuation (Resolution of Complaints) Act 1993 (Cth), the Superannuation Industry (Supervision) Act 1993 (Cth), and the National Consumer Credit Protection Act 2009 (Cth).[45]

Both the ACCC and ASIC emphasise the importance of compliance by businesses with the requirements of the law. They emphasise compliance with the spirit and objectives of the regulatory framework, not just strict legal compliance. The multi-regulator agreement places a high value on the escalating enforcement

[35]Competition and Consumer Act 2010 (Cth), Part 11, section 6A(2), (3).

[36]Competition and Consumer Act 2010 (Cth), Part 11, section 4.

[37]Australian Securities and Investments Commission Act 2001 (Cth), section 8.

[38]Australian Securities and Investments Commission Act 2001 (Cth), section 8A.

[39]Australian Securities and Investments Commission Act 2001 (Cth), sections 9 and 10.

[40]Australian Securities and Investments Commission Act 2001 (Cth), section 9(4).

[41]Competition and Consumer Act 2010 (Cth), section 2.

[42]See https://www.accc.gov.au/about-us/australian-competition-consumer-commission.

[43]Competition and Consumer Act 2010 (Cth), section 28.

[44]Australian Securities and Investments Commission Act 2001 (Cth), section 12A(2), (3).

[45]Australian Securities and Investments Commission Act 2001 (Cth), section 12A(1).

pyramid beginning at the base with education and tapering off at criminal conviction.[46] The ACCC encourages compliance and also cooperation by businesses that are in breach of these obligations but will seek enforcement both administratively and by litigation.[47] Most regulatory resources are devoted to education, investigation and complaints handling.[48]

In addition to litigation initiated by the Commission, the ACCC has the power to intervene in any proceedings under the ACL.[49] ASIC also has power to intervene in private proceedings.[50] Both agencies can take representative actions.[51] It is sometimes suggested that the ACCC has more litigation expertise than ASIC. Both make significant investment in court action from time to time. A 2015 report suggested ASIC should take a more risk focused strategic approach to litigation.[52] The agencies publicly report their enforcement outcomes on a regular basis.[53] There are resource constraints to the level of enforcement action a regulator may take. The ACCC has stated that it has resources to take only 30 court actions a year across all its areas of which the ACL is only one.[54]

The ACCC prioritises its compliance and enforcement activities and has set out a list of matters that it takes into account in pursuing action. These are conduct that is or relates to: significant public interest or concern; substantial consumer (including small business) detriment; unconscionability, particularly involving large national companies or traders, impacting on consumers and small businesses; a blatant disregard for the law; issues of national or international significance; essential goods and services; disadvantaged or vulnerable consumer groups; concentrated markets which impact on small businesses or suppliers; a significant new or emerging market issue; industry-wide or likely to become widespread without ACCC intervention; a history of previous contraventions of competition, consumer protec-

[46]For a diagram see Australian Government Productivity Commission, Consumer Law Enforcement and Administration Draft Report, December 2016, p. 83.

[47]See https://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy#accc-compliance-and-enforcement-strategy.

[48]Australian Government Productivity Commission, Consumer Law Enforcement and Administration Draft Report, December 2016, p. 88.

[49]Competition and Consumer Act 2010 (Cth), section 139.

[50]For an account of how ASIC approaches this see http://www.asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-s-approach-to-involvement-in-private-court-proceedings/.

[51]Competition and Consumer Act 2010 (Cth), section 277.

[52]ASIC Capability Review Panel, Fit for the Future: A Capability Review of the Australian Securities and Investments Commission, A Report to Government, December 2015.

[53]See e.g. ASIC Report 485, ASIC Enforcement Outcomes January to June 2016, http://www.asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-enforcement-outcomes/.

[54]The other areas are competition law, regulated infrastructure and industry codes. Australian Government Productivity Commission, Consumer Law Enforcement and Administration Draft Report, December 2016, p. 91.

tion or fair trading laws; and where ACCC action can have a worthwhile educative or deterrent effect.[55]

The regulatory maze and consumer confusion was reviewed by the Productivity Commission report into Consumer Law and Enforcement. While consumers (and suppliers) may not have a good grasp as to which is the appropriate regulator and there are instance of conflicting advice,[56] there are efforts by all regulators to direct consumers to the correct place. These include telephone hotlines and websites and redirection of enquiries for which there is a high level of consumer satisfaction.[57] The Report raises the possibility of a national one stop shop to be a central source of information.[58]

In 2008 the Productivity Commission recommended a review of industry specific consumer regulation with a view to greater coherence and elimination of unnecessary regulation. The 2016 Report assessed the implementation of this recommendation and found mixed progress including jurisdictional inconsistencies in therapeutic goods and food safety.[59]

4 Number and Characteristics of Consumer Complaints and Disputes

Consumer complaints are the bedrock of enforcement as they may lead to investigation, regulatory intervention and private or regulator initiated litigation. Australia still does not have a national database that would more readily enable analysis of complete comparable disaggregated complaints data for the purposes of identifying trends, patterns and issues of concern.[60] The Productivity Commission and the ACCC support a national complaints data base and believe this would overcome information silos.[61] Individual ACL regulators typically collect and analyse such data for their own jurisdiction, although there are some mechanisms in place to share

[55]Paraphrased from list at https://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy#accc-compliance-and-enforcement-strategy.

[56]E.g. the Samsung washing machine recall Australian Government Productivity Commission, Consumer Law Enforcement and Administration Draft Report, December 2016, p. 143.

[57]Australian Government Productivity Commission, Consumer Law Enforcement and Administration Draft Report, December 2016, p. 144 f.

[58]Australian Government Productivity Commission, Consumer Law Enforcement and Administration Draft Report, December 2016, p. 146.

[59]Australian Government Productivity Commission, Consumer Law Enforcement and Administration Draft Report, December 2016, pp. 166, 169.

[60]Australian Government Productivity Commission, *C*onsumer Law Enforcement and Administration Issues Paper, July 2015.

[61]Australian Government Productivity Commission, Consumer Law Enforcement and Administration Draft Report, December 2016, pp. 9, 19, 156.

Table 1 Enquiry and complaint activity by State and Territory ACL regulators, 2015–2016

	Contacts	Total complaints	Total enquiries	ACL related complaints	ACL related enquiries
ACT		274	6395	181	unknown
NSW	7,799,047	51,221		unknown	unknown
NT	17,137			229	unknown
QLD	174,479	14,505	69,185	unknown	unknown
SA		4866	40,835	unknown	unknown
TAS	12,114	193	11,921	61	2439
VIC	349,985			11,272	73,952
WA		11,711		8411	

data with their counterparts. In addition to comparability, there is a further issue of consistency of treatment of a complaint across jurisdictions.[62]

The following comparative Table 1 from the Report of the Productivity Commission into consumer law and enforcement shows the difficulties in isolating complaints data specific to consumer complaints.[63]

A more useful view is drawn from the State of New South Wales, which has Sydney as the capital. There is no specific delineation between complaints and disputes data. Fair Trading uses the Australian and New Zealand Standard (AS/NZS 10002-2014) which defines a complaint to include an expression of dissatisfaction and where implicitly or explicitly there is the expectation of a response or resolution. The NSW Fair Trading website sets out three steps for resolving issues.[64] The first is for parties to try to resolve an issue between themselves. The consumer is urged to speak or write to the supplier and the website contains tips and sample letters. The next step if the issue cannot be resolved is for the consumer to find out more information about their rights and obligations. The website links to ways of doing this. The third step if a problem remains unresolved is to lodge a complaint. The website provides for both online complaints and provides a downloadable complaints form for mailing. In some instances, Fair Trading may negotiate between the parties in an attempt to resolve the matter.[65] If the matter cannot be resolved, the consumer can take the matter to the NSW Civil and Administrative Tribunal (NCAT). It is not mandatory to follow these steps and a consumer may go directly to NCAT.

[62] Australian Government Productivity Commission, Consumer Law Enforcement and Administration Draft Report, December 2016, p. 14.

[63] Australian Government Productivity Commission, Consumer Law Enforcement and Administration Research Report, 2017, p. 81, table 3.1 (Source: CDRAC response 2016 table 2, p. 9).

[64] See Fair Trading Act 1987 (NSW), section 9 allows the agency to give information and advice to consumers.

[65] See advice to Business http://www.fairtrading.nsw.gov.au/ftw/Businesses/Acceptable_business_conduct/Complaints_about_your_business.page.

In 2015 NSW introduced legislation for a public complaints register.[66] The idea was that open data about suppliers who had ten more complaints against them may have a similar effect to ratings in other areas.[67] In 2014–2015, 46,973 consumer and trader complaints were received.[68] Ninety-four per cent of these were resolved without going to a Court or Tribunal.[69] This amounted to transactions worth up to $716 million. There has been a slow increase in the number of complaints received: 44, 248 in 2011–2012; 43,160 in 2012–2013; and 45,108 in 2013–2014. The number of complaints resolved was only 85% in 2011–2012. This increased to 93% for 20012–2013 and 2013–2014.[70]

The following Table 2 reprinted from NSW Fair Trading Year in Review 2014–2015[71] is headed Top ten consumer complaints. It has a large category of other and significant numbers attributable to cars, consumer durables and electronics and clothing.

There is no hard data on the time taken to resolve these complaints and disputes. However the NSW Fair Trading customer service standards state: "We aim to answer 90% of all telephone enquiries within 5 minutes. If you write to us, we respond as promptly as possible. We aim to finalise 85% of general consumer complaints or disputes between parties within 30 days of receiving the complaint. In other cases we contact the parties within 30 days to advise them of actions being taken."[72] The Victorian Consumer Affairs Year in Review 2014–2015 reports 95.6% customer satisfaction with services provided and 90.5% services provided within agreed time frames.[73]

NSW has engaged in a trial of super complaints in cooperation with a leading consumer organisation, CHOICE. Two super complaints were brought, electricity switching and mislabelling free range eggs. The trial has concluded but NSW Fair Trading will still consider complaints from CHOICE.[74]

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[66]Fair Trading Amendment (Information About Complaints) Act 2015 (NSW), section 86AA. See http://www.fairtrading.nsw.gov.au/biz_res/ftweb/pdfs/About_us/Complaints_Register_Guidelines.pdf. See also Australian Government Productivity Commission, Consumer Law Enforcement and Administration Draft Report, December 2016, p. 109.

[67]Fair Trading Amendment (Information About Complaints) Bill 2015 (NSW) Second Reading Speech, Mr Victor Dominelli Hansard, 16 September 2015.

[68]NSW Government, Fair Trading Year in Review 2014–2015, http://www.fairtrading.nsw.gov.au/mobile0c9a66/biz_res/ftweb/pdfs/About_us/Publications/Annual_reports/Year_in_Review_1415.pdf, p. 3.

[69]Ibidem, p. 5.

[70]These figures are drawn from the relevant NSW Fair Trading Year in Review.

[71]NSW Government, Fair Trading Year in Review 2014–2015, p. 10.

[72]See http://www.fairtrading.nsw.gov.au/ftw/About_us/Our_services/Customer_service_standards.page.

[73]NSW Government, Fair Trading Year in Review 2014–2015.

[74]Australian Government Productivity Commission, Consumer Law Enforcement and Administration Draft Report, December 2016, p. 179.

Table 2 Top ten consumer complaints

Product description	Complaints	%
Residential Tenancy, Bonds & Parks	4045	8.6
Electrical, Electronic, Whitegoods and Gas Appliance sales	3079	6.6
Automotive (Used) sales	2441	5.2
House Construction	2282	4.9
Furniture, Furnishings, Manchester sales	2216	4.5
Clothing, Footwear, Accessories, Jewellery sales	1997	4.3
Automotive repairs and maintenance	1735	3.7
Automotive (new) sales	1614	3.4
Travel & Tourism services	1410	3.0
Property purchase or sales	1082	2.3
All other complaints	25,072	53.5
Total	46,973	100

5 Courts and the Enforcement of Consumer Law

The Australian judiciary is independent from the other arms of government. The separation of powers doctrine means that in interpreting and applying the law, judicial officers act independently and without interference from the parliament or the executive. The constitutional guarantees of tenure and remuneration assist in securing judicial independence. The Constitution establishes the High Court of Australia and empowers parliament to create other federal courts. Each state and territory has their own laws and court system. Depending on standing requirements, a consumer dispute may be heard in a State local or Magistrates court, or in the Federal Court. Matters initiated by the Federal regulators commonly commence in the Federal Court. It is unusual for a consumer matter to reach the High Court.

The most important venue for many consumer disputes is in a Tribunal which is constitutionally different from a Court. There are administrative Tribunals in the States e.g. Victorian Civil and Administrative Tribunal (VCAT) and New South Wales Civil and Administrative Tribunal (NCAT). They hear consumer disputes in specialised divisions within the Tribunal.

The NSW Civil and Administrative Tribunal (NCAT) has a Consumer and Commercial Division. It can hear consumer claims up to $40,000.[75] It is trialling online dispute resolution for consumer claims up to $5000.[76] It has jurisdiction only if the contract was made or the goods supplied or intended to be supplied in NSW.[77] It does not have jurisdiction for consumer claims if the matter has already

[75]Fair Trading Act NSW 1987, Part 6A.

[76]NSW Government, Department of Justice, Annual Report 2014–2015, http://www.justice.nsw.gov.au/Documents/Annual%20Reports/DoJ_Annual_Report_2014-15.pdf, p. 23.

[77]Fair Trading Act NSW 1987, section 79K.

commenced in a court.[78] The Limitation period is 10 years after the goods were supplied and 3 years after the cause of action accrues.[79] NCAT is not bound by rules of evidence and may use alternative resolution processes such as conciliation.[80] In general, parties must represent themselves before the Tribunal, though it may give leave for legal representation.[81] Parties are entitled to legal representation if legal assistance is granted under the Fair Trading Act.[82] One of the grounds for granting such assistance is if this is desirable for the general interests of consumers.[83] Hearings are open to the public unless the Tribunal otherwise decides.[84]

NCAT may itself, or at the request of a party, refer a question of law to the Supreme Court of NSW for its opinion.[85] The Tribunal must give written notice of its decision and may and at the request of the parties give reasons for its decision.[86] Decisions of the Consumer and Commercial Division of the Tribunal may be appealed as an Internal Appeal if there is a risk of miscarriage of justice because the decision was not fair and equitable, against the weight of evidence or if significant new evidence arises.[87] VACT is a little different. It states that there is limit on the cost or value of the goods in claims it can hear relating to the supply of goods.[88] While NCAT does not require leave for representation in the consumer and commercial division, it is with some exceptions, required by VCAT.[89] The rates of representation are not reported by Tribunals but estimated to be between less than 20%, 6% and 2.5%.[90] Views about legal representation in Tribunals range from promoting efficiency to introducing unnecessary complexity.[91] The requirement to seek leave was not enforced consistently.[92] There are also differences between Tribunals regarding Appeals. NSW first allows internal appeals whereas in Victoria an appeal from the Tribunal is to the Supreme Court.[93]

[78]NCAT Act Schedule 4, section 5(7), (8). Jurisdiction is not ousted if the court quashes the matter for want of jurisdiction.

[79]Fair Trading Act NSW 1987, section 79L.

[80]NCAT Act, sections 37 and 38. It must observe rules of evidence in its enforcement jurisdiction and in imposing civil penalties: section 38(3).

[81]NCAT Act, section 45.

[82]NCAT Schedule 4, section 7.

[83]Fair Trading Act 1987 NSW, section 13(1)(b).

[84]NCAT Act, section 49.

[85]NCAT Act, section 54.

[86]NCAT Act, section 62.

[87]NCAT Act, section 80(2)(b). See Collins v Urban [2014] NSWCATAP 17.

[88]See https://www.vcat.vic.gov.au/adv/disputes/civil-disputes.

[89]Productivity Commission, Inquiry Report, Access to Justice Arrangements, 2014, vol 1, p. 367.

[90]Productivity Commission, Inquiry Report, Access to Justice Arrangements, 2014, vol 1, p. 368.

[91]Productivity Commission, Inquiry Report, Access to Justice Arrangements, 2014, vol 1, p. 370.

[92]Productivity Commission, Inquiry Report, Access to Justice Arrangements, 2014, vol 1, p. 372.

[93]Productivity Commission, Inquiry Report, Access to Justice Arrangements, 2014, vol 1, p. 380.

The question of consistency between the Tribunals was raised in the Productivity Commission's Issues Paper—*Consumer Law Enforcement and Administration* (July 2016) which identified differences in application fees to access courts and tribunals and different penalties available in different States and Territories. This was taken up in the Draft Report which commented that some differences are to be expected in a multi regulator model and indicated that comparable data would allow a better assessment of whether the differences have any serious impact on consumers.[94] The fees for a consumer to take a matter to one of the State Tribunals differ from state to state.[95] In 2014, the average direct costs for small business disputants in VCAT for matters under $5000 was found to be $200, but taking into account indirect costs such as staff time this was $1000.[96] In VCAT there is around a six month delay from bring a claim to a hearing and some matters take longer.[97]

The following Table 3 shows differences in fees.[98]

In addition to the administrative Tribunals, the chief low cost venue for consumers with disputes about financial services and products is the Financial Ombudsman Service (FOS). This is funded by industry, essentially free to consumers, binding on industry, but not on the consumer. FOS receives over 30,000 disputes a year.[99] The jurisdiction, monetary limits and compensation caps are set out in the FOS Terms of Reference. There has been an issue with failure by some in industry to pay FOS determinations leading to failure to compensate the consumer.[100] There is currently no last resort compensation fund. One of the proposals floated as part of the review of the ACl has been a Retail Ombudsman.[101]

Governments and other bodies such as the State Consumer Affairs agencies and Law foundations expend considerable resources in educating consumers about their rights and in providing access to information relevant to legal problems. An example of this is the Everyday-Law website (www.everyday-law.org.au) maintained by the

[94]Australian Government Productivity Commission, Consumer Law Enforcement and Administration Draft Report, December 2016, pp. 6, 19, 30, 74, 76.

[95]Australian Government Productivity Commission, Consumer Law Enforcement and Administration Draft Report, December 2016, p. 74; Productivity Commission, Inquiry Report, Access to Justice Arrangements, 2014, vol 1, p. 357.

[96]Productivity Commission, Inquiry Report, Access to Justice Arrangements, 2014, vol 1, p. 117.

[97]Australian Government Productivity Commission, Consumer Law Enforcement and Administration Draft Report, December 2016, p. 181.

[98]Australian Government Productivity Commission, Consumer Law Enforcement and Administration Research Report, 2017, p. 202 (Source: CHOICE sub 11, pp 18–19).

[99]For a useful account of FOS see Financial Ombudsman Service Australia, Submission to Victorian Access to Justice Review, March 2016, Submission No 76, http://fos.org.au/homepage/search-results/?orderby=rank&rpp=10&rst=All&str=payment+of+FOS+determinations&type=and&xcid=181.

[100]Financial Ombudsman, Service Unpaid Determinations by Financial service Providers, Report 070414 April 2014, http://fos.org.au/homepage/search-results/?orderby=rank&rpp=10&rst=All&str=payment+of+FOS+determinations&type=and&xcid=181.

[101]Australian Government Productivity Commission, Consumer Law Enforcement and Administration Draft Report, December 2016, p. 173 f.

Table 3 Fees in tribunals and courts[a]

State/ Territory	Tribunal or court	Filing fee	Application type
ACT	ACT Civil and Administrative Tribunal	$68	When the amount in dispute is $2000 or less
NSW	NSW Civil and Administrative Tribunal	$47	If the amount claimed is $10,000 or less
NT	NT Magistrates Court	$65	Small claims—statement of claim
Qld	Qld Civil and Administrative Tribunal	$23.80	Not more than $500 in dispute
SA	South Australian Magistrates Court	$138	Minor civil action
Tas	Magistrates Court of Tasmania	$111	Claim for $5000 or under
Vic	Victorian Civil and Administrative Tribunal	$59.80	Claims for less than $500
WA	Magistrates Court of Western Australia	$106	Filing fee for claim not exceeding $10,000

[a]Source: CHOICE, 2014, Consumer voice in travel industry, Media release, www.choice.com.au/about-us/media-releases/2014/august/consumer-voice-in-travelindustry, sub. 11, pp. 18–19

Victorian Law Foundation. This is an aggregator website which helps people find resources including low cost legal assistance. It is aimed particularly at people who are unable to afford a lawyer but who would be able to make use of resources to resolve a problem.[102] Community Legal Centres such as Consumer Action Law Centre in Victoria and the Financial Rights Centre in NSW play an important role in assisting consumer claimants.

The availability of low cost dispute resolution for consumers through the tribunal and ombudsman systems mean that if a consumer complaint falls within the jurisdiction of these bodies and if it is not so complex that in the case of a Tribunal it requires legal representation, the consumer can usually obtain a remedy. The view that they do provide an inexpensive, accessible, timely remedy is now questioned.[103] There is concern at creeping legalism and increased adversarialism.[104] Judicial proceedings, which will usually be regulator initiated, if successful will impact on the supplier or a whole industry through court enforceable undertakings, adverse publicity and ultimately a decision. However, courts are usually the most expensive avenue for consumer matters. For an individual consumer they may be far too expensive to contemplate, take too long, and be difficult to navigate.

[102]Victoria, State Government, Access to Justice Review Report and Recommendations, August 2016, vol 1, p. 105.

[103]Productivity Commission, Inquiry Report Access to Justice Arrangements, 2014, vol 1, p. 345 ff.

[104]Australian Government Productivity Commission, *C*onsumer Law Enforcement and Administration Draft Report, December 2016, p. 181 f.

6 Specialised Agencies and the Enforcement of Consumer Law

The regulatory agencies discussed above, the two national agencies and the state bodies, all have a role in enforcing consumer law. The national bodies have offices in state capitals and the state agencies have offices or outreach centres in regional areas. The ACL was an outcome of a 2008 Productivity commission inquiry.[105] One of its recommendations was a review and reform program for industry specific consumer regulation. Subsequently there have been changes to consumer credit, building and construction, occupational licensing, therapeutic goods, food safety, electrical product and gas appliance safety.[106] Eight years later, the Draft Report on Consumer Law and Enforcement suggests that there are still problems of inconsistency with State and Territory legislation and that considerations should be given to transferring responsibilities to the Commonwealth government.[107]

In the area of specialist safety regulation there is inconsistency between States, fragmentation and uneven relationships between State regulators and the national regulator and a problem of delineation of roles.[108] There is national regulation of boats and marine safety, industrial chemicals, medicines and medical devices, pesticides and veterinary chemicals, and for road transport vehicles. The States regulate building and construction, electrical goods, food, and gas appliances. There has been little progress towards a national electrical safety regime.[109]

The Department of Infrastructure and Regional Development, a Commonwealth Department is responsible for the safety of road transport vehicles. It does have an MOU with the ACCC. There is an MOU between the Queensland Office of Fair Trading and the Energy and Water Ombudsman, Queensland. Energy Safe Victoria and consumer Affairs Victoria have an informal agreement. NSW Fair Trading regulates electrical and gas safety and plumbing. In health and medicine, the respective roles of the Therapeutic Goods Administration and the ACCC are confusing. Non-conforming building products exemplify the regulatory maze as indicated in a Victorian Report.[110] One of the shortcomings identified in relation to some

[105] Australian Government Productivity Commission, Review of Australia's Consumer Policy Framework 2008.

[106] Australian Government Productivity Commission, Consumer Law Enforcement and Administration Draft Report, December 2016, p. 168 f.

[107] Australian Government Productivity Commission, Consumer Law Enforcement and Administration Draft Report, December 2016, p. 170.

[108] Australian Government Productivity Commission, Consumer Law Enforcement and Administration Draft Report, December 2016, p. 135. See especially chapter 5.

[109] Australian Government Productivity Commission, Consumer Law Enforcement and Administration Draft Report, December 2016, p. 162.

[110] Victoria State Government, Victoria's Consumer Protection Framework for Building Construction, 2015.

specialist safety regulators is the lack of enforcement powers. In this case, they may draw on the expertise of the ACCC.[111]

An area of consumer importance is telecommunications. The regulator here, for industry and consumers, is the Australian Communications and Media Authority (ACMA).[112] It administers a universal service obligation but does not have a direct consumer enforcement role.[113] The relevant complaints body is the Telecommunications Industry Ombudsman. The ACCC in its competition guide also plays an important role in communications regulation.

7 The Role of Consumer Organisations in Enforcement of Consumer Law

Consumer organisations play a number of important roles in Australia—as advocates, by formulating and contributing to policy debates and inquiries, through litigation and by providing formal representation on numerous agency advisory bodies and self-regulatory bodies. The Consumer Federation of Australia (CFA) is the peak body for consumer organisations in Australia. Membership of the CFA is open to individuals and organisations with a consumer focus compatible with the CFA's objectives.[114] The role and functions of consumer organisations vary and may include: Providing information and advice to consumers including through product reviews and testing (e.g. CHOICE); Exposing and taking action against unfair trade practices; Campaigning for changes to consumer law and industry behaviour; Providing legal advice and pursuing litigation for vulnerable and disadvantaged consumers (e.g. Victoria's Consumer Action Law Centre); Financial counselling (e.g. Financial Counselling Australia).

There is a legal aid commission in each Australian state and territory. In addition to these, large national and multi-national law firms provide pro bono legal assistance. The Community Law Centres provide an important source of advice and litigation assistance. Some of these are attached to Universities such as the Kingsford Legal Centre. Some such as the Redfern Legal Centre cater to the community as a whole and also have an indigenous focus. Others as mentioned above specialize in consumer work.

[111] Australian Government Productivity Commission, Consumer Law Enforcement and Administration Draft Report, December 2016, p. 157.

[112] See http://www.acma.gov.au/.

[113] Telecommunications (Consumer Protection and Service Standards) Act (Cth) 1999.

[114] The CFA's Rules of Association can be found at http://consumersfederation.org.au/wp-content/uploads/2010/01/CFA-Rules-of-Association-current-as-at-131114.pdf. A directory of consumer organisations is available at http://consumersfederation.org.au/members/cfa-organisational-members/.

8 Private Regulation and Enforcement of Consumer Law

Private or self-regulatory mechanisms are an important part of Australian consumer protection. These are primarily codes of practice, and complaints and dispute resolution schemes. Codes of practice are expected to establish standards of conduct that are higher than that required by legislation. They can be used to assist an industry transform and act towards consonance with consumer interests. Complaints and dispute resolution schemes are commonly funded by industry, relieving the government of the financial burden of the consequences of some illegal industry behaviour.

The close relationship between the regulatory agencies and private bodies is indicated by the provision on the ACCC website of the list of bodies that provide dispute resolution and ombudsman services.[115] These include, for example the Airline Customer Advocate, an independent body established in July 2012 as an industry-based scheme to facilitate the efficient resolution of complaints from customers about the airline service provided by the five participating airlines; all the State and Territory Energy Ombudsmen; the Telecommunications Industry Ombudsman and the Financial Ombudsman Service (soon to be replaced by the Australian Financial Complaints Authority).

Codes of Practice are widely used in the financial services sector. They are reviewed independently and updated regularly. They tend to be monitored by an independent compliance committee which does not take consumer complaints but is concerned with industry compliance with code obligations. ASIC has the power to approve codes of practice but has approved only one, the epayments Code.[116] Other Codes which are self-regulatory include the Code of Banking Practice, the Customer Owned Banking Code of Practice, the FPA Code of Professional Practice (financial planners); the General Insurance Code of Practice, the Insurance Brokers Code of Practice, and a new Life Insurance Code of Practice.[117]

The Codes often prescribe internal dispute resolution procedures. In the financial services industry, FOS has a dual role as it monitors industry compliance with codes of practice and also investigates customer complaints and provides a dispute resolution process. It has the power to award compensation.

The Codes of conduct linked to the ACCC tend to be more relevant for inter industry conduct such as regulating franchisors and franchisees.[118] These may impact on consumers. For instance grocery retailers and wholesalers can elect to be bound by the Food and Grocery Code of Conduct, a voluntary code prescribed

[115] See https://www.accc.gov.au/contact-us/other-helpful-agencies/industry-ombudsmen-dispute-resolution.

[116] See http://asic.gov.au/for-consumers/codes-of-practice/.

[117] See http://www.fsc.org.au/policy/life-insurance/code-of-practice.aspx.

[118] The ACCC administers prescribed industry Codes under the Competition and Consumer act 2010 (Cth) and also has guidelines for voluntary Codes. See https://www.accc.gov.au/business/industry-codes.

under the Competition and Consumer Act. The Code has rules relating to grocery supply agreements, payments, termination of agreements, and dispute resolution.

9 Enforcement Through Collective Redress

Class actions are a recognised form of redress in Australia. They may be brought in the Federal Court of Australia (where the claim falls within the Federal jurisdiction) or in the State Supreme Courts.[119] Class actions will sometimes be taken by plaintiff law firms which take actions regarding defective products, payday lending and unfair bank fees.[120] Litigation funders are useful to class actions.[121] The regulators can commence class actions or intervene in existing class actions.[122] If the regulator brings the action the regulator bears the expense. When class actions were first introduced in 1992, they were first used for product liability claims. Actions have been brought regarding peanut butter, oysters, aircraft fuel, pacemakers, arthritis medication, knee implants and hip implants.[123] In the last 15 years there have been around 40 product liability class actions.[124] More recently class actions have been used in relation to financial services claims.

There must be at least seven persons in order to bring a representative claim. The claim must derive from the same or related circumstances and there must be at least one common issue of law or fact that is of substance. There is no ceiling on the number of persons within the class. The numbers or names of persons do not have to be specified. However there must be public notification of the right to opt out of the representative proceedings once a claim has commenced. However, if the ACCC, the regulator, brings a representative action it must do so on behalf of an identified group and obtain the consent of those on whose behalf the claim is being brought.[125]

A recent study has compared class actions, regulatory enforcement and alternative dispute resolution in relation to consumer claims following the spectacular collapse of an investment scheme and loss of family homes and retirement incomes.[126] It found that a consumer was likely to achieve a better outcome (taking

[119]Federal Court of Australia Act 1976 (Cth), Part 1VA; e.g. Supreme Court Act 1986 (Vic), Part 4A.

[120]See https://www.mauriceblackburn.com.au/general-law/class-actions/.

[121]Productivity Commission, Inquiry Report, Access to Justice Arrangements, 2014, vol 2, p. 607.

[122]E.g. Australian Securities and Investments Commission Act 2001 (Cth), section 50.

[123]See International Comparative Legal Guide, Collective Redress: Parallels Between the Reforms in England and Wales and the Established Australian Regime, published 28/10/2015.

[124]See https://www.claytonutz.com/articledocuments/178/ICLG-Class-And-Group-Actions-Australia-2016.pdf.aspx?Embed=Y.

[125]Competition and Consumer Act 2010 (Cth), Schedule 2, section 277.

[126]M.A. Legg, Comparison of Regulatory Enforcement, Class Actions and Alternative Dispute Resolution in Compensating Financial Consumers, 2016, Sydney Law Review Vol. 38, p. 311.

into account amounts paid and delays) through ADR than through regulatory litigation launched by ASIC against the banks or by representative proceedings.

10 Sanctions for Breach of Consumer Law

Civil sanctions and penalties and criminal sanctions are set out in the ACL and in the ASIC Act. The ACCC can undertake a number of regulatory activities to seek compliance with the law or as a prelude to litigation.[127] It can require claims made to promote goods, services or interests in land to be substantiated.[128] For any matter in the ACL where it has a power or function, the ACCC can take a written undertaking from a person.[129] There is a public register of enforceable undertakings.[130] If the regulator believes the person has breached any aspect of that undertaking, the regulator can apply to the Court for an order.[131] The Court may order the person to comply with the undertaking, pay an amount to the government comparable to the benefit received as a result of the breach, give compensation to a person who has suffered loss or damage because of the breach, or any other order.[132] The regulator may issue a public warning notice about the conduct of a particular person.[133] The grounds for a public warning notice include suspicion that the conduct amounts to a contravention of the ACL and that some persons are likely to suffer detriment and that it is in the public interest for such a warning to be given.[134] Failure to comply with a substantiation notice may be grounds for a public warning.[135] If there are alternative applicable safety standards for goods, the regulator may require a supplier to nominate which one it is intending to comply with.[136] Bans on goods and compulsory product recalls are the province of the responsible government Minister, however a recall notice may require the regulator to take further action such as recalling the goods or notifying the public about defects.[137]

[127]For a Table summary see Australian Government Productivity Commission, Consumer Law Enforcement and Administration Draft Report, December 2016.

[128]Competition and Consumer Act 2010 (Cth), section 219.

[129]Competition and Consumer Act 2010 (Cth), section 218(1).

[130]For ASIC see http://www.asic.gov.au/about-asic/asic-investigations-and-enforcement/about-the-enforceable-undertakings-register/. For an evaluation of ASIC and its management of enforceable undertakings see Australian National Audit Office, Administration of Enforceable Undertakings, Australian Securities and Investments Commission, Report No 38, 2015. For the ACCC see http://registers.accc.gov.au/content/index.phtml/itemId/815599.

[131]Competition and Consumer Act 2010 (Cth), section 218(3).

[132]Competition and Consumer Act 2010 (Cth), section 218(4).

[133]Competition and Consumer Act 2010 (Cth), section 223.

[134]Competition and Consumer Act 2010 (Cth), section 223(1).

[135]Competition and Consumer Act 2010 (Cth), section 223(2).

[136]Competition and Consumer Act 2010 (Cth), section 108.

[137]Competition and Consumer Act 2010 (Cth), section 123.

Table 4 ACL enforcement outcomes, 2015–2016[a]

Activity (actions taken under the ACL, or under the ACL with other legislation)	Number	Value ($)
Infringement notices	195	902,886
Enforceable undertakings	33	
Public warnings	66	
Court cases	149	
Court action fines		711,400
Court action costs		122,165
Compensation awarded (as a result of court action or enforceable undertaking negotiations)		2,963,849
Civil pecuniary penalty orders		15,642,000

[a]*Source*: Compliance and Dispute Resolution Advisory Committee 2016, Response to information request from the Productivity Commission, October. Available from the Productivity Commission website, www.pc.gov.au/inquiries/current/consumer-law

Many of the substantive provisions of the ACL carry the possibility of the imposition of a pecuniary or civil penalty if that provision is contravened. The regulator may apply to the court for the imposition of such a pecuniary penalty.[138] The regulator may also apply to the court for the imposition of an injunction.[139] The Productivity Commission summarises ACL penalties and remedies and differences in the powers of the different regulators to issue infringement notices.[140]

The following Table 4 from the Productivity Commission shows total enforcement outcomes for all ACL regulators in 2015-2016, including number and value.[141]

ACL offences are set out in chapter 4 of Schedule 2 of the Competition and Consumer Act 2010 (Cth). Prosecutions must be commenced within 3 years and preference must be given to compensation for victims.[142] To a large extent the offences echo the civil contraventions, though not all. The offences include false or misleading representations, asserting a right to payment for unsolicited supplies, participation in a pyramid scheme, dual- pricing, referral selling, harassment, some matters regarding unsolicited consumer agreements, some matters with lay-by agreements, supplying goods that do not comply with safety standards or information standards, or are banned, and failure to comply with recall requirements and with substantiation notices. There is a statutory defence for the offences. It follows that there are no offences with respect to misleading or deceptive conduct, unconscionable conduct, unfair terms, and contravention of the consumer guarantees. It is

[138]Competition and Consumer Act 2010 (Cth), section 228.

[139]Competition and Consumer Act 2010 (Cth), section 232(1).

[140]Australian Government Productivity Commission, Consumer Law Enforcement and Administration Draft Report, December 2016, p. 118 f.

[141]Australian Government Productivity Commission, Consumer Law Enforcement and Administration Research Report, 2017, p. 95. Table 3.2 ACL Enforcement Outcomes, 2015–16 (Source: CDRAC Response 2016).

[142]ACL, sections 212 and 213.

possible for a person to be jailed for an offence under the ACL and indeed there is at least one example.[143]

11 Alternative Mechanisms for the Resolution of Consumer Disputes

Many businesses have internal dispute resolution mechanisms and under the Corporations Act this is compulsory for financial service provider licensees.[144] They must also be members of an ASIC approved external dispute resolution scheme.[145] This is typically the Financial Ombudsman Service and may be the Credit and Investments Ombudsman.[146] These are both privately run. There are ombudsman schemes for telecommunications, the Telecommunications Industry Ombudsman[147] and energy such as the Energy and Water Ombudsman, NSW (EWON).[148] As noted above, there is no Retail Ombudsman. EDR plays a central role in dispute resolution.

12 External Relations and Cooperation of the State, Enforcers and Consumer Organisations

Australian and New Zealand consumer protection is closely aligned through Consumer Affairs Australia and New Zealand (CAANZ). This body was previously called the as the Standing Committee of Officials of Consumer Affairs. Features of the ACL were designed to harmonise with NZ law e.g. consumer guarantees. Australia is also a member of ICPEN, the International Consumer Protection Enforcement Network. The ACCC website urges consumers with cross border complaints to lodge that complaint on the ICPEN complaints portal. The ACCC participates in the OECD's consumer protection work through its membership on related working groups and is the current lead of the Product Safety Working Group. International regulatory cooperation is regarded as important for enforcement. The ACL has extra territorial jurisdiction and this is particularly useful for internet sales and software downloads.

[143] See http://www.fairtrading.nsw.gov.au/ftw/About_us/News_and_events/Media_releases/2015_media_releases/20150217_fraudster_sentenced_to.page, http://competitionandconsumerprotectionlaw.blogspot.com.au/2015/03/you-can-go-to-jail-for-breaching.html.

[144] Corporations Act 2001 (Cth), sections 912A(1)(g) and 912A(2).

[145] Corporations Act 2001 (Cth), sections 912A(1)(g) and 912A(2).

[146] See http://www.cio.org.au/.

[147] See https://www.tio.com.au/.

[148] See https://www.ewon.com.au/.

The ACCC is party to a number of cooperation agreements/treaties with international competition and consumer agencies and governments. There is a detailed list on the ACCC website.[149] These include agreements with the US, Canada and New Zealand and the European Commission. Australian consumer organisations are linked to Consumers International (CI) and the current CEO of CHOICE is on the board of CI.

13 Final Questions

In a broad sense the existing system is effective. The laws and enforcement generally ensure that food and goods are safe. The regulators are proactive on a number of issues such as imported children's toys prior to Christmas, and safety issues with goods sold by international chains. The multi-regulator framework has the virtue that State and regional based offices are in touch with local concerns and can interact with the community in the local geographic area. It also means the burden of new initiatives can be shared. There is a shortcoming as this is also a complex system with different moving parts, hard for those outside the system to grasp. Other problems are with the enforcement of compensation ordered by Ombudsmen. A further problem that may be transitional is the interpretation of new law. At present all consumer guarantee cases are being heard in the State Tribunals and there is no superior court decision on the meaning of some key provisions. This limits uniformity of interpretation and application.

The multi-regulator framework is being assessed by the Productivity Commission and through the ACL Review. These reviews have yet to be concluded and draft results have been discussed in the body of this chapter. Perhaps a major outcome will be an increase in the quantum of penalties that may be imposed on business for a contravention.

One of the great virtues of the Australian system is that there is social consensus that consumers should be protected. There is special concern reflected in some statutes for the vulnerable and disadvantaged. There has been a great emphasis on business compliance in the last two or three decades and a comparatively high degree of acceptance by most businesses that this is important for their reputations and business itself. The regulators are active and engaged. Problems remain as in all systems.

[149] See https://www.accc.gov.au/about-us/international-relations/treaties-agreements.

Consumer Protection in Brazil: The 2016 Report for the International Academy of Consumer Law

Claudia Lima Marques and Patricia Galindo da Fonseca

1 Introduction

Until 1960, the Brazilian legislation opts for a restricted and strictly criminal approach when addressing issues related to the right to consumer protection. In 1971, the National Chamber of Deputies receives a bill that aimed to create a Council for Consumer Protection. The Commission of Justice on procedural grounds rejected the project. However, from that time on, the issue of consumer protection attracted the attention of the media and various social players, especially in regards to the problem of misleading advertising.

Between 1960 and 1980, the Brazilian government began to intervene directly in the economy and the legislation adopts a public economic law and administrative law approach. This perspective leads to a new perception of consumers,[1] designating them as a distinct socio-economic group whose interests, weakened by certain

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[1] See Fonseca (2013), pp. 29–54.

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market practices, deserve protection but also deserve to be heard and organized in the same way as those of workers.[2]

The entry into force of the Act on public civil action in 1985[3] confirms this perspective by providing collective redress procedures of consumer interests.[4] According to the Brazilian doctrine, the adoption of this law represents a new phase in the evolution of the Brazilian consumer law. In 1988, the Brazilian Constitution recognizes the status of a fundamental right to consumer protection.[5] Thus, the consumer protection emerges in a context of social and entrenchment of fundamental rights guarantees. Consumers have a fundamental constitutional right from then on.

This article presents a general understanding of the legal design of the regulatory system of consumer protection in Brazil. It aims to demonstrate the particularities of the enforcement and the effectiveness of Consumer Law by explaining the national legal framework, the mechanisms to initiate disputes, the evolution of complaints resolved by suppliers. It also presents an overview of the top causes of litigation, the time and the cost of judicial access and the results of enforcement through collective redress.

2 National Legal Framework for Consumer Protection in Brazil

Since 1900, Brazil has a consolidated national consumer policy and Brazilian consumers are aware of their rights (Brazilian total population was estimated in 1 August 2016 on 206,237,710 people[6]). The Consumer Protection and Defense Code (Law 8.078 of 11 September 1990, CDC) is the second most known law after the Constitution. Moreover, since 2013 each establishment or store must have a copy of the Consumer Code in display, so the consumer can read in case of doubt.

The Articles 105 and 106 of the CDC aims to set up a national consumer protection system.[7] The objectives of the system are established in Articles 4 and 5 of the CDC, grouped under the title "the national policy of consumer relations."[8] The legislation chose not to indicate how to implement this policy, as they preferred to leave a certain autonomy to the local actors to play their role.

[2]Ibidem, p. 31.

[3]Lei 7.347 de 24 julho de 1985.

[4]Fonseca (2011), pp. 115–155.

[5]See Marques (2016a), pp. 115 f.

[6]See Instituto Brasileiro de Geografia e Estatística, http://www.ibge.gov.br/home/. The last census is from 2010 and it has show a population of 190,732,694 persons. Source: http://www.ibge.gov.br/home/estatistica/populacao/censo2010/default.shtm.

[7]See more information in Sodré (2007), pp. 148 ff.

[8]Marques (2013), pp. 226 ff.

The Article 4 describes the goals of the system and lists the principles. The Article 5 lists the institutions that play an important role in the implementation of this policy and those, which may cooperate with the authorities in this regard. The combined efforts of all state agencies, both federal and provincial, municipal and civil society for the implementation of consumer rights is essential to the national consumer protection system.

The joint action of the institutions responsible for the implementation of the national consumer protection policy is seen as crucial to ensure the effectiveness of the Brazilian consumer defense system. Such action involve: mutual and continuous exchange on the activities of institutions; coordination among agencies to ensure the consistent implementation of policies; cooperation and mutual cooperation; communication and joint action regarding the initiatives carried out, the information gathered and results.

The CDC is composed of six following Parts: I. Consumer Rights; II. Penal Infractions; III. Consumer Defense in Court; IV. National Consumer Defense System; V. Collective Consumer Convention; VI. Final Provisions.

The first Part contains all the basic concepts of the CDC: the notions; principles and goals, as well as all CDC's substantive provisions. The first three chapters of the CDC are the most important and compose the general section. The first defines the scope of the CDC (Articles 1, 2 and 3); the second deals with its objectives and its fundamental principles (Articles 4 and 5); the third lists the consumer's basic rights but not all of them (Articles 6 and 7). Section 6 is a summary of the substantive and procedural rights addressed in the CDC. Chapter IV of first part regulates the quality of products and services as well as compensation for damages, including the regime of liability of the product or service. Chapter V deals with commercial practices (supply, advertising, abusive practices, debt collection, database and consumers' database) and Chapter VI stablishes contractual protection (standards on the interpretation of contracts, the obligation to inform unfair terms and guarantees). Administrative sanctions are the subject of Chapter VII.

The CDC addresses the procedural aspect of consumer protection in Part III. Part IV establishes the components of the national consumer protection system that aims to bring together provincial and municipal institutions, public and private, of consumer protection and to coordinate initiatives regarding the Department of Protection and Consumer Protection, designated as the body primarily responsible for policy in this area in Brazil. Part V introduces the instrument of the collective agreement consumption, enabling ad hoc civil institutions, together with organizations representing enterprises, to set the terms of certain consumer relations, including price, quality, quantity, warranty and product features and services.

The CDC is as a legal microsystem designed to ensure that defense, organized by four different types of legal protection: (a) civil protection especially in the provisions on trade practices and unfair terms but not exclusively; (b) criminal protection through the establishment of a wide range of criminal offenses consumption; (c) judicial protection resulting in procedural standards; (d) administrative protection by the establishment of an institutional system to the field of consumer protection.

The special system of the CDC has general protection measures to ensure equality of parties in the consumer relationship. According to the Brazilian doctrine,[9] the specificity of the system established by CDC comes from the central idea that inspired it: the defense of a specific group of people, the consumers. This idea encompasses highly diverse themes.

The CDC reaches any legal relationship liable to be a consumption relationship, in spite of being governed by other legislation. For instance, in case of an automobile insurance policy, although it is regulated by the Brazilian Civil Code and by the insurance sector rules, the CDC still applies to it. Consequently, the use of CDC does not imply that its application is exclusive. Rather, its higher hierarchical status means that specific rules that would apply in a complementary way, if those rules are incompatible with the CDC principles and dispositions, it becomes void.[10]

It is important to mention that our jurisprudence recognize the coherent application of more than one source to protect consumers in a so-called '*dialogue des sources*' (expression created by Erik Jayme[11] and spread in Brazil by Claudia Lima Marques).[12] The "sources dialogue" is "a concept about the simultaneous and consistent application of many laws or private sources of law, under the light (or with the values guide) from the Constitution. The use of Jayme's expression, "*dialogue de sources*" is an attempt to express the need of a consist application of private law, coexisting at the system. Sources Dialogue is a rhetorical expression (and semiotics, which means it tells its own purpose to impose two logics, to apply simultaneous and coherently two laws).[13]

In March 2013, a decree[14] created a National Consumption and Citizenship Plan and a National Chamber of consumer relations. Since the purpose of this decree was to update consumer relations, it states three main areas for the plan: the establishment of a policy to reduce the causes of the most common conflict between consumers and enterprises; the adoption of an effective system to remedy disputes; and the application of sanctions and punishments for offenders. For its part, the Chamber composed by a council of ministers and members of regulatory agencies, constitutes a forum to discuss future actions, measures and new goals to be adopted on consumption subject.

This institutional reform follows also a restructuring of the national consumer protection policy, which once again strengthen state structures.[15] It concerns the

[9]See Marques (2016b), pp. 99 f.

[10]See Fonseca (2016). The author sustains that "*Le recours au CDC n'implique aucunement que son application soit exclusive. Plutôt, signifie que son statut hiérarchique, lorsque appliqué en complémentarité avec d'autres normes, les normes plus spécifiques qui s'appliqueraient mais qui sont incompatibles avec les principes et les règles du CDC deviennent nulles*" at p. 279.

[11]See Jayme (1995).

[12]See more than 1484 quotation at the Superior Court of Justice site, www.stj.jus.gov.

[13]Marques (2012b), pp. 18 f.

[14]Decree 7.963, 18 March 2013.

[15]Fonseca (2014), pp. 113–156.

mandate of coordination of the national consumer protection in the Department of Protection and Consumer Protection System (DPDC). Other skills and aspects of the mandate of this institution remain intact. A decree adopted in 2012[16] provides for the creation of a new institution with the exclusive mandate to coordinate the national consumer system: the Consumer's National Office (*Secretaria Nacional do Consumidor*). The Office is composed of one single organism: DPDC.

The Brazilian legislation has been inspired by concepts and solutions already recognized abroad.[17] For example, the concept of vulnerability, as a principle base of the Brazilian consumer law, finds its source in the Resolution 39/248 of 9 April 1985 on consumer protection adopted by the General Assembly of the United Nations. Among foreign sources of law, there are the project of French Consumer Code coordinated by Professor Jean-Calais Auloy; the 1978 Consumer Protection Act of Quebec,[18] the 1984 Spanish Consumer Protection Act[19]; the 1981 Portuguese Consumer Protection Act[20]; the 1976 Mexican Consumer Protection Act.[21] For publicity and liability, the Brazilian Consumer Code was influenced by the European Community law (Directives 84/450 and 85/374) and regarding general contract terms, the main sources were the Portuguese[22] and German legislation.[23] The legal Committee of the National Consumer Protection Council—Ministry of Justice, responsible for writing the Brazilian Consumer Code (the President of the Expert Committee was Prof. Dr. Ada Pelegrini Grinover, São Paulo University), was particularly sensitive to the proposals discussed at the first International Congress of consumer law, held in São Paulo in 1989 that had the participation of several leading foreign jurists.[24]

The current focus of consumer policy in Brazil is to adapt the 1990 Consumer Code to the new digital challenges and also to deal with problems at the consumer credit and over-indebtedness.[25] The two Bills to Reform the Consumer Code are PL 3515, 2015 and PL 3514, 2015. The first one is about prevention and treatment of consumer over-indebtedness.[26] The second one, PL 3514, 2015 deals with e-commerce and has EU Law for e-commerce and distance sales, national and international as a model. Those Bills are based on the French Legislation model on prevention and treatment of consumer over-indebtedness (PL 3515, 2015) and the

[16]Decree 7.738 du 28 May 2012.

[17]See Marques (2010), pp. 47 f.

[18]Loi sur la protection du consommateur, LQ 1978, c 9.

[19]Ley 26/1984, de 19 de julio, General para la Defensa de los Consumidores y Usuarios.

[20]Lei 29/81 de 22 de Agosto de 1981.

[21]Lei Federal de Protección al Consumidor, promulguée le 5 février 1976.

[22]Decreto-lei número 446 de 25 outubro de 1986.

[23]Gesetz zur Regelung des Rechts der Allgemeinem Geschaeftsbedingungen—AGB-Gesetz, 9 Dezember 1976, BGBI. 1976, I-3317.

[24]See Benjamim and Grinover (2007), pp. 9–10.

[25]Marques (2012a), p. 153.

[26]See Fonseca (2016).

Brazilian Proposal[27] to the CIDIP VII on applicable law to consumer contracts (PL 3514, 2015).[28]

3 The General Design of the Enforcement Mechanism

The Brazilian courts are the most prominent actors in charge of enforcement of consumer laws, but the public prosecutor and the legal assistance exert also an important role.[29] The two main administrative institutions for consumer protection in the Brazilian institutional framework of consumer protection are the Department of Protection and Consumer Protection (located in Brasilia, the capital) and the PROCONs. The PROCONs are public consumer protection agencies that can be provincial or municipal. The main task of PROCON is to serve consumers by informing them about their rights. In addition, PROCONs publish books on various topics and organize regular courses and lectures on various aspects of the protection and defense of consumers.

The basis for that authority is the Brazilian Consumer Code (CDC), Law 7.347 of 24 July 1985 and Decree 2.181/97.

In Brazil, one must pass a public selection, examinations and titles to become a judge. This is the way to access a judicial career. The Order of Brazilian Lawyers participates in all phases of the selection. It is necessary to have 3 years of experience to be a candidate. A successful public selection is followed by an appointment as substitute judge, always in the lower courts. The Federal Constitution provides a career development system in Article 93 I. Access to a judge in a court (promotion) is based on seniority and deserved criteria.

Public selection is also the way to access a career as a prosecutor or as a member of the legal aid.

The PROCONs are very well known and also the small claims courts (Juizado Especial Cível—JEC), but they exist only in the capitals and in medium and big cities of the country, so the consumidor.gov (federal internet mediation platform) and the State Attorneys (*Ministério Público*) are used in the cities that don't have PROCONs. The service provided by PROCON is present in 26 states, the Federal District and 400 municipalities. The system covers 683 units spread over 531 cities. These PROCONs meet a monthly average of 220,000 consumers.

Besides PROCONs, the regulatory agencies have also power over the enterprises working in regulated sectors. The agencies can thus monitor the activities of private actors, can intervene, can fix prices and can even impose the termination of the provision of a service or the production of a product. In Brazil, there are ten

[27] See Marques (2006), p. 145.

[28] See Marques (2016a).

[29] See for all discussion in regard to the role played by Brazilian actors in charge of consumer laws enforcement, Fonseca (2016), pp. 368–399, 414–428.

regulatory agencies. They were all created between 1996 and 2001: the National Telecommunications Agency (*ANATEL*), the National Petroleum Agency, the National Agency of Electrical Energy, the National Supplementary Health Agency, the National Health Surveillance Agency, the National Water Agency; the National Film Agency; the National Agency for Water Transport; the National Agency for Land Transport and the National Civil Aviation Agency.[30]

The consumer has the right to file a complaint against any public service provider. If the company providing the service does not respond to such a complaint, the consumer must contact the respective regulatory agency. Moreover, these regulatory agencies have the authority to impose administrative sanctions, which are based on specific rules to each sector as well as the consumer protection general rules established in the Brazilian code. However, this possibility for the consumer to complain to a regulatory agency does not prevent to do so before the PROCON in the case of a claim for an individual interest or before the Public Prosecutor in the case of a claim regarding a collective interest.

4 Number and Characteristics of Consumer Complaints

The National System of Consumer Protection Information is part of the service provided by PROCON in 26 states, the Federal District and 400 municipalities. As many of these PROCONs have more than one drive, the system covers 683 units spread over 531 cities. These PROCONs meet a monthly average of 220,000 consumers.

Complaints accounted for most (65%) of visits recorded in 2015 and 35% referred to consultations/guidance provided by PROCON consumer. On the other hand, it does not count for judicial disputes.

According to the Bulletin of the National Consumer Bureau—SINDEC, in 2015 were registered 2,648,521 calls by the PROCONs integrated into SINDEC. It represents a growth of 6.3% over the previous year, with a monthly average of 220,000 consumers served. It does not count for judicial disputes, only administrative.[31]

According to the Bulletin of the National Consumer Bureau—SINDEC, there were 2,648,521 disputes initiated in 2015, but it does not count for judicial disputes. Complaints accounted for most (65%) of visits recorded in 2015 and 35% referred to consultations/guidance provided by PROCON consumer.

In 2015, more than 879,000 notifications have been sent by PROCON, by means of which earned on average 78.8% of Resolution by suppliers: about 3,177,100 disputes resolved.

[30] See Miragem (2016), pp. 803 ff.

[31] See http://sindecnacional.mj.gov.br/SindecNacional/graficos/SelecionaGraficoForm.jsp?tp=sindec.

Since the beginning of its operation in 2004, PROCONs carried out more than 16 million calls that were integrated into SINDEC since the beginning of its operation in 2004. The few number of complaints registered in the first year (9000) is due to the fact just the calls of the first PROCON integrated agency were counted, e.g. Belo Horizonte PROCON.

From the period of 2013 and 2015, there were 7,621,248 complaints in total. The evolution was as follows: there were 2,481,958 complaints in 2013; 2,490,769 complaints in 2014; and 2,648,521 complaints in 2015.

On average 78.8% of all complaints are resolved by suppliers. In the past 3 years were resolved about 6,005,543 complaints. Since 2014, there were 15,479,127 complaints filed according to SINDEC. The top one cause of complaints is, by far, mobile phone, representing 13.4% of all complaints.

PROCON treats most of the requests received with summary proceedings of care, such as the Simple Query, adopted when the orientation provided by PROCON is enough to solve the consumer problem, or as a Preliminary Service used for the cases in which PROCON obtains an agreement between the consumer and the supplier by phone.

Another quick example of primary care to the consumer is the Charter of Background Information (CIP), used when the PROCON sends a notice to the provider and through this an agreement can be concluded. As a rule, the problems raised by the adoption of these type of care take place in a maximum period of 10 days. When demand is not resolved, or when the seriousness or urgency of the problem requires it, an administrative process is opened, which is the raw material of the National Substantiated Complaints Register.

5 Courts and the Enforcement of Consumer Law

The Brazilian judicial system is established in a very special way. There is the justice called "Common Justice" and the one known as the "Special Justice" (or specialized justice). The Special Justice is composed by the Labor Law Justice, the Electoral Justice and the Military Justice, each specialty is responsible for solving specific issues related to the respective field. The "Common Justice" is either federal or provincial and is internally divided in specialized chambers. All topics that are not delimited by the Special Justice are set by the Common Justice (for example, civil law matters, criminal law, tax law, business law, family law, notarial law, environmental, consumer law and juvenile law). Therefore, the jurisdiction of the Common Law is residual and the Superior Court of Justice (*Superior Tribunal de Justiça—S.T.J.*) is the highest court of the Common Justice, whether federal or provincial. The Federal Supreme Court (*Supremo Tribunal Federal—S.T.F.*) is the court to resolve any issues relating to the constitutionality control of any rule in spite of the subject discussed.

The Brazilian Consumer Code establishes the creation of consumer law specialized chambers in in the courts: "Art. 5. For execution of the National Policy of

Consumer Relations, the Government shall have access to the following instruments, among others: (IV) creation of Small Claims Courts and Specialized Courts for the settlement of consumer litigation" [our translation]. The internal division of the court leads to specialization of the judge and allow a more efficient judicial process and a better decision in terms of quality. These factors contribute to the mobilization of the judges for the consumerist cause and, through judicial performance, to the development of a specific and innovative consumer's law.[32]

The same Consumer Code disposition prescribes also the creation of a Consumer Chamber inside the Public Prosecutor Offices (Article 5 II) and the provision of legal aid services to the needy consumer (Article 5 I).

There are no minimum or maximum amounts to address the court. The small claims court has a general limitation for claims under 40 Minimum wages (1 Minimum Wage is the equivalent of 300 US Dollars).

There is not a specialized (civil law) procedure before the court for consumer disputes. The general Civil Procedure Code (Lei 13.105, 16 March 2015) applies, but for collective or class actions there is an especial Law from 1985 (Lei 7.347/1985), that should be used together with the Brazilian Consumer Code (Article 81 of the Consumer Code—Law 8.078/1990).

The Law 7.244 of 7 November 1984 establishes a specific civil procedure for disputes involving limited financial claims before the Small Claims Court. Article 98 of the 1988 Constitution also confirms the creation of these courts. The Brazilian Consumer Code sees it as an instrument of the national consumer protection policy. The Law 9.099 of 26 September 1995 modifies the name of "Small Claims Courts" to "Special Civil Courts" and expands their sphere of competence to the criminal field.

In the consumer sphere, the civil Special Court (*Juizado Cível Especial*) plays a unique role. From January to August 2012, there was a whole of 248,284 civil litigations in the Civil Special Court of Rio de Janeiro. From this total, 191,953 civil litigations or 77.31% were related to consumer protection.[33]

The Brazilian Constitution predicts free legal aid in Article 134. The Brazilian legal aid system consists of lawyers who accessed to the function of public legal aid lawyers by a public competition. These lawyers, called "defensores públicos" have the role to protect and represent the interests of the person who cannot afford the fees of a lawyer without endangering his/her livelihood and basic needs of his/her family. The parameter used is not necessarily the income but the impossibility to pay the court costs. A legal person whose resources are insufficient is eligible for legal aid, including micro-enterprises, non-profit organization and community association, subject to prove the lack of resources to the "Defensor".

The material scope for legal aid in Brazil is very broad. It includes family law, civil law, criminal law, childhood and youth law, consumer law, and many other law

[32]Fonseca (2011).

[33]This data was provided by the Executive Director of the Rio de Janeiro Court of Justice, Mrs. Beatriz Gaspar.

fields.[34] The full and free legal assistance is set out as a fundamental right in the Brazilian Constitution.

There is no current statistics data available about the percentage of consumers are satisfied with the outcome and timing of a consumer dispute before the court, but in 2011 the National Justice Council (CNJ) has lunch a research with 26,750 persons, 7259 judicial workers, 803 judges and 18,688 users of the judicial system (only 8.4% were consumers at court).[35] Anyway, the result was that 63.6% consider the system too low, 62.7% complaint about the delay of the audiences and procedures acts and 67.5% consider that the workers do not gave good information about the processes.[36]

The major commitment of the Brazilian judges in handling issues of consumer law, are encouraged by the Constitution that imposes to the judge to ensure, in its decisions, respect with the guidelines established by the Consumer Code. The activism of the Brazilian judge is strengthened by the existence of specialized judicial institutions in handling consumer disputes. The particularly active role of the public prosecutor through its specialized consumer protection shall be also outlined. The Brazilian public prosecutor ensures a broad protection to consumers specifically in collective redress procedures.

The diversity of collective forms of redress admitted by the Brazilian consumer law and the autonomy that the judge has to conduct these procedures is also another main advantage of the judicial enforcement of consumer rights.[37]

In addition, as another important advantage is the broader discretion granted to the Brazilian judges in dealing with consumer issues, as for instance the reverse of the burden of proof.

The time and the cost of judicial access are the main shortcomings of the judicial enforcement of consumer rights in Brazil. There are alternative methods of dispute resolution, but they demand some effort of suppliers. In cases when suppliers are not interested on making a deal or assuming responsibility, consumer rights must be enforced by a Court of Law. It might take, on average, at least 1 year until final decision and consumers are required to be present at two judicial hearings.

[34]See for a brief summary of the Brazilian legal aid broadness, Fonseca (2010), pp. 283–299.

[35]See http://www.cnj.jus.br/gestao-e-planejamento/gestao-e-planejamento-do-judiciario/pesquisa-de-satisfacao-e-clima-organizacional.

[36]See the 'usuários' document in http://www.cnj.jus.br/gestao-e-planejamento/gestao-e-planejamento-do-judiciario/pesquisa-de-satisfacao-e-clima-organizacional, pp. 6 f.

[37]"*La plupart des normes composant le CDC sont des normes ouvertes et générales qui comptent sur un engagement effectif du pouvoir judiciaire en vue de leur interprétation et, à travers celle-ci, l'avancement du droit de la consommation*". Fonseca (2016), p. 416.

6 Specialized Agencies and the Enforcement of Consumer Law

The Department of Protection and Consumer Protection (DPDC) is the agency responsible for coordinating the National Consumer Defense System. It aims to ensure the effectiveness of interventions in favor of consumers. The DPDC is the only department of the Consumer's National Office (*Secretaria Nacional do Consumidor*), a division of the Federal Ministry of Justice. Even though the primary mandate of the Consumer's National Office and the Department is to coordinate the National Consumer Defense System (SNDC), it is important to emphasize that those organisms do not have a coercive power vis-à-vis other institutions members of the National Consumer Defense System, particularly the PROCONs, whose autonomy is conserved. Furthermore, the Department regularly organizes seminars and conferences on the daily work of the actors of the national consumer protection system about their needs and interests, as well as current issues. The Department managed to create discussions on various consumer topics towards consensual and harmonious solutions by bringing together players from across the country.

The Department consists of four sections: one in charge of technical consultations and administrative proceedings (*Coordenação-Geral de Consultaria Técnica e Processos Administrativos*); a section responsible for articulation and supervision of institutional relations (*Coordenação-Geral de Articulação e Relações Institucionais*); a section responsible for research and monitoring of market players (*Coordenação-Geral de Estudos e Monitoramento de Mercado*) and a section in charge of the National information System on consumer protection (*Coordenação-Geral do Sistema Nacional de Informações de Defesa do Consumidor*).

The Department offices are located in the federal capital of Brasília and its functions are enumerated in Article 106 of the CDC and Decree 2.181/97. Articles 55–60 of the CDC provide the list of administrative sanctions. If mediation fails and the administrative procedure concludes that the enterprise committed a violation, the PROCON can issue an administrative penalty. The notification must include the following information: the CDC rule that was transgressed and the description of facts that led to the offense report; identification of who committed the acts; criteria that led to the establishment liability, the choice of the penalty and justification regarding the proportionality of the imposed penalty.

The PROCONs are provincial and municipal government agencies that have specific objectives to protect, inform and advise consumers. The creation of a PROCON requires a legal provision in which its functions are listed. It is therefore possible that a PROCON does not have the same functions as its counterpart in the neighboring province. If the word "PROCON" is the common and simplified naming of public bodies consumer protection, the full name of these organizations varies from one province to another because of their legislative autonomy.

The PROCON is very active in the resolution of consumer disputes by acting as a conciliator/mediator/arbitrator. In a situation when it is impossible to reach an agreement between the parties, an administrative lawsuit procedure is engaged.

The administrative procedure is composed by a sequence of acts established by law, in particular Articles 33–55 of Decree 2.181/97. Its goal is to make decisions based on the acceptance or rejection of consumers' complaints that proved to be true. Such administrative instrument allows the PROCON to act in a very transparent way whenever the mediation/conciliation fails.

The legal basis for the establishment and the operation of that agency are CDC and Decree 2.181/97. The agencies are organized as a system on Articles 105 and 106 of the Consumer Code as '*Sistema Nacional de Defesa do Consumidor*',[38] each one is independent, but some are part of the executive power of the municipalities and of the federal states. The SENACON, Consumer's National Office is a division of the Ministry of Justice, in Brasília.

Outside this system there are other regulatory agencies for the specific public services markets and which can help the Consumer's National Office and other PROCON on the consumer protection (Telephony and communication: ANATEL, Sanitary measures: ANVISA, Metrology: INMETRO, Water and services related with water supply: ANA, Private Health: ANS, Aero Transportation: ANAC, Credit and Banks regulation: Braz. Central Bank, etc.), but none has a strong activity in favor of consumers.[39]

The internal organization of PROCON depends from province to province, city to city; it depends on what features the provincial or municipal law that created it. The example of PROCON in the province of São Paulo illustrates quite well its internal organization and how it works. São Paulo PROCON is composed of six departments: Special Programs Dept.; Studies and Research Dept.; Institutional Relations Dept.; Inspection and Control Dept.; Complaints and Consumer Counseling Services Dept.; and Administration and Finance Dept.

Remedi[40] provides impressive data on the work done by this organization during the year of 2009. The Department of Special Programs answered 56,632 consumer inquiries. The Department of Studies and Research has organized conferences for students following professional and technical courses (college equivalent), reaching 2980 students. In addition, 329 research studies have been done on the most diverse topics, including price products, banking and consumer social actors behavior. The Department of Special Programs of São Paulo's PROCON also organized conferences targeting consumers; courses for companies; theatre plays for children; launching and editing various publications. On the other hand, the Institutional Relations Department signed agreements with 239 municipal PROCONs of São Paulo province. The Department of Inspection and Control began 39,842 preliminary investigations and 38,457 inspection procedures on various suppliers and traders. In addition to that, the Inspection and Control Dept. implemented 1562 administrative proceedings for consumer protection rules violations. The

[38]Sodre (2007).

[39]See the official information about these agencies: http://www.brasil.gov.br/governo/2009/11/agencias-reguladoras.

[40]Remedi (2013).

Complaints and Consumer Counseling Services Dept. served 533,000 consumers in different sectors such as food, health, housing, goods, services and financial services. The Department of Administration and Finance is responsible for the administrative and financial management and human resources of PROCON.

As mentioned above, the PROCONs are provincial and municipal government agencies. In the 1980s, almost all provinces of the country (called states) had already established public consumer protection agencies. National meetings between various PROCONs were since then organized. Nowadays, all Brazilian states have PROCONs and most of the Brazilian cities have PROCONs.

The joint role of the Consumer's National Office and the Department of Protection and Consumer Protection (DPDC) is to plan, develop, propose, coordinate and implement the national consumer protection policy. At the federal level, the Consumer's National Office bears the task of coordinating the integration of the consumer's protection players in the Brazilian consumer system. The lack of hierarchy between these organizations is unanimously recognized by the Brazilian doctrine. It is a result of the interpretation of Article 106 of the CDC. Thus, decisions from the Consumer's National Office to coordinate the national consumer protection system have no binding effect on other organisms. The DPDC encourages the establishment of specialized government agencies at the state level (State PROCONs) and in municipalities (Municipal PROCONs). It also encourages the creation of consumer protection civil associations and the creation of specific programs.

PROCON shall function independently of the judiciary, prosecutors, legal aid or any other institution in national consumer protection system.

The subjective fundament i.e. the concept of vulnerable consumer on which is based the Brazilian consumer law reflects the consumers position on the market in a more real and relevant way. The Brazilian law did not adopt the objective basis of the contract, which leads to a different way of applying the consumer law.[41] The adoption of vulnerability as the guideline of the code application means a disregard to the area of law concerned. Since a vulnerable person is part of the relationship, the Consumer Code applies and all the actors' parts of the national protection consumer system are involved, including the agency.

A consumer dispute before the specialized agency or other form of non-judicial institution typically last from ten days to up to 1 year. According to the bulletin of National Consumer Bureau, when a demand is not resolved, or when the seriousness or urgency of the problem requires it, it opens an administrative process—Complaint, which is the raw material of the National Substantiated Complaints Register.

The main advantages of the enforcement of consumer rights before a specialized agency is that it is faster than the courts of law and free of charges. Also, there is no need for consumer to be represented by a lawyer. On the other hand, the main shortcomings of the enforcement of consumer rights before a specialized agency is

[41] According to Fonseca, the fact that the contract is not the main pillar of the Brazilian consumer law results in a wider protection based upon a collective dimension, therefore distant from the liberal ideology. Fonseca (2016), p. 555.

that it depends on the good will and an effort of suppliers to solve consumer problems. Although administrative agencies may impose administrative fines, they do not have ruling power.

7 The Role of Consumer Organizations in Enforcement of Consumer Law

In Brazil, there are several consumer organizations. BRASILCON and IDEC are the most prominent nowadays.

The Brazilian Institute of Policy and Consumer Rights (BRASILCON) is a nonprofit civil association of national and multidisciplinary scope. Its purposes are of scientific, technical and pedagogical character. BRASILCON was established in 1992 in the city of Canela, State of Rio Grande do Sul, by the authors of the draft bill that gave rise to the Consumer Protection Code (law 8.078/90).

Consumer organizations are not present in every city in the country.

There are mandatory legal conditions for the establishment and operation of a consumer organization in Brazil. It starts with an Assembly of Constitution, which it is a formal step in the legalization process. It is held on the association's constitution act in the presence of all members and in order to be a consumer protection organization it must be the main purpose of the association. At that meeting, the name of the association and the headquarters will be chosen. To promote class actions the Association must be, at least, 1-year-old.

In order to be a consumer protection organization it must be registered as the main purpose of the association. To promote class actions the Consumer Protection Association must be at least 1-year-old. It might also act as *Amicus Curiae* in any legal case.

BRASILCON, for example, supported, directed and participated in more than a hundred events, conferences and seminars, academic activities and scientific, updating and discussing issues affecting consumers: sustainability, responsible lending, economic plans, collective consumer protection at all levels of the Brazilian judiciary, strengthen the National consumer protection System, quality of public services, international protection consumer, among others.

Resuming: (a) 9 international conferences; (b) 13 national congresses; (c) Dozens of regional conferences, the symposium formats, courses and seminars; (d) Contests monographs; (e) Literary Awards; (f) Edition, in partnership with the Journal of the Courts, Consumer Law Journal (over 100 volumes); (g) Edition in partnership with RT, Consumer Law Library (about 50 works); (h) Monitoring lawsuits national impact; (i) Bills monitoring with repercussions on consumer rights; (j) Support for carrying out the preparatory meeting VIII of the International Convention of Private Law (OAS); (k) Participation and performance in international bodies and Congress Consumer Law; (l) Participation and co-promotion of international exchanges

concerning study and Consumer Law Knowledge; (m) Participation in the review of the UN guidelines on international consumer protection.

Universities usually have special departments of free legal aid, but they serve only people without financial conditions.[42]

8 Private Regulation and Enforcement of Consumer Law

The private regulation has almost none relevance in Brazil. There are some autoregulation council of ethic that work in many cases each year, with some interesting regulation for children advertising and environmental impacts. For example in advertising, the *Conselho de Autoregulamentação Publicitária* (CONAR) was created in 1977 and since 1978 has decided more than 8000 cases. Despite this effort, many illicit advertising remain in Brazil and have no important impact at the web advertising. There are also some autoregulation Code, like the Brazilian Bank Federation Conduct of Conduct (*Código de Autoregulação Bancária,de 28 de Agosto de 2008*),[43] but the impact in the bank praxis with consumers is almost null.

Article 7 of the Brazilian Consumer Code allows the consumer to use the deontological rules of the professionals and providers to establish the standard of good faith of the conduct. So some international and intern Rules of the Central Bank are used in consumer cases. The consumers may claim direct to the CONAR (in 2015, from the 241 cases solved, 128 came from consumers), and in 56% of the cases the professional have same fine as sanction.[44] CONAR makes also conciliations between the advertising providers and their clients.

9 Enforcement Through Collective Redress in Brazil

In Brazil, the system of representation of the collective consumer rights in court is wide open because of the diversity of possible claims in one procedure—injunction and compensation.[45] There is the possibility of obtaining compensation for damage caused both to homogeneous individual interests of consumers and to their collective interest seen as a distinct interest of the general interest.

Since 1965, the Brazilian civil procedural system recognizes the collective redress. The *Lei de Ação Popular* (Lei 4.717 de 29 de junho de 1965) allowed the citizen to file an injunction against the public government in order to nulify an act

[42] See e.g. the UFRGS Clinic, in http://www.ufrgs.br/saju.

[43] See http://www.autorregulacaobancaria.com.br/.

[44] In 2015, 38.9% of the cases are from TV advertising, 38.3% from Internet, 15% from external media, 4.2% News, 2.7% Newspapers, see Boletim do CONAR, 35 anos, http://www.conar.org.br/.

[45] See Fonseca (2011).

potentially harmful to a public property related to art, landscape, history and tourism or a public act that could harm the environment. In 1985, the *Lei de Ação Civil Pública* has institutionalized the injunction collective redress and has added the consumer's protection to the environment, artistic, historical, landscaped and touristic public property as the public interests to be protected. Five years later, the Brazilian Consumers Code establishes a new collective redress in the Brazilian civil procedural: the class action format. The interests protected in this collective redress is called "direito individual homogêneo" by the Brazilian law.

The Brazilian judges and the doctrine unanimously declare the absolute compatibility of those different collective redress in the Brazilian procedural system.

The Brazilian consumer law recognizes three different types of consumers interests protected in the collective redress (1) protection of diffuse interests, (2) protection of collective interests and (3) protection of homogeneous individual interests. This is the nomination adopted by the Brazilian law to the consumer interests protected in a class action: homogeneous individual interests. Besides, the protection of these three categories in a single lawsuit is possible.[46]

The CDC recognizes the right for diverse plaintiffs to file an injunction or a class action: the consumer civil associations, the public prosecutor, the Union, the States and the municipalities, the public bodies responsible for consumer protection (PROCON) and the legal aid. Therefore, in the Brazilian system, there is no criteria to distinguish the collective redress as an injunction or a class action because both kinds of collective redress are accepted. Besides that, all the organizations mentioned above have the power to initiate the two kinds of lawsuits. One can join the lawsuit initialized by other plaintiff. Rather contradictories, these forms of collective representation are seen as complementary.[47] Prevention lawsuits (injunctions) stand alongside with compensation ones (class actions).

The total amount of cases of collective redress have been recorded in 2015 is not quantified. Only a few organizations keep a public record of collective redress cases. Public prosecutors of the State of Minas Gerais, for example, won more than two hundred class actions in many fields, such as feeding, trade, education, finances,

[46]"*Il est donc* possible *d'introduire dans une même action collective une demande de protections des intérêts collectifs (la demande d'annulation d'une clause abusive) et une demande de protection des intérêts individuels homogènes. Tel serait le cas, par exemple, d'une clause abusive insérée dans un contrat d'adhésion. Si le parquet entame une action collective et demande la nullité de cette clause, les droits collectifs de tous ceux ayant signé le même contrat d'adhésion se trouveront protégés. S'il y a eu des dommages causés par cette clause, le parquet peut encore demander l'indemnisation. Certains systèmes mixtes reconnaissent encore la juxtaposition de la protection des intérêts diffus, comme le système brésilien. Par exemple, lorsqu' on ajoute une exigence du fournisseur, l'enjoignant de ne pas insérer une pareille clause dans les futurs contrats*". Fonseca (2016), p. 475.

[47]That is why Fonseca nominates the Brazilian collective redress system of "mixed system", regarding the objective and the subjective criteria. The first classification calls for an injunction (prevention lawsuit) or a class action (compensation) whereas the subjective classification concerns the plaintiff. The author considers it a strong point in the Brazilian consumer system. Fonseca (2016), pp. 171–183 and 255–290.

housing, information, internet, recreation, defective products and services and transport.

There is no national statistics data available about how many cases of collective redress occurred in the last 3 years, but the *Ministério Público* from Rio de Janeiro has a site with all victories of the *Ministério Público* in the country,[48] so in the last years there are 129 victories, with redress to consumers, in '*ações coletivas*' and 209 victories in '*ações civis coletivas*' registered in this site. The site has the claims state by 25 Brazilian States, so the number of all consumer collective actions is difficult to achieve.[49]

10 Sanctions for Breach of Consumer Law

The administrative sanctions for the breach of consumer law in Brazil might be: fine; seizure of the product; destruction of the product; cancellation of the product registration with the competent body; prohibition manufacturing the product; suspension of supply of goods or services; temporary suspension of activity; to grant or revoke permission to use; license revocation of the establishment or activity; ban all or part of the establishment, work or activity; administrative intervention; or counter-enforcement.

There is also a law that defines crimes against the tax and economic order and against consumer relations, and other measures, imposing prison sentences. Administrative fine is the most common form of sanction.

The applicable penalties are defined by Decree n. 2181/1997, which lays down general rules for the application of administrative sanctions provided by Law n. 8078 of 11 September 1990, repealing Decree n. 861 of 9 July 1993, and it imposes other measures. Law n. 8137 of 1990 also defines crimes against the tax and economic order and against consumer relations, and rules other measures.

The application of the sanctions in practice is not satisfactory enough, since there is a very strict limit to administrative fines. In case of huge profits taken from illegal practices, the limit is simply not enough to avoid misconduct. Breach of consumer legislation might also lead to criminal liability, but prison sentences are hard to be imposed since the penalties are small and the author's identification is difficult because of the action by corporations.

[48] See http://rs.consumidorvencedor.mp.br/.

[49] Source: http://rs.consumidorvencedor.mp.br/pesquisa-nacional?p_p_id=mprjcadastrodecisoes$32#buscafederada_WAR_mprjcadastrodecisoesportlet&p_p_lifecycle=0&_mprjcadastrodecisoes$32#buscafederada_WAR_mprjcadastrodecisoesportlet_keywords=a%C3%A7%C3%B5es+coletivas&_mprjcadastrodecisoesbuscafederada_WAR_mprjcadastrodecisoesportlet_fisrtPage=true&_mprjcadastrodecisoesbuscafederada_WAR_mprjcadastrodecisoesportlet_efeitoCheckbox=&_mprjcadastrodecisoesbuscafederada_WAR_mprjcadastrodecisoesportlet_jspPage=%2Fhtml%2Fbuscafederada%2Fview_search.jsp.

11 Alternative Mechanisms for the Resolution of Consumer Disputes

There are several types of alternative mechanisms for the resolution of consumer disputes in Brazil. The most popular are the ones that allow conciliation and mediation access through the internet. In 2014, the Consumer's National Office (SENACON) established a new public service to solve consumer disputes through the internet, which allows direct communication between consumers and businesses, and provides the state essential information to the development and implementation of public policy for the protection of consumers. It is a technological platform for information, interaction and sharing of data called "consumidor.gov.br".

The platform "consumidor.gov.br" is monitored by PROCON and by the National Consumer Ministry of Justice. The creation of this platform is related to the provisions of Article 4 paragraph V of Law 8078 of 1990 and Article 7, items I, II and III of Decree 7963 of 2013, as part of Brazilian joint system of consumer protection.

There is also other internet platforms (websites) working as alternative mechanisms for the resolution of consumer disputes in Brazil created by consumer's initiative, such as "www.reclameaqui.com.br" and "www.proteste.org.br".

In Brazil, there are both types of features of national ADR mechanisms: publicly and privately operated national ADR mechanisms.

A Brazilian legal entity must be incorporated. In order to file a class action for collective redress it must be at least 1-year-old since its proper registration, but to mediate consumer resolving disputes, it must only have been created accordingly to civil law.

There were 82,897 complaints registered at the first semester of 2015 and 168,326 complaints registered at the second semester of 2015, total of 334,120 in 1 year. On average, the percentage of resolved consumer disputes are 80.4% and the percentage of complaints answered is 99.6% (February, 2016).

According to "reclameaqui.com.br", every day more than 600,000 people search the reputations of companies before making a purchase, before hiring a service. Since 2014, the platform "consumidor.gov.br" had about 260,922 claims registered by a total of 221,364 users and 329 companies accredited. The platform "reclameaqui.com.br" has 15,000,000 registered users and 120,000 companies accredited. The platform "consumidor.gov.br" has a total of 373,542 complaints registered.

The percentage of satisfied consumers depends on the field of business. A methodological problem of is that if the consumer does not rate, the complaint is recorded as "resolved". In that case, the percentage may not be accurate.

The percentage of traders or merchants that are satisfied with the outcome and timing of the ADR is not measured, but in "consumidor.gov.br" there are 329 companies registered, most of them are the biggest suppliers in Brazil.

The ADR mechanisms only are effective means of enforcement of consumer law for small complaints, since it is free of charge. But it is not very effective to solve disputes involving larger sums of money.

12 External Relations and Cooperation of the State, Enforcers and Consumer Organisations

Brazil is part of the Mercosul (with an regional cooperation to protect tourists, the Acuerdo Interinstitucional de protección del Visitante) and of the OAS (with the Sistema Interamericano de Alertas Rápidos das Américas).

Brazil is not part of the ICPEN. At the OAS there is an information system about health problems and also in Mercosul there are several network of enforcement agencies. But Brazil still does not have any bilateral or multilateral agreements with other countries on the enforcement of consumer law.

13 Conclusions

13.1 The Reform Bills

There are some undergoing reforms in the consumer's legislation in Brazil.[50]

The Bill 281 from the Senate dated August 3, 2012, proposes changes on the general rules of the Brazilian Consumer Code (CDC) and on the rules about jurisdiction. The same project introduced new rules in electronic commerce. Following the due legislative procedure, this Bill went to the Deputies Chamber where it received a new number: Bill 3.514/2015.

The Bill 3.514/2015 changes significantly the rules about courts legal proceedings regarding the enterprises' responsibility, especially to uphold such jurisdiction on the criteria of the consumer's domicile, allowing, under certain conditions, the election of the forum by the plaintiff. The Bill cancels the choice of forum clause and the arbitration clauses set by the enterprise. The Bill also specifies the issues of jurisdiction for disputes arising from international consumer relations.

Moreover, the Bill 3.514/2015 proposes to add a new section of legal provisions regulating electronic commerce activities applicable to suppliers of goods or services by electronic or similar means in the CDC chapter on trade practices. The Bill 3.514/2015 aims to strengthen the obligation of the enterprise to provide detailed information and to add certain specific obligations to him. The Bill 3.514/2015 intends to regulate more rigidly the advertising message and to ensure the consumer's right to

[50]See Fonseca (2016), where the author makes a critical analysis on each of Brazilian undergoing reforms on pp. 291–314 and 332–350. See also Fonseca (2014).

reconsider and to increase criminal and administrative protection liability of the enterprise.

There was another Bill from the Senate also dated 2012 proposing modifications on the CDC concerning collective redress: Bill 282/2012. The Senate rejected it at the end of 2014.

The third Bill proposing a reform in the Brazilian Consumer Code was originated in the Senate and dated 2012. It was numbered Bill 283/2012 and became Bill 3.515/2015 after entering the Deputies Chamber. In summary, the Bill 283 creates of over-indebtedness prevention mechanisms, the explicit recognition of rules guaranteeing the responsible lending practices, financial education, and support to the parts of a new consumer fundamental right. Moreover, the project suggests that the prevention of over-indebtedness to be listed among the contractual protection rules.

Various factors explain why the legislator decided to introduce rules in the Consumer Code about the over-indebtedness subject. The access to credit democratization, a recent phenomenon in Brazil, has revolutionized the Brazilian market by opening credit to millions of people who had never had access before. According to a research made by Boa Vista Seguros, a company dealing with Brazilian central service credit, 35 million people had access to credit for the first time in their lives between 2008 and 2012.[51]

In March 2013, a decree created a National Consumption and Citizenship Plan and a National Chamber of Consumer Relations. The purpose of this decree was to update consumer relations as it offers three main areas for the plan: the establishment of a policy to reduce the causes of the most common conflict between consumers and suppliers; the adoption of an effective system to remedy disputes; and the application of sanctions and punishments for offenders. The Chamber is composed of a council of ministers and regulatory agencies members. It provides a forum to discuss future actions, measures and new goals to be adopted. In addition, the decree ensures PROCONs have more autonomy by allowing them to punish and impose restrictions on enterprises which violate the Consumer protection rules.

A restructuring of the national consumer protection policy, which intended to strengthen the public structures, followed this institutional reform. Reforms at the institutional level were introduced, concerning the coordination of the national consumer protection a mandate recognized to Department of Consumer Protection and Defense (DPDC). A decree adopted in May 2012 provided the creation of a new institution with the exclusive mandate to coordinate the national consumer system: the Consumer's National Office (*Secretaria Nacional do Consumidor*, its official abbreviation is SENACON).

The Decree 7.738/2012 modified Article 106 of the Consumer code and Article 3 of Decree 2.181/1997 to empower the consumer's National Office as the

[51]Boa Vista Seguros e Mercados Endividamento Inadimplência - Mitos e Verdades 2012 Research Report, September 2012, http://www1.boavistaservicos.com.br/upload/mkt/mercados_endividamento2012.pdf. This research conducted at national level is the third book of the series "Markets". Estadão conteúdo, "Pesquisa de novos aponta 35 milhões tomadores of crédito" Estadão [São Paulo], 27 September 2012.

coordinator of the national defense system consumers. More specifically, it states that consumer's National Office has the role of the planning, development, coordination and implementation of national policy relating to consumer relations. The first tasks of consumer's National Office are the management of the national information system for consumer protection, the organization of the National School of Consumer Protection, the activities related to the health protection and consumers security, the repression of illegal practices and the development of regulations. By this institutional change within the Ministry, the Government seeks to give more visibility, importance and autonomy to its division responsible for consumer protection. Indeed, the way federal departments are constituted in Brazil, the divisions named *Secretaria* have a higher hierarchical importance than *Departamentos*.

The reform also reflects more awareness of the globalization of markets and the internationalization of consumer protection theme since the Consumer's National Office have the mandate to represent Brazilian consumers interests before international organizations such as MERCOSUR and the Organization of American States.

13.2 Final Assessment

The unit of the Brazilian consumer law, its clear objectives and its expressed guiding principles allow it to be less susceptible to the inevitable changes of consumer society. This assertive is not only valid to the legal framework but also valid to the institutional system.[52] The Brazilian institutional framework offers to the consumer law a plural and flexible environment that is open to changes, having characteristics of postmodern law. The number of actors playing a role in consumers' protection in a coordinated, effective and citizen-friendly way facilitates the development of both political, participative and a democratic consumer law.

The existence of a code dedicated to consumer protection, recognized as a specific law field and a fundamental right, involves an overcoming of the classic concept based upon the Civil Code as a central axis of the private law system.[53] Different values and constitutional rules emerge as new fundamental dispositions ruling the private law. A new private law model arises, formed by the constitutional law and framed by the fundamental rights expressed therein.

The main advantage of the existing system of consumer protection the country is the autonomy that characterizes the Consumer Protection Code in Brazil vis-à-vis the Civil Code, making the consumer code an authentic legal micro-system. As

[52]For a more detailed explanation, see Fonseca (2016). The author conclues that "*ce qui est vrai du cadre normative l'est aussi du système institutionnel*" at p. 556.

[53]Fonseca recognizes three pillars in the Brazilian consumer system: (1) the collective perspective of consumer law, (2) the constitutional status assured (3) and the concept of vulnerability as a guiding principle Fonseca (2013).

mentioned above, the definition of a set of guiding principles in the code gives consistency to its rules and assist their interpretation.

Moreover, even before the recognition of consumer right as a fundamental right[54] and before the codification of consumer rights in the Brazilin law system,[55] there was a favorable legal environment for consumer collective interest. The predominance of consumer collective interests plays an important role in the effectiveness of the ongoing consumer system in the Brazil. Facilitating the protection of collective rights has proved to be an effective tool for improving access to justice. In Brazil, the judges stimulate the practice of collective redress in the consumer law field. The Federal Supreme Court ruled that "as much as possible, considering the existing law, the collective redress must be encouraged in order to prevent the proliferation of consumer individual lawsuits" [our translation].[56]

The time and the cost of judicial access are the main shortcomings of the judicial enforcement of consumer rights in Brazil. There are alternative methods of dispute resolution, but they demand some effort of suppliers. In cases when suppliers are not interested on making a deal or assuming responsibility, consumer rights must be enforced by a Court of Law. It might take, on average, at least 1 year until final decision and consumers are required to be present at two judicial hearings.

Brazil started to develop very interesting public online services for alternative dispute resolution, such as consumidor.gov. It is a very important step towards consumer protection, but it demands some investments and efforts from suppliers.

The effectiveness of consumer law enforcement in Brazil is linked closely to the predominance of a broad view of consumer relationship which goes beyond a contract framework. The awareness of the inequality that characterizes the relationship between the consumer and the company goes further the contract. The key element of the consumer code scope is the subjective notion of consumer more than the notion of contract itself.[57] Therefore, it is primarily the vulnerable position in which the consumer is that identifies him as such and not so much the fact that he signed a contract. The concept of vulnerability is essential to perceive a person as a consumer. The approach is relational because it presupposes another part in a position of superiority.[58] The existence of a legal relationship marked by inequality between the parties determines the applicability of the CDC, inequality meaning the presence of a vulnerable part in the relationship: a consumer.

Consumer vulnerability manifests itself in the position it occupies on the market before, during and after the signing of a sales contract or provision of services. For example, the consumer has information restrictions about products and services

[54]The Brazilian Constitution dates of 1988.

[55]The Brazilian Consumer Protection Code dates of 1990.

[56]Brazil. STF, RE 441.318, rel. Min. Marco Aurélio, j. 25/10/2005, DJU 24/2/2006.

[57]Fonseca sustains that the Brazilian consumer law "s'est vu contraint de prendre ses distances par rapport à une logique libérale fondée sur la primauté du droit privé, l'autonomie des volontés et la protection individuel". Fonseca (2016), p. 548.

[58]Marques (2016b), p. 66.

placed on the market as well as pressure on his free consent resulted by advertising and marketing practices. Consumer vulnerability is also real after the closure of the contract, for example regarding the product warranty, the responsibility of the company to obtain the settlement of a dispute or the enforcement of sanctions provided by the legislation. Consequently, the Brazilian consumer law is far from the common private law. The Civil Code rules fade and have only a residual application. Special and specific provisions of the Consumer Code take precedence.

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Effectiveness and Enforcement of Consumer Law in Bulgaria

Antonina Bakardjieva Engelbrekt

1 Introduction

Bulgaria belongs to a group of Central and East European (CEE) countries, which until only recently were commonly referred to as 'transition economies'. As is well known, for several decades after the end of World War II, Bulgaria was part of the Soviet sphere of influence and was characterised by command economy and authoritarian rule. Following the demise of state socialism, the country embarked on a difficult path of reforms towards building democracy, rule of law and a social market economy. Importantly, already in the early 1990s the country made clear its aspirations to join the European institutions. Indeed, in 1992 Bulgaria was accepted as member to the Council of Europe and in 2007, after lengthy negotiations and years of monitoring, technical assistance and preparation, acceded the European Union (EU). These processes of transition and integration in the European institutions have been decisive for determining the direction of Bulgarian consumer law and policy, as well as for shaping the modalities of consumer law enforcement. As a result of sustained efforts, the country now has in place detailed consumer legislation, closely following EU consumer law instruments, and a full-fledged institutional framework of consumer law enforcement with a variety of public and private bodies and enforcement avenues. This development has certainly contributed to improving the position of Bulgarian consumers. Nevertheless, the system of enforcement still suffers of serious weaknesses, related foremost to limited resources and institutional capacity, and to imperfect implementation and application of consumer law.

In the present chapter, I first give a brief historical account of the development of consumer law and policy in Bulgaria. Then, I provide an overview of the current

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priorities of consumer policy, as well as of the legal and institutional framework set out to ensure the implementation of this policy. In a third step, I outline the existing enforcement avenues for defense of collective consumer interests and of individual consumer rights, respectively. Separate attention is paid to the role of consumer organisations, of private regulation and of existing schemes for alternative dispute resolution (ADR) for the enforcement of consumer law. Throughout the chapter, an attempt is made to estimate the actual working and effectiveness of the system on the basis of empirical data, although such data is not always readily available. In conclusion, the current trends of consumer law enforcement are summed up, venturing some proposals for improving the system.

2 Historical Background

As in most CEE countries, the national tradition in the field of consumer protection in Bulgaria is relatively young. First discussions on consumer law in the academic literature can be traced back to the mid 1970s, echoing the debate in Western Europe.[1] However, there were at the time a number of obstacles to developing a genuine consumer policy and effective consumer law and institutions. As already mentioned, Bulgaria belonged then to the Soviet bloc and was characterised by command economy, governed by the socialist plan. This was an economy of poor quality and undersupply of consumer goods. Consequently, the problems of consumers were mostly associated with ensuring access to goods and improving product quality. Regulating unfair commercial practices was not relevant at all, since there was practically no direct-to-consumer advertising and marketing in the socialist economy. Also, given the symbiosis between politics and economics, a debate on consumer rights, could easily be perceived as a critique at the political system in the country and hence, as ideologically subversive.[2]

Following the collapse of state socialism, the country embarked on a difficult path of transition from command to market economy. Already at the beginning of the 1990s, first pieces of economic legislation were adopted setting out the legal framework for market conduct of economic actors. Important role played the first Competition Act (CA) of 1991, stipulating rules against abuse of market power, anticompetitive agreements and unfair competition.[3] Interestingly, this initial legislative package for the market economy contained no statutes devoted specifically to consumer protection.[4] Instead, the Competition Act showed a pronounced concern for the interests of consumers.

The absence of consumer protection legislation in the first years of transition can partly be explained by the initial overreliance on the forces of free competition,

[1] See Łętowski (1976), p. 654; Stalev (1976), p. 770.

[2] See Bakardjieva Engelbrekt (2006), pp. 1–36.

[3] Act on Protection of Competition of 1991, St G No. 39 of 1991.

[4] See Pritchard (2000).

which were expected to take care of the consumer interest. As formulated by Łętowska, the paradigm of the central plan came to be subplanted by the paradigm of the 'invisible hand' of the market.[5] Apart from the ideologically underpinned idea of "efficient competition as the best protection for consumers", there were also some institutional synergies in treating competition law and unfair competition law jointly and with consumer interests in mind.

The true development of consumer law and policy started in the mid 1990s when Bulgaria made first steps to join the European Union (EU). In 1995 the Commission issued its White Paper on Preparation of the Associated Countries of CEE for Integration into the Internal Market of the Union (COM (95) 163 final). The document defined consumer protection as one area of the Community *acquis* where approximation of rules and standards was required prior to accession. The White Paper listed all relevant consumer directives that had to be transposed in the national laws of the Candidate States. More unexpectedly, the White Paper ventured to provide a sort of a blueprint for the institutional framework necessary to meet the institutional requirements of membership. The process of preparation for accession to the EU thus boosted the development of consumer legislation and the building up of institutional structures for implementation of consumer policy in Bulgaria.[6]

The first more ambitious consumer protection statute in Bulgaria was the Law on Consumer Protection and Rules on Trade of 18 March 1999 (1999 ConsPA).[7] This law was followed in 2006 by the current Consumer Protection Act (ConsPA).[8] The ConsPA builds in large parts on relevant EU directives. The institutional guidelines in the 1995 White Paper and subsequent Commission recommendations also visibly influenced the institutional framework of consumer law and policy, in particular concerning the setting up of one single public authority responsible for consumer protection.[9]

3 Main Characteristics and Priorities of Consumer Policy

The main institution responsible for setting the goals and priorities of national consumer policy in Bulgaria is the Ministry of the Economy. The Ministry has also the task of implementing national consumer policy and integrating it in other horizontal and sectoral polices (Articles 162 and 163 ConsPA).

[5] Łętowska (1999), pp. 1–4.

[6] See Bakardjieva Engelbrekt (2009), pp. 91–133.

[7] Promulgated in State Gazette (St G), No 30 of 1999. On the early development of consumer law in Bulgaria see Goleminov (2001).

[8] Zakon za zashtita na potrebitelite, St G No. 99 of 9.12.2005, last amended St G No 74 of 2016 and No 8 of 24.1.2017.

[9] See Bakardjieva Engelbrekt (2008), pp. 98–137.

3.1 Policy Goals

The main goals of Bulgarian consumer policy are published on the website of the Ministry of the Economy and are currently stated to be:

(a) building up a legislative framework for consumer protection and
(b) effective application of consumer protection legislation.

Consumer policy is further said to have a number of components, such as consumer safety, protection of consumers' economic interests, protection of the individual and collective interests of consumers, participation of consumer organisations in the application of consumer protection legislation. The policy carried out by the Ministry of the Economy aims at ensuring the protection of the main consumer rights, as defined in the ConsPA (see below).

More specific priorities and targeted areas of consumer law enforcement are set out by the specialised body for oversight and enforcement of consumer law, the Commission for Protection of Consumers (Komisija za zashtita na potrebitelite, hereinafter ConsPC), as outlined in its annual reports.[10] Thus, for 2015 the Commission has had a focus on tourist services, and in 2014 on telecom services. As a general observation, it is difficult to discern a long-term strategy in the choice of enforcement priorities.

3.2 Legislative Framework

Protection of competition and protection of consumers enjoy constitutional status in Bulgaria. Article 19(2) of the Constitution from 1991 states that the law creates and guarantees equal legal conditions for economic activity for all citizens by preventing monopolistic behaviour and unfair competition and by protecting consumers.[11]

The main legal framework of consumer protection is set out through the ConsPA.[12] The Act seeks to provide comprehensive regulation of all matters related to consumer protection. It proclaims a number of consumer rights, like the right to information; right to protection against risks; right to protection of the economic interests of consumers; right to compensation for damages; right of access to justice; right to education; right to association; right to representation before public bodies (see Article 1(2), pp. 1–8 ConsPA).

The ConsPA treats extensively the main subject-matter of relevance for consumer protection and is structured along the following chapters: consumer information obligations, including indication on price (Ch 2), unfair commercial practices (Ch 4), consumer safety (Ch 5), unfair terms in consumer contracts (Ch 6), time share contracts (Ch 7), institutions for consumer protection, including consumer organisations and

[10] See, for instance Consumer Protection Commission, Annual Report 2015, p. 5.
[11] StG No. 56 of 13 July 1991.
[12] See Aleksiev (2006).

representation (Ch 8), consumer disputes, including ADRs, mediation and collective actions (Ch 9), administrative controls (Ch 10) and administrative penalties (Ch 11).

In addition to the ConsPA there are a number of other legislative acts that contain rules of relevance for consumer law and policy. Thus, the Civil Procedure Code (CCP) lays down rules on collective actions, which are of general application and do not focus exclusively on consumer rights (Ch 33 CCP). The Act on Obligations and Contracts regulates contracts and torts on a general level and complements the special rules on consumer contracts and product liability in the ConsPA. Furthermore, there are various statutes that govern relations in individual industry sectors, or address particular types of media, transactions or practices.

3.3 Institutional Framework

The institutional framework for oversight and enforcement of consumer policy was built up consecutively throughout the last two decades and includes nowadays a number of public bodies with horizontal and vertical competences. These bodies interact with consumer and business associations which have also evolved slowly and are still relatively week. Needless to say, courts are also an important component of the institutional framework.

3.3.1 Commission for Protection of Consumers

The main public authority in charge of consumer law enforcement in Bulgaria is the Commission for Protection of Consumers (ConsPC). Its functions and powers are laid down in the ConsPA. The more detailed rules on the institutional set-up of the agency, its structure, functions, staff and relations with other public bodies, are stipulated in the Statutory Regulations of 2006, adopted by the Council of Ministers.[13]

The ConsPC is a specialised public agency within the auspices of the Ministry of the Economy (Article 165 ConsPA). It has its main seat in the capital Sofia, but has also regional offices in most major cities in the country. The Agency is tasked with implementing national consumer policy and acting in defense of collective consumer interests. The activity of the ConsPC is solely focused on consumer protection, even though the Agency cooperates with public agencies in adjacent policy areas, such as financial services and health protection, and coordinates the activity of all administrative bodies related to consumer protection (Article 194a ConsPA).

The law refers to the ConsPC in a narrow and in a broad sense.[14] In a narrow sense, the Commission is the collegial body, deciding on infringements of the

[13]See St G No. 49 of 26 June 2006, last amended St G No. 67 of 26 August 2016.

[14]Varadinov (2014), p. 211.

consumer protection legislation. It consists of three public officials, including the Chair, all nominated by the Council of Ministers and appointed for a period of 5 years upon decision of the Prime Minister. At least one of the members of the Commission has to be a lawyer and one—an economist (Article 165(2) ConsPA). The members of the Commission have to be Bulgarian citizens with higher education and at least 5 years of work experience. The members are under obligation to timely and accurately report any conflict of interests that occurs in the course of their work and in case of such conflict shall not take part in the investigations or the decisions of the Commission (Article 165(5) ConsPA).

In a broader sense, a reference to the ConsPC envisages the public authority as a whole, with its administration, currently approx. 180 civil servants.

3.3.2 Sectoral Public Authorities

Apart from the ConsPC there are a number of specialized agencies and sectoral authorities, which carry out activities of importance for consumer interests.

Bulgarian National Bank (BNB)
Within the sphere of banking services, the regulatory authority is the Bulgarian National Bank (BNB). It is an independent public institution, directly accountable to the National Parliament.[15] BNB exercises prudential supervision over the banks and other payment institutions in view of maintaining the stability of the banking system and protecting the interests of depositors.

Financial Supervision Commission (FSC)
In the sphere of non-banking services (investments, insurance, assurance) the competent supervisory authority is the Financial Supervision Commission (FSC).[16] The Commission is an independent regulatory authority, consisting at present of five members, who are appointed by Parliament. One of the members of the FSC has specific responsibility for protection of the interests of investors and of insured and assured persons (Article 3(1), p. 3 FSCA).

The Communications Regulation Commission
In the sphere of communications, the Communications Regulation Commission has competences in protecting consumer rights relating to electronic communication services and postal services on the basis of the Electronic Communications Act of 2007 and the Postal Services Act of 2000. However, the Commission has no competences in settling individual consumer disputes. For this purpose there is a special sectoral conciliation commission (see below, Sect. 6.1).

[15]See Bulgarian National Bank Act, St G No. 46 of 10 June 1997, with multiple amendments.

[16]See Financial Supervision Commission Act (FSCA), St G No. 8 of 28 January 2003, with subsequent amendments.

Electronic Media Council
The Electronic Media Council handles among others complaints from consumers and citizens concerning the content of radio and TV-programs, but also as to the volume and content of advertising in these media.

Competition Protection Commission (CompPC)
Finally, one has to mention the Commission for Protection of Competition. The primary function of the CompPC is enforcement of the rules on anticompetitive practices and state aid. However, the Commission has competences in the area of unfair competition as well, enforcing rules against misleading and unfair commercial practices in B2B relations. These rules run sometimes parallel with the rules on unfair commercial practices in the ConsPA, which creates a need for certain coordination in the enforcement practices of the two public authorities. The CompPC is conceived as a strong and independent public agency, which is directly accountable to Parliament.

3.4 International Cooperation

As a Member State of the EU, Bulgaria is bound to transpose and implement all EU legislative instruments in the consumer protection field. The ConsPC is the Bulgarian representative in the Consumer Protection Cooperation (CPC) Network. It is both single liaison office and competent authority for enforcement of most of EU consumer legislation within the scope of Regulation 2006/2004/EU (CPC-Regulation). The participation of Bulgarian public officials in the meetings and activity of the CPC-Network seems to have strengthened their competence and self-confidence. The Network has been a forum for exchange of good practices and for institutional learning, especially valuable for the consumer protection bodies in the new Member States from CEE. The enforcement activities within the Network exert influence on the enforcement priorities of the ConsPC.[17] In particular, the common enforcement actions (so-called 'sweeps') coordinated by the Commission appear to contribute to the efficient enforcement of consumer law.

At the international level the Bulgarian ConsPC is member of ICPEN.

3.5 Courts

There are in Bulgaria two main types of courts—general courts and administrative courts, all of them having some role in the enforcement of consumer law.[18]

[17]Consumer Protection Commission, Annual Report 2015, p. 5; Annual Report 2014, p. 7.

[18]See Judicial Systems in Member States—Bulgaria, at https://e-justice.europa.eu/content_judicial_systems_in_member_states-16-bg-en.do?member=1.

3.5.1 General Courts

The general courts are structured in three tiers: district courts, provincial courts (28 courts) and Supreme Court of Cassation. The district courts are the main courts for examining cases in the first instance. They would typically be the courts competent to try most consumer law cases based on actions by individual consumers. Their decisions are subject to appeal before the relevant provincial courts.

The Supreme Court of Cassation is the supreme judicial instance in criminal and civil cases. It exercises supreme judicial review over the proper and uniform application of laws by all courts and has its seat in Sofia.

3.5.2 Administrative Courts

The administrative courts have jurisdiction over all actions seeking the issue, amendment, repeal or annulment of administrative acts; redress against unwarranted actions and omissions by the administration, etc.

Cases are examined by the provincial administrative courts (28 courts) as courts of first instance. The Supreme Administrative Court (SAC) exercises supreme judicial review over the proper and uniform application of laws by administrative courts.

4 Enforcement of Consumer Law in Defense of Collective Consumer Interests

Enforcement of legislation in defense of collective consumer interests is primarily carried out by the ConsPC presented above. In addition, there are relatively broad possibilities for consumer organisations to institute injunctive proceedings, as well as to file actions for violation of consumers' collective interests before the general courts.

4.1 Sanctions and Remedies

The ConsPA is predominantly public law oriented and the emphasis is on administrative sanctions. The most common sanction for violation of provisions in defense of collective consumer interests appears to be the administrative penalty, along with the injunction. In addition, there are possibilities for claiming compensation for damages inflicted on the collective interests of consumers.

4.1.1 Penalties and Withdrawal of License

Most violations of legislation protecting the collective interests of consumers qualify as administrative offences and can be sanctioned by administrative penalties and fines. The applicable penalties are defined in Chapter 11 of the ConsPA. The size of the penalty varies depending on the type of infringement. For instance, the penalties for violations of obligations concerning consumer information and price indications are between BGL 300 and 3000 (approx. Euro 150–1500), for unfair contract terms—up to BGL 5000 leva (approx. Euro 2500) and for some cases of unfair commercial practices—up to 50,000 leva (approx. Euro 25,000).[19] Repeated violation of the law can incur double-size penalties (Article 231 ConsPA).

Once an order establishing an administrative offence enters into force, the sanctioning organ can require that the license for exercise of commercial activity, if any, is withdrawn (Article 232 ConsPA).

4.1.2 Injunctions

The other typical remedy is the injunction. The ConsPA envisages both the possibility for an injunctive order by way of administrative procedure before the ConsPC, as well as an injunctive action before the general courts on the initiative of a broad circle of public or private actors (see below, Sect. 4.2).

4.1.3 Damages

The ConsPA grants consumer organisations a right to claim damages inflicted on the collective interests of consumers (Article 188 ConsPA). Individual consumers have the right to compensation for damages on the basis of the general principles of civil law. Competitors have no right to damage compensation under the ConsPA, although they may have separate rights under other legislation, for instance the provisions on unfair competition in the CA.

4.1.4 Criminal Sanctions

In principle, some acts and practices that violate consumer protection legislation may be so grave that they qualify as fraud or other criminal offence under the Criminal Code. This is, however, relatively rare.

[19] See Articles 197–198, Articles 202–208 and Articles 197–225c ConsPA.

4.2 Enforcement by the ConsPC

The main avenue for enforcement of the legislation protecting the collective interests of consumers is through the ConsPC. Any consumer whose rights have been infringed upon or impaired by a violation of the ConsPA has a right to petition the ConsPC to investigate the alleged infringement (Article 178 et seq ConsPA). It is noteworthy that competitors are not granted any express right to institute administrative proceedings before the ConsPC and cannot therefore be constituted as party in such proceedings. In legal doctrine, this is considered as a serious omission, and an instance of non-compliance with the requirements of Article 11(1) Directive 2005/29/EU.[20]

4.2.1 Investigative Powers

The ConsPC has relatively broad investigative powers. Pursuant to Articles 192 and 192a ConsPA, the officials of the ConsPC have the right to access business premises, to require necessary documents, to take samples for laboratory tests, to summon experts when the controls require expert knowledge.[21]

In proceedings before the ConsPC on the basis of unfair commercial practices, the Chair of the ConsPC can reverse the burden of proof and require the allegedly infringing trader to provide evidence that the commercial practice is *not* misleading or unfair (cf. Article 68 l(2) ConsPA).

The ConsPC can impose penalties of BGL 1000–3000 on traders and other actors for not cooperating with the Commission in the course of its investigations (Article 220a ConsPA).

4.2.2 Sanctioning Powers

The sanctioning powers of the Agency are also relatively broad. The Chair of the ConsPC has the right to require the infringer to give binding commitment to cease and desist from an infringing conduct and to make such commitment public, as well as to order the termination of the infringement (Article 192a ConsPA).

More specifically, in cases of unfair or misleading advertising, the Chair can oblige the advertiser or the advertising agency to disseminate information about the infringement and when appropriate, corrective advertising at its own expenses (Article 68 l ConsPA).

[20] See Varadinov (2014), p. 214.

[21] See Varadinov (2014), p. 214.

4.2.3 Procedure

If an infringement of the ConsPA is established, and the violation is considered to constitute administrative offence, an order for imposing a penalty is issued by the Chair of the ConsPC, or by a competent official of the ConsPC designated by the Chair (Article 165(4)(6) ConsPA). The procedure follows the general rules of the Act on Administrative Offences and Penalties. Decisions can be appealed before the first instance administrative courts.

For most of the infringements under the ConsPA, the injunctive orders are imposed by the Chair of the ConsPC (Article 192a(2) ConsPA, in conjunction with Article 165(4)(6) ConsPA). The acts of the Chair can be appealed before Sofia Administrative Court with the Supreme Administrative Court as a second instance, following the Act on Administrative Procedure.

A somewhat different, two-step procedure is envisaged for cases of unfair commercial practices. In a first step, a decision on whether certain conduct is in violation of the relevant provisions of the ConsPA is taken by the ConsPC as a collegial body (Article 68 l ConsPA). In a second step, the Chair of the ConsPC has to issue an injunctive order prohibiting the practice and ordering the trader to cease and desist from using the practice in the future. It is this order that constitutes the final administrative act, which can be appealed by the addressee of the act.[22]

This procedural set up has been criticized in the literature as having a number of flaws. It is pointed out that the Chair of the ConsPC participates in the decision of the Commission as a collegial body on whether a commercial practice is in violation of the law, but has to execute the decision even if he or she is not personally in agreement with this decision. From the practice of the Commission, cases are reported where the Chair, when in disagreement with the collegial decision, consciously slows down the issuing of the sanctioning order or the execution of the order, ultimately undermining the speed and effectiveness of enforcement.[23] Especially for certain cases of unfair commercial practices, where the swift discontinuing of the practice is of the essence, such delay may render the injunction meaningless. There is also a risk of conflict and incongruence between the outcomes in the procedure on establishing and prohibiting a violation on the one hand, and the procedure for imposing of administrative penalties, on the other, especially given the different order of appeal.[24]

[22]See Varadinov (2014), p. 215, with reference to Decision No. 15778 of 11 December 2012 and No. 6419 of 8 May 2012 of the Supreme Administrative Court.

[23]Varadinov (2014), p. 216.

[24]Varadinov (2014), pp. 214 et seq.

4.3 Judicial Enforcement

Enforcement of consumer laws in defence of collective consumer interests can also be carried out via judicial proceedings through various means for collective consumer redress set out in Chapter 10, section IV of the ConsPA.

4.3.1 Types of Action

Most widely used is the action for injunction, seeking the cessation and prohibition of infringements of legislation protecting collective consumer interests. In addition there are possibilities for consumer organisations to institute representative action, to claim compensation for damages inflicted on the collective consumer interest, or to bring group action on behalf of a group of consumers affected by the same infringement.

Injunctive Action
The possibility to bring an action for injunction is envisaged for most legal rules protecting collective consumer interests. An enumeration of the relevant rules and statutes is provided in Article 186(2) ConsPA and includes all consumer legislation based on relevant EU Directives.

A right of action to seek cessation and prohibition of infringements of collective consumer interests is granted to qualified consumer organizations, which are approved by the Minister of the Economy (Article 186 (1) ConsPA). The same right is granted to the ConsPC (Article 186(3) ConsPA) and to qualified entities from other EU Member States under the EU Injunctions Directive (Article 187 ConsPA).

If the court establishes an infringement, it can order the termination of the infringement and can oblige the infringer to make public, in an appropriate manner and at his expense, the court ruling, or a part thereof and/or make public a corrective statement. The court can also order the termination of an unfair commercial practice, the setting aside of unfair terms in consumer contracts, or any other measure to bring the infringement to an end (Article 187 ConsPA).

Following the general rules of civil procedure on enforcement of judgments, non-compliance with prohibitive and prescriptive court orders can be subject to penalties of BGL 400 for each instance of non-compliance (Article 527(3) CCP).

Representative Action
Article 188 ConsPA sets out a right of consumer organisations to lodge an action for compensation of damages caused on the collective consumer interest. Where the claim for compensation has been lodged by more than one consumer association, the compensation shall be awarded to all claimants for joint disposal. The compensation received may be expended only for the purposes of consumer protection.

Group Action
Finally, the ConsPA stipulates a right for consumer organisations to lodge an action for compensation of damages on behalf of a group of consumers who have been

affected by the same infringement (Article 189 ConsPA). This right will be addressed in more detail below, Sect. 7.

4.3.2 Competent Courts and Procedure

Injunctive, representative and group actions based on the ConsPA are to be handled by the general courts, following the rules on collective actions in Chapter 33 CPP (Article 186(1) ConsPA). Subjecting the injunction proceedings to the rules of collective actions in the Code of Civil Procedure is a legislative choice that has provoked much criticism in legal doctrine. In practice, it has created considerable confusion, since some of the rules in the CCP are shaped after the particularities of class actions, aggregating numerous claims in one single lawsuit. For instance, the question has been raised whether courts shall require consumer associations to demonstrate that they have the capacity to bear the costs of a lawsuit, and whether the court shall publicly disseminate the filing of the case, and invite other interested plaintiffs to join the proceedings. These requirements are, however, ill-suited to the nature of injunctive actions.

4.4 Application in Practice

4.4.1 Administrative Enforcement

The number of consumer complaints filed with the ConsPC is usually indicated in the annual reports of the agency. For 2015 there were 20,453 written complaints and signals. On the basis of the complaints, 14,160 inspections were carried out and 1512 administrative acts establishing infringements were issued. Of the total number of complaints 10,703 concerned lack of conformity of goods and services; 2176—contracts concluded at a distance and unsolicited commercial communications and 5311—services of general interest like heating, water supply and electricity.[25]

In 2015 the ConsPC investigated 572 cases of allegedly unfair commercial practices and issued 199 cease-and-desist orders. Another major group of investigations related to distance selling. Finally, within the area of unfair terms in consumer contracts, the ConsPC analysed 156 standard contracts with altogether 12,291 contract terms, mostly concerning banking and financial services. Of these 827 contract clauses were declared unfair.[26] For 2014 the statistics reveals a somewhat lower number of complaints and enforcement activity.[27]

[25]Consumer Protection Commission, Annual Report 2015, p. 44.

[26]Consumer Protection Commission, Annual Report 2015, pp. 31, 37.

[27]Consumer Protection Commission, Annual Report 2014.

The aggregate amount of penalties imposed by the ConsPC in 2015 was BGL 1,640,977. The respective amounts for 2014 were BGL 1,653,610 (or approx. 800,000 Euro).[28]

4.4.2 Judicial Enforcement

Concerning judicial enforcement of collective consumer interests, according to the annual report of the ConsPC, in 2015 the Commission instituted 19 injunctive proceedings for protection of the collective interests of consumers, 16 of them about unfair terms in consumer contracts and 3 on unfair commercial practices. The injunctive actions on unfair terms of consumer contracts concerned foremost the sphere of tourist services, and electronic communication services.[29] In 2014 the ConsPC instituted 27 injunction proceedings, all of them on the basis of unfair terms of consumer contracts.[30]

It appears that the number of injunction proceedings has been steadily increasing during the last years. In a study of 2011 the total number of actions for injunction lodged by the ConsPC between January 2007 and August 2011 was reported to be 21 (2 in 2007, 3 in 2008, 5 in 2009, 9 in 2010 and 2 in 2011).[31]

Given the fact that the ConsPC in many situations has a choice between administrative and judicial injunction, one question is when the Commission prefers to take on the challenge of judicial enforcement instead of imposing the injunction itself. One can assume that judicial enforcement is more appropriate when the case involves more complex legal assessment and where the ConsPC wants to obtain a precedent-setting judicial decision. In its annual report for 2016 the ConsPC explains that it brings injunctive proceedings foremost in cases of unfair terms in consumer contracts, since it is only the court that can pronounce an unfair clause null and void and prohibit its use in the future. The Commission also turns to the court in situations of unfair commercial practice, when a violation persists despite a valid administrative injunctive order.[32]

As to injunctive actions brought by consumer organisations, the study from 2011 reported altogether 30 such actions in the period between 2007 and 2011. Eighteen actions were lodged by the Union of the insured persons in Bulgaria. Ten injunctive actions were lodged by the National League of Consumers of Services. One action in the sphere of energy supply was lodged by the Federation of Consumers. More recently, consumer associations have emerged that specialise in consumer litigation. One such organisation is the Association for Legal Assistance of Consumers. On its

[28]Consumer Protection Commission, Annual Report 2015, p. 6 and 2014, p. 7.

[29]Consumer Protection Commission, Annual Report 2015, p. 37.

[30]Consumer Protection Commission, Annual Report 2014, pp. 40 et seq.

[31]E. Alexiev, Country Report Bulgaria, Study on the application of Directive 98/27/EC on injunctions for the protection of consumers interests, codified by Directive 2009/22/EC (2011).

[32]Consumer Protection Commission, Annual Report 2016, p. 60.

website the association reports dozens of initiated injunctive proceedings on the basis of unfair standard terms in consumer contracts or unfair trade practices.[33] Other associations, like 'Active consumers' pursue instead a strategy of cooperation with the ConsPC, stepping in as supporting party in judicial proceedings instituted by the Commission.

4.5 Evaluation

Generally, administrative enforcement through a specialised public agency has the advantage that the agency can accumulate professional expertise in the field of consumer protection and bear the sometimes considerable costs of enforcement action before the courts (where applicable). By aggregating consumer complaints an agency gets a good idea about the markets that are dysfunctional and where most serious violations of consumer rights take place and can, at least in theory, ensure efficient enforcement.

Indeed, the Bulgarian ConsPC seems to be visible and well-known to consumers. It attracts a lot of complaints and engages actively in enforcement of consumer law. The Commission makes increasing efforts to inform consumers about their rights and its work is often highlighted in public media.[34]

However, a major disadvantage of public enforcement in Bulgaria is the lack of sufficient resources in terms of both funding and competent staff. As in the case of other Bulgarian public authorities, it is difficult to keep highly qualified staff because of the relatively low pay of public officials and the resulting high turn-over of employees. This may put into doubt the ability of the Commission to offer professional expertise. In addition, the budget of the Agency is modest.

Another major shortcoming is in my view that the ConsPC does not seem to have an established practice of long-term planning and a clear method for setting enforcement priorities. It rather follows consumer complaints and may thus not be able to identify and prioritise infringements with more pervasive and long-term negative consequences. Furthermore, the activity of the Commission seems often to be directed at penalising numerous small infringements instead of taking action in legally complex and risky cases, involving big economic interests.

If one looks at the legal regulation of administrative enforcement, there appear to be a number of unclear procedural rules that lead to overlapping or even conflicting competences and ultimately to fragmentation and inefficiency of enforcement. For serious infringements and if the companies have high turn-over and profit, the size of the penalties may not be sufficiently dissuasive.

[33]Information is available at http://zastitanapotrebitelite.com/.

[34]Consumer Protection Commission, Annual Report 2016, pp. 66 et seq.

5 Enforcement of Individual Consumer Rights

Individual consumers can pursue their consumer rights through a variety of actions before the competent courts, for instance for rescinding a contract and for compensation of damages, although the incentives and capacity for engaging in judicial proceedings are notoriously lacking.

5.1 Enforcement of Individual Consumer Rights Before the General Courts

The courts competent for consumer disputes in civil law cases are the general courts. Typically, given the low value of the lawsuit in consumer cases, this would be the district courts. There is no specialised procedure for consumer disputes, meaning that the general rules of the CCP apply.

5.2 Enforcement of Individual Consumer Rights as a Follow-on of Administrative Enforcement

A less conventional enforcement avenue is the recently granted right of consumers to rescind a contract that has been entered into as a result of an unfair commercial practice and to claim compensation for ensuing damages, as a follow-on action of an administrative injunctive order. The necessary condition is that the order is confirmed by a decision of the Supreme Administrative Court which has entered into force, or alternatively that the order is not appealed and has entered into force (Art. 68 m ConsPA).

5.3 Litigation Costs and Legal Aid

There is no special tariff or tax for consumer disputes, and no special exemption from taxes to the benefit of consumers. Neither are there special provisions on legal aid for consumers. The general rules of the Legal Aid Act of 2005 apply. The system of legal aid has generally been criticized as inefficient and intransparent.[35]

[35]See National report of the International Legal Aid Group, http://www.legalaidreform.org/national-legal-aid-systems/national-legal-aid-systems-by-country/item/50-legal-aid-system-in-bulgaria.

5.4 Enforcement in Practice and Evaluation

As a whole, judicial enforcement of individual consumer rights is not particularly efficient. The trust in the judiciary in Bulgaria is rather low and there is a wide-spread perception that courts are slow, inefficient and even corrupt. In the EU Justice Scoreboard Bulgaria consistently figures among the EU Member States with the lowest perceived independence of the judiciary.[36] Reforming the judiciary has also been a key point in the post-accession monitoring by the European Commission within the framework of the Cooperation and Verification Mechanism on Bulgaria.[37]

It is difficult, if at all possible, to find data on the average duration of a consumer dispute. However, excessive length of judicial proceedings is one notorious and much debated flaw of the Bulgarian judicial system. Analyses by the Supreme Judicial Council and the recently founded Judicial Inspectorate occasionally report cases that had not been decided for up to 20 years.[38] While these cases are rarely consumer cases, it can be assumed that if an action is filed before a general court and if the decision of the lower instance court is appealed all the way to the Supreme Court of Cassation, it can take several years before the case is finally decided.

Courts tend also to be quite formalistic, a tendency that according to commentators has increased recently. This attitude, in combination with statutes that are lacking on precision and clarity, especially in the procedural detail, often results in too restrictive interpretations and is one more obstacle to actually achieving true access to justice for consumers.[39]

Against this backdrop, it is not surprising that consumers rarely muster the resources and the resolve to initiate judicial proceedings. More often they turn with their complaints to the responsible public authority, namely the ConsPC. Nevertheless, there are recently attempts to use collective action, often with the help of consumer associations or activist attorneys (see below).

6 Alternative Dispute Resolution

ADR takes place in the form of conciliation commissions working within the auspices of the ConsPC and with the participation of business and consumer representatives. In addition, the ConsPC can appoint a mediator upon the request of a consumer. In 2015 the ConsPA underwent a reform to transpose the EU

[36]See 2016 EU Justice Scoreboard, pp. 35–36.

[37]Report from the Commission on Progress in Bulgaria under the Co-operation and Verification Mechanism, Brussels, 25 January 2017, COM (2017) 43 final.

[38]See Analysis of violations established by the Judicial Inspectorate of the right to have a case tried and decided within a reasonable time (1/10/2013–31/3/2014) and (1/4/2016–30/9/2016), available at http://www.vss.justice.bg/root/f/upload/6/10.pdf.

[39]See Chernev (2009) and Markov (2007), pp. 9 et seq.

Directive 2013/11/EU on alternative dispute resolution for consumer disputes (Directive on consumer ADR). The rules on conciliation commissions and on mediation now generally comply with the Directive.

6.1 Institutional Structure

The ADR mechanism with conciliation commissions is run by the public ConsPC, with the support and participation of business and consumer representatives. The Minister of the Economy sets up general and sectoral conciliation commissions as organs for ADR within the auspices of the ConsPC.

The general conciliation commissions act for settling domestic and cross-border disputes between consumers and traders concerning contracts on sale of goods and delivery of services. They are active in areas of the economy where no sectoral conciliation commission exists.

Sectoral conciliation commissions handle domestic and cross-border disputes between consumers and traders in sectors like energy, water supply, electronic communications and postal services, transport and financial services. Disputes between service providers and consumers of payment services are settled by the Conciliation Commission for Payment Disputes, run jointly by the BNB and the ConsPC.

The Chair of the ConsPC approves the list of chairs, vice-chairs and members of the general and sectoral conciliation commissions (Article 182(8) ConsPA). The chairs have to be jurisconsults or lawyers at the ConsPC. The members have to have a clean criminal and professional records and qualifications depending on the subject-matter of the disputes.

The general conciliation commissions are composed by a chair, one representative of a consumer organisation and one representative of an industry or trade association, or chamber of trade and commerce (Article 183 ConsPA). The chair of the conciliation commission appoints the members out of the list of approved members mentioned above.

The sectoral conciliation commissions are composed of three members. The chair is designated by the regulatory body in the respective sector. One member is appointed by the ConsPC and one member is a representative of a trade or industry association in the sector (Article 183a ConsPA).

6.2 Principles

Part II, Chapter 9 of the ConsPA sets out the principles for ADR applicable to resolution of domestic and transborder consumer disputes. The general and sectoral conciliation commissions have to follow the procedural rules for ADR of domestic and transborder disputes and have to comply with the principles of voluntariness,

expertise, independence, impartiality, transparency, effectiveness, fairness, freedom and legality.

6.3 Application in Practice

The work of the ADR bodies has not yet gained popularity among Bulgarian consumers. In 2015, the number of instituted dispute settlement procedures with the general conciliation commission was 426. The cases were mostly related to guarantees, consumer rights in connection with non-conformity of goods and services, unfair terms in consumer contracts, and other commercial practices. The dispute was successfully settled in 69 cases. In 272 cases, the procedure was terminated on grounds of non-appearance of the trader.[40]

In 2014 the number of instituted dispute settlement proceedings was 507. Settlement was achieved in 70 disputes, or 14% of the cases. Of these, 205 proceedings, or 36% of the cases, were closed because the trader did not appear before the Commission and did not send a representative.[41]

6.4 Evaluation

The ADR mechanism is promoted by the state, but there is relatively limited experience with it so far and the assessment is as a whole not very positive. In the 2014 Annual Report of the ConsPC the work of the conciliation commissions is critically evaluated as not particularly efficient. The main reason is the non-appearance of traders before the commissions. Following the current procedural design of the system, the chairpersons of the conciliation commissions have no other option but to close the case if the trader does not appear before the Commission (see Article 21, p. 2 Regulation on Conciliation Commissions). Given that the whole idea of out-of-court dispute resolution builds on voluntariness, the lack of interest and support on the part of traders is detrimental for the prospects of success.

[40]Consumer Protection Commission, Annual Report 2015, p. 41.

[41]Consumer Protection Commission, Annual Report 2014, p. 48.

7 Enforcement Through Collective Redress

Bulgaria introduced a legislative possibility for collective redress for infringements of consumer rights already in the 1999 ConsPA. However, these procedures remained largely unnoticed in practice. Only a few lawsuits were initiated and it proved generally cumbersome to achieve collective redress in the courts.[42]

The ConsPA of 2006 took over the provisions on collective redress from the old Act, introducing some changes to make the procedure more efficient. Still, following a major reform of Bulgarian procedural law and a new CCP, a wholly new regulation on collective actions was adopted, having the ambition of comprehensively governing all types of collective redress and not limited to consumer law. With the new CCP, the Bulgarian legislator opted for an unconventionally broad term of 'collective action', extending to injunctive actions, representative actions, as well as to the more classical group actions in the form of aggregating individual claims stemming from the same law infringement, usually associated with the American class action institute. Since injunctive and representative actions were already treated in Sect. 4.3 above, here, the attention will be on group actions aggregating individual consumer claims.

7.1 Forms of Collective Redress

7.1.1 Group Action by Consumer Organisations

Where damages have been inflicted on two or more consumers, a consumer association may bring an action on their behalf before the court for compensation of the damage sustained by the consumers, provided that: (1) the consumers can be identified; (2) the individual damages suffered by consumers are caused by one and the same producer or trader, and the injuries are of the same origin; (3) the consumer association has been authorized by an express power of attorney by at least two consumers to bring action for compensation on behalf of the said consumers, and to represent them in the proceedings (Article 187(1) ConsPA).

7.1.2 Collective Actions Under the Code of Civil Procedure

Chapter 33 CCP stipulates a general right of collective redress applicable not only to claims based on consumer law.[43] Pursuant to Article 379(1) CCP a collective action may be brought on behalf of persons who are harmed by the same infringement

[42] See Markov (2007) and Chernev (2009).

[43] On collective actions generally, see Chernev (2009) and Markov (2007).

where, according to the nature of the infringement, the circle of the persons harmed cannot be defined precisely but is identifiable.

The action can be lodged by individuals belonging to the group as well as by individuals and organisations representing the infringed collective interests. The opt-out principle applies, meaning that the decision extends to all who claim to have been harmed by the same cause and who have not stated that they will pursue their defence individually (Article 386(1) CCP).

At the same time, the CCP introduces a number of safeguards for preventing possible abuse of this right and possible harm to the individual consumer interest. The court is given broad discretion to control the procedure and the formation of the class. In particular, the court is empowered to *ex officio* check the capacity of the plaintiff to credibly and seriously represent the collective or group interest, including the ability to take on the litigation costs. The court can take adequate measures to secure a fair distribution of the awarded damages among the injured (Article 387 (1) CCP).

7.2 Procedural Rules for Collective Actions

Collective actions shall be examined by the district court acting as a court of first instance (Article 380 CCP). The person or organisation bringing a collective action has to specify the circumstances, which identify the circle of injured persons and the form in which publication of the bringing of the action is proposed.

The ruling of the court whereby the case is not admitted to examination shall be appealable by an interlocutory appeal (Article 382).

7.3 Application in Practice and Evaluation

Instances of group and collective actions for aggregated compensation of damages are relatively rare. The fact that the collective action under the CCP is of the 'opt out' type should in principle enable the forming of a class and the collective claiming of damages. However, there has been lack of clarity on a variety of issues, such as the mode of communicating the instituting of the proceedings, determining the court fee, ascertaining the capacity of the plaintiff to protect the injured interests and to represent the group, etc. These procedural details have been causing complications and confusion, giving rise to multiple interim appeals already at the stage of admissibility of the action, and lengthy procedures.

One problem that has produced ample difficulties in practice is related to the method for determining the value of the claim, which in Bulgarian procedural law is based on the material interest of the claim. The value of the claim is in turn decisive for the court fee and the attorney fees. In collective claims, the aggregate material interest is usually significant, something that leads to substantial value of the claim,

and respectively to very high level of court fees and attorney fees. Given the excessively high costs for bringing a collective action, courts have shown a tendency to find lacking capacity of the plaintiff to protect the harmed interest and to bear the costs and charges related to the case, and to interpret this as an obstacle for allowing the collective action.

Statistics for collective actions by consumer organisations or individual consumers is not readily available. The Supreme Court of Cassation has tried around ten cases concerning different actions for collective consumer redress in 2015. As mentioned above, recently there has been a trend of setting up of consumer associations or consumer groups in particular industry sectors, notably financial services, or services of general interest, with the specific aim of pursuing active litigation strategies. One such association is the above mentioned Association for Legal Assistance of Consumers, founded by attorneys specialised in litigation in defense of consumers' interests.[44] The Association has been behind a number of injunctive actions, but has also sought to bring group proceedings seeking compensation for damages to consumers. This activism may be a sign of gradual emancipation of consumers from the tutelage of the state and from reliance on public authorities. It is probably partly also an expression of consumers' disappointment of the ineffectiveness of public enforcement.

8 The Role of Consumer Organisations

The taking off of a grassroot consumer movement in Bulgaria has been a slow process, partly due to the legacies of state socialism.[45] The socialist state was all-pervasive and there was little room for spontaneous forms of citizen organisation. The years of transition have, despite expectations to the contrary, not brought about a break-up with this legacy, but have sustained the popular distrust vis-à-vis different forms of civic organisations and collective action. Even in this respect, the accession to the European institutions has played an important role, encouraging the building up of consumer associations and providing, albeit minimal, financial support for their existence.

Nowadays, there are a number of consumer organisations in Bulgaria. However, many of them are relatively week and lack sufficient resources and staff.

[44]Information can be found on the webpage of the Association http://zastitanapotrebitelite.com/.

[45]See Rose-Ackerman (2005) and Bakardjieva Engelbrekt (2009).

8.1 Legal Status and Requirements

The ConsPA defines consumer associations as not-for-profit associations which: (1) act exclusively in the best interest of consumers; (2) are not connected with any specific political party; (3) are economically independent of any producers, importers, traders or suppliers, and (4) are registered at the Ministry of Justice as not-for-profit associations designated for pursuit of public-benefit activities (Article 168(1) ConsPA).

As is evident from this provision, apart from economic and political independence and registration with the Ministry of Justice, there are no particular requirements for setting up a consumer organisation. However, certain rights and opportunities are only granted to so-called 'representative' consumer associations. Importantly, only representative consumer associations are eligible for financial support by the state and can nominate representatives in the National Council on Consumer Protection and in other consultative and decision-making bodies in the field of consumer protection.

To qualify as representative, a consumer association must have as its objective the protection of consumer rights and be registered as a not-for-profit association. More demandingly, it has to demonstrate that it takes effective public action for protection of consumer interests, which is assessed on the basis of: (a) actions brought for protection of the collective interests of consumers; (b) information campaigns; (c) magazines and specialized publications on consumer subjects; (d) assistance rendered for settlement of consumer disputes; (e) participation in meetings of advisory bodies concerned with consumer protection. Finally, to be recognized, an association has to have help-desks providing advisory services to consumers in at least one-third of the regional centres countrywide. This last requirement appears particularly difficult to meet for smaller and more specialised associations.

The procedure for being recognized as representative is quite strict. The association has to file an application with the Ministry of the Economy, showing that it meets the legal requirements. The Ministry issues a decision, which has to be renewed every 3 years (Articles 170a–170d ConsPA). The Ministry of the Economy is authorized to monitor the activity of consumer organisations and verify whether they genuinely meet the requirements. This relationship of dependence creates non-negligible tensions in the relations between the Ministry and some consumer associations.[46]

Furthermore, the Minister of the Economy sets out additional criteria for consumer associations, wanting to be recognized as 'qualified entities' for bringing an action for injunction for the protection of the collective interests of consumers.[47]

[46]Bakardjieva Engelbrekt (2009).

[47]Regulation № 1 of the Minister of Economy and Energy, St G No 89, of 3 November 2006.

8.2 Main Consumer Organisations

The oldest consumer organisation in Bulgaria is the Federation of Consumers, which existed and had some activity already during the time of the socialist economy. In the period of transition, the most active organisation that has established itself in the field of consumer information, advice and enforcement is the Bulgarian National Association (BNA) 'Active consumers'. It is also the only representative consumer organisation, currently approved by the Ministry.[48] BNA 'Active consumers' is member of BEUC, the umbrella organisations of European consumers with its seat in Brussels. It is also member of Consumers International, as well as of several other international organisations for cooperation between consumer associations.

8.3 Role in Consumer Law Enforcement

Consumer associations that are on the list of qualified entities, have the right to bring before the courts actions for cessation and prohibition of infringements on collective consumer interests (Article 186(1) ConsPA). Consumer associations are furthermore granted the right to file a representative action and group actions as explained above.

The list of qualified organisations under Article 164(1) p. 7 ConsPA includes currently eight associations.[49] Some of them, like the Federation of Consumers in Bulgaria, BNA 'Active Consumers' and the Association for Legal Assistance to Consumers, have indeed been quite active in the area of litigation.

9 Private Regulation and Enforcement

Similar to the situation in other post-communist countries, self-regulation in Bulgaria took off only with difficulty after the transition to market economy. Today, the National Council for Self-Regulation (NCS) is the main self-regulatory body in the area of advertising and commercial communication.[50] The Council was founded by some of the most important business associations in the sphere of advertising and media.

Among the members of the NCS are representatives of the advertising industry, which voluntarily accept the objectives and the By-Laws of the Council. The main objective of the Council is to unite the advertising industry around commonly defined rules of professional conduct in the area of advertising and commercial

[48]See Ordinance of the Minister of the Economy, No. RD-16-584/24.04.2017.

[49]See Ordinance of the Minister of the Economy RD-16-1053/10.12.2009, complemented by Ordinance No. RD-16-1630/22.11.2012.

[50]Information on the Council is available at http://www.nss-bg.org/about_us.php.

communications and a shared commitment to complying with these rules. The Council adopts, distributes and ensures the application of an Ethical Code aiming at fair competition and foremost at protection of consumers.

In 2009 the NCS adopted National Ethical Rules on Advertising and Commercial Communication. These rules were acknowledged as the relevant standard in the area of marketing and communication in TV and Radio by the Radio and Television Act. The Act obliges media service providers to comply with the Ethical Rules and with the decisions of the Ethical Commission of the NCS. Non-compliance with these decisions can lead to sanctions. In this way, a regime of co-regulation has been put in place.

The supreme governing body of the NCS is its General Assembly. The day-to-day work is led by a Management Board and a Secretariat. The Management Board appoints an Ethical Commission, an Appellate Commission and an Expert Group for interpretation of the ethical rules.

The National Council for Self-Regulation (NSCR) is member of the European Advertising Standards Alliance.

While these recent initiatives are important steps in the right direction, the Bulgarian business community has still a long way to go before being able to show genuine and active engagement in establishing and enforcing norms of ethical and responsible market conduct.

10 Conclusion

Consumer protection in Bulgaria has undergone considerable development during the last two decades, starting from sheer non-existence to a full-fledged system with detailed legislation, ambitious goals and an institutional framework encompassing both public and private bodies and enforcement avenues. This development can be positively assessed and has undoubtedly contributed to improving the position of Bulgarian consumers. Although the system has a number of shortcomings, one should not leave out of sight the important positive transformation that has taken place.

At least in theory, the existing regulative regime opens rich possibilities for both public and private enforcement of consumer rights. Still, the focus is predominantly on public enforcement, with one central public authority for protection of consumer interests, the ConsPC. The most positive feature of the Commission is its relative accessibility. The ConsPC seems receptive to consumer complaints and tends to pursue complaints through administrative or judicial action. There is generally, a tendency among Bulgarian consumers (probably inherited from the socialist past) to expect public authorities to solve all the problems and therefore an accessible public authority is an important way of pooling consumer complaints and taking adequate enforcement action.

Among the main shortcomings of public enforcement are the limited capacity, expertise and resources of the ConsPC and the likewise limited expertise and resources of administrative courts. While the Agency makes sincere efforts to

monitor the market and enforce the law, the sanctions imposed may not be sufficiently dissuasive, especially for big companies, which make substantial profit from violating the law. For the future, it may be worth considering defining the sanctions in terms of percentage from the trader's turn-over in cases of more serious violations.

Furthermore, in its enforcement activity the ConsPC seems to be chiefly guided by consumer complaints and it is difficult to identify a more theoretically founded and carefully designed strategy for setting enforcement priorities. Thus, the activity of the Commission appears often to be directed at penalising numerous small infringements that do not involve factual and legal complexity. Instead, the ConsPC will be well-advised to focus on those infringements that cause serious and widespread consumer harm.

Despite the predominance of administrative enforcement, there are also promising opportunities for collective action under the ConsPA and CCP. These additional avenues of enforcement constitute an important complement to the public enforcement system. They introduce a positive dynamic, by occasionally mobilizing consumer interests for defending a common cause.

Yet, while the rules on collective action are generously defined in the CCP, a number of incongruences in the legal regime and all too formalistic attitudes of the courts render the practical application difficult. To reach their full potential, the rules on collective action in the ConsPA and the CCP, and in particular the rules on determining litigation costs, should be clarified and coordinated better in order to avoid confusion and to make the rules more easily applicable in practice.

More generally, the judicial system in Bulgaria is subject to serious criticism for ineffectiveness, lack of competence and even corruption. Judicial proceedings can take several years before a case reaches a final judgment, which makes the enforcement of consumer rights in court neither easy, nor attractive.

Self-regulation is not well-functioning either, the major drawback being the disinterest and lack of cooperation on the part of traders. Sincere attempts to engage representatives of the business community are required in order to boost the confidence in and the efficiency of ADR mechanisms.

In conclusion, serious efforts are made for improving consumer law enforcement in Bulgaria. The system is still far from efficient and satisfactory, but the continuous integration of Bulgarian public and private consumer enforcement bodies in the closely meshed European networks of peer institutions, holds promise for increased effectiveness of consumer law in this country.

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Enforcement and Effectiveness of Consumer Law in Chile: A General Overview

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1 Introduction

This paper is intended to provide a general view and assessment of the enforcement and effectiveness of Consumer Law in Chile. To that end, not only are the legal and administrative regulations described, but empirical data are also included, where available, in order to provide a depiction of both the legal framework and the law in action.

2 Legal Framework

Consumer law is a relatively young subject in Chilean law. Formally, the first piece of legislation that expressly mentioned consumer rights was Ley (Act) N° 18.223 of 1983, but that Act was far from being a systematic and substantive instrument for consumer protection, being concerned mainly with the sanctions applicable for certain economic crimes.

The milestone for consumer protection was the enactment of the Consumer Protection Act in 1997 (Ley N° 19.496 sobre protección de los derechos de los

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consumidores). The enactment of the Act entailed the development of consumer policies by the State, particularly with the reformulation of the National Service of the Consumer (Servicio Nacional del Consumidor—SERNAC) as the public agency responsible for the enforcement of consumer law, the promotion of consumer rights and the development of actions for the information and education of the consumer.

Although the President's message which introduced the Consumer Protection Act into Parliament for discussion did not mention expressly the sources of inspiration of the Act, the influence of comparative sources is evident in significant aspects of the Act and its subsequent amendments. Thus, it is clear that an important source of inspiration was the now repealed Spanish Ley 26/1984 General para la Defensa de los Consumidores. In particular, the rules on unfair terms were heavily influenced by EU consumer law, via Council Directive (EEC) 93/13 of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29. This is very clear if we compare the text of the general clause of Ley N° 19.496 Article 16 g) with the text of Unfair Terms Directive 93/13 Article 3. The "black list" system is also a reflection of the influence of EU consumer law on this subject. Likewise, the introduction and regulation of collective actions were influenced by U.S. and Brazilian consumer law. For instance, the distinction between collective and diffuse interests was adopted in the light of Brazilian consumer law.[1]

The main features of Ley N° 19.496 are the following[2]:

(a) Consumers are defined as "those natural or legal persons that, by any onerous juridical act, purchase, use or enjoy, as final user, goods or services" (Ley N° 19.496 Article 1.1).
(b) The Act is not applicable to services provided by independent professionals. Ley N° 19.496 Article 2 indicates the wide spectrum of contracts that it regulates: (a) contracts that are commercial for the provider[3] and civil (private) for the consumer; (b) the selling of sepulchres or graves; (c) contracts in which the subject-matter is the use of land for short periods of time for amenity or holidays, as timeshare contracts; (d) contracts with educational institutions, including universities; (e) house building contracts; and (f) contracts with health institutions. In the case of education, building and health contracts, the application of the Act is subject to important restrictions, mainly related with the quality of the services that are provided in these areas of the economy, which cannot be challenged via consumer law but through the general private law.
(c) The Act adds that its provisions will not be applicable to matters regulated by special legislation, unless the specific issue is not covered by that legislation, and with regard to the procedure on collective actions and the individual right of the consumer to claim damages when the special legislation does not provide appropriate procedures.[4]

[1] See especially Aguirrezabal (2006), p. 69.

[2] For a detailed study of the Consumers' Protection Act, see de la Maza and Pizarro (2013).

[3] In this paper, the expression provider will be preferred over other similar terms (e.g. "trader"), following the terminology used by the Consumers Protection Act ("proveedor").

[4] For an analysis of the scope of application of the Act, see Momberg (2004), p. 41.

(d) Interestingly, Ley N° 19.496 Article 3 establishes not only consumers' rights, but also consumers' duties. Consumers have (a) the right to freely choose goods or services; (b) the right to be accurately informed in a timely manner and the duty to inform themselves responsibly; (c) the right not to be discriminated by suppliers; (d) the right to safety, health and the protection of the environment, and the duty to avoid risks; (e) the right to adequate reparation and compensation for both pecuniary and non-pecuniary losses; and (f) the right to education for responsible buying and the duty to buy in legally established commerce.
(e) The right of withdrawal is regulated in Ley N° 19.496 Article 3bis, allowing consumers to unilaterally terminate the contract within 10 days in the cases of sales concluded during meetings especially organized for that purpose by the supplier; and in contracts concluded electronically or by any form of distance communication. However, in the latter case, the provider can exclude the right of withdrawal by an express provision.
(f) Ley N° 19.496 Article 4 establishes that consumers' rights cannot be waived.
(g) Unfair contract terms are regulated following the model of a black list plus a general clause (Ley N° 19.496 Articles 16 and 17). Thus, Article 16g provides that, in a contract of adhesion, a clause or provision will not produce any effect when "Against the requirements of good faith, under objective parameters, it causes a significant imbalance in the parties' rights and obligations arising under the contract. For this, the purpose of the contract and the special and general legal provisions that regulate it must be considered."[5]
(h) Financial contracts and services are specially regulated (amendment introduced by Ley N° 20.555 of 2011).
(i) In cases of non-performance by the provider, the consumer is provided with the right to demand repair of the good, its replacement or the return of the price paid.
(j) The Act also regulates issues related to information and marketing, sales, offers and consumer credit.
(k) Importantly, the Act regulates the procedure both for individual and collective actions.
(l) Finally, the Act provides the general administrative regulation of SERNAC and consumer organizations.

The Act is technically "special legislation", therefore the Civil Code applies as default law, particularly in matters related to consumer contract law and damages (tort).

With regard to other instruments of special legislation, although they may include some provisions relevant to consumers, the trend is to incorporate the regulation of consumer protection in specific areas (e.g. financial services) in the Consumer Protection Act. Additionally, courts have interpreted the scope of application of the Act very broadly, including a wide range of issues under its sphere of protection, even when they are regulated in other pieces of specific legislation. Thus, it has been

[5] See Barrientos (2014).

decided that the Act is applicable to claims related with public utilities, transport, educational services, medical services and insurance.[6]

The Act has been subject to a series of amendments. The most important amendments, which also reflect shifts in consumer policy, are the following:

(a) Ley N° 19.955 of 2004, which reformed the rules on the scope of application of Ley N° 19.496, and introduced the right of withdrawal, rules on electronic contracts, a general clause on unfair terms and, for the first time in Chilean legislation, the regulation of collective actions.
(b) Ley N° 20.555 of 2011, which introduced a special regulation for standard terms in financial services contracts and the so-called "Sello SERNAC", a certification granted by SERNAC to financial services contracts attesting that the contract complies with the provisions on consumer protection.

The two reforms mentioned implied a shift in consumer policy, in particular with regard to the actions adopted by SERNAC. Thus, one of the main goals of SERNAC since then has been the control and sanction of unfair terms, both through collective actions and collective mediations. Financial services have been particularly under the scrutiny of SERNAC, with an increase in the control of standard terms in that area; education on financial services has been promoted, mainly directed towards vulnerable consumers.

3 Enforcement by Administrative Authorities

3.1 The National Service of the Consumer (SERNAC)

The main administrative authority responsible for the enforcement of consumer law is the National Service of the Consumer (SERNAC).

The legal basis for the establishment of SERNAC is Ley N° 19.496 (Articles 57–60). According to this regulation, SERNAC is a specialised agency for the enforcement of consumer law. Its main functions are to supervise compliance with the Consumer Protection Act and other legal provisions related with consumer protection, to promote and inform the rights and duties of consumers, and to perform activities of information and education for consumers.[7] SERNAC is exclusively responsible for the enforcement of consumer law and has no competence in other areas of law, for instance, competition law, insurance law or environmental law, etc. The role of SERNAC should not be underestimated: a study has shown that 78.5% of

[6] See Momberg (2004).
[7] Article 58.

persons consulted in a poll declared that they were aware of the existence of SERNAC.[8]

For administrative purposes, SERNAC is a decentralised institution with presence in all the regions of the country, with legal personality and with its own budget. Nevertheless, it is subject to the supervision of the President of the Republic through the Ministry of Economy.[9] Its superior body is the National Direction, presided by the National Director.

Ley N° 19.496 Article 59 provides that the National Director of SERNAC must establish the organization of the agency. The Director in office set up the current organization of SERNAC through Resolution No. 1339 of 9 September 2015.[10] Subject to the Director are the Cabinet, the Legal and Financial Consumer Sub-direction, the Sub-direction of Management and Territory, the Department of Strategic Communication, the Strategic Planning and Quality Team and the Internal Auditors' Team. A detailed overview of the functions of each body of the organization can be found on the SERNAC website, www.sernac.cl.[11]

3.2 SERNAC and the Enforcement of Consumer Law

Ley N° 19.496 Article 59 expressly authorizes SERNAC to receive complaints by consumers against providers, establishing a special administrative procedure. Formally, SERNAC acts as mediator in this procedure, the procedure being voluntary for the provider. SERNAC notifies the complaint to the provider, and if the provider replies to the complaint, SERNAC will propose an agreement. The procedure has a compulsory legal period for resolution of 25 working days. However, the average time for the resolution of complaints during 2015 was 15 working days.[12]

The administrative procedure described above is one of the main tools for consumer redress in Chile. According to the SERNAC Public Report of 2015, during

[8]See http://www.sernac.cl/wp-content/uploads/2013/12/Resumen-Ejecutivo-Encuesta-de-percepci%C3%B3n-2014-enero-2015.pdf. The Public Address of the Director of SERNAC states that during 2015, SERNAC had more than 18,000 reports or appearances in the media and there were more than 2,200,000 visits to the institutional webpage www.sernac.cl. It is also detailed that SERNAC released 173 studies and reports plus 11 Financial Bulletins during that period. There is a dedicated webpage on education for consumers, www.sernaceduca.cl. SERNAC also organizes training activities for directives of consumer organizations. Finally, with regard to financial education, the Public Address states that during 2015, 1139 educational activities were organised, with more than 98,000 participants.

[9]Article 57.

[10]Available at http://www.sernac.cl/transparencia/archives/2016/2/pdf/resolucion_n_1339_2015.pdf.

[11]Organization chart SERNAC, available at http://www.sernac.cl/transparencia/archives/2016/2/pdf/resolucion_n_1339_2015.pdf.

[12]SERNAC, 4 May 2016, Request of information N° AH009T0000193 <elisa.moralesortiz@gmail.com> 4 May. no-responder@portaltransparencia.cl.

that year the agency received more than 270,000 complaints. Of those complaints, 53% were resolved because the provider accepted the complaint of the consumer; 32% were terminated with no positive answer from the provider; in 12% the provider did not appear; and 3% were classified as "other cases".[13]

Additionally, within the framework of its powers of investigation and information, SERNAC issues reports about the behavior of providers, specifying the number of complaints received in a period. These reports are available on the SERNAC website.[14] For example, in January 2014, "The ranking of complaints in telecommunications" was published. This included the number of complaints in the telecommunications market in a certain period and territory.[15] SERNAC not only issued specific reports, but also general reports such as the "Statistical Report complaints" in which it reports the number of complaints admitted during 2014, classifying them according to territory, markets, products, etc.[16] The reports for the first semester of 2014 and the first semester of 2015 show that the economic areas with most complaints are retail, telecommunications and financial services.[17] The most frequent motives for consumer's complaints were non-compliance with contractual terms and non-compliance of information duties.[18]

3.3 *Advantages of the Administrative Procedure Before SERNAC*

The main benefits of enforcing consumer rights before SERNAC are the time and cost associated with the resolution of the conflict. As stated above, the average time for the resolution of a complaint before SERNAC is 15 working days.[19] The procedure is free of cost for the consumer and the complaint can be filed via internet.

However, this administrative procedure also has some limitations. As mentioned earlier, SERNAC's role is only that of a mediator between the parties; furthermore, the procedure is voluntary for the provider, so he has no obligation to reply to the

[13]SERNAC, Cuenta Pública Participativa Gestión 2015, available at www.sernac.cl/wp-content/uploads/2014/03/Cuenta-P%C3%BAblica-Participativa-Gesti%C3%B3n-2015.pdf.

[14]Available at www.sernac.cl/category/estudios/rankings-de-empresas-y-servicios/.

[15]Available at www.sernac.cl/sernac-y-subtel-dan-a-conocer-ranking-de-reclamos-en-el-mercado-de-las-telecomunicaciones/.

[16]Available at www.sernac.cl/wp-content/uploads/2014/09/Reporte-1er-semestre-reclamos_2014.pdf.

[17]SERNAC, Ranking de Respuesta de Proveedores 2015, First Semester 2015 – First Semester 2014, October, 2015, Department of Studies and Intelligence, available at www.sernac.cl/wp-content/uploads/2015/11/Ranking-de-Respuesta-de-Proveedores.pdf.

[18]SERNAC, 9 May 2016, Request for information N° AH009T0000184 <elisa.moralesortiz@gmail.com> 9 May. no-responder@portaltransparencia.cl.

[19]SERNAC, 4 May 2016, Information request N° AH009T0000193 <elisa.moralesortiz@gmail.com> 4 may. <no-responder@portaltransparencia.cl>.

complaint or to appear before SERNAC. Inaction implies no adverse consequences for the provider. If the consumer and the provider reach an agreement, the document will have the merit of an extrajudicial agreement. The consumer is prevented from initiating judicial procedures for the same cause of action, but the agreement gives him no right of execution. Therefore, if the provider does not comply with the agreement, the consumer will have to initiate a judicial (declarative) action to obtain redress.

3.4 The Role of Other Public Agencies

There a number of public agencies in charge of the supervision of specific sectors. However, they are not particularly designed and organized to deal with consumer enforcement, although most of them have the authority to impose fines on providers, in cases of infraction of legal or administrative provisions, which may include provisions dealing with consumer issues.

The main characteristics of these agencies are that they are public and autonomous, and that their Directors are appointed by the President of the Republic. Their main function is to supervise the activity of businesses and providers that are under their scope of competence.

The main supervisory agencies are:

- Superintendencia de Bancos e Instituciones Financieras (SBIF—Superintendence of Banks and Financial Institutions)
- Superintendencia de Valores y Seguros (SVS—Superintendence of Securities and Insurance)
- Superintendencia de Electricidad y Combustibles (SEC—Superintendence of Electricity and Fuels)
- Superintendencia de Servicios Sanitarios (SISS—Superintendence of Sanitary Services)
- Subsecretaría de Telecomunicaciones (Subtel—Sub secretariat of Telecommunications).

Details about the role of these agencies in consumer law enforcement are explained later in this paper, in relation to ADR redress mechanisms (see below Sect. 5).

4 Enforcement by Courts

4.1 Structure of the Chilean Judicial System

The structure of the judicial system in Chile is based on a Supreme Court ("Corte Suprema"), 17 Courts of Appeals ("Cortes de Apelaciones") and a Constitutional

Court ("Tribunal Constitucional") as superior courts. The Supreme Court is based in Santiago, has 21 judges and operates in three or four separate panels. It is the court of last resort and the highest appeal court in Chile.[20] The Constitutional Court is an autonomous court that is not under the direction of the Supreme Court. It has 10 judges and its main mission is to control the constitutionality of laws.[21]

At the lower levels of the hierarchy, there are "Juzgados de Letras", which generally hear non-criminal disputes, and specialized criminal courts ("Juzgados de Garantía" and "Tribunales Orales en lo Penal"). There are also specialized courts that solve, among other areas, family law ("Juzgados de Familia"), labor law ("Juzgados de Letras del Trabajo" and "Juzgados de Cobranza Laboral y Previsional"), and tax law ("Tribunales Tributarios y Aduaneros").[22]

4.2 Individual Consumer Disputes

In Chile, individual consumer disputes are heard by "Juzgados de Policía Local" (JPL). These courts are not part of the judicial system ("*Poder Judicial*") but come under the supervision of the competent Court of Appeal. The Juzgados de Policía Local are non-specialized courts. In general, these courts hear traffic offences and violations of other municipal regulations.[23] The Consumer Protection Act specifically establishes that all individual actions arising from the Act will be heard by these courts (Article 50 A). If the amount of the dispute (according to the claim) is less than 10 UTM (around 650 US dollars at current rates), there will be no appeal against the court's decision (Article 50 G of Ley N° 19.496); while if the amount is more than 10 UTM, the court's decision can be appealed before the Court of Appeal.

Ley N° 19.496 Article 50 provides that a consumer whose rights have been infringed can demand, in the same procedure, the imposition of a sanction on the seller or supplier, the annulment of any abusive clause in the contract, the performance of the contract, a judicial order to stop the violation of a right, and adequate compensation for losses. The Act establishes a simplified procedure for consumer disputes, in which the consumer can directly address the court (JPL). Assistance of a lawyer is not required to make a claim or to participate in the proceedings, unless it is a collective action procedure (Article 50 C).

[20]It is the Court of last resort mainly through "recurso de casación", and the last appeal court with habeas corpus and "recurso de protección". See Código Orgánico de Tribunales, Articles 98 and 100.

[21]Chilean Constitution, Article 93, available in English at www.constituteproject.org/constitution/Chile_2015?lang=en.

[22]Código Orgánico de Tribunales, Article 5.

[23]Ley N° 15.231 of 1978, Article 13.

In principle, there are no court tariffs or taxes to be paid. However, the court may deem the claim to be 'reckless' (*temeraria*), in which case the consumer will be fined (Article 50 E).

Since there are no court tariffs or taxes, and the assistance of a lawyer is not required to make a claim in court, legal aid is not specifically offered to consumers. However, a consumer with financial difficulties could potentially ask the "Corporación de Asistencia Judicial" for legal aid. This institution provides free legal aid to deal with non-criminal cases. The assistance is provided by law graduates who are receiving training to become lawyers.

4.3 Advantages and Limitations of Judicial Enforcement: Individual Consumer Disputes

The system offers two main advantages for individual claims. First, the procedure is simplified, and therefore should be resolved in less time than an ordinary legal claim. Secondly, the fact that the procedure does not require the assistance of a lawyer allows consumers easier access to the courts to make a claim.

However, paradoxically the advantage of a simplified procedure could become at the same time its main disadvantage, mainly because JPL are not specialized courts in consumer law. Even today, when in practice all JPL judges are lawyers, no professional training is required for appointment to the position and most are appointed part-time. Also, the fact that no legal assistance is required to appear before the court can be detrimental to the consumer if, on the other side, the provider is assisted by a lawyer. Furthermore, if the dispute reaches the Court of Appeal, the length of the procedure may increase considerably. At the same time, it has been suggested that SERNAC should have more prerogatives, because many consumers are reluctant to start a judicial procedure if the provider has not settled the case during the previous mediation process.

4.4 Collective Redress

Ley N° 19.496 recognizes a form of collective redress in Articles 51–54. It was introduced in 2004 by an amendment to Ley N° 19.496 (Ley N° 19.955), and was later modified in 2011 (Ley N° 20.543). The regulation follows the Brazilian model of the protection of collective and diffuse interests (Lei N° 8.078 of 1990), or supra-individual interests.[24]

[24]See Aguirrezabal (2006).

Ley N° 19.496 provides a special procedure for collective redress. The competent court for these disputes is not the Juzgado de Policía Local, but rather the ordinary civil courts ("Juzgados de Letras").

According to Article 51, the procedure is applied in cases in which the consumers' collective or diffuse interest is involved, and can be initiated by:

(a) SERNAC.
(b) A consumers' association established at least 6 months before the claim is made, and authorized by its assembly.
(c) A group of 50 or more consumers that have the same collective interest affected.

The court will apply an admissibility test of the collective action, related with its formal requirements. If the court deems it admissible, the plaintiff(s) must publish a notice to the public that the collective action has been made, giving the opportunity to any consumer involved to participate in the proceedings (Article 53).

The court's verdict has an *erga omnes* effect, in the sense that any consumer affected by the same facts of the case can make a claim for the compensatory damages or other reparatory mechanisms ordered by the court (Article 54).[25] There is a deadline of 90 days after the verdict is given to present these claims (Article 54 C).

In recent years, collective actions have been extended to cover particular economic areas in which consumers' rights can be seriously affected. Thus, Decreto con Fuerza de Ley N° 458 of 1975 (Ley General de Urbanismo y Construcciones) Article 19 and Ley N° 20.945 of 2016, which amended different legal rules on competition law, have introduced the possibility for consumers to bring collective actions for infringement and damages in matters related with construction, housing and competition. Remarkably, in both cases, consumers are allowed to claim moral or non-pecuniary damages, something that is not possible under the general rules on collective actions provided by Ley N° 19.496.

The number of cases initiated annually shows that the procedure has been used relatively often (for example, 28 cases were initiated in 2014), and the number is increasing steadily.[26] However, consumers' associations claim that the results are unsatisfactory, mainly because the cases can take a very long time to be solved, and they might even end up in the Supreme Court.[27]

[25] See Aguirrezabal (2010), p. 99.

[26] See below Sect. 4.6.

[27] For instance, Conadecus (a consumer association) claims that the first case of collective action in Chile, raised against the State Bank (Banco del Estado) took 8 years to be solved. E Carabantes and K Cárcamo, Las demandas colectivas en Chile (2014), http://www.conadecus.cl/conadecus/wp-content/uploads/2014/12/Documento-base-final-Demandas-Colectivas-corto.pdf.

4.5 Sanctions

In individual procedures, consumers are entitled to recover both pecuniary and non-pecuniary losses suffered as a consequence of the breach of consumer law (Ley N° 19.496 Article 20), following the general rules of civil liability. Regarding sanctions, Ley N° 19.496 Article 24 establishes a general maximum for a pecuniary fine that the JPL can order for any breach of consumer law, if there is no other applicable specific fine for the breach: 50 UTM (around $3000 US dollars).

However, art 24 establishes a higher amount for cases in which advertising laws have been infringed (false or deceptive advertising). In these cases, the maximum fine could rise to 750 UTM (around $50,000 US dollars). And if the false or deceptive advertising was connected with features of products or services that can cause harm to the health or safety of the population or the environment, the maximum fine is 1000 UTM (around $66,000 US dollars).

Article 23 also establishes a special fine in the case of public events, including sport and artistic shows, in which the seller offers more tickets to the public than the real places available. In these cases, the seller could be fined between 100 and 300 UTM (around $6000 US dollars and $18,000 US dollars).

In all of these cases, the final amount of the fine is determined at the court's discretion within the maximum fixed by the law, taking into account the value of what is under dispute, the objective parameters that define the seller's professional duty, the extent of the asymmetry of information between the defendant and the victim, the profits that the defendant may have obtained with the breach, the severity of the harm caused, the risk that the breach involved to the victim or the community and the defendant's economic situation.

Since the courts, and not SERNAC, are responsible for imposing the sanctions, it is not possible to report this information accurately. However, we can assume that the most common form of sanction ordered by courts is the general fine for breaches of consumer law established in Article 24, with a maximum of 50 UTM (around $3000 US dollars), along with any compensatory damages to the victims.

In theory, sanctions should play a relatively satisfactory role in deterring breaches of consumer law. However, not all breaches of consumer law go to court. As mentioned, many of them are settled with the help of SERNAC as mediator. In these cases, the disputes will simply not come before a court and therefore, no sanctions will be imposed (since SERNAC cannot impose any fine on the providers). In view of this, current reform projects are suggesting that the consumer agency should be allowed to impose the sanctions directly on the sellers, which should increase the deterrent effect of sanctions.

Consumer legislation does not contemplate criminal sanctions for breaches of consumer law, only the fines mentioned above. Providers or merchants can only be imprisoned if they incur criminal liability according to the crime of fraud established in the Penal Code or other special legislation.[28]

[28]See Código Penal de Chile, Article 467: "Whoever defrauds another regarding the substance, quantity or quality of the goods delivered by virtue of a binding title, will be punished".

4.6 Statistics

The INE (National Statistics Institute), the agency responsible for official statistics in Chile, issues an annual report called "Justice", containing the statistics of the judicial system during the previous year. This contains the information collected by the courts that has been processed and systematized by INE.

In that report, the Institute specifies the number of disputes brought before the courts, with two items relating to disputes over consumer rights: the collective actions brought before the ordinary courts and the individual actions brought before local courts (Juzgados de Policía Local—JPL).

According to INE statistics, 105,918 consumer disputes were initiated in the period 2005–2014. It must be noted that the statistics from 2005 to 2010 show only information on individual actions, although collective actions were introduced in Chile in 2004.[29]

Another interesting figure is the number of disputes in which SERNAC has intervened in accordance with their authority to ensure compliance with consumer law. As stated in art. 58 of the Consumer Protection Act, SERNAC can take part in legal proceedings involving the general interests of consumers.[30] According to information provided by SERNAC, the agency participated as a party in 1123 disputes initiated during 2015, 676 of which were resolved.[31] The information can be complemented with data provided by SERNAC relating to the disputes in which it has intervened in defence of the general interest of the consumers, but limited to the period between 2011 and 2014. There were 4597 such disputes during the period, of which 3204 were resolved.[32]

In the case of individual actions, the general information provided by INE does not distinguish the matter of the dispute resolved. It is therefore not possible to identify how many consumer disputes were resolved over a given period of time.[33]

The number of collective actions has increased progressively since their introduction in 2004. Thus in 2011, the number of collective actions initiated was 10, while in 2015 the figure had risen to 31.[34] The "Justice" report states that

[29]Ley N° 19.955 of 2004 which modifies Ley N° 19.496.

[30]Ley N° 19.496 Article 58g).

[31]This information can be accessed via the procedure for requesting public information established in the Act on Access to Public Information: Act 20.285 of 2008, on access to public information. Information request N° AH009T0000184 <elisa.moralesortiz@gmail.com> 9 May. <no-responder@portaltransparencia.cl> [request: 9 May 2016].

[32]Servicio Nacional del Consumidor, 9 May 2016, Information request N° AH009T0000184 <elisa.moralesortiz@gmail.com> 9 May. <no-responder@portaltransparencia.cl> [request: 9 May 2016].

[33]Instituto Nacional de Estadística, 4 May 2016, Information request N° AH007T0001358 <elisa.moralesortiz@gmail.com> 4 May. <no-responder@portaltransparencia.cl>.

[34]The complete figures for collective actions initiated from 2011 to 2015 are: 2011, 10; 2012, 6; 2013, 18; 2014, 28; and 2015, 31.

12 of those disputes were resolved during 2015, with a total of 37 collective actions resolved during the period 2011–2015.

5 Alternative Mechanisms for the Resolution of Consumer Disputes (ADR Mechanisms)

In Chile, ADR consumer protection mechanisms are provided either by statute or by the private regulations of providers' organizations.

5.1 ADR Mechanisms Provided by the Consumer Protection Act

As mentioned above, SERNAC has the authority to deal with individual complaints by consumers and start a mediation process, in which it notifies the complaint to the provider. The aim is for the provider to voluntarily propose one or more possible solutions, and SERNAC promotes an agreement between the parties based on the provider's reply.[35]

SERNAC also deals with "collective mediations". This type of mediation is not regulated by statute, but it has been interpreted that SERNAC has the authority to start these procedures based on its duty to safeguard the protection of consumers' rights, including their collective and diffuse interests.[36] This procedure starts with an official communication by SERNAC to the provider, the aim of which is to find an extrajudicial solution to the situation of infringement of the consumer's rights.

In both cases (individual and collective mediations) the provider's participation in the procedure is voluntary. If an agreement is reached, the consumers are prevented from starting judicial procedures based on the same infractions or facts.

Since SERNAC's main mission is the protection of consumers' rights, providers usually criticize its role as mediator because of a presumed lack of impartiality. However, the position of consumers as weaker parties justifies the intervention of SERNAC as a means to counterbalance the asymmetries between providers and consumers.

In the field of financial services, the Consumer Protection Act established the figure of financial mediators and arbitrators, who have the authority to deal with complaints of financial consumers when the internal customer services of the banks

[35]Ley N° 19.496, Article 58f).

[36]Contraloría General de la República. División de Coordinación e Información Jurídica. Resolution number 94206N14, 04-12-2014, www.contraloria.cl/LegisJuri/DictamenesGeneralesMunicipales.nsf/FormImpresionDictamen?OpenForm&UNID=46361CAF8226F35C84257DAA004CC7E3.

or financial institutions have not satisfactorily dealt with the consumer's complaint. However, again, these mechanisms are voluntary for the provider of financial services, and it has been used only once, in the so called "La Polar affair", to deal with the massive complaints linked to that financial scandal.[37]

5.2 ADR Mechanisms Provided by Private Regulations

(a) In the insurance market, the Insurance Companies' Private Regulation Board (Consejo de Autorregulación de las Compañias de Seguros) has established the "Ombudsman of the Insured" (Defensor del Asegurado), whose main function is to find solutions to conflicts derived from the performance of an insurance contract or other services provided by insurance companies.[38]

The insured party can also request information and make complaints to the Superintendence of Securities and Insurance (Superintendencia de Valores y Seguros—SVS). The SVS communicates the complaint to the insurance company, and informs the insured party of the result of the claim. This procedure does not prevent the parties from making a judicial or arbitral complaint.[39] Strictly speaking, this is not a dispute resolution mechanism but more a communication channel between the parties. The SVS may also act as arbitrator if the parties agree to subject the dispute to this procedure.[40]

(b) In the financial services market, the Association of Banks and Financial Institutions has established the "Office for the Defence of the Client" (Defensoria del cliente bancario). This is an independent body, the function of which is to answer the complaints and requirements of clients of banks that are party to the Association, ensuring that the client will receive an independent resolution by means of arbitration.[41]

Additionally, one of the functions of the Superintendence of Banks and Financial Institutions (Superintendencia de Bancos e Instituciones Financieras—SBIF)[42] is to deal with the complaints of banking clients, and if necessary require information about the case from the bank. With the reply provided by the bank, the SBIF gives a written report to the client. The aim of this procedure is to give a satisfactory explanation to the client's complaint and to check whether the bank has committed any administrative infraction; however, the SBIF report does not have the value of a

[37]Primer Informe de Evaluaciones Sistema de Atención al Cliente, Mediación Y Arbitraje, 2p, www.sernac.cl/wp-content/uploads/2014/06/Primer-Informe-Evaluaciones-SMA-web.pdf.

[38]Available at www.ddachile.cl/home.asp.

[39]Available at www.svs.cl/mascerca/601/w3-article-1244.html.

[40]Available at www.svs.cl/mascerca/601/w3-article-1244.html.

[41]Available at www.defensoriadelclientedeabif.cl/Sitio/QuienesSomos.aspx.

[42]Both the SVS and the SBIF are public watchdogs that can be considered as independent and impartial with regard to the interests of consumers and traders.

judicial or administrative decision. It is therefore not mandatory for the parties, and any of them has the right to go to court if it is not satisfied with the decision.[43]

The private entities mentioned in the preceding paragraphs are in theory impartial when dealing with consumers' complaints, however the fact that their appointment and removal from office depends on the corresponding Association undermines their real independence.[44]

(c) In the telecommunications market, the Sub secretariat of Telecommunications (Subsecretaría de Telecomunicaciones—Subtel)[45] is the body which deals with users' complaints. However, again, Subtel's decision does not necessarily put an end to the dispute, since the parties have the right to start judicial proceedings with regard to the same complaint.[46]

5.3 Statistics

There are no official aggregated statistics on the number of disputes resolved by ADR mechanisms. From the information available, the estimated number for 2015 is approximately 290,630 resolved disputes.

To summarise, SERNAC resolved more than 270,000 individual consumer disputes[47] and 53 collective mediations during 2015.[48] Subtel resolved 19,785 complaints[49] and the Ombudsman of the Insured resolved 792 complaints during the same period. SVS reported 17,283 resolved complaints for 2014,[50] while SBIF reported 7336 resolved complaints for 2013.[51] Subtel resolved 55,514 complaints during 2013–2015.[52]

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[43]Available at www.clientebancario.cl/clientebancario/como-hacer-reclamos.html.

[44]Reglamento Defensoría del Cliente, Asociación de Bancos e Instituciones Financieras, Article 3, www.defensoriadelclientedeabif.cl/descargas/reglamento_defensor.pdf.

[45]Subtel is directly dependent on the Government. One of its functions is the defence of users of the telecommunications market, and therefore it is not absolutely impartial with regard to the resolution of consumer's complaints. See www.subtel.gob.cl/quienes-somos/.

[46]Available at www.subtel.gob.cl/reclamos/.

[47]SERNAC, Cuenta Pública Participativa Gestión 2015, www.sernac.cl/wp-content/uploads/2014/03/Cuenta-P%C3%BAblica-Participativa-Gesti%C3%B3n-2015.pdf.

[48]SERNAC, 20 January 2016, Information request N° AH009T0000102 <elisa.moralesortiz@gmail.com> 20 January. <no-responder@portaltransparencia.cl>.

[49]Subsecretaría de Telecomunicaciones (SUBTEL), 2 May 2016, Information request AN002T0000508 <elisa.moralesortiz@gmail.com> 2 May. <no-responder@portaltransparencia.cl>.

[50]See IRMA, Informe de Reclamos del Mercado Asegurador, www.svs.cl/portal/estadisticas/606/w3-propertyvalue-20207.html.

[51]See Claims submitted to SBIF, www.sbif.cl/sbifweb/servlet/InfoFinanciera?indice=4.1&idCategoria=565&tipocont=1112.

[52]Subsecretaría de Telecomunicaciones (SUBTEL), 2 May 2016, Information request AN002T0000508 available at <elisa.moralesortiz@gmail.com> 2 May. <no-responder@portaltransparencia.cl>.

The Report on Complaints in the Insurance Market, published by SVS, is not yet available for 2015.[53] There are no official statistics with regard to arbitrations under SVS.[54] SBIF official statistics are only available until 2013.[55] In the case of the Office for the Defence of the Banking Client, there is no information available.

Finally, from the information available, 2,022,579 disputes have been resolved in the last 10 years by ADR mechanisms. SERNAC has information only from 2010 onwards. Between 2010 and 2015, SERNAC dealt with 1,746,309 complaints, including individual[56] and collective complaints.[57] SVS dealt with 48,509 complaints between 2007 and 2014.[58] SBIF dealt with 67,528 complaints between 2005 and 2013.[59] In the same period, Subtel resolved 155,261 complaints.[60] There are no public statistics for the Office for the Defence of the Banking Client and the Ombudsman of the Insured. However, in response to a request for information the Ombudsman of the Insured reported that 4972 complaints were resolved from 2008 to 2015.[61]

5.4 Evaluation

The large number of disputes resolved by ADR mechanisms could lead to the conclusion that they provide better solutions for consumers, since they are usually faster and less costly, more flexible and informal. However, it is difficult to evaluate accurately the impact and efficiency of these mechanisms, because there is no coordination between the different agencies (public and private) that deal with consumer complaints. This is particularly serious when we consider the lack of coordination between SERNAC and the sectorial agencies.

[53]See IRMA, Informe de Reclamos del Mercado Asegurador, www.svs.cl/portal/estadisticas/606/w3-propertyvalue-20207.html.

[54]Superintendencia de Valores y Seguros, 25 April 2016, [PUFED] Electronic communication No: 10216 <elisa.moralesortiz@gmail.com> 25 April <webmaster@svs.cl>.

[55]See Claims submitted to SBIF, www.sbif.cl/sbifweb/servlet/InfoFinanciera?indice=4.1&idCategoria=565&tipocont=1112.

[56]SERNAC, Cuenta Pública Participativa Gestión 2010 a 2015,www.sernac.cl/acerca/cuentas-publicas/.

[57]SERNAC, 20 January 2016, Information request N° AH009T0000102 <elisa.moralesortiz@gmail.com> 20 January. <no-responder@portaltransparencia.cl>.

[58]See IRMA, Informe de Reclamos del Mercado Asegurador, www.svs.cl/portal/estadisticas/606/w3-propertyvalue-20207.html.

[59]See Claims submitted to SBIF, www.sbif.cl/sbifweb/servlet/InfoFinanciera?indice=4.1&idCategoria=565&tipocont=1112.

[60]Subsecretaría de Telecomunicaciones (SUBTEL), 2 May 2016, [Information request AN002T0000508 <elisa.moralesortiz@gmail.com> 2 May. <no-responder@portaltransparencia.cl>.

[61]Mauricio Riesco, 18 April 2016, Answer to question online elisa.moralesortiz@gmail.com 18 April <mr@ddachile.cl>.

As a result, there is an overlap of competences and procedures that prevents measurement of the efficiency of ADR mechanisms. Although the market area of the complaints dealt with by SERNAC can be identified, it is not possible to know if that complaint has been already reported to or resolved by a sectorial agency. There is no legal or administrative rule that promotes this coordination. As a way of overcoming this problem, SERNAC has entered into a number of "cooperation agreements" with sectorial agencies, but there is no official information about the effectiveness or results of these agreements.

In conclusion, it is clear from a purely statistical point of view that the results obtained through ADR mechanisms seem to be better for the consumer than the results obtained through judicial disputes. From a substantive perspective, however, this is uncertain, since no information is available about the outcome of the complaints or the satisfaction of consumers with the results of the procedures.

6 The Role of Consumer Organisations

Consumer organizations are regulated by Ley N° 19.496 and Decreto Ley N° 2.757 of 1979 of the Ministry of Labour.[62] They can be created either by the assembly and agreement of at least 25 people or by the agreement of at least 4 legal persons not for trading purposes. The constitution of these organizations is subject to certain formalities stated in the two laws mentioned above. After compliance with those formalities, the organization can be registered in the Register of Provider Associations of the Ministry of Economy. Consumer organizations are completely independent of one another. According to the registers of the Ministry of Economy, there are 106 consumer organizations currently active in Chile, 57 of which are based outside Santiago.[63]

Consumer organizations are subject to some substantive restrictions: they cannot carry out religious or political actions and they must be independent of any economic, commercial or political interest. Their purpose is provided by law, namely to protect, inform and educate consumers, as well as representing them and assuming their defence, independent of any other interest. It is forbidden for consumer organizations to pursue economic profits, accept contributions from commercial entities that provide services to consumers, and advertise or disseminate communications beyond mere information about goods or services.

The competences of consumer organizations are provided by Ley N° 19.496 Article 8. They include dissemination of the provisions of the Act, informing and educating consumers about their rights, giving advice to consumers, proposing actions related to the protection of consumers, representing consumers and initiating

[62]Decreto Ley N° 2.757 of 2002 which establishes standards for trade associations.

[63]Information available at economiasocial.economia.cl/busqueda-de-organizacion.

legal actions on their behalf, including individual and collective actions, and participating in determining the price of public services.

Among their legal functions, consumer associations may represent both the individual and collective interests of consumers—their role in collective actions has increased in recent years.[64] However, their role in the enforcement of consumer law in fact goes further, and in practice they also act as mediators between consumers and providers, through informal alternative dispute resolution mechanisms.

7 Private Regulation

Private regulation is a subject that has not been sufficiently researched in Chile. Although there are private regulation codes in different economic areas, there are no studies about its impact and importance for consumer protection.

Probably the area where private regulation is most important is insurance, where an Insurance Companies' Private Regulation Board (Consejo de Autorregulación de Compañias de Seguros) has been established. This body is in charge of the correct interpretation and application of the Compendium of Best Corporative Practices (Compendio de Buenas Prácticas Corporativas) that governs the activity of insurance companies.[65] The system of private regulation of insurance companies is subject to a Code of Private Regulation. At this moment, 55 insurance companies are subject to the Code, representing 90% of the insurance market.[66] One of the main purposes of this regulation is to promote loyalty between companies and consumers.[67]

As mentioned in the section on ADR mechanisms, some rules have been developed by private regulation for the enforcement of consumer law. Thus in the insurance market, the "Ombudsman of the Insured" (Defensor del Asegurado) has been established, a private institution whose purpose is to resolve conflicts arising in relation to insurance contracts or the provision of services by insurance companies. The establishment of this institution is a result of the Code of Private Regulation of insurance companies (see above). For dispute resolution, the Ombudsman must consider the contract concluded between the parties, the applicable legislation (including the Consumer Protection Act) and the general principles of equity.[68]

In addition, as mentioned above (Sect. 5.2) in the context of banking and financial services, an "Office for the Defence of the Client" (Defensoría del Cliente) has been

[64] A report of Conadecus shows 32 collective actions initiated by consumer organizations. Available at www.conadecus.cl/conadecus/wp-content/uploads/2015/01/DEMANDAS-COLECTIVAS-PRESENTADAS-EN-CHILE.pdf.

[65] See www.svs.cl/portal/prensa/604/articles-17397_doc_pdf.pdf.

[66] Information available at www.autorregulacion.cl.

[67] This seems to be common in codes of private regulation. See Asociación de Marketing Directo de Chile, El Código de Autorregulación para el Marketing Directo y Relacional en Chile, amddchile.com/codigo.

[68] Available at www.ddachile.cl/home.asp.

established. This is an independent instance for the resolution of conflicts between banks and their clients, established by the Association of Banks and Financial Institutions.[69]

8 External Relations and Cooperation of the State, Enforcers and Consumer Organisations

Chile participates at different levels in some international or regional organizations of states. However, the country has tended to establish international commercial relations under specific bilateral or multilateral treaties, which do not contain provisions on the development or establishment of a common consumer policy, but only certain specific obligations that may indirectly benefit consumers, for instance, those related to the quality of goods and services, labelling and transparency.

Special mention should be made of Chile's participation in MERCOSUR (Mercado Comun del Sur), which is a clear illustration of Chile's approach to regional organizations of states. MERCOSUR has developed a common (but incomplete) policy on matters of consumer protection.[70] However Chile is only an associated member of MERCOSUR, and since that policy has not been expressly accepted by the Chilean Government, it is not binding on the country.

It is also important to mention that Chile has been a member of the OECD since May 2010, being the first South American country to join this organization. In this context, there have been several recommendations to Chile, including extending consumer protection to improve the functioning of goods markets through increased price transparency. OECD has also recommended establishing a national strategy for financial education to help consumers make informed financial decisions.[71]

Chile has not signed any specific bilateral or multilateral agreements on the enforcement of consumer law. However, Chile has signed a number of international agreements on the enforcement of foreign judicial decisions. Some of these agreements are of general application, so in theory can be used to enforce foreign judicial decisions on consumer law.[72]

[69] Available at www.defensoriadelclientedeabif.cl/Sitio/Inicio.aspx.

[70] See Rojo (2012), p. 1.

[71] See OECD, Mejores políticas para el desarrollo: Perspectivas OCDE sobre Chile (2011) and OECD, Estudios económicos de la OCDE, Chile (2013).

[72] The rules on cross-border enforcement are mainly contained in the Code of Civil Procedure (Articles 242 to 251) and the Convention of International Private Law of 1928, widely known as Código Bustamante. In addition, there are a number of international agreements, mainly applicable to arbitral decisions, such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958); the Inter-American Convention on International Commercial Arbitration (Panama, 1975); the ICSID Convention (Washington 1965) and Ley 19.971 of 2004 on International Commercial Arbitration.

Turning to the participation of Chilean consumer organizations in international networks, the two main consumer organizations, Conadecus and Odecu, are members of Consumers International, as is the Asociacion Juvenil de Consumidores y Consumidoras (FOJUCC).[73] SERNAC is a "Government Supporter" of Consumers International.[74]

9 Concluding Remarks

As stated in this paper, the framework for consumer protection in Chile is basically determined in Ley N° 19.496. In substantive terms, successive amendments to the Act have made it more effective in the protection of consumer rights, especially with regard to unfair terms, financial services and collective actions.

The fact that the courts have interpreted the provisions of Ley N° 19.496 in most cases in favor of the consumer, and that also that the scope of the Act has been understood by the courts in broad terms, including under its scope an extensive range of matters, have helped to increase consumer protection in Chile.

The main shortcomings are still the length of judicial procedures and the lack of coordination between the various entities applying consumer law, particularly the overlap of functions between SERNAC and other sectorial agencies.

In any case, in both judicial and extrajudicial instances, the specialized agency SERNAC appears to have a leading role in the enforcement of consumer law, and this can certainly be taken as an indicator of effectiveness. According to studies carried out by the agency, the number of complaints has increased by 50% in recent years, reaching more than 300,000 in 2013. It has been estimated that in that year, 95% of consumers took their complaints to SERNAC, achieving a rate dispute resolution (where the provider answered complaints) of 53%, resulting in quick, efficient solutions without recourse to the courts.

Furthermore, access to the courts is relatively easy for consumers, particularly in the case of individual actions. The fact that the procedure is simple implies that it can probably be resolved in less time than an ordinary legal claim. Secondly, the fact that the procedure before the court does not require the assistance of a lawyer allows consumers easier access to the courts to make a claim. With regard to collective

[73] See www.consumersinternational.org/our-members/member-directory?search=&region=0&type=0&country=2589&campaigns=#resultsAnchor.

[74] Consumers International is an international federation of consumer groups with over 240 member organizations in 120 countries. Consumers International states as its mission "to champion Consumer Rights internationally in order to help protect and empower consumers everywhere". See www.consumersinternational.org/who-we-are/about-us/. Membership of Consumers International includes benefits such as capacity building, access to grants and funding projects, networking and events, organisational support, engagement opportunities and governance. See www.consumersinternational.org/media/1340276/joinourmovement_final.pdf.

actions, the main advantage for consumers is the fact that SERNAC and consumer organizations are entitled to initiate an action.

For administrative redress and ADR, in general, the advantage of the system is that consumers can submit their complaints directly to administrative organs. This benefits consumers since they do not need a lawyer to appear before the court, making the procedure more accessible and affordable. The fact that there are administrative agencies with competence in matters of consumer law works as a "conflict filter". This can be inferred if we compare the number of cases heard by administrative agencies with the number of cases decided by the courts.

As mentioned above, the main shortcoming of judicial enforcement is the length of procedures, in particular if individual actions go to the Court of Appeal, or in the case of collective actions. Also, the fact that no legal assistance is required to appear before the court can be detrimental for the consumer if the provider is assisted by a lawyer.

With regard to administrative enforcement, one of the main shortcomings of the system is the lack of coordination among agencies. While a possible double review of an issue could work as a "enhanced protection" to the consumer, since there is no legal or *de facto* coordination, it is not possible to know, in order to avoid unnecessary expenditure of resources and time, which aspects of the conflict have already been reviewed and which have not.

In addition, as mentioned earlier, the administrative procedure before SERNAC is voluntary for the provider, so there is no guarantee for the consumer that his or her complaint will be satisfactorily resolved.

As a general evaluation, the consumer redress system can be qualified as moderately effective. It guarantees an adequate level of access for the consumer, both to judicial redress and to administrative or ADR redress. However, the system should be improved in terms of procedure, increasing the effectiveness of administrative redress and reducing the length of judicial procedures, in particular in collective actions. Also the problem of lack of coordination between the different public agencies that deal with different aspects or economic areas related with consumer protection should be resolved, especially in order to share information regarding disputes, complaints and resolutions, avoiding double review and improving the system as a whole.

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Enforcement and Effectiveness of Consumer Law in the People's Republic of China

Dan Wei

1 National Legal Framework for Consumer Protection

1.1 Consumer Policy and Consumer Education

By the end of 2015, China was the country with the largest population worldwide.[1]

During the time of planned economy, consumer products in China were very scarce, being produced and supplied essentially by the state. Traditional public enterprises were merely production or budget entities. Due to the lack of economic stimulus of their own interests, infringement of consumer rights was not a common phenomenon. As the modern market economy was gradually established in 1980s, the individual economy, the private economy and other non-public economies have gained more prominence in economic activities. While the supplies of consumer products became more and more diversified and abundant, fake and shoddy products, false and misleading advertising, acts of unfair competition, breach of contract and other abusive practices have proliferated and become a major social problem.

The first consumer organization was established in the Xinyue District of Hebei Province in May 1983, followed by consumer commissions in Guangzhou City and Harbin City. At the national level, on 26 December 1984, the Chinese Consumers' Association was founded. It became a full member of Consumers International on 13 September 1987. The consumer movement in China has promoted the study of consumer policies. China adopted its national consumer policy for the first time in

[1] National Bureau of Statistics of China, see http://data.stats.gov.cn/english/easyquery.htm?cn=C01 (accessed on 7/2/2017). The total population reached 1,374,620,000 people.

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1993 with the promulgation of Law on Protection of Consumer Rights and Interests (Consumer Law).[2]

Both the government departments and the consumer associations are responsible for promoting consumer education. Consumer education started quite late in China, but it has become more and more popular in recent years. In primary and secondary schools, basic consumer education courses have been offered as a part of citizenship education programme since 1990s.[3]

Every year starting from 1991, China's state-run media company, China Central Television (CCTV), broadcasts the well-known "March 15th Consumer Day Gala" program, which highlights the consumer rights and reports the consumer campaign. The theme of the 315 Gala Programme varies from year to year, for instance, "life and safety", "healthy order, healthy life", "responsibilities", "empowerment of consumers", "new rules and new dynamics", etc. CCTV usually send their under-cover journalists to investigate across the country and companies are named and shamed for their misconducts. When targeted by Chinese media, the companies would face the government actions.

In 1999, the State Administration for Industry and Commerce (SAIC) created a national-level telephone hotline "12315" for consumer complaints. Now, consumers in China are also free to use "12315 online" to loge their complaints. In recent years, some local administrative departments for industry and commerce have also utilized free social networking and created microblogging and we-chat—Chinese equivalent of tweeter to deal with consumer complaints.[4] The statistics show the number of complaints received from rural areas has been constantly increasing, which shows the consumers in rural areas are more aware of the existence of their rights.[5]

Regarding the financial services, under the supervision of the People's Bank of China, the China Foundation for Development of Financial Education was established in 1992. Its missions are to alleviate poverty, improve the capabilities building and promote financial literacy to the public, especially farmers.[6] Financial literacy programs have been largely promoted by financial regulatory bodies and financial associations in China. After the world financial crisis, new financial

[2]The effective Law of the People's Republic of China on the Protection of Consumer Rights and Interests was adopted at the 4th Session of the Standing Committee of the Eighth National People's Congress on 31 October 1993; amended for the first time in accordance with the Decision on Amending Some Laws adopted at the 10th Session of the Standing Committee of the Eleventh National People's Congress on 27 August 2009; and amended for the second time in accordance with the Decision on Amending the Law of the People's Republic of China on the Protection of Consumer Rights and Interests adopted at the 5th Session of the Standing Committee of the Twelfth National People's Congress on 25 October 2013.

[3]Yin and Yin (1998), p. 168.

[4]See an official report in Chinese published on Journal of China Industry & Commerce on 23 January 2017, available at http://www.315.gov.cn/wqyw/201701/t20170123_174661.html.

[5]See an official report in Chinese published on Journal of China Industry & Commerce on 23 January 2017, available at http://www.315.gov.cn/wqyw/201701/t20170123_174661.html.

[6]See the official website of China Foundation for Development of Financial Education at http://www.cfdfe.cn/html/Home/report/1330-1.htm.

consumer protection departments have been created, for instance, Insurance Consumer Protection Bureau within the China Insurance Regulatory Commission, Investors Protection Bureau within the China Securities Regulatory Commission, the Financial Consumer Rights Protection Bureau in Peoples' Bank of China and the Banking Consumer Protection Bureau within the China Banking Regulatory Commission. Financial education activities take mainly the following forms: financial knowledge exhibitions, launching of public services websites, publishing warning information, delivering financial knowledge to the communities and countryside. However, it is believed that financial educational system in China is still far from being imperfect.[7]

1.2 Legal Framework of Consumer Protection

1.2.1 Law on Protection of Consumer Rights and Interests

The principal legal framework for consumer protection in China is the Law on Protection of Consumer Rights and Interests, which is a separate and independent legal act, being the basic legislation of consumer law.

The Consumer Law of 1993 originally had a total of 55 articles, structured in 7 chapters, referring to the General Provisions, Consumer Rights, Duties of Business Operators, State Protection of Consumers' Rights and Legitimate Interests, Consumers' Organizations, Dispute Resolution, the Legal Responsibility and Supplementary Provisions. The new Consumer Law[8] of 2013 came to integrate a total of 63 articles, by introducing changes essentially at 5 levels:

First, there is an explanation, clarification and thickening of consumer rights, eliminating the legal vacuum is in the area of financial consumption by the express affirmation of the possibility of defending the rights and legitimate interests of consumers in the financial sector in accordance with the law.[9] Also for the first time, the Law came expressly to enshrine the protection of personal data as an important right and interest of the consumer, ruling on the respective civil and administrative liability of offenders.[10] On the other hand, the law has provided a cooling off period for the consumer, allowing, in the absence of a State provision or agreement to the contrary, the product to be returned within 7 days counting from the consumers' reception.[11]

[7] See Liu et al. (2014).

[8] China's consumer policy has been provided by Articles 1, 4, 5, 6, 31 and 37.

[9] Article 28 of Law on Protection of Consumer Rights and Interests (Consumer Law, amended in 2013).

[10] Articles 14, 29, 50 e 56 of the Consumer Law (amended in 2013).

[11] Article 24 of the Consumer Law (amended in 2013).

Second, the responsibilities and obligations of business operators are reinforced. The Law came to solve the issue of difficult gathering of evidence by the consumer in his defense, with the reversal of the burden of proof to the operator in disputes arising from the discovery of defects in durable goods or decorating services or property repair within 6 months from the date of acceptance by the consumer. On the other hand, the recall scheme was extended to defective products, which initially covered only the automotive[12] scope to any product or service, to protect personal and property security of the consumer.[13] Another aspect, which differs from the majority of the compensatory mechanisms provided for in civil law, is the introduction of a penalty compensation scheme. The Consumer Law came to aggravate the penalties applicable to operators when providing counterfeit products or services, from the old "plain return and compensation of such" to the limit "plain return and treble compensation", that is, an operator must increase the amount of compensation according to customer requirements, which should be at least 500 yuan and a maximum of 3 times the price of the product or service purchased by the consumer.[14]

Third, in line with the trend of development of e-commerce and the digital economy, the new Consumer Law came to regulate new forms of consumption, including cyber consumption, also strengthening the protection of rights of free choice, information and fair negotiation. In particular, it establishes that the consumer is entitled to return the product without justified reason, within 7 days of his receipt whenever there is use of the Internet, broadcast, telecommunications or mail by the operator for the sale of his products.[15] To enhance the effectiveness of the Law, policy makers did not fail to list the situations that discourage the return of products and to state a requirement, that the product to be returned must be in good condition and the respective expenses are to be borne by the consumer. On the other hand, operators of cyber platforms must also assume limited legal responsibility, anticipating the payment of compensation due to the consumer whenever it cannot provide the actual name, domicile and effective ways to contact the seller or service provider. In the event that the seller or service provider is or should be aware of the injury of rights or legitimate interests of the consumer by the use of the cyber platform, the respective platform operator must respond jointly if he did not adopt the necessary measures.[16]

Fourth, the new law has come to strengthen the supervisory powers and administrative responsibilities of the state and administrative bodies. When the old Law empowered the industrial and commercial administration services to impose fines to business operators 2–5 times the amount illegally obtained, the new law comes raises the penalty intensity and the illegality of the operators' costs, allowing the fine to be

[12]Regulation for the Administration on the Recall of Defective Automotives of 1 January 2013.

[13]Articles 19, 33 e 56 of the Law on the Protection of Rights and Interests of Consumers (amended in 2013).

[14]Article 55 of the Law on the Protection of Rights and Interests of Consumers (amended in 2013).

[15]Article 25 of the Law on the Protection of Rights and Interests of Consumers (amended in 2013).

[16]Article 44 of the Law on the Protection of Rights and Interests of Consumers (amended in 2013).

10 times the amount illicitly obtained. Similarly, the upper limit of the fine in the absence of product illicitly obtained was raised from 10,000 RMB under the old Law to 500,000 RMB under the new law. On the other hand, to increase transparency in law enforcement, increase participation and public scrutiny and, also, to create an environment where agents can interact in good faith, the sanctioning bodies should, under the new Law, record and publish all unfair acts in the individual history of each business operator.[17]

Fifth, it expressly enshrines the status and nature of consumer associations and extends their powers. Consumer groups differ from the majority of civil society groups because they are semi-official organizations set up on the initiative of governments, led by the Industrial and Commercial Management Services of the corresponding level and financed by the respective government. The old Law assigned them the nature of "social group", the doctrine also agrees that these associations were "social government communities".[18] However, the new law came to replace the term for "social organization" following and in line with the new definition of "association" given by Article 2 of the Regulations on Registration Administration of Associations, promulgated by the State Council in 1998 and revised in 2016, according to which associations refer only to "as non-profit-making social organizations voluntarily composed of Chinese citizens that perform activities in accordance with the articles of association for the realization of the common desires of the membership". The new Consumer Law had especially in view to clarify the "duties of public interest" of consumer associations by giving them in particular the legitimacy for bringing collective actions. When facing the injury of rights or legitimate interests of a plurality of consumers, they have standing to bring an action before the people's courts, the China Consumers' Association and consumer associations established by the provinces, autonomous regions and municipalities directly dependent on the Central Government.[19] It is clearly a demonstration of manifestation in the area of consumption, the system of "collective action" introduced with the reform of China's Civil Procedure Law of 2012, specified to the field of consumer relations. On the other hand, the new Consumer Law also provides that consumer groups can participate in the lawmaking process, regulations and normative standards relating to the rights and interests of consumers, thus broadening the scope of action of consumers in legislative process. In support of the defense of consumer rights, the associations now also have the power to hire qualified experts to conduct expertise.[20]

As is easy to see, the review of the Consumer Law was guided by the legislative design of consumer rights protection as the weaker party in consumer relations. Whereas consumer protection is a joint responsibility of the State and society in

[17] Article 56 of the Law on the Protection of Rights and Interests of Consumers (amended in 2013).

[18] Liang (2000), p. 21. For the analysis of the doctrinal concept of social collectivities in China, cfr. also Yu (2006), pp. 109–122.

[19] Article 47 of the Law on the Protection of Rights and Interests of Consumers (amended in 2013).

[20] Article 37 of the Law on the Protection of Rights and Interests of Consumers (amended in 2013).

general and as it is an important civil right, the Consumer Law has clear characteristics of a social law, whose legal system is to ensure the safety, loyalty and justice in consumer relations.

1.2.2 Other Sources

In China, consumer law has not been codified. In addition to the general consumer protection law (Law on the Protection of Rights and Interests of Consumers), there are other legal instruments that are relevant for consumer protection.[21] For instance, for consumer health and safety, there are General Principles of Civil Law (effective in 2017), Product Quality Law (effective in 1993 and revised in 2000), Tort Law (effective in 2010), Law on the Administration of Drugs (effective in 2001 and revised in 2015), Agricultural Product Quality Safety Law (effective in 2006) and Food Safety Law (effective in 2009). Concerning unfair commercial practices and consumer's right to information, the examples are Trademark Law (effective in 1983 and revised in 2013), the Law against Unfair Competition (effective in 1993), Advertisements Law (effective in 1995), Standardization Law (effective in 1989), Metrology Law (effective in 1986) and Price Law (effective in 1998). As far as consumer contracts, the main sources is the Law of Contract (effective in 1999). There is also legislation on consumer redress, namely, Civil Procedure Law (effective in 1991 and revised in 2012) and the Law of Arbitration (effective in 1995).

There are sector-specific laws that address consumer's rights and interests. For example, Tourism Law (effective in 2013), Civil Aviation Law (effective in 1996), Postal Law (effective in 1987 and revised in 2009) and Law of The People's Republic of China on Management of Urban Real Estate (effective in 1995).

Meanwhile, there is also secondary legislation, which means administrative regulations aiming to implement the above-mentioned laws or rules adopted by ministerial departments (e.g., State Administration for Industry and Commerce, General Administration of Quality Supervision, Inspection and Quarantine, National Development and Reform Commission, the Ministry of Housing and Urban-Rural Development, Ministry of Transportation, etc.) or by local governments.

1.3 Strategic Plan

Although different authorities have released action-plans in the area of consumer protection in the past a few years, the very first systematic mid-long term plan for national level only appeared very lately. On 23 January 2017, the State Council issued its strategic "Planning on Market Regulation for the Thirteenth Five-Year

[21] See relevant comments made by Liang (2000), p. 24.

Plan" (2016–2020),[22] which identifies the major tasks for consumer protection in order to achieve a sustainable and a healthy economic development. In the "Planning on Market Regulation for the Thirteenth Five-Year Plan", it is clearly indicated that one of the three main objectives is to create a safe and rest assured market consumption environment.[23] The "Planning" proposes to strengthen market regulation to adapt for the digital age and optimize the consumer redress, aiming to protect the consumers as a weaker party in consumption relations and especially children and elderly people as the most vulnerable consumers.

1.4 International Inspiration

The regulatory model of consumer protection in China has been influenced by the UN Guidelines on Consumer Protection (UNGCP). The UNGCP (adopted in 1985, revised in 1999 and 2015) provide policy advice for member states and leave them enough flexibility when transposing principles into national laws. More than one hundred countries including China have laws based on the Guidelines. The consumers' rights enshrined in Chinese Law on the Protection of Rights and Interests of Consumers as well as its basic framework and principles well reflect the guidance provided by the UNGCP.

When drafting the Law on the Protection of Rights and Interests of Consumers, Chinese legislators have taken reference from numerous regulatory models of comparable regimes rather than following the practices of any single jurisdiction as a main orientation.[24] Because of the same legal tradition of Civil Law, many European Union's experiences have been referred during the amendment of Chinese consumer law, for example, unfair terms, unfair commercial practices, and product liability, among others. On the other hand, one can see that some institutions that Chinese legislator have learned are not identical with those applied in other jurisdictions. For instance, punitive damages, which was inspired by the US experiences, is conceived and applied in China as a contractual responsibility especially for contract fraud, instead of being a tort liability.

[22]For a full version in Chinese, see the official website of the State Council at http://www.gov.cn/zhengce/content/2017-01/23/content_5162572.htm.

[23]The other two objectives are to create a loose and convenient market access environment and to create a fair and orderly market competition environment.

[24]See Li (2013).

2 The General Design of the Enforcement Mechanism

2.1 The Main Enforcement Authority

The main authority in China in charge of enforcement of consumer law is the State Administration for Industry & Commerce (SAIC),[25] an administrative agency of ministerial level. SAIC also coordinates local administration offices for industry and commerce.[26]

The SAIC was established by the Circular of the State Council concerning Organizational Structure (No. 11 of 2008).[27] It is directly under the State Council in charge of market supervision and regulation and related law enforcement through administrative means. SAIC functions in maintaining market order and protecting the legitimate rights and interests of businesses and consumers by drafting and enforcing regulations for consumer protection.[28]

Based on the Circular of the State Council concerning Organizational Structure (No. 11 of 2008), the State Council further approved and published Notice of SAIC Organizational Set-Up and Personnel on 11 July 2008.[29]

The Consumer Protection Bureau of SAIC drafts detailed measures and practice directions in respect of consumer protection, overseas the quality of goods in market circulation, protects consumers' rights in the service sector, investigates and punishes irregularities such as counterfeiting, faking and inferior quality and guides the acceptance and handling of consumer inquiries, appeals and complaints, and instruct the development of related networks.[30]

2.2 Other Particular Enforcement Mechanisms and Authorities

In financial services, new financial consumer protection departments have been created, for instance, Insurance Consumer Protection Bureau within the China Insurance Regulatory Commission, Investors Protection Bureau within the China Securities Regulatory Commission, the Financial Consumer Rights Protection

[25]See the official website for more information at http://www.saic.gov.cn/.

[26]Consumers can file a complaint with a relevant administrative department or file a lawsuit with a people's court.

[27]For a full version in Chinese, see http://news.xinhuanet.com/politics/2008-04/24/content_8044595.htm.

[28]See a short description about the main responsibilities in English at http://www.saic.gov.cn/english/aboutus/Mission/.

[29]See the full version in Chinese, available at https://www.jetro.go.jp/ext_images/world/asia/cn/ip/law/pdf/origin/20080807588915502.pdf.

[30]See http://www.saic.gov.cn/english/aboutus/Departments/.

Bureau in Peoples' Bank of China and the Banking Consumer Protection Bureau within the China Banking Regulatory Commission.

In November 2015, State Council promulgated Guidelines on Strengthening the Protection of the Rights and Interests of Financial Consumers, which set out three work requirements. First, financial management departments shall closely cooperate with each other and enhance cooperation with local people's governments to explore the establishment of a mechanism, under which local people's governments coordinate with central-level authorities in protecting the rights and interests of financial consumers. Second, financial Institutions are encouraged to follow the principles of equality, voluntariness and good faith and safeguard the rights of financial consumers, namely, the rights to enjoy asset security, be informed, make independent choices, engage in fair dealing, seek for recourse, be educated, be respected, information security, among others. Thirdly, social organizations in the financial sector shall play a bigger role in the protection of the rights and interests of financial consumers, help financial consumers to safeguard their rights and promote the financial literacy.[31] The Guidelines further highlighted the need to improve the supervision and administration mechanisms[32] and the need to establish safeguarding mechanisms.[33] One of the objectives is to establish and improve complaint handling mechanisms, ensure smooth channels for accepting and handling complaints, establish a financial consumer dispute third-party mediation and arbitration mechanism, and form a diversified financial consumer dispute resolution mechanism that includes self-reconciliation, external mediation, arbitration and litigation, so as to effectively resolve financial consumer disputes in a timely manner.

In December 2016, the People's Bank of China published a detailed Notice on Issuing the Implementation Measures for Protecting Financial Consumers' Rights and Interests.[34] The Implementation Measures contain 6 chapters and 50 articles, focusing on General Provisions, Codes of Conduct of Financial Institutions, Protection of Individuals' Financial Information, Acceptance and Handling of Complaints, Supervision and Administration Mechanism and Supplementary Provisions.

However, in other specific sectors, no particular enforcement mechanisms and authorities have been developed so far.

[31]Guiding Opinions of the General Office of the State Council on Strengthening the Protection of the Rights and Interests of Financial Consumers, the State Council of PRC, Guo Ban Fa [2015] No. 81, Paragraph 2.

[32]Guiding Opinions of the General Office of the State Council on Strengthening the Protection of the Rights and Interests of Financial Consumers, the State Council of PRC, Guo Ban Fa [2015] No. 81, Paragraph 4, for example, "establish a cross-sectoral mechanism for financial consumer education, financial consumer dispute resolution and regulatory and law enforcement cooperation to enhance information sharing".

[33]Guiding Opinions of the General Office of the State Council on Strengthening the Protection of the Rights and Interests of Financial Consumers, the State Council of PRC, Guo Ban Fa [2015] No. 81, Paragraph 5.

[34]The Notice can been found at http://en.pkulaw.cn/.

3 Number and Characteristics of Consumer Complaints and Disputes

The official statistics on the number of consumer complaints are released by SAIC.[35] The figures in 2015 show all consumer complaints reached 7,776,000.[36] The total number of consumer complaints in 2016 was 8,080,060.[37] In the same year, SAIC handled in total 1,291,100 consumer disputes.[38] In 2016, SAIC dealt with 1,667,000 consumer disputes,[39] the success rate of mediation provided by SAIC was 77.5%, that is to say, more than 1,000,600 consumer disputes were resolved.[40] In 2016, the success rate decreased to 71.9%.[41]

In the period between 2005 and 2016, in total 11,324,838 consumer disputes were initiated.[42] In the last 3 years (2014–2016) there were in sum 4,120,300 consumer disputes initiated.[43]

Here are the detailed figures: 2005 (730,485), 2006 (722,433), 2007 (746,887), 2008 (769,007), 2009 (726,626), 2010 (754,000), 2011 (846,100), 2012 (892,700), 2013 (1,016,400), 2014 (1,162,200), 2015 (1,291,100), 2016 (1,667,000).[44]

Since the amendment of the Law on Protection of Consumer Rights and Interests in October 2013, the consumer complaints and disputes have had some new features.

Product quality, contract and after-sales service remain to be the three main causes of consumer complaints and disputes, accounting more than 59.4% of the total cases. However, compared to the records in previous years, the percentage of these three types of consumer complaints and disputes has evidenced a constant decrease. At the same time, misleading and deceptive advertising activities represented more than 20% of the total complaints and disputes. Nearly 45.4% of complaints and disputes were related to services, in which more and more were involved in distance selling and online shopping.[45]

In 2016, the average time to settle down a consumer dispute was 13.25 days, more than 3.61 days compared to the time spent in 2015.[46]

[35]See http://www.315.gov.cn/wqsj/12315sj/.

[36]See http://www.315.gov.cn/wqsj/12315sj/zj12315sj/201604/t20160420_168093.html.

[37]See http://www.315.gov.cn/wqsj/12315sj/zj12315sj/201703/t20170322_175920.html.

[38]See http://www.315.gov.cn/wqsj/12315sj/zj12315sj/201604/t20160420_168093.html.

[39]See http://www.315.gov.cn/wqsj/12315sj/zj12315sj/201703/t20170322_175920.html.

[40]See http://www.315.gov.cn/wqsj/12315sj/zj12315sj/201604/t20160420_168093.html.

[41]See http://www.315.gov.cn/wqsj/12315sj/zj12315sj/201703/t20170322_175920.html.

[42]Seehttp://www.315.gov.cn/wqsj/12315sj/zj12315sj/201604/t20160420_168093.html and http://www.315.gov.cn/wqsj/12315sj/zj12315sj/201703/t20170322_175920.html.

[43]See http://www.315.gov.cn/wqsj/12315sj/.

[44]See http://www.315.gov.cn/wqsj/12315sj/.

[45]See http://www.315.gov.cn/wqsj/12315sj/zj12315sj/201703/t20170322_175920.html.

[46]See http://www.315.gov.cn/wqsj/12315sj/zj12315sj/201703/t20170322_175920.html.

4 Courts and Alternative Mechanisms for the Resolution of Consumer Disputes

Among the five means to settle disputes provided by Article 39 of the Consumer Law, consumers may request conciliation with business operators through consultations, or request mediation by a consumer association or any other mediation organization legally formed, or alternatively apply to an arbitral institution for arbitration under an arbitral agreement with a business operator, in addition to lodging complaints with the relevant administrative department or filing a lawsuit with a people's court.

4.1 Courts and Enforcement of Consumer Law

4.1.1 The Structure of the Judicial System and Its Main Characteristics

The people's court system in China, provided by the Constitution and the Law on the Organization of People's Courts (adopted in 1979 and amended in 1983), consists of the Supreme People's Court, local courts and special courts. The local courts are divided into three levels: basic people's courts, intermediate people's courts and higher people's courts. The special courts include military courts, maritime courts and forest courts, among others.[47] China adopts two instance of trials and the second instance is final.

The basic people's courts are located at counties, autonomous counties, districts of cities and cities without administrative districts. In order to facilitate the rights to access to justice of rural areas, the basis people's courts may set up a number of detached tribunals. Except for cases otherwise provided for by laws or decrees, basic people's courts adjudicate criminal and civil cases of first instance, in addition to guiding the work of the people's mediation committees and handling minor civil disputes and criminal cases that do not need to be determined by trials.

The intermediate people's courts are established in prefectures of a province or autonomous region, autonomous prefectures, municipalities directly under the central government and municipalities directly under the jurisdiction of a province or autonomous region. The jurisdiction of intermediate people's courts cover cases of first instance provided by laws and decrees, cases of first instance transferred from the basic people's courts, and appealed and protested cases.

The higher people's courts are set up in provinces, autonomous regions and municipalities directly under the central government. Their responsibilities are to adjudicate cases of first instance assigned by laws and decrees, cases of first instance transferred from people's courts at lower levels, and appealed and protested cases.

[47] In China, special courts have no jurisdiction over criminal cases and civil cases, which belong to the ordinary courts.

The Supreme People's Court, being the highest judicial organ, supervises the administration of justice by the local people's courts at various levels and by the special people's courts. The Supreme Court handles cases of first instance assigned by laws and decrees to its jurisdiction and which it considers should adjudge as well as appealed and protested cases. It also issues interpretations on questions concerning specific application of laws and decrees in judicial proceeding. The Supreme People's Court shall establish circuit courts, as its standing judicial organs and branch offices, to try important administrative, civil and commercial cases across administrative regions.[48]

There are different divisions in each court (for example, criminal division, economic division, civil division, administrative divisions, intellectual property division). The main form of court trials is collegiate panels. For the cases of the first instance, the collegiate panels are composed by judges or of judges and people's assessors. For appealed or contested cases, only judges can be part collegial panels. A single judge may adjudicate simple civil cases and minor criminal cases. All courts should set up a Judicial Committee presided by the President of the court to deliberate on complicated cases and summarize judicial practices.

It should be noted that the Law on the Organization of People's Courts provides re-examination system, as a special remedy, which allows the courts to re-examine erroneous judgments and rulings that have already taken effect.[49]

4.1.2 Consumer Disputes in the Courts

The general courts are competent for consumer disputes in China. There is no a specialised court in charge of consumer disputes.

In accordance with the Law on the Protection of Rights and Interests of Consumers, where any dispute over consumer rights and interests arises between business operators and consumers, consumers may settle the dispute through filing a lawsuit with a people's court.[50] The courts shall take measures to facilitate consumers' filing of lawsuits, and must accept and hear in a timely manner consumer rights and interests dispute cases that meet the litigation conditions as set out in the Civil Procedure Law.[51] Consumer associations shall file lawsuits in accordance with law or shall support the consumers in filing lawsuits.[52]

There is no specialised civil law procedure before the court for consumer disputes. Generally speaking, there is no specialised court tariff/taxes for consumer disputes. Normal tariffs and taxes shall apply. However, local courts are allowed to

[48]See the Provisions of the Supreme People's Court on Several Issues concerning the Trial of Cases by the Circuit Courts, adopted on 5 January 2015, effective on 1 February 2015.

[49]For details, see Article 14 of the Law on the Organization of People's Courts (amended in 1983).

[50]Article 39 of the Law on the Protection of Rights and Interests of Consumers (amended in 2013).

[51]Article 35 of the Law on the Protection of Rights and Interests of Consumers (amended in 2013).

[52]Article 37 of the Law on the Protection of Rights and Interests of Consumers (amended in 2013).

establish their own rules regarding the tariffs/taxes for certain cases. For example, the People's Court in Fuyang of Zhejiang Province created a speedy mechanism to deal with consumer's mediation and court proceedings and elaborated detailed procedures for consumer's small claims to be handled by circuit court, according to which, the tariffs and taxes are totally exempt for consumers' small claims.[53]

A free legal aid is offered to qualified citizens including consumers who are faced with financial difficulties. Under the provisions of the Regulation on Legal Aid (effective in September 2003) promulgated by the State Council, free legal aid is offered to both criminal[54] and civil matters. In civil cases, free legal assistance is available for the requests for state compensation, social insurance treatment or minimum life alimony treatment, survivor's pensions or relief funds, the payment for supporting parents or grandparents, and children, the payment of labour remuneration, civil rights and interests arising from the brave act of righteousness.[55]

There are four tiers of legal assistance structure: national, provincial, municipal and the county level.[56] The Ministry of Justice established a Centre for Legal Assistance to coordinate and supervise legal aid across the country. Legal aid is funded by government, social contributions and volunteering.

Consumer associations and legal professionals usually offer legal aid for consumers has been usually offered procedural and non-procedural aid including free legal counselling and document drafting. Some local courts (for example, the Intermediate Court of Shenzhen City of Guangdong Province) have adopted special rules to provide legal aid to consumers.[57]

The Supreme People's Court in China published a White Paper on Safeguarding the Consumers' Interests by People's Courts at All Levels 2010–2013.[58] During that period, 42,174 consumer disputes were concluded, which showed that an average rate of cases closed was 87.4% and an average rate of cases settled in prescribed time was 97.8%.[59] Around 88.3% of the consumer disputes were settled at the first

[53]See the version in Chinese of White Paper on Safeguarding the Consumers' Interests by People's Courts at All Levels 2010–2013, http://www.chinacourt.org/article/detail/2014/03/id/1228910.shtml.

[54]Article 11 of the Regulation on Legal Aid of 2003.

[55]Article 10 of the Regulation on Legal Aid of 2003.

[56]See more information on http://www.china.org.cn/english/Judiciary/31005.htm.

[57]White Paper on Safeguarding the Consumers' Interests by People's Courts at All Levels 2010–2013, the version in Chinese at http://www.chinacourt.org/article/detail/2014/03/id/1228910.shtml.

[58]See the version in Chinese at http://www.chinacourt.org/article/detail/2014/03/id/1228910.shtml.

[59]All relevant provisions regarding the timing to conclude civil cases can be found at Articles 149, 161, 176, 177, 204, 207 and 270, of the Civil Procedure Law of the People's Republic of China (amended in 2013 and effective on 1 January 2013). Normally, a case of ordinary procedure shall be concluded within 6 months from the date of docketing, with possibility to extend to 6 months where necessary. The cases subject to summary procedure shall be concluded within 3 months from the date of docketing. Appeal shall be concluded within 3 months from the date of docketing for second instance trial, being possible for extension. The re-examination for retrial application based on re-examination system shall take normally 3 months' time.

instance. For those closed at the first instance through verdicts, 26.5% of the disputes were appealed. Among the judgments and rulings that had already taken into effect, 10.4% were re-examined in accordance with the re-examination system and courts made a new judgment or order to amend.

Between the date (15 March 2014) on which the new amended Law on the Protection of Rights and Interests of Consumers and the May of 2015, the enthusiasm of consumers in filing lawsuits increased and the winning rate for consumer also increased significantly.[60] The courts at all levels handled 164,115 consumer disputes, among of which 147,704 were concluded.[61]

Along with the administrative enforcement, the courts also play an extremely important role in the defence of consumer rights. The main advantages of the judicial enforcement of consumer rights in China are reflected owing to recent legislative improvements and the judicial improvements. The legislative improvements refer to the modernization of some institutions of the laws in force, which aim to empower the consumers, while the judicial improvements include measures taken by courts at all levels directing to facilitate the litigation and reduce costs and burdens for consumers.

Under the newly revised Consumer Law and the Food Safety Law, consumers are becoming highly motivated to file claims for punitive damages,[62] since the Consumer Law entitles the consumers to request triple compensation for fraudulent behaviours and the Food Safety Law allows consumers to claim for an indemnity of ten times the price paid or three times the loss.

The recent legislative amendment on Consumer Law establishes the inversion of burden of proof, which alleviates some problems faced by consumers in their legal proceedings. For durable commodities (such as domestic appliances) and services (such as decoration and remodelling services) provided by business operators, if consumers discover any defects within 6 months of receiving commodities or services and disputes arise therefrom, business operators shall bear the burden of proof regarding the defects.[63] Another example is the Consumer Law provides expressively that if the standard terms and conditions, notices, declarations, and on-site posters, among others, contain any rules that impose unfair or unreasonable rules on consumers, or exclude or restrict consumer rights, or reduce or waive the responsibilities of business operators, or to aggravate the responsibilities of consumers, shall be void.[64] Such clear provisions, to some extent, facilitate the courts to apply the Consumer Law.

[60] See http://www.chinacourt.org/article/detail/2016/03/id/1821716.shtml.

[61] See an official report in Chinese published at the Journal of People's Courts, which is available at http://www.chinacourt.org/article/detail/2015/06/id/1650962.shtml.

[62] See Article 55 of Consumer Law (amended in 2013) and Article 148 of Food Safety Law (amended in 2015).

[63] Article 23 of Consumer Law (amended in 2013).

[64] Article 26 of Consumer Law (amended in 2013).

On the other hand, after the entry into force of the newly amended Consumer Law, some optimization measures to improve judicial enforcement have been taken by courts at all levels.

The Supreme Court issued respectively on 23 December 2013 and 16 June 2015, a "Judicial Interpretation on the Provisions relating to Some Problems in Law Enforcement in the Prosecution of Cases involving Food or Medicine" and ten paradigmatic cases on the protection of consumer rights. An analysis of the ten cases allows us to understand some aspects of the application of the new Consumer Law by the Chinese courts. First, it appears that the content of judicial protection orders are broadly identical to the administrative complaints, focusing on foodstuffs (including nutritional supplements and wines), communication products, home appliances, cars, jewellery and services. Second, cases reflect the new schemes introduced by the new Consumer Law, in particular with regard to reversing the burden of proof, punitive damages for commercial fraud, consumption in advance of payment, recall of defective products and cyber shopping. Thirdly, the cases portray violations of consumers basic rights, which are highly representative, in particular the rights to safety, health, fair trade, information and compensation. Fifth, it can be seen that other laws were applied, not limited to the new Consumer Law, but also including other laws and regulations such as the Food Safety Law and Law of Contracts.

In addition to those ten paradigmatic cases, starting from 2010, the Supreme Court began to introduce a "guiding case scheme" in order to standardize the interpretation and application of the law, having published so far 15 sets and 87 guiding cases.[65] Among those guiding cases, at least four cases directly involve consumer protection, being the Guiding Cases No. 17[66] (Zhang Li v. Beijing Heli Huatong Auto Service Co., Ltd.), No. 23[67] (Sun Yinshan v. Jiangning Store of Nanjing Auchan Supermarket Co., Ltd.), No. 51[68] (Abdul Waheed v. China Eastern Airlines Corporation Limited) and No. 64[69] (Liu Chaojie v. Xuzhou Branch of China

[65]For the lists and summaries, see http://www.court.gov.cn/fabu-gengduo-77.html.

[66]The case involves a sales fraud in which the business operator's did not fulfil its obligation of prior notification. The Court supported the consumer's claim for punitive damages.

[67]The case involves the purchasing food not up to the food safety standards. The Court held that seller should compensate the consumer in the amount of ten times the money paid under the Food Safety Law or compensate the consumer according to other statutory compensation standards.

[68]The case involves standard conditions of an airplane ticket defined by the air company which prejudiced consumer/tourist's right. The Court held that where a flight is delayed for a force majeure, as a result of which the airline company fails to carry passengers who would connect to other flights to the destination on time, the airline company is obligated to clearly notify passengers of whether endorsement services are provided after they arrive at the destination and how passengers would handle their travelling formalities if the airline company does not provide endorsement services. If the airline company fails to perform such an obligation, causing losses to transit passengers, the airline company should assume the compensatory liability.

[69]The case involves telecommunications service contract and the right to know and the right to choose of the consumer. The Court held that the party supplying the standard terms shall define the rights and obligations between the parties abiding by the principle of fairness, and shall inform the

Mobile Communications Corporation ("CMCC") Jiangsu Co., Ltd.). The published guiding cases are conducive to minimizing controversies in implementing the Consumer Law.

Some local courts have taken measures to improve the access to justice for consumers. For instance, the Intermediate Court of Chengdu City of Sichuan Province has established circuit courts to hear, mediate and trial the cases in places where the consumer disputes occurred, in order to create more convenience for consumers of remote areas. Another example, the Intermediate Court of Anyang of Henan Province has offered "one-stop services" for consumer disputes; consumers could thus enjoy priority from filing of pleadings, trial to execution. Moreover, a number of local courts have been trying to use alternative dispute resolution mechanism (mainly mediation) for consumer disputes.[70]

4.1.3 The Main Shortcomings of the Judicial Enforcement of Consumer Rights

Consumer disputes have their own features. Generally, they involve relatively small amounts of money. Due to high costs and lengthy judicial proceedings, the consumer, who is the weaker part of the relationship, will probably quit after facing a set of difficulties.

In China, consumers living in rural areas are more reluctant to rely on judicial enforcement due to the following reasons. First, farmers' education level and in particular legal knowledge level is relatively much lower, as such, their awareness of legal rights is still weak. Second, their capacity in bringing lawsuits is also much lower, they lack knowledge about how to adduce evidence to prove and they are worried about the possibility of losing cases. Thirdly, they do have practical difficulties such as the traffic inconvenience and economic difficulties. The ten paradigmatic cases of consumer disputes published by the Supreme Court exhibits that all the ten cases occurred in municipalities directly dependent of the Central Government or in coastal provinces or large cities. It illustrates an imbalance in the territorial application of the new Consumer Law in Mainland China, meaning there is a need to strengthen sensitivity to consumer protection in smaller inner cities and rural areas.

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other party to note the exemption or restriction of its liabilities in a reasonable way, and shall explain the standard terms upon request by the other party, and the telecommunications service enterprise shall assume liability for breach of contract.

[70]White Paper on Safeguarding the Consumers' Interests by People's Courts at All Levels 2010–2013, See the version in Chinese at http://www.chinacourt.org/article/detail/2014/03/id/1228910.shtml.

4.2 *Alternative Mechanisms for the Resolution of Consumer Disputes*

4.2.1 Overview

China has an alternative mechanism for the resolution of consumer disputes.

The agreement reached by the parties through conciliation is not enforceable under the law. Most of the times, the success of conciliation depends on the good will and behaviour of the business operator.

The mechanisms of mediation and arbitration are established by law. For certain private regulations, one can see that platform providers take the initiative to establish ODR rules. Mediation has a private and non-litigation character. It is presided by mass mediation organizations in their attempts of solving civil disputes (neighborhood disputes) in general. Even if it is not binding, as the parties can back away from it and file a lawsuit with a people's court, mediation is the most widespread and most used tool of social intervention.

It is important to add that the Rules for the Adjudication of Civil Cases Concerning People's Mediation,[71] as judicial interpretation for the people's courts when adjudicating civil cases, confirm the contractual legal effect of agreements concluded by people's mediation, thereby promoting instructive results.[72]

It is interesting to note that the new 2010 People's Mediation Law of China[73] reinforced the legal effects of the mediation agreement, expressly confirming that the mediation agreement reached through the mediation of a people's mediation committee is legally binding for all stakeholders and the interested parties shall perform it as agreed.[74] After an agreement is reached through people's mediation, interested parties may jointly apply to the people's court for judicial confirmation within 30 days from the day the mediation agreement takes effect.[75] After the People's Court confirms the validity of the mediation agreement, and one party refuses to perform it or fails to completely perform it, the other party may apply to the People's

[71] Adopted on 5 May 1989 by the 1240th Meeting of the Judicial Committee of the Supreme People's Court, published on 16 September 2002, and entered into force on 1 November 2002.

[72] According to Article 1 of the Rules for the Adjudication of Civil Cases Concerning People's Mediation, "the agreement concluded through people's mediation, which includes in its content rights and obligations, and is properly signed or stamped by the relevant parties, is considered a civil contract. The parties must ensure the performance of the obligations under the agreement and cannot modify or revoke it improperly". The Supreme People's Court of China has already set the legal effects of a "civil contract" produced by an agreement concluded through mediation. In our opinion, even if the agreement is concluded with the help of the popular mediator, it does not differ from an ordinary civil contract based in party autonomy. In other words, the popular mediator exercises the role of a witness in this process.

[73] Adopted on 28 August 2010 by the 16th Session of the Standing Committee of the 11th People's National Congress.

[74] See Article 31 of People's Mediation Law.

[75] See Article 33 of the People's Mediation Law.

Court for mandatory execution. Where the people's court confirms that the mediation agreement is invalid, the parties may alter the original mediation agreement or conclude a new mediation agreement through people's mediation, or they may also file a lawsuit with the people's court.

Aiming at enjoying the benefits and conveniences of people's mediation provided by the new People's Mediation Law, many consumer associations in China have been successfully establishing within their own structures people's mediation committees, both at central and at local levels, in order to provide mediation services with efficiency and free of charge to consumers.

The arbitration award, which is enforceable and final, is done according to ordinary proceedings and the general rules of the Arbitration Law[76] and the Civil Procedure Law.[77] Up until now, there is not a special judicial proceedings aimed at facilitating consumer protection in China.

As for arbitration, generally, Chinese consumers will have to submit consumer disputes to an arbitration committee,[78] pay for the costs and observe the proceedings and time limit for arbitration of contractual disputes and disputes arising from property rights. Therefore, Chinese consumers, as a rule, cannot enjoy the rapidity and gratuity of found in arbitration of consumer disputes in Portugal, Netherlands or in other European countries.

An arbitration commission can be established in the place of residence in municipalities directly under the central government (Beijing, Shanghai, Tianjin and Chongqing), capital cities of provinces and autonomous regions, or of cities divided in counties, and it is a public law legal person. Therefore, consumers of rural areas and small cities are in an inconvenient position if they wish to submit a dispute to arbitration.

Differently from institutional arbitration, *ad hoc* arbitration is not recognized by the Chinese Arbitration Law. Up until 2015, there was a total of 244 arbitration commissions in mainland China, which handled 136,924 cases.[79] Due to restrictions imposed by the current Arbitration Law, arbitration commissions still cannot delegate their competences to consumer associations, and consumer associations are not authorized to create arbitration commissions within their structures. Therefore, the only feasible way is the provision of arbitration services to consumers through arbitration commissions legally established.

[76] Adopted by the 9th Session of the Standing Committee of the 8th National People's Congress on 31 August 1994, amended in 2009.

[77] Approved by the 4th Session of the 7th National People's Congress and promulgated by the Order No. 44 of the President of the People's Republic of China on 9 April 1991; amended on the 30th Session of the Standing Committee of the 10th National People's Congress and promulgated by the Order No. 75 of the President of the people's Republic of China on 28 October 2007, coming into force on 1 April 2008; amended again on the 28th Session of the Standing Committee of the 11th National People's Congress of the People's Republic of China and promulgated by the Order No. 59 on 31 August 2012, which came into force on 1 January 2013.

[78] See Articles 9 to 15 of Arbitration Law of China.

[79] Data was obtained from http://www.wfzc.org.cn/html/075934925.html on 24 May 2016.

ADR entities are required to ensure the impartial and prompt resolution of economic disputes, to protect the legitimate rights and interests of the parties. The people's mediation committee shall support local people from the society who is impartial, decent, enthusiastic in mediation and approved by the community to be involved in mediation.[80] In mediating the disputes among the people, a people's mediator shall adhere to principles, be conversant with the laws and be reasonable, and uphold justice.[81] Arbitration shall be carried out independently according to law and shall be free from interference of administrative organs, social organizations or individuals.[82]

In 2015, the total number of consumer complaints received by consumers organizations was 642,570, among which 545,727 cases were resolved though mediation.[83]

Starting from 2017, SAIC launched a free Online Dispute Resolution Platform national wide. It is estimated that the cases to be resolved by the ADR will increase constantly in the coming years.

4.2.2 Comparison of Effectiveness

The ADR mechanism promoted by the State is the as the most effective means of enforcement of consumer law.

Notwithstanding the existence of different ways of solving consumer disputes, due to certain lack of certainty in their order of priority, in practice, there are still some problems which affect the efficiency and effectiveness in their use.

There may be a repetition of *de facto* mediation or mediation offered simultaneously by a multiplicity of mediators. Both consumer associations and administrative departments can organize mediation. The consumer has, naturally, the expectation of counting on the administrative power to better protect its interests; however, the current Chinese legal system does not give broad powers to administrative bodies in the settlement of disputes.

Where there is a civil consumer dispute, administrative departments cannot issue their view through an administrative decision, because these bodies can only intervene in the dispute as mediators, and many times they simply repeat the mediation already organized by a consumer association. Where there are no obvious infractions, not all business operators are willing to take part in the mediation. In this sense, the repetition of mediation increases the administrative costs and does not help to solve the problems in hand.

[80] Article 20 of People's Mediation Law.

[81] Article 21 of People's Mediation Law.

[82] Article 8 of Arbitration Law.

[83] See statistics of the China Consumers Association at http://www.cca.org.cn/zxsd/detail/25965.html.

Mediation through consumer associations has been made difficult by the punitive damages mechanism. One of the novelties of the recent amendment of the Consumer Law is the reinforcement of punitive damages. The Law aggravated the applicable sanctions applicable to business operators who provide fraudulent products or services, from the then "return in plain and payment of damages in an equivalent amount" to a maximum of "return in plain and payment of damages in triple". In other words, the business operator shall increase the damages according to the consumer's requests, within a minimum of 500 yuan and a maximum of 3 times the price of the product or service acquired by the consumer.[84]

Consequently, the litigation culture became more common in China. Lately, there is a steady increase in the number of "professional consumers" ("professional opportunistic") who deliberately buy defective goods or services in order to request for punitive damages. There are consumers who managed to get, at the end of a lawsuit, an amount ten times higher from what they paid.[85]

5 Collective Redress

China recognizes collective redress for consumers' interest. The Civil Procedure Law, revised on 31 August 2012, effective on 1 January 2013, introduced for the first time the regime of collective redress. Article 55 of the Civil Procedure Law provides that "For conduct that pollutes environment, infringes upon the lawful rights and interests of vast consumers or otherwise damages the public interest, an authority or relevant organization as prescribed by law may institute an action in a people's court".

The newly revised Consumer Law in 2013 also addressed the collective redress in the Article 47, according to which, "for infringement upon the lawful rights and interests of vast consumers, the China Consumers' Association and the consumer associations formed in provinces, autonomous regions, and municipalities directly under the Central Government may file lawsuits in the people's courts".

The Supreme Court issued respectively "Interpretations of the Supreme People's Court on the Application of the Civil Procedure Law" on 30 January 2015 and "Interpretations of the Supreme People's Court on Certain Issues concerning the Application of Law in the Trial of Consumer-related Civil Public Interest Actions" on 24 April 2016 to clarify detailed procedures for initiation of collective redress.

In order that a court accept a public interest litigation, four conditions must be met simultaneously, namely: (a) there are definite defendants; (b) there are detailed

[84] Article 55 of the Law on the Protection of Consumer Rights and Interests.

[85] For example, the case Zhang Xiaohong and Xing Zhihong against Shanxi Mama Baobei Meitehao Baby Products and Mothers Ltd. and Guangzhou Jinqi Shi Nutrition Ltd., about imported food with illegal additions of cod-liver oil. See more details on http://www.315law.org/hotspot/0517259.html, visited on 30 May 2016.

litigation requests; (c) there is prima facie evidence that public interests are damaged; and (d) such lawsuits are within the scope of civil lawsuits acceptable by people's courts, and fall under the jurisdictions of the lawsuit-accepting people's courts.[86]

In 2015, there was one case of collective redress. On 1 July 2015, the Shanghai Consumer Council brought a collective action to the First Section of the Intermediate People's Court of Shanghai based on Article 47 of the new Consumer Law, against Tianjin Samsung Telecom Technology Co., Ltd., and GuangDong OPPO Mobile Telecommunications Corp., Ltd., on alleged injuries to information rights and free choice of consumers through the applications previously installed on mobile phones. The case became the first collective action on consumption judged by the Chinese courts, constituting a milestone, it turned out to fully realize the procedural order and not only the two defendant companies settled the violating measures of the rights and interests of consumers, as well as other industry companies such as Apple, Sony and Huawei declared they were already adopting improvement measures. In this context, the Shanghai Consumer Council finally agreed to discontinue the proceedings and subsequently presented a number of legislative proposals to the Ministry of Industry and Data Processing.[87]

Until March, 2017, there are in total six cases of collective redress. One was initiated by China Consumers Association (China Consumers Association sued LOVOL International Heavy Industry Co., Ltd. of illegal production and sale of three wheeled motorcycle) and other five were initiated respectively by consumer organizations in Zhejiang Province,[88] Shanghai, Jiangsu Province (Jiangsu Province Consumers Association sued Nanjing Water Group for the unfair terms and conditions of breach of water supply contract), Jilin Province (Jilin Province Consumers Association sued Han and other two people for the sale of fake salt) and Guangdong Province (Guangdong Consumer Council sued Li for the illegal production and illegal sale of meat from sick and dead pigs, and of pork preserved using hazardous liquid).

[86]See Article 283 of Interpretations of the Supreme People's Court on the Application of the Civil Procedure Law on 30 January 2015.

[87]The case was included as a success story of CI members, having been presented in the 20th international reunion of Consumers International, which occurred in Brasília between the 18 and 20 November 2015.

[88]On 30 December 2014, the Zhejiang Consumers' Association brought an action before the Court against Shanghai Railway Transport, asking it to ban the Shanghai Railway Transport Services' imposition of the purchase of a new ticket to those who mislay the ticket purchased with a nominative title. The case represented the first collective action for the defence of consumer rights in the country brought by a consumer association since the entry into force of the new Consumer Law. Despite having obtained the support of the China Consumers' Association, the case came to be rejected in the 1st instance on the basis of non-fulfilment of procedural conditions provided in the Civil Procedure Act for collective action. The 2nd instance upheld the decision, which let the Association of Zhejiang Consumers to give up the action. The case has aroused the attention of the judicial sector, generating discussion and leading pressure from society to impose on the Supreme Court the imminent publication of a judicial interpretation of the collective actions of consumers to regulate, in particular, the procedural assumptions and the burden of proof.

In terms of the remedies that consumers may get from collective action, it should be noted that the "Interpretations of the Supreme People's Court on Certain Issues concerning the Application of Law in the Trial of Consumer-related Civil Public Interest Actions" issued by the Supreme Court on 24 April 2016, does not lay down all the possible solutions.[89] Perhaps, this cautious approach was adopted initially to allow some flexibility and improvement in the future.

The cases brought by Consumer Associations of Zhejiang, Shanghai and Jiangsu only involved injunctions to merchants or enterprises to stop certain practices. In the case of Jilin Province Consumer Association v. Han for the sale of fake salt, the plaintiff requested the defendant to offer an apology to consumers and the court upheld the request. In addition, the merchant was sentenced to imprisonment and a penalty, which was collected by the court.

At this moment, the cases brought by China Consumers Association and by Guangdong Consumer Council are still in the trial. However, through these two cases, one can see a shift from a preventative approach to a punitive approach aiming to enhance the redress effectiveness in the collective actions. China Consumers Association requested the court to confirm the defendant's fraud practice as provided by Article 55 of the Consumer Law, so that the consumers can either individually claim their rights to compensation or authorize China Consumers Association to claim their three times of punitive compensation. The Guangdong Consumer Council requested the defendant to bear the punitive compensation of 10,062,000 yuan RMB, being the very first landmark case in collective actions to apply the punitive compensation system.[90]

6 The Role of Consumer Organisations in Enforcement of Consumer Law

6.1 Consumer Organisations

Nearly 3280 consumer organisations exist in China, among of which one is of national level (China Consumers Association), 31 are of provincial level, 409 are established at municipal level and 2839 are located at county level.[91] According to the statistics of China Consumers Association, there are 16,351 sub-associations, 80,444 complaint handling offices and 22,952 liaison stations established at the villagers or community committees, administration departments, colleges and universities and other enterprises in urban and rural areas, and over 72,461 voluntary

[89]See Articles 5 and 13 of Interpretations of the Supreme People's Court on Certain Issues concerning the Application of Law in the Trial of Consumer-related Civil Public Interest Actions.

[90]See http://www.spp.gov.cn/zdgz/201703/t20170322_185995.shtml.

[91]See http://www.de-think.com/news/show-188.html.

supervisors and participants are engaged in the undertakings of consumer rights protection.[92]

Different from the practices of other countries, China Consumers Association is a quasi-governmental organization in terms of budget, organizational structure and personnel.[93] Consumer organizations in China have the authorized size of personnel, enjoy hierarchy and perform some functions of administrative agency. Their leaders are appointed or dismissed by the Party and government departments at all levels.[94]

The newly amended Consumer Law changed the status of consumer organizations from social group to social organizations,[95] according to which "Consumer associations and other consumer organizations are social organizations legally formed to exercise social supervision over commodities and services and protect the lawful rights and interests of consumers". Consumer organizations in China do not collect membership fees and purport to protect the legal interests of all consumers. The Consumer Law also states that the people's governments at all levels shall provide necessary operating funds and other support for consumer associations to perform their duties.[96]

The Regulations on Registration Administration of Associations, promulgated by Decree No. 250 of the State Council on 25 October 1998 and revised by Decree No. 666 of the State Council on 6 February 2016 is the most relevant legal instrument for the establishment and operation of a consumer organization.[97]

In May 2016, Guangdong Province Consumer Association created "Consumer Public Interest Lawyers Group", the very first NGO in China (besides consumer organizations) aiming to enforce the consumer law.[98] The "Consumer Public Interest Lawyers Group" offers free legal aid and institutes consumer-related civil public interest actions against business operators on the grounds of their activities of infringing upon the lawful rights and interests of unspecific consumers in large number, endangering the personal or property safety of consumers or otherwise impairing social public interests.

[92]For more information, see the official webpage of China Consumers Association at http://www.cca.cn/En/AboutUs.html.

[93]Tian (2012), p. 18.

[94]YU (2006), p. 30.

[95]Article 36 of Consumer Law (amended in 2013).

[96]Article 37 of Consumer Law (amended in 2013).

[97]Article 10 of the Regulations on Registration Administration of Associations sets mandatory legal conditions. Article 13 of the same legal instrument sets out prohibited legal conditions for the establishment of an association in China.

[98]See the report at http://news.xinhuanet.com/politics/2016-05/05/c_128960414.htm.

7 Private Regulation and Enforcement of Consumer Law

In some areas, private regulation is relevant for consumer protection. The e-commerce and financial services are the most relevant areas. Not all private regulations (best practices and codes of conducts, among others) are enforceable.[99] So far, several industry associations or voluntary service providers have developed codes of conduct that are relevant for the enforcement of consumer law.

For instance, in 2016, China Financial Services Code of Conduct, adopted by numerous financial institutions, Alipress, Baidu, among others,[100] defined the legal obligations of financial services providers.

In March 2017, China Association of Self-Employed Individuals published Code of Conduct for Life Services by Internet Platform Providers,[101] which creates legal obligations such as the good-faith, fairness, protection of intellectual property, protection of consumers' safety and right to health, among others, allows the consumers to lodge complaints and provide the consumers advance payments.

The giant Alibaba Group has developed very sophisticated rules of consumer protection mechanism and online dispute resolution both for B2C and for C2C e-commerce.

Currently, some platform operators in China offer online dispute resolution services. By nature, arbitrations promoted by platform operators are non-binding arbitrations. For example, the popular shopping site Taobao Alibaba Group, the largest C2C platform in China, launched a consumer protection center to handle disputes between consumers and sellers on the basis of Taobao rules. The Taobao operator handles the dispute of the parties in accordance with its own criteria and may order internal punishments, such as the cancellation of the vendor registration and prohibition of transactions, among others. Such mechanisms, to some extent, can help consumers solve some hassles, however, apparently there is a concern regarding the legitimacy and impartiality. Taobao plays several roles simultaneously, being the creator of the rules, the arbitrator of disputes and also the enforcer of decisions, and may be related to some disputes. Platform operators are founders of the internet realm, and in many cases the consumer is not included in the preparation of such self-regulation and public supervision is not enough. Considering the nature of consumer relations (consumer vulnerability, limited freedom of consumer choice and information asymmetry), it is justified that states and legislatures should be protagonists in the development of the legal system and the national authorities for consumer protection should take faster action. The privatization of the legislative process will continue to exist; however, it should only be complementary in

[99]For example, in 2013, IFC1000 (Internet Financing Club of One Thousand People) launched a "Code of Conduct of Internet Financing" which contains 8 articles which deal with the very broad declarations and principles, see http://www.chinanews.com/fortune/2013/08-14/5160658.shtml.

[100]See more details at http://www.ce.cn/xwzx/gnsz/gdxw/201601/21/t20160121_8442175.shtml.

[101]The full version has been published by the official webpage of the Central Government, available at http://www.gov.cn/xinwen/2017-03/16/content_5177894.htm.

improving the level of consumer protection and should always be subject to judicial control and monitoring system.

In most cases, the private regulators themselves organize proper enforcement.

8 Sanctions for Breach of Consumer Law

For the breach of consumer law in China, the envisaged sanctions include civil liability, administrative sanctions and criminal liability.

Law on Protection of Consumer Rights and Interests (amended in 2013) defines the applicable penalties. SAIC has also produced new legal instruments, such as administrative measures on cybernetic transactions,[102] measures on inspection by sampling the quality of products in circulation,[103] measures for the treatment of consumer complaints by the Commercial and Industrial Management Services,[104] Interim Provisions on the Publication of Information related to the Administrative Sanctions applied by the Industrial and Commercial Administration Services[105] and Sanctioning Measures for Acts Harmful to Consumer Rights and Interests (hereinafter Sanctioning Measures).[106]

In particular, the Sanctioning Measures (with 22 articles) came to increase the effectiveness of the new Consumer Law through a full densification of the duties of business operators enshrined in Chapter II of the Consumer Law (14 articles), with the following content: quality below legal standards (Article 5), false advertising (Article 6), fake brands (Article 5), return without cause within 7 days in cyber transactions (Article 9), after-sales services (Article 10), consumption by advanced payment (Article 10), violation of consumers' personal data (Article 11), unfair contractual clauses (Article 12) and illegal acts of service operators (Article 13), serving as a basis for the enforcement of the new Consumer Law by the administrative bodies. Features enhanced by the Sanctioning measures can be summarized as follows: at the outset, its main content reflects the most pronounced problems as configured in complaints received from consumers since the entry into force of the new Consumer Law, problems which coincide precisely with the obstacles to the enforcement of the law. Thus, the General Directorate came to fulfill the legal duties using the powers conferred by the Act, enhancing the functionality in their implementation. In the second place, in many of the rules employed in the Sanctioning measures is an exemplary method to densify the most credible cases of injury of consumer rights and interests in the provision of goods or provision of services by operators as a complement and enhancement of the content of the new Consumer

[102]Published by Order of the SAIC, No. 60 of 26 January 2014, to take effect from 15 March 2014.
[103]Published by Order of the SAIC, No. 61 of 14 February 2014, to take effect from 15 March 2014.
[104]Published by Order of the SAIC, No. 62 of 14 February 2014, to take effect from 15 March 2014.
[105]Published by Order of the SAIC, No. 71, of 19 August 2014, to take effect from 1 October 2014.
[106]Published by Order of the SAIC, No. 73, of 1 January 2015, to take effect from 15 March 2015.

Law providing grounds for the application of the provisions on sanctions contained therein. Thus, for example, Article 6 lists openly acts of misleading advertising or inducing in error; Article 9 indicates four types of "delaying tactics or forms of unjustified refusal" against the exercise of the consumer's right to return without cause within the cyber transactions; Article 11, in addition to the discipline of the new Consumer Law, describes three forms of violation of consumers' personal data; Article 12 openly lists the general contractual clauses contrary to the law; and Article 16 clarifies the notion of "fraud" for the purposes of the punitive compensation system provided for in the new Consumer Law. Third, in strengthening the coactivity of the Sanctioning measures, all sanctions, whether tort or not, are associated to it.

The most common form of sanction in practice is administrative sanction. Where business operators fall under any of the circumstances specified by the Law, in addition to punishment in accordance with laws and regulations, the punishing authorities shall enter the violations into their credit files and disclose them to the public.

As of the end of 2015, the administrative enforcement authorities interviewed 24,272 enterprises, issued 12,235 administrative proposals and 7176 notices for corrective actions, redressed 14,651 unfair terms in standard form contracts, investigated 3834 cases and imposed administrative fines with a total value of 47,88 million yuan. Compared with January 2015, in December 2015, the national illegal advertising practices decreased 26,878 pieces.[107]

Breach of consumer legislation leads to criminal liability. Traders or merchants who are suspected of any crime for infringing upon the lawful rights and interests of consumers in providing commodities or services, shall be subject to criminal liability in accordance with the law.

Whoever obstructs, by force, threat, or other means, the legal performance of duties by the employees of relevant administrative departments shall be subject to criminal liability; and whoever refuses or obstructs, without resorting to violence or threats, the legal performance of duties by the employees of relevant administrative departments shall be punished by the public security authorities.[108]

9 External Relations and Cooperation of the State, Enforcers and Consumer Organisations

Being a member of United Nations, China has followed the UN Guidelines for Consumer Protection in formulating the national consumer law and policy.

[107] See http://www.saic.gov.cn/ywdt/xwfb/201604/t20160401_167690.html.

[108] Article 60 of the Consumer Law (amended in 2013).

Except the common consumer principles and frameworks set out by the United Nations, China has not been part of any regional or international organization to develop any "common consumer legislation" in a strict sense.

China is a member of the International Consumer Protection and Enforcement Network (ICPEN). The main authorities in charge of enforcement of consumer law has been strengthening the exchanges, information sharing and cross border enforcement collaboration with other members. There has been an annual consultation mechanism among China, the Republic of Korea and Japan on the enforcement of consumer law.

So far, SAIC has signed with Korea a Memorandum of Understanding (MOU) on the Collaboration of Consumer Protection. SAIC has also signed respectively a Memorandum of Understanding on Collaboration and Exchanges in the Areas of Anti-unfair competition and Antimonopoly, with Russia and with Canada, which aim to promote bilateral collaboration for enforcement (including deceptive commercial practices and misleading advertisements).[109] There was another bilateral MOU signed by SAIC and the Office of Fair Trading UK in 2011.[110]

There are no any particular rules on cross-border enforcement in China's national regime of consumer law.

China Consumers Association became a member of Consumers International in September 1987.

10 Final Remarks

The newly revised Consumer Law of China has given new rights to consumers and new responsibilities to operators. The sustainable and healthy development of any economy depends on having a good consumer environment as well as effective protection of legitimate rights and interests of consumers. Although in general it may be said that the new Law has obtained positive results, the truth is that it still has new challenges ahead. In our view, the latest review of the Consumer Law does not cease to hold shortcomings and room for improvement. In particular, the law still does not provide a clear concept of the consumer by providing in Article 2 that "The injury of rights and interests of consumers who, by virtue of arising needs arising from life, through purchase or use of products or acceptance of services are protected by this law." Now, although it has witnessed a remarkable awareness of the protection of the rights by the majority of consumers in comparison to the past, more and more "professional opportunist" are beginning to emerge to formulate claims for punitive damages. Considering the relative market disorder in the context of an economy in

[109]More information can be found at http://www.saic.gov.cn/ywdt/xwfb/201604/t20160401_167690.html.

[110]See a report available at http://cxnews.zjol.com.cn/cxnews/system/2011/03/25/013526460.shtml.

transition, should such "professional opportunists" deserve the same protection as is afforded to most consumers? On the other hand, should the consumer purchasing or using goods or accepting services by needs of another kind (such as the spirit hedonic consumption or consumption) be protected in the same way? Moreover, it must be said that China's consumer associations still have a certain gap at the level of operational mechanisms and institutional framework in the light of international standards. On 2 November 2015, concerning the assessment of the implementation of the new Consumer Law report at the 17th Session of the Standing Committee of the 12th National People's Congress, the legislature came to note that certain content of its provisions was not still effectively "put into practice". Thus, we have good reason to believe that with the successive accumulation of experiences in implementing the new Law, the consumer protection regime in China will come to evolve constantly.

The enforcement mechanism in China is currently undergoing a reform of digitalization in the era of big data. SAIC has taken an initiative to launch in 2017 a national-wide "12,315 Online Platform for Consumer Complaints and Disputes" which aims to optimize the efficiency, effectiveness, transparency of enforcement.

The newly revised Consumer Law is accessible and takes reference of the experiences of numerous jurisdictions. Its applicability has been enhanced by a number of implementing rules, which were adopted by the enforcement organs.

Capacity building is definitely needed for constant improvement. As the largest developing country in the world, China has experienced an exponential economic development over the past decades, accompanied by major changes in the forms of consumption, on the consumption structure and on the consumption mentality. Nevertheless, China's economic development model has also evidenced a market disorder, which has been historically experienced by many countries in transition. In recent times, the mainland China market has been flooded by large quantities of counterfeit and bad quality goods and there has been serious food security problems. With the development of computer technology, it began to become increasingly common the use of internet, broadcasting and telecommunications for the sale of goods or the provision of services, with a whole new range of consumer disputes arising therefrom. Consumers, generally little aware of risk prevention, began to be subject of continued harm to their legitimate rights and interests. With information failure, translated into incompleteness, asymmetry, lack of clarity and lack of transparency of information, there is a "crisis of confidence" and a "lack of confidence" in several areas of consumer relations. Taking into account the characteristics of consumer disputes and the massive demand from consumers, mediation and arbitration are important alternative disputes resolution mechanisms in China.

However, the traditional model of alternative dispute resolution (arbitration, in particularly) meets certain limitations when facing today's consumer disputes, namely, the willingness of the consumer and the service provider or supplier of goods to submit to mediation and arbitration attempts, knowledge and confidence of consumers in extra-judicial settlement of their disputes in a quick and cheap way, the legal force of mediation decisions and arbitral awards, and the contradiction between the constant internationalization of consumer contracts and the difficulties of

recognition and enforcement of arbitral awards issued by foreign arbitration centers or by platform operators.

For the modernization extra-judicial settlement of consumer disputes in China, there is a need to optimize the design of the current system, so that mediation and arbitration can play a most relevant role in balancing the rising litigation. It is a matter of urgency for the legislature to define and strengthen the legal framework of alternative dispute resolution mechanisms in new forms of consumption (for example, in financing via internet and e-commerce).

Even arbitration commissions in China will also have to overcome some existing limitations in order to reduce costs and time consumer faces to defend their interests. There are a growing number of arbitration institutions that are struggling to get out of the obsolete scope of traditional commercial arbitration and expand to arbitration of consumption disputes.

In an emerging economy like China, there are still many challenges for the enforcement policy in the traditional areas, however, we have noticed that there are also new focuses on the administrative bodies, on the provision of services, in the area of financial services. There is also a shift from the judicial resolution of consumer disputes to out-of court resolution of consumer disputes.

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Enforcement and Effectiveness of Consumer Law in Croatia

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1 Croatian Consumer Protection in General

Over the past 15 years, since the beginning of the process of accession to the EU, the Republic of Croatia[1] has been gradually developing policy of consumer protection. Consumer protection policy represents today a comprehensive body of measures, tools and activities in different fields of the market aimed at fostering the role and protection of consumers.[2] Consumer protection policy in Croatia comprises of comprehensive legislation which regulates business-to-consumer (B2C) relations and strategic documents which define the main goals and measures of consumer protection policy in the given time framework.

Although consumer protection is a relatively new concept, some elements of consumer protection in Croatia can be traced back in the late seventies of the twentieth century. Thus, for example, the Civil Obligations Act of 1978 contained provisions on sale purchase contract with deferred payment which featured some elements nowadays considered to be principal tools of consumer protection, like for example, withdrawal right (a cooling-off period), and semi-mandatory nature of protective rules. Furthermore, the same Act already in the seventies contained provisions on strict products liability. Approximately at the same time, legislation on products safety begun to develop. However, comprehensive and systematic

[1]Croatia is a unitary republic with population of 4.3 million (2011 census). It is a Member State of the EU as of 1 July 2013.

[2]Nacionalni program zaštite potrošača za razdoblje od 2013. do 2016. godine (National program of consumer protection for the period 2013–2016), Official Gazette of the Republic of Croatia (hereinafter: OG) 90/13.

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development of consumer protection in Croatia commences at the beginning of the twenty-first century when, in the course of preparing for the accession to the EU, Croatia accepts the EU standards in consumer protection. From that time on, Croatia has been developing strategic documents, legislation, administrative capacities and capabilities of civil society with the aim of achieving a high level of consumer protection, and consumer protection became one of the most prominent social policies.

Consequently, Croatian national regime of consumer protection is fully inspired by the EU consumer law and policy. As the Member State of the EU, the Republic of Croatia is required to fully harmonise its legislation with the acquis, including in the area of consumer protection. For this reason, Croatian legislation in the area of consumer protection is nowadays predominantly based on the EU legislation.

A principal strategic document in the area of consumer protection, which defines the main goals of consumer protection policy and measures for fulfilment of these goals, is National program. National programs are passed by the Croatian Parliament, in principle for the period of 4 years. First National program was issued for the period 2005–2006,[3] followed by National programs for the period 2007–2008,[4] 2009–2012,[5] 2013–2016, and 2017–2020.[6]

As the development of consumer protection system in Croatia progressed, so has the focus of consumer protection changed. In the beginning of the process of developing consumer protection system in the early 2000, the focus was primarily on institutions and capacity building. Nowadays, as the National program issued for period 2013–2016 suggests, general goal of consumer protection policy in Croatia is a well-informed, well-educated and responsible consumer. More particular goals achieved in consumer protection policy in the designated period included: improving financial literacy of consumers and better protection of consumers in financial sector, better protection of consumers in public services, better safety standards of products and services, encouragement of alternative dispute resolution, improving legal certainty of consumers and traders in cross border transactions.

Measures aimed at achieving these goals include: improving existing legislative solutions and institutional framework, better integration of consumer protection policy in other sectoral policies, more active role of local authorities in implementation of consumer protection policy, strengthening of consumer protection associations, continuous education and information of consumers and traders, enhanced market surveillance.

Consumer protection legislation and consumer education and information represent two main pillars upon which Croatian consumer protection system is build.

[3] Official Gazette No 31/05.

[4] Official Gazette No 84/07.

[5] Official Gazette No 30/10.

[6] Official Gazette No 90/13.

Croatian legal system belongs to the civil law legal tradition. Pursuant to Article 115(3) of the Constitution,[7] the courts in the Republic of Croatia adjudicate on the basis of the Constitution, legislative acts, international treaties and other legal sources which are in force. Therefore, written regulation is the principal source of law in the Republic of Croatia.

The Consumer Protection Act (the CPA)[8] is the principal comprehensive source of law in the area of consumer protection. The first legislation particularly aimed at consumer protection was adopted in 2003,[9] and replaced by the new Act in 2007, which had several amendments.[10] The most recent CPA was adopted in 2014, and slightly amended in 2015. The CPA defines the organisational structure of consumer protection in Croatia, by enumerating entities responsible for consumer protection, and contains provisions aimed at protection of economic interests of consumers. In this respect, this Act mostly regulates contract law issues in B2C transactions, such as unfair contract terms in consumer contracts, consumer protection in distance contracts, consumer protection in timeshare contracts, as well as other elements of market relations which influence economic interests of consumers, such as unfair commercial practices, provision of public services, indication of prices, labelling of products, etc. This Act also contains detailed procedural provisions regulating collective protection of consumer interests.

A number of other legal sources contain provisions aimed at consumer protection, such as the Civil Obligations Act (hereinafter: the COA),[11] which specifically regulates non-conformity with a contract in B2C transactions, liability for defective products and package travel contract, the Consumer Crediting Act,[12] the Residential Immovable Consumer Crediting Act, the Provision of Services in Turism Act, the Credit Institutions, Act,[13] the Electronic Communications Act,[14] the Leasing Act,[15] the Insurance Act,[16] the Basic Obligations and Property Law Relations in Civil

[7]Constitution of the Republic of Croatia, Official Gazette No 56/90, 135/97, 113/00, 28/01, 76/10, 85/10 (consolidated version), 5/14.

[8]Official Gazette No 41/14, 110/15.

[9]Official Gazette No 96/03.

[10]Official Gazette No 79/07, 125/07, 75/09, 79/09, 89/09, 133/09, 78/12, 56/13.

[11]Official Gazette No 35/05, 41/08, 125/11, 78/15.

[12]Official Gazette No 75/09, 112/12, 143/13, 147/13, 09/15, 78/15, 102/15, 29/18.

[13]Official Gazette No 159/13, 19/15, 102/15, 52/16.

[14]Official Gazette No 73/08, 90/11, 133/12, 80/13, 71/14.

[15]Official Gazette No 141/13.

[16]Official Gazette No 30/15.

Aviation Act,[17] the Civil Procedure Act,[18] the Arbitration Act,[19] the Trade Act,[20] the Electronic Trade Act,[21] just to mention the most important ones.

Moreover, safety related issues of consumer protection are regulated in a separate body of law. In the area of protection of consumers' safety, the principal source of law is the General Products Safety Act,[22] supplemented by other acts of general application like the Standardisation Act,[23] and the Technical Requirements for Products and Assessment of Conformity Act.[24] Safety of particular products is regulated in special regulation like the Food Act,[25] the Food Related Information of Consumers Act,[26] the Materials Coming in Direct Contact with Food Act,[27] the Hygiene of Food and Microbiological Requirements for Food Act,[28] and the Products of General Use Act.[29]

Based on some of the previously mentioned acts, a number of bylaws were issued, which provide for detailed regulation of some aspects of consumer protection.

Since the Republic of Croatia is the Member State of the European Union, EU Regulations, legislative acts of the European Union directly applicable in the Member States, are also important source of law in the Republic of Croatia.

As the EU consumer protection law undergone a rapid development in the past 15 years, so was the Croatian legislation on consumer protection in the constant change in that period. For instance, as already mentioned, the First Consumer Protection Act of Croatia, based on the EU legislation, entered into force in 2003. Already in 2007 this Act was replaced by the new CPA, which reflected changes occurred in the European law in the meantime. Even this Act had been amended almost on the yearly basis, and in 2009 and 2012 substantively, in order to harmonise Croatian legislation with the developments in the EU law. Finally, in 2014 the latest Consumer Protection Act entered into force, which was the third Consumer Protection Act in 11 years. Similar development occurred in the area of consumer safety. The first General Products Safety Act, harmonised with the EU legislation, entered

[17]Official Gazette No 132/98, 63/08, 134/09, 94/13.

[18]Official Gazette No 53/91, 91/92, 112/99, 88/01, 117/03, 88/05, 2/07, 84/08, 96/08, 123/08, 57/11, 148/11, 25/13, 43/13, 89/14.

[19]Official Gazette No 88/01.

[20]Official Gazette No 87/08, 96/08, 116/08, 114/11, 68/13, 30/14.

[21]Official Gazette No 173/03, 67/08, 36/09, 130/11, 30/14.

[22]Official Gazzete No 30/09, 139/10, 14/14.

[23]Official Gazzete No 80/13.

[24]Official Gazette No 80/13, 14/14.

[25]Official Gazette No 81/13, 14/14.

[26]Official Gazette No 56/13, 14/14, 56/16.

[27]Official Gazette No 25/13, 41/14.

[28]Official Gazette No 81/13.

[29]Official Gazette No 39/13, 47/14.

into force in 2003.[30] After an extensive modification in 2007,[31] this Act was replaced in 2009 with the new General Products Safety Act,[32] which was also amended twice, in 2010[33] and 2014.[34]

Apart from special consumer protection legislation, the consumers' information and education system represents yet another pillar upon which the consumer protection in Croatia rests. In this area, a variety of measures is undertaken with the aim of educating and informing consumers of their rights. Thus, for example, pursuant to Article 133 of the CPA, elementary school programs and high school programs must include basic information on consumer protection.[35] Furthermore, Article 126 of the CPA mandates local governments to perform activities aimed at education and information of consumers on their respective territories.

Important efforts aimed at education and information of consumer have been undertaken on the level of central government as well. The Ministry of Economy, responsible for consumer protection, developed a web page containing a variety of tools designed to educate and inform consumers. Thus, for example, consumers may obtain all the basic information about their rights by visiting the Ministry of Economy's web page.[36] Apart from the Ministry of Economy's web page, consumers may obtain relevant information or advice through the Central Information System for Consumer Protection (CIS CP) or through a special phone line set up exclusively for the purposes of informing and/or advising consumers.[37]

Relevant information and advice consumers in Croatia can also obtain through the web pages of other governmental institutions and independent regulators, responsible for consumer protection in particular industries and economy sectors, like for example, the Croatian National Bank,[38] the Croatian Regulatory Agency for Network Industries (HAKOM),[39] the Croatian Food Agency (HAH),[40] the Croatian Civil Aviation Authority (CCAA).[41]

The availability of relevant information on the Internet is of particular importance since, according to some surveys, 71% of all consumers in Croatia obtain relevant information about their rights over the Internet.[42]

[30]Official Gazette No158/03.

[31]Official Gazette No 107/07.

[32]Official Gazette No 30/09.

[33]Official Gazette No 139/10.

[34]Official Gazette No14/14.

[35]See Article 133 of the CPA, Official Gazette No 41/14, 110/15.

[36]See http://potrosac.mingo.hr/hr/potrosac/.

[37]See http://potrosac.mingo.hr/hr/potrosac/.

[38]See https://www.hnb.hr/o-nama/informacije-potrosacima.

[39]See https://www.hakom.hr/default.aspx?id=233.

[40]See http://www.hah.hr/.

[41]See http://www.ccaa.hr/hrvatski/prava-putnika_24/.

[42]See the Report of Execution of the National Program for Consumer Protection for the Period 2009–2012, p. 12.

Over the years, special programs dedicated to information and education of consumers have been developed on national and regional television and radio stations. Most noticeable achievement in this respect is the program "Consumer Code", broadcast on the Croatian National Television on a weekly basis for more than 10 years.[43]

Finally, consumer protection associations are one of the most important players in the field of consumer education and information. Among other activities, they have set up four regional consumers' consultancy centres situated in Zagreb, Split, Osijek and Pula and financed by the Ministry of Economy and the EU Commission.[44] Number of advices given to consumers via consumers' consultancy centres is steadily growing and in 2014 exceeded 23,000 individual advices.[45]

All these measures form a comprehensive system of information and education of consumers, which significantly improved the level of consumers' awareness on their rights. Although an overall assessment of the level of consumers' awareness of their rights generally shows satisfactory results, further efforts will be needed in this area, as some data suggest.

For example, although a poll conducted on the Ministry for Economy webpage shows that 68% of consumers know of their right to withdraw from contract concluded on the Internet,[46] which may be regarded as satisfactory, the available data also show that there is ample space for improving existing level of consumer awareness of their rights. Thus, for example, 50% of consumers claim that they are generally not familiar with their rights in case of shopping on the Internet. Moreover, 81% of consumers would like to know more about their rights in case of shopping on the Internet and 85% of consumers would like to know more about their rights in case of credit arrangements.[47] All this suggest that further measures in awareness raising are necessary, which is obviously why National program for consumer protection for the period 2013–2016 focused on improving the level of information of consumers.

2 Authorities Responsible for Consumer Protection

Responsibility for enforcement of consumers' rights is divided between several authorities: courts, independent regulators and administrative bodies, i.e. inspections, and this responsibility as well as authority for resolution of B2C disputes is based on statutory provisions. In the course of analysing the

[43] See http://www.hrt.hr/315462/organizacija/potrosacki-kod-desetljece-u-sluzbi-potrosaca.

[44] See http://potrosac.mingo.hr/hr/potrosac/clanak.php?id=12348.

[45] See http://potrosac.mingo.hr/slike/dokumenti_3/g2015/m03/x1387450024531904.pdf.

[46] See http://potrosac.mingo.hr/hr/potrosac/anketa.php.

[47] See http://potrosac.mingo.hr/slike/dokumenti_3/g2015/m03/x1387503066442231.pdf.

responsibilities for resolution of consumer disputes, one has to make distinction between individual and collective protection of consumers' rights.

Since in majority of cases B2C disputes derive from a contract concluded between a consumer and a trader/service provider, primary path of enforcing infringed individual consumer's rights is a civil procedure before regular courts. Croatian law does not recognise special civil procedure developed exclusively for resolution of consumers' disputes. Hence, in order to protect his/her infringed rights, a consumer will need to initiate a regular civil procedure before the first instance court. However, bearing in mind generally small value of consumer disputes, in majority of B2C cases, a consumer will be able to make use of an accelerated, simplified procedure designed for resolution of small disputes. Civil procedure is regulated in the Civil Procedure Act, and pursuant to this Act, consumer disputes will be resolved in the first instance by Municipal Courts, the courts of general jurisdiction. According to this Act, civil procedure is in principle accusatory in nature, which implies that courts have very limited powers, if any, in establishing facts on their own motion. Hence, in civil procedure, parties in principle will be responsible for facts finding and a court is not authorised to perform its own investigations. In civil procedure, the courts in principle decide based on direct, oral and publicly held hearing.

Situation is somewhat different with respect to protection of consumers' collective rights, regulated in the CPA. Authority for resolving such disputes in the first instance lies with the Commercial Courts, specialised courts responsible for resolution of commercial and business related disputes. A limited number of entities, defined in the Government's ordinance, can initiate this type of proceedings.[48] Within these proceedings, consumers are given a preventive, and not a compensatory protection. Save as otherwise provided for in the CPA, a court will conduct these proceedings in accordance with the Civil Procedure Act. Hence, in principle, this is a regular civil procedure.

Although in principle designed for the purposes of general prevention, administrative proceedings before the competent inspectorate are sometimes used by consumers for resolving their individual disputes with traders. This is due to fact that the CPA vests on competent inspectorates limited powers of issuing the so-called administrative measures, a relief by which a cessation of a trader's particular behaviour or action is ordered. Thus, for example, the competent inspectorate has the power to order a trader to fulfil a contract concluded with the consumer, to order a trader to remedy a non-conformity of the object sold, to fulfil the guarantee issued, etc.[49] Furthermore, pursuant to Article 135, paragraph 2 of the CPA, a competent inspector has the power to order cessation of unfair commercial practices, which means that administrative proceedings before the competent inspectorate can also be employed as a collective relief.

[48]See in more detail under the Sect. 7 below.

[49]See Article 137(3) of the CPA.

Request for inspection may be submitted by mail, by electronic mail, over the Internet, in person or by using special application of the Central Information System for Consumer Protection,[50] which is a part of the Central State Information Portal. This system enables consumers either to submit a question regarding their rights and their realization or to request control by the inspection. Inspection would be executed only after the consumer has made a complaint in writing to the respective trader.[51]

Inspection proceedings are administrative proceedings governed by the Inspections in Economy Act and the General Administrative Procedure Act.[52] Administrative procedure is based on inquisitorial principle and a person conducting an administrative procedure has more freedom in determining the facts than is the case with the judge in civil proceedings. Thus, for example, a person conducting an administrative procedure (e.g. an inspector) is empowered to adduce evidence on its own motion.[53] Court protection against a decision of an administrative body (e.g. inspector) is provided in administrative dispute, which can be initiated before the Administrative Court, pursuant to the Administrative Disputes Act.[54]

In specific circumstances, consumers will be able to make use of specific procedures designed for resolution of individual disputes outside courts. One of these possibilities is provided for in the Electronic Communications Act and consists of the possibility to refer the dispute between the user and provider of telecommunication services to HAKOM, which has the authority to resolve the dispute. Pursuant to Article 51 of the Electronic Communications Act, a user of telecommunication service can refer the dispute against the operator to HAKOM within 30 days as of receiving a written answer of the Claims Committee of a particular operator. HAKOM observes its authority for resolution of the dispute *ex offo* and will immediately suspend proceedings if established that the user initiated court proceedings for the resolution of the same dispute. The operator is obliged to take part in these proceedings and to provide HAKOM with all the data and documentation in its possession. HAKOM decides based on available data and documentation, in principle without oral hearing. The decision must be reached as soon as possible and the latest 4 months as of the initiation of proceedings. HAKOM's decision must be supported by detailed reasoning. Proceedings before HAKOM are considered to be administrative in nature and HAKOM will conduct these proceedings in accordance with the General Administrative Procedure Act. According to the Statute of HAKOM, the Legal Department of HAKOM conducts dispute resolution proceedings before HAKOM.[55] The decision of HAKOM is based on an opinion of HAKOM's Committee for Protection of End Users' Rights, which consists of seven members, five of which are the representatives of HAKOM's expert

[50]See https://prijava.mingo.hr/CD/prijava.jsp.

[51]Articles 135, 10(1-2) and 25(5) CPA.

[52]Official Gazette No 47/09.

[53]Article 58 of the General Administrative Procedure Act.

[54]Official Gazette No 20/10, 143/12, 152/14, 94/16, 29/17.

[55]See Artice 15(4) of the Statute of HAKOM (Official Gazette No 97/14).

department and two are representatives of consumer protection associations. The HAKOM's Council appoints members of the Committee for the period of 2 years with a possibility of re-election.[56]

Another example of dispute resolution system outside courts is amicable dispute resolution of disputes arising out of transportation by air before the CCAA, which is the responsible body for effecting the passenger rights in aviation traffic. In case of being deprived of his/her rights, a passenger firstly has to submit a written complaint to the respective air carrier or/and to the airport operator and to include supporting documentation for his/her complaint. If the air carrier or airport operator does not placate the passenger's claims within 30 days, the complaint shall be submitted to the CCAA or to the respective body in other EU member states with the aim of settling the dispute without involvement of judiciary. Only following the unsatisfactory outcome of this procedure, passenger may initiate the proceedings before the competent court.[57] The Act on Obligations and Proprietary Rights in Air Traffic does not specify whether the CCAA has the power to impose the decision upon airline and/or airport operator involved in the dispute or is it just empowered to propose an amicable solution of the dispute.

This rather comprehensive, to some extent even complicated network of responsible authorities may raise doubts as to whether consumers are aware of the existence of particular dispute resolution mechanisms. The available data, however, suggest that consumers generally are aware of the authorities responsible for enforcing their rights. Moreover, it seems that consumers are even aware of some of the shortcomings of particular dispute resolution mechanisms. This is particularly true with respect to court procedures, which consumers tend to avoid due to their excessive length and expenses associated with these procedures. For this reason, consumers often tend to resort to responsible inspectorates and regulators like HAKOM in an attempt to efficiently resolve their disputes.

3 Judicial Protection of Consumer Rights

As already explained, the principal path of consumer protection is the court proceedings. The judicial system in civil cases consists of the Municipal Courts (first instance), the County Courts (second instance), and the Supreme Court, which are all courts of general jurisdiction. The Commercial Courts and the High Commercial Court are specialised courts. In cases of individual redress in consumer disputes competent are the Municipal Courts, as courts of general jurisdiction, while the Commercial Courts have competence in collective actions.

[56] Article 2 of the Committee for Protection of End Users' Rights Ordinance (Official Gazette No 52/15).

[57] Article 87 of the Act on Obligatory and Proprietary Rights in Air Traffic.

Croatian law recognises no specialised court for consumer disputes, no specific court procedure for consumer disputes, nor specific requirements for consumers to fulfil in order to address their problems to the court. Moreover, in domestic disputes a consumer is not allowed to bring an action against trader in the place of consumer's domicile, as is the case in cross-border transactions,[58] but instead, pursuant to general rules on jurisdiction in civil procedure, an action must be brought in a place of trader's domicile or seat. The only exception in this regard concerns actions brought against producers due to breach of a guarantee in which case, pursuant to Article 53 of the Civil Procedure Act, a buyer can bring an action against producer in the place where the trader who sold the item has its seat.

Croatian law also recognises no special tariff or fee for consumer disputes nor is there any exemption from a court tariff for consumer disputes. Pursuant to the Courts' Fees Act, a basic tariff for an action, which involves a dispute whose value does not exceed 3000 HRK (approx. € 400) would be 100 HRK (approx. € 13). If the value in dispute falls within the range between 3000 and 6000 HRK (approx. € 400–€ 800), the tariff for an action would be 200 HRK (approx. € 26).

Based on the Free Legal Aid Act,[59] a person in financial difficulties is entitled to receive free primary or secondary legal aid. Primary legal aid consists of providing general legal information, giving legal advice and/or drafting submissions, whereas secondary legal aid consists of representation before the courts or other competent authorities. Primary legal aid is provided by competent offices of local governments, legal clinics and authorised associations, whereas attorneys of law provide secondary legal aid. Free aid can be obtained by persons whose monthly income does not exceed 3326 HRK (€ 443) or persons living in a household whose monthly income does not exceed 3326 HRK per full age member of a household provided that this person or household does not own any assets (except for a home in which they reside) worth more than 199,560 HRK (approx. € 26,600). Even if a person does not meet this financial census, he/she will be entitled to receive free legal aid if full payment of expected legal fees and expenses would endanger support of this person or his/her household.

There are no specific data regarding satisfaction/dissatisfaction of consumers and traders with outcome and duration of disputes before the courts. However, some general surveys clearly show general dissatisfaction of Croatian society with Croatian judiciary. According to the survey conducted for the World Bank and Croatian Ministry of Justice, 60% of all natural persons who took part in the poll generally distrust the courts. Moreover, ¾ of all natural persons expressed their dissatisfaction with the duration of court procedures. Besides excessive duration of court proceedings, 67% of natural persons who took part in the poll see the costs of court proceedings as a problem and 51% of all natural persons taking part in the poll emphasised the problem of unintelligible Croatian laws. Poll conducted among businesspersons show similar results. Two thirds of businesspersons who took part

[58] See Article 16 of the Brussels I Regulation.

[59] Official Gazette No 143/13.

in the survey expressed their general dissatisfaction with the functioning of Croatian judiciary. Generally speaking, businesspersons are more satisfied with Commercial Courts than with general Municipal Courts.[60] Although, as mentioned before, this survey does not relate exclusively to B2C disputes, but covers all types of court proceedings (including criminal and civil cases, enforcement proceedings, succession cases, labour cases, etc.) and all types of civil cases (B2C, B2B, C2C, C2G, B2G), results of this survey, no doubt, reflect the realities of B2C disputes as well.

Judging from the results of the above mentioned survey, the most important advantage of the judicial system in Croatia, and arguably the enforcement of consumer rights before Croatian court, would be qualified and well-trained judges, whereas the most noticeable pitfalls would include excessive duration and disproportionate expenses of court proceedings.

4 Out of Court Protection of Consumer Rights

In Croatia, there is no specialised agency or any other form of non-judicial institution which would be specifically entrusted with enforcement of consumer law. However, as already explained, some special regulatory agencies (independent regulators), such as HAKOM and CCAA, are empowered to conduct alternative resolution of consumer disputes.

HAKOM is an autonomous, independent and non-profit legal person with public competences whose founder is the Republic of Croatia, responsible only to the Parliament of the Republic of Croatia.[61] The work of HAKOM is run by the Council comprised of five members appointed by the Parliament of the Republic of Croatia. HAKOM's Council members cannot be state officials, officials of political parties, officials of local governments, trade unions, nor can they be employed or otherwise linked with legal persons who fall under the scrutiny of HAKOM.[62] HAKOM is a regulator in telecommunication, postal and railway services. Hence, HAKOM is not only responsible for enforcement of users' protection but also for competition among service providers, promotion of investments and innovation in infrastructure, promotion of interconnectivity and development of the EU common market in telecommunications, postal and railway services.[63] The CCAA is the body responsible for effecting the passenger rights in aviation traffic. The CCAA is an independent regulator with public competences whose founder is the Republic of Croatia, responsible to the Government of Croatia.[64] The CCAA is not only responsible for protecting the passengers rights but primarily for issuing certificates to aircraft

[60] See https://pravosudje.gov.hr/UserDocsImages/dokumenti/JSSP/Izvjestaj_WB_JSSP_v7.pdf.

[61] Article 7 of the Electronic Communications Act.

[62] Article 8 of the Electronic Communications Act.

[63] Article 5 of the Electronic Communications Act.

[64] Article 5 of the Air Traffic Act (Official Gazette No 69/09, 84/11, 54/13, 127/13, 92/14).

operators, airport operators, surveillance of actors in civil aviation, maintenance of aircraft registry, etc.[65]

As already explained in detail,[66] pursuant to special regulation on telecommunication, postal, and transportation services, the consumers will be able to make use of some of the specifically designated out-of-court dispute resolution mechanisms run by the HAKOM and the CCAA.

There are no publicly available information regarding satisfaction/dissatisfaction of consumers and business with dispute resolution mechanism conducted before HAKOM and the CCAA.

The advantages of the dispute resolution mechanism conduced before HAKOM is its speed, since the proceedings must be completed the latest within 4 months as of the receipt of complaint, and the fact that the proceedings are conducted at no cost for the end users. As for disadvantages, one has to note the lack of transparency with respect to competences of the members of Committee who propose the decision and procedure preceding the decision. On the other hand, the lack of relevant information does not allow assessing the advantages and disadvantages of the dispute resolution mechanism conducted before the CCAA.

5 The Role of Consumer Associations

Consumer associations are the principal form of self-protection of consumers. There are currently 26 consumer protection associations in Croatia. Some of them have their seat in the capital, however most of them are established in other parts of Croatia, and their work is generally greatly decentralised.

Consumer associations are non-profit organisations, organized in the legal form of association, voluntary and non-profit oriented form of associating at least three individuals or legal persons based on independence, democracy and impartiality. By-laws of the association, autonomously adopted by its members, are the principal source of the association's organisation and government. The Associations Act prescribes the obligatory contents of the by-laws. The highest body of an association is the general assembly whose members are either all members of the association or their representatives elected in accordance with the by-laws of the association.

Apart from the requirements provided for in the Associations Act, applicable to all associations, there are no other specific requirements provided specifically for consumer associations. The only specific requirement of a general nature, which consumer associations must meet, is to be independent from traders.[67]

Pursuant to the CPA, consumer associations are responsible for: providing preventive protection through information and advice given to consumers,

[65] Article 5 of the Air Traffic Act.

[66] See Sect. 2 above.

[67] See Article 128 of the CPA.

undertaking, through accredited laboratories, comparative testing of products and release the results in the media, undertaking, through accredited laboratories, post-marketing testing of products, providing legal aid to consumers in their relations with traders, taking part in the process of drafting legislation in the area of consumer protection by giving suggestions and objections.[68]

Action for collective redress can be filed only by two alliances of consumer organisations: "Potrošač" Croatian Alliance for Consumer Protection and Federation of Associations for Consumer Protection. Consumer associations cannot represent individual consumers before the courts or other competent authorities.

Apart from consumer associations, a limited role in enforcement of consumer rights play entities which provide free legal aid, like competent offices of local governments, legal clinics, authorised associations, and attorneys at law. There are currently 52 entities authorised to provide primary free legal aid.[69]

In an attempt to resolve their disputes, consumers often resort to the Ombudsman and other entities which have no authority to resolve their disputes. Although Ombudsman predominantly protects human rights and basic freedoms,[70] citizens often make complaints to the Ombudsman concerning problems they face in B2C relations. Thus, for example, according to the Ombudsman's report, in 2015 the Ombudsman received 180 complaints concerning foreclosure and 93 complaints concerning services of general interest.[71] Likewise, in 2015 Croatian National Bank received 2605 consumer complaints and Financial Services Supervisory Agency (HANFA) received 86 consumer complaints, although these two institutions are not vested with power to decide individual cases.

6 The Role of Private Regulation

Private enforcement of consumers' rights has a potential of becoming an important dispute resolution mechanism in Croatia, especially before two Courts of Honour: the Court of Honour of the Croatian Chamber of Economy and the Court on Honour of the Croatian Chamber of Crafts. These are internal disciplinary courts, which decide on violations of the good business practices and non-fulfilment of the membership duties.[72] The importance of these two Courts is further amplified with the fact that, according to the Croatian Chamber of Economy Act and the Crafts Act,

[68]See Article 129 of the CPA.

[69]See https://pravosudje.gov.hr/istaknute-teme/besplatna-pravna-pomoc/ovlastene-udruge-i-pravne-klinike-za-pruzanje-primarne-pravne-pomoci/6190.

[70]See Article 2 of the Ombudsman Act (Official Gazette No 76/12).

[71]See Ombudsman's Report for 2015, http://ombudsman.hr/hr/component/jdownloads/send/67-2015/745-izvjesce-pp-2015-pdf.

[72]See Article 18 of the Croatian Chamber of Economy Act (Official Gazette No 66/91, 73/91) and Article 88 of the Crafts Act (Official Gazette No 143/13).

the membership in the Croatian Chamber of Economy and the Croatian Chamber of Crafts is mandatory.[73] Hence, every entrepreneur in Croatia must be a member of the Croatian Chamber of Economy and every craftsman in Croatia must be a member of the Croatian Chamber of Crafts. Consequently, the Courts of Honour of the Croatian Chamber of Economy and the Croatian Chamber of Crafts have jurisdiction over virtually every business entity in Croatia, apart from free professions.

One of the shortcomings of the system of protection of consumers' rights before the Courts of Honour is that these courts do not have the authority to enforce consumers' rights directly, e.g. by ordering traders of craftsmen to fulfil the contract, to make payments, compensate for damages, etc. Instead, they may enforce consumers' rights indirectly, by facilitating settlement between a consumer and a trader or by punishing a trader for violating good business practices in its relations with a consumer. This is probably the reason why figures regarding consumer disputes resolved before the Courts of Honour are relatively modest. In the period between 2010 and 2015, the Court of Honour of the Croatian Chamber of Economy received 366 applications, out of which 90 were resolved amicably, by a settlement. In the same period, for example, HAKOM, telecommunications regulator, resolved over 6000 cases through its system of alternative dispute resolution, which is arguably, because this system enables a direct enforcement of consumer rights.[74]

The process before the Courts of Honour runs through three stages; preliminary mediation stage, first instance proceedings, and second instance proceedings.[75] The proceedings before the Courts of Honour of the Croatian Chamber of Economy and the Croatian Chamber of Crafts are initiated by an application, which can be filed by any person, including a consumer whose rights are infringed.[76] Before the first instance proceedings commence, the dispute shall be attempted to be resolved by settlement, in the course of mediation. Should the mediation fail, a president of the first instance panel shall summon an oral hearing. If the first instance panel finds the application against an entrepreneur sustained, it can issue a reprimand or a public reprimand.[77] In the case of an application against a craftsman, the following measures can be issued: a reprimand, a public reprimand, temporary ban of providing crafts services, permanent ban of performing crafts services.[78] An appeal against the

[73]See Article xx of the Croatian Chamber of Economy Act and Article 77 of the Crafts Act.

[74]See Sect. 10 below.

[75]See Articles 24, 28, 39 of the Court of Honour of the Croatian Chamber of Economy Rules of Procedure (Official Gazette No 66/06, 129/07, 8/08, 74/15) and Articles xx of the Court of Honour of the Croatian Chamber of Crafts Rules of Procedure (Official Gazette No. 11/07, 81/08, 145/10, 92/14, 4/16).

[76]Articles 4 and 15 of the Court of Honour of the Croatian Chamber of Economy Rules of Procedure and Article 17 of the Court of Honour of the Croatian Chamber of Crafts Rules of Procedure.

[77]Article 36 of the Court of Honour of the Croatina Chamber of Economy Rules of Procedure.

[78]Article 14 of the Court of Honour of the Croatian Chamber of Crafts Rules of Procedure.

first instance decision can be filed within 15 days and the second instance panel will decide upon the appeal.[79]

The Court of Honour of the Croatian Chamber of Economy consists of the president, two deputy presidents, 121 first instance judges and 25 second instance judges. 48 first instance and 12 second instance judges are elected among the independent legal experts, many of which are judges of regular courts, 40 first instance judges and 6 second instance judges are representatives of traders and 33 first instance judges and 7 second instance judges are representatives of consumers.[80] The Court of Honour of the Croatian Chamber of Crafts consists of the president, two deputy presidents, 108 first instance judges and 26 second instance judges. The Chamber of Crafts Assembly elects judges for the mandate of 4 years. 70 first instance judges and 20 second instance judges are elected among the craftsmen and independent legal experts, many of which are judges of regular courts, whereas 38 first instance judges and 6 second instance judges are elected among consumers.[81]

Based on an agreement concluded between the Croatian Chamber of Crafts, the Croatian Chamber of Economy and the Ministry of Economy of the Republic of Croatia, the expenses of proceedings before the Courts of Honour of these two Chambers, initiated by consumers, shall be covered by the Ministry of Economy and therefore consumers do not have any expenses in case they initiate these proceedings.

Similar courts are formed within numerous associations of free professions who do not fall under the jurisdiction of the Croatian Chamber of Economy and the Croatian Chamber of Crafts like, for example, the Croatian Chamber of Medical Physicians,[82] the Croatian Chamber of Dental Medicine,[83] the Croatian Chamber of Architects,[84] the Croatian Chamber of Construction Engineers,[85] Croatian Bar Association,[86] etc.

[79] Article 39 of the Court of Honour of the Croatian Chamber of Economy Rules of Proceudre and Article 26 of the Court of Honour of the Croatian Chamber of Crafts Rules of Procedure.

[80] See http://www.hgk.hr/category/sudovi-pri-hgk/sud-casti-pri-hgk.

[81] See http://www.hok.hr/sud_casti.

[82] See https://www.hlk.hr/casni-sud-komore.aspx.

[83] See http://www.hkdm.hr/rubrika/82/Opcenite-informacije.

[84] See http://www.arhitekti-hka.hr/hr/komora/tijela/.

[85] See http://www.hkig.hr/Stegovni-sud/.

[86] See http://www.hok-cba.hr/hr/disciplinski-sud.

7 Collective Redress

Two sources in Croatian legal system provide for a collective redress; the Civil Procedure Act, general civil procedure regulation intended for general civil law protection of collective interests, and the CPA, special civil procedure regulation intended exclusively for protection of collective interests of consumers. With respect to collective actions, provisions of the CPA have priority in application over the Civil Procedure Act.

The CPA provides only for an injunctive collective redress whereas compensatory collective actions are not available. Namely, this Act provides that the court may (1) establish the violation of relevant statutory provisions (2) order the defendant to cease the actions violating those provisions and, if possible, to implement measures necessary to eliminate harmful consequences resulting from those actions and (3) prohibit those and similar actions of the defendant in the future.

The judgment of the court in collective injunctive actions are binding to other courts in separate compensatory legal actions initiated by individual consumers.[87] In addition, the judgement prohibiting particular illegal behaviour of the trader simultaneously obliges the trader to refrain from those and similar actions in the future vis-à-vis all consumers and not only those who have initiated the proceedings through the authorized organizations or bodies.[88]

Commencement of the collective action does not preclude the right of any person injured by the actions of the trader to initiate, subsequently or simultaneously, individual action against a particular trader.

Collective actions are also without prejudice to simultaneous voluntary control of the trader's actions instigated by the autonomous association of traders.

Claims for collective redress can be filed only by organisations and state bodies enumerated in the decision of the Government, issued based on the CPA.[89] These are the Ministry of Health, the Ministry of Economy, the Ministry of Finance, the Ministry of Maritime Affairs, Transport and Infrastructure, HAKOM, Agency for Electronic Media, "Potrošač" Croatian Alliance for Consumer Protection and Federation of Associations for Consumer Protection.

Collective actions may be initiated against a particular trader, a group of traders from the same economic sector whose behaviour violates provisions of the relevant legal acts, and chambers and interest associations of traders who promote illegal behaviour.

Specific feature of collective actions in comparison to general civil proceedings is shifting of burden of proof from claimant to the defendant in specific, statutorily defined circumstances.

The financing of collective actions is not specifically regulated.

[87] Articles 118 and 120 CPA.

[88] Article 117 CPA.

[89] Official Gazette No 105/14.

Collective injunctive redress can also be achieved through some alternative mechanisms. For example, HAKOM has the power to suspend or amend a general contract term if it finds that it contradicts the Electronic Communications Act or other acts aimed at protection of consumers.[90] Furthermore, proceedings before HAKOM, available under Article 51 of the Electronic Communications Act, can also be instigated to combat unfair commercial practices.

Finally, collective injunctive redress can also be achieved through the activities of a competent inspectorate. Pursuant to Article 137 of the CPA, a competent inspector may order a trader to cease commercial practice, which is considered unfair, or to order elimination of irregularities determined in the course of inspection.

In fact, it seems that collective injunctive redress can be more easily achieved through these alternative mechanisms than before the courts. First, limitations regarding persons authorised to initiate collective redress mechanism before the court, do not exist with respect to these alternative redress mechanisms. Every consumer may file a complaint to HAKOM or a competent inspectorate and thus initiate a collective injunctive redress before these entities. Furthermore, in case of collective injunctive redress mechanisms before HAKOM or competent inspectorates, there are no costs or expenses for consumers, because once a consumer files a complaint, further proceedings before HAKOM or inspectorate are run *ex offo*. Finally, proceedings before HAKOM or a competent inspectorate take considerably shorter than court proceedings.

This is probably why these alternative collective injunctive redress mechanisms are used far more often than regular, judicial collective injunctive redress. Since 2003, when judicial collective injunctive redress mechanism was introduced for the first time in the CPA, only one case of collective injunctive redress was brought before Croatian courts. On the other hand, in the period between 2010 and 2014 HAKOM alone resolved 1289 cases, which involved unfair commercial practices of telecommunication operators.[91]

8 Sanctions for Breach of Consumer Regulation

Sanctions for breach of consumer law in Croatia include civil liability sanctions for breach of contract, injunctive redress, misdemeanour penalties, disciplinary sanctions and criminal liability.

Since the relationship between consumers and traders is based on a contract, the breach of consumer law will often amount in a breach of B2C contract and consumer will be entitled to claim specific performance and/or damages for breach of contract, based on general rules of law on obligations provided for in the COA.

[90] See Article 42(2) of the Electronic Communications Act.

[91] See HAKOM's Yearly Report for 2014, p. 83.

Furthermore, every breach of consumer law represents a misdemeanour, punishable pursuant to the CPA and other acts aimed at consumer protection. Misdemeanour sanctions provided for by the CPA range from 10,000 HRK (approx. € 1330) to 100,000 HRK (approx. € 13,300). The CPA provide for 84 different misdemeanours.[92]

Misdemeanour penalties provided for in the CPA are perceived to be sufficiently effective, proportionate and dissuasive.

As already explained, in case of a breach of consumer law, a trader can be ordered an injunctive relief, i.e. to cease practice, which violates consumer law. The competent Commercial Courts, competent inspectors and/or particular regulators, like HAKOM, can order such injunctive relief.

Violation of consumer law can also be sanctioned according to internal regulation of relevant traders' associations like the Croatian Chamber of Economy and the Croatian Chamber of Crafts. Based on the internal regulation of these associations, entrepreneurs and craftsmen can be sanctioned before the respective courts of honour for violation of consumer law and sanctions can take a form of a reprimand or a public reprimand. In procedures against craftsmen, the Court of Honour of the Croatian Chamber of Crafts can even issue a measure of temporary or permanent ban of providing crafts services.

Pursuant to the Criminal Code,[93] some violations of consumer law shall be regarded as criminal offence and will be sanctioned with criminal sanctions. Pursuant to Article 255 of the Criminal Code, misleading advertisement is a criminal offence punishable with imprisonment up to 2 years. This is a new criminal offence, introduced in the new Criminal Code of 2011 and so far, there have been no reported cases regarding this criminal offence. Some criminal offences of a general nature can also be applicable in B2C relations, like for example, a fraud, punishable with the imprisonment up to 5 years; abuse of securities, punishable with imprisonment up to 3 years; abuse of a credit of a debit card, punishable with imprisonment up to 3 years; abuse of trust, punishable with imprisonment up to 8 years; violation of another's rights, punishable with imprisonment up to 1 year; conclusion of an usury contract, punishable with imprisonment up to 8 years; and extortion, punishable with imprisonment up to 15 years.

9 Alternative Dispute Resolution

Croatian legislation and private regulation of particular industry sectors provide for various types of alternative dispute resolution mechanisms, either of general use or specifically designed to protect consumer interests. Moreover, the Republic of Croatia actively promotes and supports alternative dispute resolution, among others,

[92]See Article 138 of the CPA.

[93]Official Gazette No 125/11, 144/12, 56/15, 61/15, 101/17.

by promoting the ADR on the web pages of the Ministry of Economy,[94] financially supporting resolution of consumer disputes before the Courts of Honour of the Croatian Chamber of Economy and the Croatian Chamber of Craft, as well as by forming the Alternative Dispute Resolution Committee with the aim of promoting alternative dispute resolution, especially in disputes in which the Republic of Croatia is a party.[95]

However, notwithstanding rather extensive list of available ADR providers and available ADR mechanisms, and notwithstanding continuous efforts in promotion of the ADR, the figures show that there is ample room for improvement in the use of ADR mechanisms in consumer disputes.

The CPA provides that in case of a dispute between a consumer and a trader, an appeal may be filed to the Court of Honour of the Croatian Chamber of Economy or the Court of Honour of the Croatian Chamber of Crafts. As already explained, although perceived by the CPA as an ADR mechanism, these proceedings are not genuine dispute resolution mechanism, but rather a disciplinary proceedings against traders, which may only indirectly bring to a dispute resolution between a consumer and a trader. Moreover, consumers cannot initiate these proceedings but may only request the competent bodies to initiate these proceedings.

Another possibility for alternative dispute resolution is mediation, which can be initiated by filing a proposal for mediation before any of the mediation centres in accordance with the Mediation Act.[96]

In Croatia, arbitration, as a form of alternative dispute resolution, is also available in B2C disputes. However, the Arbitration Act provides for specific requirements regarding the form of arbitration agreement in B2C transactions. In the case of B2C transaction, an arbitration agreement must be entered into in a separate document signed by both parties. In such a document no stipulations may be contained other than those referring to the arbitral proceedings, except if the document was drawn up by a notary public.

Apart from this specific form requirement, the Arbitration Act provides for no other special rules relating to B2C disputes. Neither the Rules of Arbitration of the Permanent Arbitration Court of the Croatian Chamber of Economy,[97] which is the main arbitration institution in the country, nor the Rules on Conciliation of the Conciliation Centre of the Croatian Chamber of Economy[98] contain any specific rules which would apply specifically to B2C disputes.

ADR institutions in Croatia may be run either publicly or privately. There are no restrictions for the private organisation of arbitration or mediation. However, it is to

[94]See http://potrosac.mingo.hr/hr/potrosac/clanak.php?id=12645.

[95]See the Decision on Establishing Committee for Promotion of Alternative and Out-Of-Court Dispute Resolution in Civil Disputes in which the Republic of Croatia is a Party (Official Gazette No 69/12, 9/14).

[96]Official Gazette No 18/11.

[97]Official Gazette No 142/11.

[98]Official Gazette No 142/11.

be emphasised that there are no specially designed ADR mechanisms for consumer disputes in Croatia. The most well-known ADR providers in Croatia are: Mediation Centre, Arbitration Centre and the Court of Honour of the Croatian Chamber of Economy, Mediation Centre and the Court of Honour of the Croatian Chamber of Crafts, Mediation Centre at the Croatian Employers' Association, Mediation Centre in the Banking Sector, Mediation Centre at the Croatian Insurance Bureau, Mediation Centre at the Croatian Mediation Association, Mediation Centre at the Croatian Bar Association.[99] Mediation can also be conducted before regular courts.[100]

Formal, statutorily based requirements for the ADR providers in Croatia are provided in the Alternative Dispute Resolution for Consumer Disputes Act,[101] which is harmonised with the EU Directive 2013/11/EU on consumer ADR.

As already explained, special alternative dispute resolution procedure are provided based on the special regulation in cases of disputes between the consumer and the provider of public telecommunications services, or the provider of the air transportation service.

As to the level of actual use of ADR in B2C disputes in Croatia, the figures show that in 2015, 59 B2C proceedings have been conducted before the Mediation Centre of the Croatian Insurance Bureau, 70% of which were finalised by settlement. In the same year, the Municipal courts conduced 420 mediations. This figure relates to all mediation cases and not necessarily to B2C cases.[102] There are no available data about the number of cases resolved before HAKOM in 2015. However, in 2014, HAKOM resolved 1350 cases.[103] In 2015, the CCAA managed 160 cases concerning air traffic. Hence, it can be concluded that in 2015 around 2000 ADR proceedings have been conducted before different ADR providers.

According to the available data, in the past 3 years 4655 B2C proceedings have been initiated before HAKOM, 145 before the CCAA, and 160 before the Mediation Centre of the Croatian Insurance Bureau, In the same period, 1431 mediations have been conducted before the Municipal Courts, which is the figure relating to all mediation cases and not only to B2C cases. Hence, it can be concluded that in the previous 3 years, around 6400 cases were resolved by different ADR providers.

In the period between 2010 and 2015, 2361 mediations were conducted before the Municipal Courts. In the same period, the Court of Honour at the Croatian Chamber of Economy managed 366 cases, out of which 90 were resolved amicably. In the period between 2010 and 2014, HAKOM resolved 6725 cases.[104] Hence in the 5 years period, around 10,000 cases where resolved through some ADR mechanism.

[99] See http://potrosac.mingo.hr/hr/potrosac/clanak.php?id=12645.

[100] See Article 3 of the Mediation Act.

[101] Official Gazette No 121/16.

[102] See Ministry of Justice's Statistical Report for 2015, https://pravosudje.gov.hr/UserDocsImages/dokumenti/Strategije,%20planovi,%20izvješća/Statistički_pregled_za_2015.pdf, p. 26.

[103] See HAKOM's Yearly Report for 2014, p. 81.

[104] See HAKOM's Yearly Report for 2014, p. 81.

These figures show that the use of ADR mechanisms is still quite modest. Relatively small number of cases resolved through ADR mechanism is also recognised as a problem in the Report of Execution of the National Program for Consumer Protection for the Period 2009–2012.[105] However, above-displayed figures also show that ADR proceedings conducted before HAKOM represent more than 2/3 of all ADR proceedings conducted before various ADR providers, which may imply that ADR proceedings could be attractive for consumers if a decision reached in the ADR providers can be imposed upon trader.

10 International Cooperation

Croatia is the Member State of the EU. Hence, Croatian consumer protection law is fully harmonised with the EU law and Croatia coordinates its consumer protection policy with the other EU Member States. As the Member State of the EU, Croatia is the member of the European Consumer Centre Net, which helps consumers in resolving cross-border disputes.

The CPA contains special provisions, which provide for a possibility that a court proceedings for protection of collective interests of consumer in Croatia be initiated by competent entities from other EU Member States if actions of a trader or a group of traders having their seat in Croatia infringe consumer rights in other EU Member States. Likewise, in the case that the rights of Croatian consumers are infringed by actions of traders from another EU Member State, Croatian entities competent for initiating collective redress in Croatia will equally be competent for initiating such redress in other EU Member States.[106]

Furthermore, based on the EU Regulation on Consumer Protection Cooperation, the Government of the Republic of Croatia had nominated a number of entities as competent national authorities responsible for cooperation in resolving cross-border intra-Community infringements of the EU consumer law.[107]

Finally, the EU Brussels I Regulation containing, inter alia, rules on jurisdiction in cross-border B2C transactions is directly applicable in Croatia.

[105] See the Report of Execution of the National Program for Consumer Protection for the Period 2009–2012, p. 26.

[106] See Article 107 of the CPA.

[107] See the Ordinance on Cooperation in Consumer Protection (Official Gazette No 84/14, 120/14).

11 Concluding Remarks

Based on the analysis conducted under the preceding headings, it is safe to conclude that consumer protection system in Croatia, built on the model of the EU consumer protection system, generally provides a high level of protection for consumers. Nowadays this system is based on extensive consumer protection legislation, and detailed strategic documents providing for full range protection of vital consumers' interests, from safety to economic interests. In the course of the past 15 years, Croatia has built institutional capacities for efficient consumer protection. In the same period, considerable efforts have been made in the field of consumers' education and information. All this amounted in a social environment in which consumers are generally aware of their rights, are willing to take actions to protect their rights, and have fairly efficient tools to protect their rights. At the same time, governmental institutions and NGO's in the field of consumer protection are being supportive towards consumers whereas traders and their associations realise the importance of having consumers satisfied and predominantly take active and constructive role in achieving satisfactory level of consumer protection.

Consumer protection system in Croatia is particularly efficient in the field of consumer safety and health, where a level of legislation, administrative capacities and market surveillance insure proper protection of all consumers. Furthermore, consumer protection associations represent yet another advantage of Croatian consumer protection system. Twenty-six consumer protection organisations equally distributed on the entire territory of Croatia, enable consumers in every part of the Country to have an easy access to free information and advice. Efforts made by the governmental and non-governmental entities in the field of education and information of consumers also have to be commended. Finally, activates of independent regulators, and in particular in the field of telecommunication services, must be emphasised as particularly efficient.

On the other hand, there are still a number of challenges in achieving fully satisfactory level of consumer protection system in Croatia. One of the most serious shortcomings of Croatian consumer protection regime represents abundant and very complicated legislation, which consists of a number of, party overlapping, and partly inconsistent legal acts. Problems associated with consumer protection legislation party derive from the EU level. European Directives are often too extensive, overly complicated and mutually inconsistent and by their transposition, these shortcomings are being reflected in Croatian consumer protection system as well. Part of the problem certainly lies with the Croatian lawmaker. It seems that nowadays in Croatia consumer protection is treated as sort of a fashion, and consequently, almost every legislative act, which regulate particular market sector, must include at least several provisions, if not the whole section, on consumer protection. This creates situation in which particular B2C transaction is regulated by a multitude of, often mutually conflicting, acts. In such legislative environment, very often neither consumers nor traders can be sure what legislative acts are applicable to their transaction and what

their rights and obligations are. This uncertainty creates unsound market environment and impedes efficient consumer protection.

Another shortcoming of Croatian system of consumer protection concerns a lack of efficiency of classic judicial protection of consumer interests. Generally speaking, the state of Croatian judiciary system is unsatisfactory. As surveys already mentioned in this Report suggest, general public is grossly dissatisfied with Croatian judiciary and dissatisfaction is predominantly caused by excessive duration of proceedings before Croatian courts. Having in mind the fact that consumer disputes often involve small value transactions, the problem of excessive duration of court proceedings particularly adversely affects consumer disputes. Excessive duration of court proceedings will simply discourage consumers from seeking court protection of their small value claims. This is probably why consumers often resort to some alternative dispute resolution mechanisms, even if those cannot always provide them a direct and immediate relief, as is the case with the Ombudsman and the Court of Honour of the Croatian Chamber of Economy and the Croatian Chamber of Crafts. However, as already explained, figures relating to the use of out-of-court mechanisms are still quite modest, which may imply that, apart from the telecommunication sector, consumers are generally in need of a truly efficient ADR mechanism.

In the past 15 years, Croatian consumer protection system has been undergoing constant changes. This is particularly true for the mechanism of enforcement of consumers' collective interests. The first Consumer Protection Act of 2003 vested the power for resolution of disputes regarding consumer collective interests to the courts. Due to the fact that in a couple of years there had been no single case regarding consumers' collective interests, the Consumer Protection Act of 2007 shifted the responsibility for resolving disputes over consumers' collective interests to administrative bodies, namely responsible inspectorates. In 2009, the jurisdiction over this sort of disputes was shifted back to the courts. In the meantime, some alternative collective injunctive redress mechanisms, conducted before the independent regulators, were developed, as for example proceedings before HAKOM, or proceedings before some administrative bodies, like for example responsible inspectorates.

Having all said in mind, on the scale from 1 to 10, we would grade the level of efficiency of Croatian consumer protection enforcement system with 5. This is the result of several factors. First of all, Croatian system does have different judicial and out-of-court dispute resolution mechanisms in place. Some of them are particularly efficient, as for example market surveillance system in the area of product safety and out-of-court dispute resolution mechanism before HAKOM. On the other hand, judicial dispute resolution system suffers from serious problems, which grossly effects efficiency of consumer protection. Although the Croatian Civil Procedure Act does provide for an accelerated small claims procedure, this procedure is still too much formalised and complicated to allow consumer disputes to be resolved in a satisfactory timing. Furthermore, existing out-of-court mechanisms often rely on a voluntary involvement and soft-law mechanisms, instead of being equipped with a possibility to impose solution on a trader, which takes off the edge of such dispute resolution mechanisms and makes the overall system of consumer dispute resolution

less effective and consequently, less attractive to consumers. Furthermore, although in the past decade significant efforts have been made in the field of information and education of consumers, the level of information of consumers is still not entirely satisfactory. According to some surveys, 50% of consumers still claim to be insufficiently familiarised with some of their rights and over 80% of consumers would like to know more about their rights.

To make the existing system more efficient, Croatia should substantially improve current judiciary system by providing for a sort of fast-track procedure for consumer disputes. Furthermore, consumers should be more informed and educated about the possibility of using out-of-court dispute resolution mechanisms. Moreover, the efficiency of the existing ADR mechanisms should be improved, possibly by providing for a larger number of ADR procedures in which a solution can be imposed upon parties. In this respect, one could think of giving more power in the area of consumer dispute resolution to the existing independent regulators or even to a newly formed agency specialised for consumer protection. Finally, providing for a possibility of a sort of collective compensatory redress (i.e. class action) would most probably boost the efficiency of consumer law enforcement.

Enforcement and Effectiveness of Consumer Law in the Czech Republic

Monika Pauknerová and Helena Skalská

1 National Legal Framework for Consumer Protection

The Czech Republic, as an EU Member State, derives its consumer policy from that of the EU, but it also has its own consumer policy administered by the Ministry of Industry and Trade. According to the document "Priorities of Consumer Policy 2015–2020", the priority is to consistently ensure the safety of products and services and the protection of the life, health and property of consumers. Measures in this area are concerned with more efficient cooperation between supervisory bodies and greater consumer knowledge. Other priorities include the preparation of high quality consumer legislation, the protection of consumers' economic interests (primarily protection against unfair business practices), the improvement of knowledge in the field of consumer protection and the development of informative and educational activities, enabling consumers to act on the market with the necessary special knowledge. One example of specific measures in this area is support of consumer and financial education which focuses primarily on secondary school students. Strengthened enforcement of the law by way of the out-of-court resolution of consumer disputes is an important new measure.[1]

[1]Compare the Ministry of Industry and Trade, Priority spotřebitelské politiky 2015–2020 (Priorities of Consumer Policy 2015–2020), www.mpo.cz/dokument155395.html (accessed 15 April 2016).

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1.1 Principal Sources of Consumer Law

Consumers are protected by the Charter of Fundamental Rights of the EU (Article 38) and by European regulations and directives, namely Regulation EC No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (hereinafter the Regulation on consumer protection cooperation, CPC Regulation).

The tradition of consumer protection in the Czech Republic dates back to the first half of the last century,[2] although the regulation of consumer protection as such only arrived in the 1990s. Czech law implements EU directives on consumer protection and European regulations—namely the CPC Regulation, Regulation No 864/2007 on the law applicable to contractual obligations (Rome I), Regulation No 524/2013 on online dispute resolution for consumer disputes, etc.—have priority over Czech national legislation.

The principal national legislation in this regard is Act No 89/2012 Sb., the (new) Civil Code (hereinafter the Civil Code or CC), which regulates consumer protection from the perspective of private law. The new Civil Code follows on from the Civil Code of 1964, which was significantly amended in the 1990s in connection with the Czech Republic's transition to the rule of law and democratic government, and European consumer protection directives were gradually incorporated therein.[3] CC regulates the concept of the consumer and the entrepreneur, consumer contracts *stricto sensu* (prohibited provisions in consumer contracts, distance contracts and contracts negotiated away from business premises, timeshare contracts), Europeanized types of civil contracts (consumer sales contracts and contracts for a package tour) and product liability.

Another key piece of legislation is Act No 634/1992 Sb., the Consumer Protection Act (hereinafter the Consumer Protection Act or CPA), encompassing both public and private provisions. CPA was passed in 1992 and has been amended many times since, particularly due to the implementation of European directives and to account for the growing interest of the state in consumers and ensuring better protection for them; this, however, is not yet considered sufficient.[4] CPA primarily regulates certain requirements for business activities which are important for consumer protection in the sale of goods or products or the provision of services, including the prohibition of unfair business practices; it also regulates the out-of-court resolution of consumer disputes, information databases on the credit rating and creditworthiness of consumers, the responsibilities of public administration in the area of consumer protection and rights, associations of consumers or other legal persons created for consumer protection.

[2]Compare Selucká (2008), p. 1, with reference to Ottův slovník naučný (Otto's Encyclopedia), 1930–1943, entry consumer policy.

[3]The list of implemented directives is provided in section 3015 CC.

[4]Compare Tichý (2014), p. 109.

1.2 The Main Aspects of the Regulation of Consumer Protection in the Civil Code

Principal regulation is provided in Chapter IV, Provisions on obligations arising from contracts concluded with consumers, sections 1810–1867 CC. This regulation is unilaterally or relatively mandatory,[5] unless provided otherwise by law. Under s. 1813 CC, provisions derogating from the statutory provisions designed for the protection of consumers are disregarded. This also applies in cases in which a consumer waives a special right conferred on him by a statute. In essence, it is a special case of protection of the weaker contracting party (section 433(2) CC), and therefore the other provisions of the Civil Code, such as the regulation of contracts of adhesion (sections 1798–1801 CC), must be taken into account. The regulation of consumer contracts contains provisions in its first division (General provisions) which are applicable to all contracts concluded with the consumer, namely the regulation of unfair terms (section 1813 CC). The blacklist of prohibited unfair terms in section 1814 CC can be considered a crucial provision.[6] General and special provisions for such contracts, including financial services, are provided in the second division (Concluding distance contracts and obligations arising from contracts negotiated away from business premises). The third division (Timeshare and other holiday services) implements the Directive on timeshares and related services.[7]

Special provisions for consumer contracts can also be found in other parts of the Civil Code, e.g., in the regulation of the sale of a movable thing (section 2090(2) CC) and unfair competition (section 2989 CC). The regulation of contracts concluded with a customer also comprises Special stipulations on the sale of consumer goods (sections 2158–2174 CC) and the regulation of a package tour (sections 2521–2549), as well as compensation for damage caused by a product defect (section 2939 CC).[8]

1.3 Interpretation

The basic principles of application and interpretation are considered to be identical to those in previous legal regulation.[9] Thus, some principles from the earlier case law of the Constitutional Court and general courts may still be applied. The principle that the autonomy of will is protected is often mentioned in this context; however, protection is not absolute in cases where there exists another fundamental right of a person or another public interest approved by the Constitution which is capable of

[5] Vítová (2014), p. 46 f.; Hulmák (2014), p. 395.

[6] See in detail Vítová (2014), pp. 105–172, with further references.

[7] Directive 2008/122/EC of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange.

[8] Those specific regulations, however, do not apply exclusively to consumers.

[9] Hulmák (2014), p. 397.

proportionately restricting the autonomy of will. Another principle is the protection of the person who performs a legal act based on specific facts presented by the other party (section 6(2) CC).[10] The Supreme Court states that in comparison with the general regulation of a sales contract, the sale of consumer goods requires stronger restriction of the contractual freedom of participants with a view to consumer protection.[11] Moreover, if a clause in the contract is unclear, it should be interpreted in a manner which is more favourable to the consumer.[12] Consumer protection, however, cannot be taken as the protection of a consumer's incompetence or carelessness.[13]

1.4 Definition of a Consumer

In section 419 CC, a consumer is defined as any individual who, outside his trade, business or profession, enters into a contract or has other dealings with an entrepreneur. An entrepreneur is a person who, on his own account and responsibility, independently carries out a gainful activity in the form of a trade or in a similar manner with the intention to do so consistently for profit. For the purposes of consumer protection, any person who enters into contracts relating to his own commercial, production or similar activities or within his trade, business or profession or any person acting in the name or on the account of an entrepreneur is considered to be an entrepreneur (section 420 CC). This description is a positive definition of a consumer, who is perceived as a natural person, unlike in some other states where the concept of a consumer may encompass legal persons not involved in any business activity.[14] Before the amendment of the old Civil Code,[15] a consumer was defined only as a person; amendment has brought compliance with European legislation and the consumer is expressly defined as a natural person. However, it may be important to mention a decision taken by the Czech Telecommunication Office (CTU) which relied on the case law of the Supreme Court.[16] CTU arrived at the conclusion that the fact that a party, when concluding a contract, (also) acted as a natural person doing business and provided both Personal Number and Company

[10]See in particular the Constitutional Court decisions ÚS II. ÚS 3/06 and ÚS I. ÚS 342/09 where the Constitutional Court refers to European directives and the case law of the CJEU.

[11]The Supreme Court decision 28 Cdo 171/2008.

[12]Vítová (2014), p. 47. This rule has become a part of the CC since recodification, see section 1812(1).

[13]The Supreme Court decision 23 Cdo 1201/2009.

[14]More in Selucká (2013), p. 13 with further references.

[15]Act No 155/2010 Sb.

[16]The Constitutional Court decision I ÚS 1930/11.

Registration Number does not necessarily mean that such party should be denied the protection afforded to consumers.[17]

1.5 Current Focus of Consumer Policy

Consumer law in the Civil Code in force has been subject to criticism from the European Commission, mainly due to the insufficient implementation of European directives and the structure of the regulation. For example, the new regulation in the re-codified Civil Code has been censured for its different approach to contracts of adhesion (section 1801 CC) and standard commercial terms (section 1751 CC), the regulation of contracts of adhesion and general commercial terms being dual even though such an approach is unjustified.[18] The new regulation has also been criticized for the fact that in the rules on contracts of adhesion, which apply only in relation to a so-called weaker party, such "weaker party" has not been defined.[19] We can state, however, that the consumer is defined in section 419 CC and that, according to section 433(2) CC, a rebuttable presumption applies that the weaker party is always the person who acts in economic transactions with respect to the entrepreneur in a manner unrelated to his own business activities.

According to the Consumer Conditions Scoreboard,[20] consumers in the Czech Republic are the best informed in the EU about their rights. By contrast, entrepreneur awareness of their duties is relatively low. Tichý expressly states that the relatively low awareness of consumer protection and rights among consumers in general means they can still be abused on an unprecedented scale.[21] Such abuse is typical mainly of banks and similar financial institutions, as banking supervision remains insufficient. In this regard we can point to problems which have arisen due to bank charges in the form of flat fees which banks charged for loan agreements with consumers and to notice of termination of building saving contracts being sent by the banks on a massive scale, etc. Law enforcement is also inefficient, as will be considered in more detail within the context of resolving consumer disputes.

[17]The Czech Telecommunications Office, I živnostník může uzavřít účastnickou smlouvu jako spotřeitel (Even a trader may conclude a participation agreement as a consumer) (14 May 2015). www.itpoint.cz/ctu/clanky/?i=zivnostnik-ucastnicka-smlouva-jako-spotrebitel-10209 (accessed 17 March 2016).

[18]Heidenhain (2014), p. 134.

[19]Heidenhain (2014), p. 135.

[20]Available at ec.europa.eu/consumers/consumer_evidence/consumer_scoreboards/11_edition/docs/ccs2015scoreboard_en.pdf. Accessed 9 May 2016.

[21]Tichý (2014), p. 112.

1.6 A Legislative Review: Current Discussions

Two possible approaches to the legal regulation of consumer relationships are currently under consideration: (1) completely replacing the current regulation in the Civil Code (sections 1810–1867 CC) with new regulation and (2) developing a Consumer Code, whereby the regulation of consumer relations would be taken out of the Civil Code and a new independent law would be passed—a Consumer Code including both public provisions and the law of obligations.

(1) The rationale for maintaining the status quo, i.e., the regulation in the Civil Code and in the Consumer Protection Act, is the fact that we have more than 10 years of experience of such an approach.
(2) By contrast, a key rationale for the adoption of an independent law is the fact that the legal regulation of consumer protection follows continually developing European legislation which must be reflected in the national legal system. We should also take into account new elements which will need to be regulated and which will not fit into the Civil Code due to their nature, level of detail, etc. The presumed new legal regulation of digital goods and online trading may serve as a typical example. Furthermore, if the respective legislation exists in one place, it will enable improved supervision of the performance of duties laid down by private law, which at present can be done only with difficulty. Private and public law are interconnected in EU consumer protection law. Consumer protection directives always bind Member States to lay down in their national legislation effective sanctions for the infringement of duties which they impose. This could be resolved more simply if the relevant regulation were provided in a piece of legislation other than the Civil Code (see the critical comment in pilot procedure 7592/15/JUST). The issue of supervision should be resolved in connection with CPC Regulation. Last, but not least, we should mention the fact that most rights and duties would be concentrated in one place, which would simplify orientation and strengthen legal certainty for consumers and entrepreneurs alike.[22]

This matter was discussed in a document entitled "Consumer Protection in the Czech Republic – a Legislative Review" (2015),[23] which is based upon Priorities of Consumer Policy 2015–2020 and was submitted for discussion along with a proposal for the comprehensive amendment of the consumer protection provisions found in the Civil Code of 30 November 2015, drafted by the Ministry of Justice in response to proceedings commenced by the European Commission against the Czech Republic for incorrect transposition of certain consumer directives. This was also discussed at a session of the Expert Board for Civil Law at the Institute of State and Law of the Czech Academy of Sciences. The conclusions of the Expert Board, adopted on 19 February 2016, are based on the assumption that the appropriate place

[22]See Ochrana spotřebitele v ČR—revize právní úpravy (Consumer Protection in the CR—a Legislative Review), document submitted to the Chamber of Deputies on 22 October 2015.
[23]Ibid.

for the private regulation of consumer protection is the Civil Code. A Consumer Code would create an undesirable dualism of legal regulation. Thus, the amendment of obvious defects would seem more appropriate.[24] The conclusion reached was that a review of consumer law in the Civil Code should preserve the unity of private law and respect the requirement for stability of the legal system. Major interference in the private code might prove to be socially counter-productive. There can be no doubt that debate will continue.

2 The General Design of the Enforcement Mechanism

Enforcement mechanisms play an important role in the area of consumer protection. Consumer disputes are specific because the subject of a single dispute is very often a petty amount. Consumers often consider whether to enforce their rights at all in light of the value of the dispute. In the end, many consumers do not enforce their rights, which leads to a situation in which certain wrongful conduct on the market remains tolerated. Another distinguishing feature of consumer disputes is that although a single case of consumer damage might be minimal, in total one trader might cause considerable harm and might benefit from his wrongful conduct, achieving competitive advantage. This may be followed by further unlawful practices because other traders may also adopt such unlawful conduct to counterbalance the advantage of the first trader. Quality and effective means of consumer protection therefore contribute toward better functioning of the market and competition.

For many years, the model of enforcement of consumer law in the Czech Republic had courts as the main authority. In addition to the courts, there are administrative agencies that are entitled to resolve disputes between consumers and traders in specific market areas, particularly telecommunication services, energy and financial services.

There has recently been active support for alternative dispute resolutions (ADR), especially with regard to the need to comply with EU legislation and in light of the high cost and duration of judicial dispute resolution. An amendment to CPA, i.e. Act No. 378/2015 Sb., in February 2016 (hereinafter the CPA Amendment) introduced a new concept for the ADR mechanism for consumer disputes. Unfortunately, this was followed by excluding consumer disputes from the competence of arbitrators in December 2016.

[24]Cited from the presentation of Milan Hulmák, leading expert in consumer law, at the mentioned session of the Board.

3 Courts

The Czech judicial system is made up of general courts (district courts, regional courts, High Courts, the Supreme Court and the Supreme Administrative Court) and the Constitutional Court. Basic rules concerning the organization and functioning of the judicial system in the Czech Republic are stated in the Constitution of the Czech Republic, the Charter of Fundamental Rights and Freedoms[25] and the Courts Act.[26] The rules of procedure before courts in the Czech Republic are traditionally codified in special procedural codes, such as Act No. 99/1963 Sb., the Civil Procedure Code (hereinafter the Civil Procedure Code or CPC).

The Czech judicial system does not distinguish a specialized court to take charge of consumer disputes. Consumer disputes are decided by general district courts. As there is no specialized court, there is no special procedure before courts for consumer disputes. We do, however, find some special provisions.

Specific provisions are applied to injunctions for the protection of consumer rights. Decisions in disputes regarding injunctions for the protection of consumer rights are binding for the parties to the proceedings *and* for other persons having identical claims against the defendant on the basis of the same legal actions or legal conditions.[27] In this matter, a court may also award the right to publish the judgment at the expense of the unsuccessful party.[28] Pending litigation in this matter is also an obstacle to other proceedings against the same defendant commenced by other plaintiffs (consumers) having claims arising from a similar legal situation and having the same demands.[29] Another specific of consumer disputes is the possibility of filing an appellate review to the Supreme Court even against a judgment which awards money in an amount less than CZK 50,000.[30] Generally, appellate reviews against such judgments are not allowed.[31]

As far as ordinary court proceedings in consumer disputes are concerned, the Court Fees Act[32] does not stipulate any special tariff or taxes. Consumers commencing court proceedings must pay the same fee as any other plaintiff and this is probably the main reason why a lot of consumers give up on enforcing their rights.[33] The costs of proceedings are not insignificant. Moreover, proceedings are rather time-consuming; the procedure may take 3 years.

[25] Constitutional Act No 2/1993 Sb., the Charter of Fundamental Rights and Freedoms.

[26] Act No 6/2002 Sb., on Courts and Judges.

[27] Sections 159a and 83(2) CPC.

[28] Section 155(4) CPC.

[29] Section 83(2)(b) CPC.

[30] Section 238(1)(c) CPC.

[31] Section 238(1)(c) CPC.

[32] Act No 549/1991 Sb., on Court Fees (hereinafter the Court Fees Act).

[33] Explanatory memorandum to Act No 378/2015 Sb., regarding part dealing with ADR, ch 1.2.5.

A court may, under extraordinary circumstances, grant a plaintiff an exemption from court fees.[34] This must be justified by the circumstances of the plaintiff and cannot merely be a case of arbitrary and apparently unsuccessful law enforcement. The above-mentioned exemption applies to any plaintiff if it is justified by his situation and not only to consumers.

As far as the enforcement of consumer rights before the courts is concerned, we should also shortly introduce protection provided to consumers within private international law. Both EU regulations[35] and the Private International Law Act (PIL Act)[36] contain special provisions on disputes arising from consumer contracts that modify provisions on applicable law and jurisdiction in favour of consumers. The main aim is to provide consumers with the protection given by the rules of the country of their habitual residence or by Czech law.[37] In relation to consumer contracts, consumers are also protected by jurisdiction rules, which are more favourable to consumers' interests than general rules and in which the autonomy of the parties is limited.[38]

4 Specialized Agencies

There is no specialized agency or other form of non-judicial institution in the Czech Republic in charge of enforcing consumer law to the full extent. However, there are administrative agencies that are authorized to decide disputes between consumers and traders in particular areas of the market.

The Czech Telecommunication Office (CTU) is a central administrative body and an independent regulatory institution that was established on the basis of the Act on Electronic Communications[39] to execute state administration in the matters set out in the Act on Electronic Communications, including market regulation and defining the conditions for business activities in the areas of electronic communications and postal services.[40] CTU is also entitled to resolve disputes between consumers and traders concerning electronic communication services.

The scope of activity at CTU includes more than simply resolving disputes between consumers and telecommunication service providers. For example, CTU is also entitled to resolve disputes between entities which execute communication

[34]Section 138 CPC.

[35]Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (Brussels I recast) and Regulation Rome I.

[36]Act No 91/2012 Sb., on Private International Law (hereinafter the PIL Act).

[37]Regulation Rome I, Preamble 25 and Article 6 and section 87(2) PIL Act.

[38]Regulation Brussels I recast, Articles 17–19 and section 86(1) PIL Act.

[39]Act No 127/2005 Sb., on Electronic Communications and on the Amendments to the Other Acts (hereinafter the Electronic Communications Act).

[40]Section 3(1) Electronic Communications Act. See more about the CTO on www.ctu.eu/.

activities.[41] CTU has exclusive authority to resolve disputes between electronic communication service providers and the other party to a contract on electronic communication services or the user of services, including proceedings regarding objections to the way a trader deals with a consumer's complaint.[42] A motion to commence proceedings may be submitted by either of the parties. If either of them files a motion to commence proceedings before a court, this motion will be denied for lack of jurisdiction. Decisions should be issued within 4 months, in especially complicated cases within 6 months. If proceedings are commenced by a consumer, a decision should be issued within 90 days; this time limit may be extended in especially complicated cases.

Another administrative agency in charge of enforcing consumer rights in a specific market area is the Energy Regulatory Office (ERO). ERO was set up under the Energy Act[43] as an administrative authority responsible for regulation in the energy sector.[44] One of the competences of ERO is to protect consumer interests. There are two main categories of consumer disputes decided by ERO. The first group can be characterized as proceedings that can be commenced only by customers. This category includes disputes about the discharge of obligations arising from contracts on the supply or distribution of electricity or gas and disputes over whether a legal relationship between a licence holder and a customer was concluded, remains or was terminated. The second category of disputes includes disputes over the limitation, suspension or resumption of supply of electricity or gas due to illegal consumption of electricity or gas. In this case, either party may commence proceedings. Either of them may also commence proceedings if they have agreed to submit the dispute to ERO.

ERO does not have exclusive jurisdiction in the above-mentioned disputes. A plaintiff may choose between administrative proceedings before ERO and court proceedings. Proceedings before ERO are free of charge, which is one of the advantages in comparison with court proceedings. ERO may also decide on the reimbursement of costs.

The last of the specialized administrative agencies analyzed here is the Financial Arbitrator (FA). FA covers a third of the most widely discussed areas in relation to consumers, i.e. financial services. FA was established by Act No. 229/2002 Sb., on the Financial Arbitrator, in the course of harmonizing the law of the Czech Republic with European legislation.[45] FA is a dispute resolution body having the competence

[41] Section 127(1) Electronic Communications Act.

[42] Section 129(1) Electronic Communications Act. The Electronic Communications Act does not state that the other contracting party or the user of services must be a consumer.

[43] Act No 458/2000 Sb., on the Conditions of Business and State Administration in Energy Industries and Changes to Certain Laws (hereinafter the Energy Act).

[44] See more on www.eru.cz/en/.

[45] Particularly with Directive 97/5/EC of the European Parliament and of the Council of 27 January 1997 on cross-border credit transfers (repealed by the directive 2007/64/EC of the European Parliament and of the Council), Commission Recommendation 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes, Commission Recommendation 2001/310/EC of 4 April 2001 on the principles for out-of-court

to decide disputes between financial institutions and their customers. Proceedings may only be commenced by the customer. FA is not competent to hear disputes between financial institutions or between private persons, individuals or legal entities.

Proceedings are not subject to a fee and FA cannot adjudicate the costs of proceedings to be borne by any party. Decisions (awards) should be issued within 30 days, in especially complicated cases within 60 days. The main advantage of proceedings before FA is that proceedings are free of charge and are considered faster than court proceedings.

5 The Role of Consumer Organizations

There are many independent organizations focusing on the protection of consumers in the Czech Republic. Although no official list is available, the following organizations are among the most important:

- dTest, o.p.s.
- Czech Consumers' Association
- Association of Civic Advisory Centres
- GLE, o.p.s.
- Generation Europe
- Consumer Net
- Association for the Protection of Customers from Moravia and Silesia
- Consumer Protection Organization—Association
- West Bohemia Association for the Protection of Customers.[46]

Consumer organizations in the Czech Republic are decentralized, meaning that they have seats in various places outside the capital, Prague, in places such as Brno, Ostrava or Pilsen. Consumer organizations are not subject to any mandatory legal conditions, apart from the general conditions applicable to any legal person. Most organizations are set up as associations.

Certain specific requirements exist for organizations that are authorized to file actions for injunctions under the Consumer Protection Act (s. 25 CPA), i.e. actions to abstain from unlawful conduct in consumer protection matters (s. 25 CPA). Such organizations must: (a) be established under the law of the Czech Republic; (b) have been active in consumer protection for at least 2 years; (c) be impartial and non-profit

bodies involved in the consensual resolution of consumer disputes, and Regulation (EC) No. 2560/2001 of the European Parliament and of the Council of 19 December 2001 on cross-border payments in euro.

[46]The Ministry of Industry and Trade, Directory of selected consumer organisations [online], Division 42100, www.mpo.cz/dokument5724.html (accessed 11 April 2017).

and (d) be without any financial debt towards the Czech Republic. A list of such organizations is kept by the European Commission.

The following organizations are authorized to file lawsuits under s. 25 CPA:

- Czech Consumers' Association
- dTest, o.p.s.
- Consumers' Advisory and Information Service
- Consumer and Patients' Protection Association
- Association for the Protection of Consumers from the Czech Republic.

Consumer organizations in the Czech Republic are also authorized to file proposals to the government bodies relating to their consumer protection activities. The relevant bodies are obliged to inform such organizations about their proposals forthwith or within 2 months of receiving the proposal (section 26 CPA). Consumer organizations are also authorized to act as an extrajudicial dispute resolution body, if authorized as such by the Ministry of Industry and Trade (section 20(f) CPA); however, none of the organizations have yet been authorized. Moreover, these organizations have competences that are not regulated by law, such as publicizing, consulting and lobbying.

The options of consumer organizations in the enforcement of consumer law are slightly limited.

The Consumers Protection Act contains general provisions (section 25(2)) on the collective representation of consumers in accordance with Directive 98/27/EC on injunctions for the protection of consumers' interests. An organization, however, must have a legitimate interest in consumer protection or must be stated in the list kept by the European Commission. Collective representation by consumer organizations before the courts in cases of unfair competition is also laid down in section 2989 CC.

There are also other NGOs in the Czech Republic that play a role in the enforcement of consumer law. Human rights organizations such as People in Need or Iuridicum remedium are active as far as free legal aid is concerned. There are also advisory centres for debtors, such as the Advisory Centre for People in Financial Difficulties or People in Need.

6 Private Regulation

In the Czech Republic, a wide range of associations of traders exists. Most of these associations have a code of conduct or rulebooks. However, such rules are not enforceable by law. Membership of any of these organizations is not a requirement for undertaking a trade. Therefore, failure to adhere to the standards set by an association may only be punished by excluding the trader from that association; it does not, however, have any effect on the trade itself.

By contrast, some traders' associations act as lobbyists in the Czech parliament. Such associations can therefore influence consumer law by advising or negotiating with Czech lawmakers.

7 Enforcement Through Collective Redress

Czech law does not recognize collective redress *stricto sensu*. We do not find any provisions in the Civil Procedure Code on representative action, group action, model or test cases or class action.

Even though Czech law does not recognize any standard form of collective redress, there was recently a highly-medialized case concerning bank charges[47] which was very often connected to the term "class action". In the cases in question, however, legal proceedings against the same defendant involving a claim arising from a similar legal situation were based on individual actions, despite the image the media presented.[48]

The recent development of Czech consumer law shows that consumer organizations play a significant role in consumer protection as they also provide forums for persons with similar claims and offer them basic legal advice and information in relation to the enforcement of their rights.[49]

Consumer organizations can also file a sort of a representative action under section 25(2) CPA for injunctions for the protection of consumer interests[50] and under section 2989 CC in cases of unfair competition.[51]

As far as collective redress is concerned, we should also mention section 83 (2) CPC, in conjunction with section 159a(2) CPC. Under section 159a(2) CPC, decisions issued in disputes regarding the matters mentioned in section 83(2) CPC (including injunctions for the protection of consumer interests[52]) are binding for the parties to the proceedings *and* for other persons having identical claims against the defendant on the basis of the same legal actions or legal conditions. The problem is that when the action is rejected the decision is also binding for other persons even though they had no chance to participate in the proceedings. It also affects their own potential compensation claims.[53] Under section 83(2)(b) CPC, pending litigation in

[47]See www.ekonom.ihned.cz/c1-63557480-spor-o-bankovni-poplatky-muze-skoncit-exekucemi.

[48]M. Zeman, *Hromadné žaloby v současném českém právu*. (Class actions in contemporary Czech law), http://www.epravo.cz/top/clanky/hromadne-zaloby-v-soucasnem-ceskem-pravu-95906.html.

[49]For more information, see e.g. www.hromadnezaloby.cz/ ran by Český spotřebitel s.r.o.

[50]See on Consumers' organisations for requirements imposed on consumes' organisations that want to file an action in this matter.

[51]Compare Balarin and Tichý (2013), p. 17; Bělohlávek (2016), p. 467.

[52]Injunctions for protection of consumer rights are regulated by Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests.

[53]Winterová (2008), p. 21.

this matter is also an obstacle to other proceedings against the same defendant commenced by other plaintiffs having claims arising from a similar legal situation and the same demands. Sections 159a and 83(2) CPC are applied regardless of whether the action is filed by a consumers' organization or an individual consumer.

Regulation of collective redress in Czech law is insufficient and the provisions on *res iudicata* and *lis pendens* mentioned are problematic because they do not contain any means to guarantee the protection of third parties or any specific procedural rules, as is typical for collective redress as a special legal institution.[54]

The biggest shortcoming in the current regulation of collective redress in Czech law is that it deals only with negatory actions, but does not relate to compensation for consumers. It should be mentioned that there have been calls for new legal regulation of collective redress, especially in connection with consumers.[55]

8 Sanctions for Breach of Consumer Law

Sanctions can traditionally be classified as private and public; consumer protection, however, is mixed in this respect.

The main means of private consumer protection is the right to withdraw from a contract, namely in the case of distance consumer contracts and contracts negotiated away from business premises (sections 1829–1838 CC), financial services (sections 1846–1851 CC), and timeshares (sections 1861–1865 CC), where the principle of *pacta sunt servanda* (section 3(2) CC) has been significantly restricted in favour of consumer protection. Special rules for consumers, in the sense of derogation from the fundamental law of contractual relationships, are used in three different situations that occur when making a contract: approaching the consumer away from the business premises of an entrepreneur (section 1828(2)(a) CC), making a contract during a package tour organized by an entrepreneur for the purpose of promoting and selling goods or providing services (section 1828(2)(b) CC), and making a contract of suretyship with a consumer under these circumstances.

Special regulations provide for the sale of goods in stores (special provisions on the sale of goods—sections 2158–2174 CC) and regulate the issue of quality upon takeover and the rights arising from defective performance. The buyer, as a consumer, has a right to request the replacement of a component part, the repair of a thing, reasonable reduction of price, the supply of a new defect-free thing or withdrawal from the contract, all this under the conditions laid down by the Civil

[54]Ibid.

[55]This matter was broadly discussed within the EU; see the Green Paper on Consumer Collective Redress (2008). Compare T. Palla, *Potřeba hromadných žalob ve spotřebitelských sporech* (Necessity of class actions in consumer disputes), www.epravo.cz/top/clanky/potreba-hromadnych-zalob-ve-spotrebitelskych-sporech-56464.html.

Code and/or Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees, which was implemented by the Civil Code.[56]

A general type of consumer protection may take the form of invalidity of juridical acts. The grounds for invalidity may be inconsistency with good morals or with the law (if so required by the purpose of the statute), in this case primarily inconsistency with the rules of consumer protection (section 580 CC). Inconsistency with mandatory provisions that enforce consumer protection in cases of manifest disruption of public order may also be relevant (invalidity of a juridical act under section 588 CC): the argument here is that providing effective consumer protection is an inherent part of public order in a democratic state.[57] We should mention another type of sanction applicable to consumer contracts, whereby the relevant provision (for example, a derogating stipulation—section 1812(2) CC—or a disproportionate stipulation—section 1815 CC) is disregarded. Opinions on the exact meaning of this wording vary. Some are of the opinion that the ostensible nature of the provisions are the grounds for disregarding derogating or disproportionate stipulations, while others speak of invalidity or non-effectiveness. What can be said, however, is that such acts should not have legal consequences. Solely in the context of consumer contracts, we can assume that public bodies must *ex officio* take into consideration the fact that the relevant provision is disregarded. Such a concept would be compliant with European legislation and with current case law; e.g. the Constitutional Court in its decision Pl. ÚS 1/10, stated that the concept of the relative invalidity of consumer contracts is contrary to the Czech constitutional order, in particular to the principles of equality, proportionality and legal certainty, and that it is incompatible with the principle protecting the effectively weaker contracting party (the consumer), which in private law rectifies the principle of autonomy of will.[58] Public bodies are in charge of supervising observance of specific provisions of the Civil Code in certain cases. For example, the Czech Trade Inspection Authority (CTIA) is the general supervisory body for section 1852 ff. CC (timesharing), while the Czech National Bank is the general supervisory body for section 1841 ff. CC (financial services).

Administrative sanctions can be found in the Consumer Protection Act (CPA) and in individual statutes which regulate controlling bodies, namely in the Czech Trade Inspection Authority Act. Controlling bodies may impose minor security measures for the removal of any defects discovered, such as a binding instruction, or a coercive measure, such as suspension of the sale of products or the provision of services, or may close the business premises, but they may also impose more severe sanctions, such as the duty to remove the product from the market (section 23a CPA). Administrative delicts may carry a fine of up to CZK 50,000,000 (in the case of imminent danger to life), see section 24 CPA. Supervisory bodies may also immediately impose a fine of up to CZK 5000. A fine of up to CZK 50,000 may be imposed on persons being investigated who obstruct or otherwise interfere with the

[56]Compare detailed explanation in Tichý et al. (2014), p. 371 ff.

[57]Compare, e.g., Selucká (2013), p. 7.

[58]Skalská (2014), p. 68.

inspection. The director of the Czech Trade Inspection Authority may impose doubled financial penalties for a repeated delict. While there are a variety of sanctions, another question is how supervisory bodies apply them. The Czech National Bank is the subject of much criticism, as its auditing and supervisory activity has thus far been insufficient.[59]

The Criminal Code[60] provides special protection to consumers by defining the crime of causing damage to a consumer in its section 253: a person who causes not insignificant damage to a thing of another by damaging a consumer, in particular by cheating on the quality, quantity or weight of goods, or who places on the market products, work or services in larger quantities and conceals their material defects will be punished by a term of imprisonment of up to 1 year, prohibition of activity or forfeiture of a thing or other property value. Criminal prosecution of usury may also be taken into account; too high an interest rate charged on a loan may qualify as the crime of usury under section 218 of the Criminal Code. The issue of usury may be assessed as a special case of conflict with good morals. The Supreme Court stated that an interest rate that significantly exceeds the interest rate common at the time of its negotiation, in particular with regard to the highest interest rate charged by banks providing credits or loans, is as a rule in conflict with good morals.[61]

Consumer protection provided by private law is usually designated as subsequent protection, while protection provided by public law is primarily considered preventive. Unlike public protection, which does not usually require an active approach by the consumer, private protection as a rule requires activity on the part of the consumer and the consumer has the right of active control over the process.[62]

9 Alternative Mechanisms for the Resolution of Consumer Disputes

Alternative dispute resolution is a system for resolving disputes using alternative procedure, as opposed to typical court proceedings. ADR is an effective tool for consumers, traders and indeed the state, allowing courts to be unburdened of cases that are not usually very complicated and that when heard before courts is disproportionately costly in time and money. ADR brings speed, simplicity and low-cost resolution to consumers and traders alike.

With respect to overloaded courts, ADR mechanisms have developed very dynamically in the Czech Republic over the past 5 years. The promotion of ADR mechanisms for consumer disputes in Czech law is also a result of EU legislation, in

[59]Compare e.g. Sik-Simon (2014), p. 218 ff.

[60]Act No 40/2009 Sb., the Criminal Code.

[61]Compare Ondřej (2013), p. 131 ff., with further references and the Supreme Court decision 21 Cdo1484/2004.

[62]Compare Kanda and Matejka (2005), p. 162.

particular Directive 2013/11/EU on alternative dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC. Under this Directive, all EU Member States should allow and ensure that all disputes between a consumer and a trader arising from the sale of goods or the provision of services can be submitted to the entity of ADR mechanisms, even via online means.

9.1 Arbitration: From Strict Conditions to Total Ban

The most traditional ADR mechanism in the Czech Republic is arbitration. Arbitration rules are found in the Arbitration Act.[63] Arbitration is a dispute resolution mechanism which is conducted privately. Arbitrators are not public authorities; they are private individuals.

It is very clear from Czech court jurisprudence over the past 20 years that arbitration has not been without its troubles, but it was held that arbitration *per se* does not violate the Constitution of the Czech Republic in terms of depriving the party of his or her lawful judge.[64] The public often considered arbitration as consumer dispute resolution to be unfair because arbitration agreements or clauses were drafted in favour of traders and unofficial arbitration centres were viewed as traders' private courts and not considered independent and impartial.[65] However, consumer disputes were never excluded from arbitration on the basis of a lack of arbitrability.[66] Until the amendment of the Arbitration Act in 2012, there were no specifics or exceptions regarding consumer disputes and their settlement in arbitration. Therefore, the validity of arbitration clauses in consumer contracts was examined mainly on the basis of substantive consumer law, in particular the protection of consumers against unfair contractual terms.[67]

The Arbitration Act was amended in 2012 by Act No. 313/2012 Sb. (hereinafter the Amendment), having a huge impact on the arbitration of consumer disputes. First of all, the Amendment emphasized the importance of sufficiency of information because an arbitration agreement can have serious impacts on consumer rights and obligations. Therefore, an arbitration agreement regarding the resolution of disputes arising from consumer contracts must be stated in a document separate from the main contract (under sanction of invalidity). Furthermore, section 3(5) of the

[63] Act No 216/1994 Sb., on Arbitration (hereinafter the Arbitration Act).

[64] The Constitutional Court decision IV ÚS 2157/08.

[65] See Raban (2010), p. 16.

[66] Bělohlávek (2012), pp. 180–181.

[67] Legal regulation of unfair contractual terms in Czech law is based on Directive 2011/83/EU of the European parliament and of the Council of 25 October 2011 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 and earlier Council Directive 93/13/EEC.

Arbitration Act defined the minimum obligatory content of such an arbitration agreement. The Amendment also regulated arbitral awards in a different way. The Amendment stated that arbitrators must always decide in accordance with substantive consumer law[68] and all arbitral awards must contain reasoning and an explicit instruction that a motion may be filed to demand that a court set aside the award.[69] As far as consumer disputes are concerned, the Amendment also introduced an exception regarding the review of arbitral awards, when under section 31(g) of the Arbitration Act a court shall set aside an arbitral award if arbitrators decide a dispute arising from a consumer contract in conflict with consumer law or manifestly contrary to good morals or public order. However, a complete review of arbitral awards relating to the merits of consumer disputes was not accepted.[70] The requirements on arbitrators in deciding consumer disputes were also made stricter. Arbitrators are listed in a register administered by the Ministry of Justice of the Czech Republic and must have had legal education.

In spite of this accommodation of arbitration for consumer disputes, the Arbitration Act was amended with effectiveness from 1 December 2016 and, as a result, consumer disputes were entirely excluded from arbitration. As a consequence, arbitration agreements concluded with consumers after 1 December 2016 would be invalid due to a lack of arbitrability. This amendment was made by way of a law connected to the Consumer Credit Act, but included all consumer disputes. This change was quite surprising and there was no extensive public discussion on this matter. The amendment has been criticized because it means that all consumer disputes (except those in specific market areas—see part on CTU, ERO, and FA) should be resolved by a court (with an enforceable title).[71] The lack of arbitrability of consumer disputes could also affect the recognition and enforcement of foreign arbitral awards in the Czech Republic under the New York Convention of 1959 on the Recognition and Enforcement of Foreign Arbitral Awards.[72]

9.2 Mediation

Another ADR mechanism in the Czech Republic is mediation, which is regulated by the Mediation Act.[73] There are no special rules or mechanisms for the mediation of consumer disputes. Mediation involves an independent third party—a mediator—helping parties reach an agreement. Supervision of the fulfilment of the mediators'

[68]The same rule for international arbitration is included in section 119 PIL Act.

[69]Section 25(2) Arbitration Act.

[70]Bělohlávek (2012), p. 182.

[71]T. Horáček, *Nové aspekty ochrany spotřebitele* (New aspects of consumer protection), 2016, www.pravniprostor.cz/clanky/obcanske-pravo/nove-aspekty-ochrany-spotrebitele.

[72]See Article V(2)(a) of the New York Convention.

[73]Act No 202/2012 Sb., on mediation (hereinafter the Mediation Act).

obligations is exercised by the Ministry of Justice of the Czech Republic, unless the mediator is an attorney.[74] The Ministry of Justice also administers a list of mediators.[75]

9.3 ADR Under the Consumer Protection Act

Last, but not at least, we should mention the ADR mechanism enacted by the CPA Amendment, with effectiveness from February 2016 as the implementation of Directive 2013/13/EU on alternative dispute resolution for consumer disputes. This CPA Amendment introduces ADR for consumer disputes arising from sale contracts and service contracts. Firstly, the part of CPA concerning ADR defines the entities authorized to settle consumer disputes or bring the parties together with the aim of facilitating an amicable solution. Section 20e CPA specifies such ADR entities. Under this section, ADR entities are CTU, ERO, FA and CTIA (Czech Trade Inspection Authority), or another entity authorized by the Ministry of Industry and Trade. Another ADR entity authorized by the Ministry of Industry and Trade is the Czech Bar Association, which settles disputes between attorneys and consumers. Certain doubts exist about the authorization of the Czech Trade Inspection Authority in relation to ADR, mainly among traders.[76] The fact that the Czech Trade Inspection Authority, as an ADR entity, also exercises supervision of traders and is competent to impose sanctions, is the principal reason for such criticism. A lack of experience in the resolution of such disputes is also cited.[77] Under CPA, ADR entities have certain obligations concerning, in particular, the provision of information to consumers about procedure. In the case of cross-border disputes, the European Consumer Centre of the Czech Republic helps consumers access the entity authorized to conduct the out-of-court settlement of consumer disputes.[78] CPA states that a trader is obliged to inform consumers on the subject of ADR for consumer disputes in a clear, comprehensible and easily accessible way and provide a link to the website of the ADR entity.[79] There is no need to conclude any agreement regarding the competence of CTIA or any other entity; it is given by law.

CPA also contains provisions on ADR procedure before the Czech Trade Inspection Authority (sections 20n–20y CPA), which is most often likened to conciliation. It should be emphasized that ADR before CTIA does not prevent the parties from

[74]Section 13 Mediation Act. In case of an attorney, supervision is exercised by the Czech Bar Association.

[75]Section 15(1) Mediation Act.

[76]A. Vejvodová, Místo soudu k ČOI. (Instead to court to COI), http://pravniradce.ihned.cz/c1-65143620-misto-soudu-k-coi-startuje-novy-zpusob-reseni-spotrebitelskych-sporu.

[77]Horáček (2016).

[78]Section 20i(1) CPA.

[79]Section 14 CPA.

exercising their right of access to the judicial system. A motion to resolve a dispute may be filed by a consumer (if failing to resolve a complaint directly with the trader), but not later than 1 year following the date on which the consumer contacts the trader in order to resolve the dispute. Proceedings are not subject to a fee and the parties cover their own costs associated with such proceedings. When ADR is commenced before CTIA, the trader is obliged to file his statement concerning the dispute within 15 business days of the delivery of information about the motion filed by the consumer.[80] Dispute resolution before CTIA should in most cases end within 90 days of its commencement.

The aim of the whole process is for the parties to reach an agreement. The fact that the result of proceedings is not a directly enforceable legal title, unlike a judgment or an award, is often criticized.[81] The process should result in an agreement (substantive) between the parties, but the consumer must submit evidence to CTIA at the beginning of proceedings and the rules of ADR before CTIA assume mainly written proceedings, as opposed to verbal hearings or any actual direct communication between the parties that could lead to an amicable resolution.[82] If a dispute does not end with an agreement, CTIA may issue a legally non-binding opinion on the subject of the dispute. The hybrid character of the ADR and the lack of enforceable legal title are probably the most significant troubles relating to ADR before CTIA.

Online dispute resolution (ODR) is another aspect relating to the ADR mechanism. ODR is provided by EU regulation on on-line dispute resolution.[83] Disputes arising from consumer contracts concluded online are resolved through a platform for ODR operated by the European Commission and available on the internet.[84]

10 Summary

Czech consumer law is largely influenced by EU law and therefore provides a relatively high level of consumer protection. Historically-speaking, a problem was often seen in of the fact that consumers lack knowledge of their rights. However, as a recent research among EU countries has shown, the Czech Republic ranks as one of the highest in the EU in terms of consumer knowledge, although it falls below the EU average on trader knowledge of consumer law.[85]

[80]Section 20s(1) CPA.

[81]R. Sik-Simon, Mimosoudní vyrovnání—levnější a rychlejší řešení spotřebitelských sporů. (Out-of-court settlement—cheaper and faster resolution of consumer disputes), www.epravo.cz/top/clanky/mimosoudni-vyrovnani-levnejsi-a-rychlejsi-reseni-spotrebitelskych-sporu-96427.html.

[82]Horáček (2016).

[83]Regulation No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes.

[84]See webgate.ec.europa.eu/odr/main/index.cfm?event=main.home.chooseLanguage.

[85]For more information, see ec.europa.eu/consumers/consumer_evidence/consumer_scoreboards/11_edition/docs/ccs2015scoreboard_en.pdf, 20.

As far as substantive law is concerned, despite the fact that Czech private law has been extensively re-codified with effect as of 1 January 2014, the consumer law contained in the Civil Code has not been modified so extensively and continues to follow the previous Civil Code of 1964. Changes in Czech consumer law mostly depend on changes in EU legislation in this matter.

We can see more significant changes as far as procedural law is concerned, or more precisely the law dealing with enforcement mechanisms for consumer disputes. Judicial resolution of consumer disputes was the main enforcement mechanism of consumer rights for many years. Unfortunately, judicial resolution is not effective and seems to be inappropriate with respect to the value of consumer disputes. Judicial enforcement is expensive and slow and does not provide any specific conditions for the resolution of consumer disputes. Another main shortcoming is the lack of collective redress.

Proceedings conducted before specialized administrative agencies, i.e. CTU, ERO and FA, have been received more positively. They are definitely much faster and cheaper than court proceedings.

There have been substantial changes in Czech consumer law in the past 5 years with regard to out-of-court enforcement mechanisms. The Mediation Act was enacted in 2012, providing another ADR mechanism which is quite suitable for consumer disputes. In the same year, the Arbitration Act was amended to make arbitration more appropriate for consumer disputes. Since December 2016, however, consumer disputes have been entirely excluded from arbitration. The CPA Amendment was enacted in 2015 and brought a new ADR mechanism, specifically before the Czech Trade Inspection Authority. The new ADR mechanisms are generally appreciated. By contrast, ADR before CTIA has been subjected to some criticism mostly because of its hybrid character: while procedure resembles authoritative proceedings, the result is not an enforceable title. Further steps are therefore to be expected.

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The EU Legal Framework for the Enforcement of Consumer Law

Peter Rott

1 Introduction

The European Union (EU) is special in that it is a multi-level system in which, principally, consumer law can be adopted at the EU level but it is enforced at the level of the Member States. Nevertheless, the EU has over time developed an ever denser legal framework for the enforcement of consumer law by the Member States. It is this legal framework that this contribution focuses upon.

It starts by offering an overview of EU consumer policy in the area of substantive law and of the institutional setting at the EU level before it discusses the general approach of the EU towards enforcement of consumer law and its influence on court procedures, on the role of specialised agencies and of consumer organisations, the relevance of private regulation and private enforcement, the availability of collective redress mechanisms and the way in which infringements of consumer law are sanctioned, and finally the role of alternative dispute resolution.

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2 Substantive EU Consumer Law

2.1 The Competence System

The EU has 28 Member States with an estimated total population, on 1 January, 2017, of 511,522,671 people (including the United Kingdom that may leave the Union). As the EU is not a genuine state, its competences to adopt legislation are, in principle, limited.[1] Under the principle of conferred powers, also called the principle of attributed competence, laid down in Article 5(2) TEU, the EU shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States. Even where the EU has the competence to act, its competence is often not exclusive.

In the areas of consumer law and internal market law, the EU and its Member States have shared competences.[2] Thus, in principle, both the EU and the Member States may legislate and adopt legally binding acts in these areas. The Member States shall, however, exercise their competence (only) to the extent that the Union has not exercised its competence, and the Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence. In other words, EU law in a specific sector of consumer law blocks national legislation in that same sector unless it expressly allows Member States to adopt more stringent measures to protect consumers or it leaves room for complementary measures.[3]

Moreover, the competence to regulate EU consumer law is limited by the principle of subsidiarity, according to which in areas which do not fall within its exclusive competence, the EU shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level[4]; although the principle of subsidiarity has not played any role in the past.[5]

Given these limitations, the EU has come a long way in pursuing its own consumer policy, and it has established an impressive body of substantive consumer law and even acquired significant influence on the enforcement of that body of consumer law at the domestic level of the Member States.

Currently, in the area of consumer law, EU legislation is complemented by Member States' legislation, although there is a tendency in EU legislation to

[1] Eurostat, Population on 1 January, http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=tps00001&plugin=1.

[2] See Articles 2(2), 4(1) and (2) TFEU.

[3] See, generally, Nettesheim (2015), margin notes 23 ff.

[4] See, for example, Tonner and Tamm (2009), p. 285. Procedural aspects of the principle of subsidiarity and proportionality are laid down in the Protocol (No 2) on the application of the principles of subsidiarity and proportionality.

[5] See, e.g., Weatherill (2011), p. 843 ff.

harmonise areas of consumer law ever more densely and at the same time totally in the sense of leaving no room for more stringent measures at the national level (see infra).

2.2 EU Consumer Law as Internal Market Law

The design of EU consumer law is special, which may be attributed to its historical development.[6] Historically, the EU did not have the competence to regulate in the area of consumer law. Thus, the only possible perspective the EU could take was the common market (now internal market) perspective. Consequently, almost all EU consumer legislation is based on Article 114(1) TFEU (ex-Article 95 EEC, ex-Article 100a EC) that allows the EU to adopt measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.[7]

Having had the political will to act in the area of consumer law, the EU legislator, and in particular the EU Commission, found several angles to approach consumer law as internal market law. First, national consumer laws had been treated by the Court of Justice in the famous case of *Cassis de Dijon*[8] as (potential) obstacles to trade that could, however, be justified if they were necessary to protect the consumer. Different levels of consumer protection have been regarded as an unequal playing field for traders in the EU, and as a distortion of competition. Thus, the first EU directives in the area of consumer law were justified with the need to create a level playing field.[9] Second, consumer rights have been found necessary to make cross-border trade work in the EU. Obviously, cross-border trade requires traders to sell in other EU Member States but also consumers to buy from traders that are domiciled in other EU Member States. In particular since the 1990s, the EU legislator has emphasised the need to confer robust rights and remedies on consumers so as to allow them to play an active role in the EU internal market.[10] Nowadays, both aspects still play a role in EU consumer law, with the emphasis being on facilitating trade again. That latter approach is reflected in a policy that aims at totally

[6]For in-depth analysis, see Reich and Micklitz (2014), p. 8 ff.

[7]For an overview see Micklitz and Rott (2014), H.V., margin notes 68 ff.

[8]Case 120/78 Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein, ECLI:EU:C:1979:42.

[9]See, for example, the second recital of the Doorstep Selling Directive 85/577/EEC, OJ 1985, L 372/31.

[10]See, for example, the fifth and sixth recitals of the Unfair Contract Terms Directive 93/13/EEC, OJ 1993, L 95/29.

harmonising consumer law at the EU level so as to establish one set of rules that applies in all Member States.[11]

The market approach is nowadays complemented by a consumer policy aiming at social inclusion of disadvantaged consumers. That approach was developed in sectors that used to be public services in the past. Since the 1990s, the EU has been determined to liberalise these markets, beginning with telecommunication services, followed by the electricity and gas markets. At the same time, the EU pursues the policy of ensuring that everyone has affordable access to so-called services of general interest, which includes telecommunication services, postal services, energy and, most recently, basic banking, and it has developed an instrument called universal service obligations.[12] To what extent that social dimension of EU consumer law develops into a veritable pillar of its own is subject to academic debate.[13]

2.3 *The Development and Form of EU Consumer Law*

EU consumer policy is based on Consumer Policy Strategies that are usually adopted for a period of 5 years. It formally started with the First Consumer Programme of 1975,[14] which provided for five basic rights:

1. the right to protection of health and safety,
2. the right to protection of economic interests,
3. the right of redress,
4. the right to information and education,
5. the right of representation (right to be heard).

That Programme was followed by the Second Consumer Programme of 1981,[15] which repeated those five rights and focused on a number of products whose safety should be addressed by EU legislation, but also on prices and their disparities.

The first legislative acts dated from the mid-80s, namely the Misleading Advertisement Directive 84/450/EEC, the Product Liability Directive 85/374/EEC, the Doorstep Selling Directive 85/577/EEC and the Consumer Credit Directive 87/102/EEC. The reason for the somewhat slow legislative start was that under the then applicable version of the Treaty on European Economic Community, the Member States had to adopt legislative acts aiming at the establishment and the functioning of

[11]For in-depth analysis, see Micklitz and Rott (2014), H.V. margin notes 44 ff.

[12]See Rott (2005), p. 323 ff. Rott (2011), p. 483 ff.

[13]See, for example, Rott (2014), p. 675 ff.

[14]Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy, OJ 1975, C 92/1.

[15]Council Resolution of 19 May 1981 on a second programme of the European Economic Community for a consumer protection and information policy, OJ 1981, C 133/1.

the (then) Common Market unanimously. After the majority principle had been introduced with the Single European Act of 1986, EU consumer law took up speed.

Conceptually, consumer policy has gone through various phases in EU law. Roughly, one can distinguish a first phase which appeared to regard the consumer as a weaker party and as a victim of unfair practices, who therefore needed the protection of the legislators.

In the 1990s, in a second phase, the consumer was regarded as an active market player that could make informed choices on the EU market, thereby at the same time helping to foster competition between traders in the EU; a development that had already been prepared by a number of policy documents in the second half of the 1980s. The main goal of EU consumer policy was therefore to grant solid rights and remedies to consumers so as to strengthen the consumer's confidence in the EU market. Consumer protection was replaced by consumer choice.[16] Examples for that approach were the Unfair Terms in Consumer Contracts Directive 93/13/EEC[17] and the Consumer Sales Directive 1999/44/EC.[18]

Towards the end of the 1990s, the focus of consumer policy shifted again to the perspective of traders who wanted to trade cross-border in the EU. While the EU legislator continued to aim at a high level of consumer protection (as Article 114 (3) TFEU requires), it also tried to reduce transaction costs of traders, predominantly by totally harmonising the consumer laws of the Member States. Examples for that approach are the Consumer Credit Directive 2008/48/EC and the Consumer Rights Directive 2011/83/EU. Current efforts focus on totally harmonising the law of the sale of goods[19] and the online sale of digital products.[20]

This is, however, a somewhat incomplete picture. One recent example of a legislative act that aims at social protection of consumers and that follows the principle of minimum harmonisation and, thus, hardly fosters the internal market,[21] is the Mortgage Credit Directive 2014/17/EU[22]; which may, however, be explained with the financial crisis that hit home owners with mortgages particularly hard in certain Member States, amongst them Spain.

In terms of focus areas, early EU consumer law was mainly product-related, with emphasis on product safety, product liability and sales law. Whereas these areas, and in particular sales law, is still on the agenda, there has been a shift towards services since the mid-2000s. One example is Directive 2006/123/EC on services in the

[16]See Reich (1992), p. 26 ff.

[17]See the fifth and sixth recitals of the Unfair Contract Terms Directive 93/13/EEC.

[18]See recital (4) of Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees, OJ 1999, L 171/12.

[19]See the Commission's amended proposal for a Directive on certain aspects concerning contracts for the online and other distance sales of goods, COM (2017) 637 final.

[20]See the Commission's proposal for a Directive on certain aspects concerning contracts for the supply of digital content, COM (2015) 634 final.

[21]See, for example, Schäfer (2014), p. 211 f.

[22]OJ 2014, L 60/34.

internal market,[23] although this is an internal market rather than a consumer protection instrument. Moreover, financial services have played a major role in recent years, in particular following the financial crisis that started in 2008.

The genesis of EU consumer law is also reflected in its structure. EU law has long been based on 'vertical' legislation, dealing with specific contracts, such as package travel contracts, timeshare contracts, consumer sales contracts, consumer credit contracts or payment services contracts, or specific situations, such as doorstep selling or distance selling.[24]

More recently, there have been long debates concerning the creation of a European Civil Code,[25] and much work has been put into the drafting of a Common Frame of Reference[26] that would have resembled a civil law codification and that would have included consumer law. To date no such codification exists at the level of EU law.

The EU has still strived to make those insular rules more coherent,[27] which resulted in the adoption of the Consumer Rights Directive 2011/83/EU,[28] in which some general concepts were meant to be harmonised. This Directive only covers a small part of EU consumer legislation. The EU legislator, however, attempts to use the same terminology as used by the Consumer Rights Directive in new legislative acts such as Directive 2015/2302/EU on package travel and linked travel arrangements.[29]

Vertical legislation also dominates in the areas of financial services and of regulated markets, such as energy and telecommunications. In financial services law, we find legislation regulating specific services such as consumer credit, mortgage credit, insurance, insurance distribution and also various directives dealing with specific types of investment. Many of these pieces of legislation do not only deal with consumer protection but rather attempt to regulate the market and therefore cover a great deal of public law, such as rules on competences, registration and supervision of service providers as necessary ingredients for mutual access of service providers to other Member States.

Similarly, legislation relating to regulated markets such as electricity, gas or telecommunications services primarily focuses on establishing an internal market in these areas, mainly through liberalisation. For example, according to Article 1 of the Electricity Markets Directive 2009/72/EC, that Directive 'establishes common rules for the generation, transmission, distribution and supply of electricity, together

[23]OJ 2006, L 376/36.

[24]For an overview, see Micklitz and Rott (2014), H.V. margin notes 68 ff.

[25]See, for example, the resolution of the European Parliament on European contract law, OJ 2006, C 305 E/247.

[26]See von Bar et al (2008).

[27]See in particular the Green Paper on the Review of the Consumer Acquis of 2007, COM (2006) 744 final.

[28]Directive 2011/83/EU on consumer rights, OJ 2011, L 306/64.

[29]OJ 2015, L 326/1.

with consumer protection provisions, with a view to improving and integrating competitive electricity markets in the Community. It lays down the rules relating to the organisation and functioning of the electricity sector, open access to the market, the criteria and procedures applicable to calls for tenders and the granting of authorisations and the operation of systems. It also lays down universal service obligations and the rights of electricity consumers and clarifies competition requirements.' Consumer law, and in particular the concept of universal service, is common to all these areas but has not been regulated in a harmonious manner.

One notable development in EU consumer law is the separation of 'core' consumer law from the law of financial services that occurred mainly in the last decade.[30] The latest step was the total exclusion of financial services from the scope of application of the Consumer Rights Directive.[31] That separation is not only by legal technique but also conceptual and reflects the lack of financial literacy of the average consumer.

The development of consumer law is usually prepared with Consumer Policy Strategies that are formulated by the EU Commission and highlight the priorities for the relevant period. The Consumer Policy Strategy 2007–2013[32] set the following five priorities: 1. better monitoring of consumer markets and national consumer policies, 2. better consumer protection regulation, 3. better enforcement and redress, 4. better informed and educated consumers and 5. putting consumers at the heart of other EU policies and regulation. The current Consumer Policy Strategy, which dates from 2012 and covers the period of 2014–2020,[33] aims at 1. improving consumer safety, 2. enhancing knowledge, 3. improving implementation, stepping up enforcement and securing redress and 4. aligning rights and key policies to economic and societal change.

2.4 The Role of Information and Education

EU consumer policy has been based on the image of an average consumer that is reasonably well-informed and reasonably observant and circumspect.[34] This idea, however, does not extend to the legal knowledge of consumers. In contrast, the EU legislator as well as the Court of Justice have often emphasised that consumers do

[30]See, for example, the separation in distance selling law, where the EU adopted the 'general' Distance Selling Directive 97/7/EC, OJ 1997, L 144/19, and Directive 2002/65/EC on the distance marketing of financial services, OJ 2002, L 271/16.

[31]See Article 3(3)(d) of Directive 2011/83/EU.

[32]See also EU Consumer Policy strategy 2007–2013, Empowering consumers, enhancing their welfare, effectively protecting them, COM (2007) 99 final.

[33]See the Commission Communication A European Consumer Agenda—Boosting Confidence and Growth, COM (2012) 225 final.

[34]See only ECJ, case C-470/93 Verein gegen Unwesen in Handel und Gewerbe Köln eV v Mars GmbH, ECLI:EU:C:1995:224, para 24.

not know their rights and therefore need to be informed of their rights. This attitude is not least based on the assumption that only consumers who know their rights will have the confidence to enter into transactions with traders from other Member States, thereby contributing to the creation of cross-border competition and ultimately to the functioning of the internal market.

Thus, the EU legislator routinely integrates into its legislative acts the Member States' obligation to inform consumers about their rights stemming from EU legislation. For example, under Article 20(1) of Directive 2014/92/EU,[35] Member States shall ensure that adequate measures are in place to raise awareness among the public about the availability of payment accounts with basic features, their general pricing conditions, the procedures to be followed in order to exercise the right to access a payment account with basic features and the methods for having access to alternative dispute resolution procedures for the settlement of disputes. To my knowledge, the Member States' efforts to inform consumers about their rights have, however, never been subject to enforcement measures by the European Commission.

Moreover, EU Directives regularly require Member States to impose information obligations on traders. Referring to Directive 2014/92/EU again, Article 20 (2) requires Member States to ensure that credit institutions make available to consumers, free of charge, accessible information and assistance about the specific features of the payment account with basic features on offer, their associated fees and the conditions of use. Enforcement of these obligations is a different issue.

A recent trend is that the EU has recognised that legal language is not always easy to understand for consumers and therefore tries to facilitate the consumers' access to information about their rights by way of comprehensible explanation of what the law means, and again this applies to the Member States' obligations as well as to the traders' information obligations. This is visible in the Mortgage Credit Directive 2014/17/EU[36] where consumer information is laid down in Article 13 with Annex II, which is has two parts. Part A contains the relevant information in legal language, whilst Part B serves to explain what the legal rights and obligations of Annex really mean. Under the above-mentioned Article 20(1) of Directive 2014/92/EU, Member States shall ensure that its communication measures are sufficient and well-targeted, in particular reaching out to unbanked, vulnerable and mobile consumers. Traders' information obligations are sometimes complemented by a duty to explain that information to consumers.[37]

The Court of Justice has also pursued the aim of ensuring access for consumers to legal information by emphasising that national law that implements EU consumer law must be transparent. In *Commission v Netherlands*, the Court of Justice held that the Netherlands had not implemented the Unfair Contract Terms Directive 93/13/

[35]Directive 2014/92/EU on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features, OJ 2014, L 257/214.

[36]Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property, OJ 2014, L 60/34.

[37]See, e.g., Article 5(6) of the Consumer Credit Directive 2008/48/EC, OJ 2008, L 60/43.

EEC correctly because they had not explicitly introduced the transparency requirement of Article 5 into Dutch law. The Netherlands had argued that the transparency requirement had been part of Dutch law anyway, according to the case law of the highest Dutch court, the Hoge Raad. This was regarded to be insufficient, as foreign consumers would not be able to find that case law and would therefore remain ill-informed about Dutch unfair contract terms law.[38]

The EU Commission itself has a website on which it explains, in consumer-friendly language, EU consumer policy and consumer rights under EU law.[39]

The EU also takes consumer education seriously.[40] This is particularly true for the area of financial services. Whilst 'normal' EU consumer law is still largely operating with information obligations that aim to enable the consumer to make informed choices, the EU legislator has (at least implicitly) recognised that more is needed to protect the consumer in the area of financial services. Thus, additional instruments, such as explanation and advice duties and even product regulation, are increasingly used in that latter area. Also, whilst the law of unfair commercial practices has, in principle, been fully harmonised by Directive 2005/29/EC, thereby taking as a benchmark the so-called 'average consumer', an exception has been made for financial services where Member States can still take a more protective stance.[41] With Article 6 of the Mortgage Credit Directive 2014/17/EU, the EU legislator has explicitly called on Member States to promote measures that support the education of consumers in relation to responsible borrowing and debt management, in particular in relation to mortgage credit agreements. The Commission shall publish an assessment of the financial education available to consumers in the Member States and identify examples of best practices which could be further developed in order to increase the financial awareness of consumers.

2.5 Little International Influence

The first consumer policy programme with its formulation of five basic rights was clearly influenced by international discussions, and in particular by President Kennedy's consumer message of 1962 to the United States Congress.[42] In the

[38]ECJ, case C-144/99 Commission v Netherlands, ECLI:EU:C:2001:257, para 18. See also ECJ, case C-478/99 Commission v Sweden, ECLI:EU:C:2002:281, para 22.

[39]See http://ec.europa.eu/consumers/index_en.htm.

[40]See only the first Report on Consumer Policy (July 2010–December 2011), SWD(2012) 132 final, and the second Report on Consumer Policy January 2012–December 2013, http://ec.europa.eu/consumers/strategy-programme/policy-strategy/documents/consumer_policy_report_2014_en.pdf, p. 23 ff.

[41]See Article 3(9) of Directive 2005/29/EC.

[42]See Reich (1992), p. 23 ff.

aftermath, however, EU consumer law (in a narrow sense)[43] has not been visibly influenced by developments outside the EU but has rather influenced, for example, the UN Guidelines on Consumer Protection.[44]

The EU Commission has focused on exploring 'best practices' within the Member States by commissioning comparative studies in the preparation of legislation. Merely the Consumer Sales and Guarantees Directive 19999/44/EC was influenced by international law, namely by the Convention on the International Sale of Goods,[45] without following its rules entirely.

There is, however, cooperation with the US through the Transatlantic Consumer Dialogue (TACD), organised by Consumers International which provides the TACD Secretariat. This is a forum of US and EU consumer organisation. The forum prepares joint consumer policy recommendations to the US government and the European Commission to promote consumer interests in EU and US policy making. The European Commission provides financial and coordination support for the TACD. Each year, the TACD organises annual meetings to discuss its resolutions with the European Commission and the US authorities. Additionally, the TACD regularly organises thematic conferences covering topics such as nanotechnologies, diet and obesity, or intellectual property.[46]

2.6 Consumer Law as a Cross-Cutting Issue in EU Law

Consumer protection is a cross-cutting issue in EU law. Whilst the main area, in which consumer law is to be considered, is internal market law under the competence laid down in Article 114 TFEU, consumer protection requirements shall also be taken into account in defining and implementing other Union policies and activities, under the so-called 'sectoral clause' of Article 12 TFEU. That provision is not meant to give priority to consumer protection but rather aims at optimizing the interaction of consumer protection policy with other policies.[47]

It should be noted that internal market under Article 114 TFEU in itself goes far beyond the protection of consumers and that we find numerous provisions on consumer protection in legislation that is primarily dedicated to the regulation of markets, such as energy, telecommunications services or postal services. In these

[43]In a broader sense, for example relating to the safety of pharmaceuticals, influence of US American law has been strong initially. The first Pharmaceuticals Directive 65/65/EEC, OJ 1965, 22/369, was clearly based on the model of the Federal Food, Drug, and Cosmetic Act of 1938 and the Kefauver-Harris Amendments of 1962.

[44]See Reich (1992), p. 25.

[45]See Kruisinga (2001), p. 177 ff.

[46]See Commission, International consumer organisations, http://ec.europa.eu/consumers/eu_consumer_policy/consumer_consultative_group/international_consumer_organisations/index_en.htm.

[47]See, e.g., Tonner (2016), § 3, margin note 15.

areas, protection is not necessarily restricted to 'consumers' in a narrow sense but often applies to 'customers'[48] or 'users'.[49]

Important legislation that is not necessarily restricted to the protection of consumers either but may have a broader personal scope of application, has also been adopted under competences laid down in other chapters of the TFEU, the most notable example being passenger rights as established under the competence related to 'transport'. Relevant legislation includes the Air Passengers Rights Regulation (EU) No. 261/2004,[50] the Railways Passengers Rights Regulation (EU) No. 1371/2007,[51] the Boat Passengers Rights Regulation (EU) No. 1177/2010[52] and the Bus Passengers Rights Regulation (EU) No. 181/2011.[53]

Consumer rights have also been derived, by the Court of Justice, from the competition law provisions of Articles 101 and 102 TFEU. In the case of *Manfredi*, the Court of Justice held that the full effectiveness of EU cartel law would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition. Thus, the Court concluded that any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under EU cartel law; which obviously includes consumers.[54]

Finally, consumer protection has been considered in EU law on jurisdiction and on private international law, adopted under the Title 'Area of Freedom, Security and Justice' (now Article 81 TFEU). With specific provisions enshrined in Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[55] (Brussels Ia Regulation) and Regulation (EU) No. 593/2008 on the law applicable to contractual obligations[56] (Rome I Regulation), EU law ensures that consumers are not normally forced into the courts of other Member States and that they are not deprived of the mandatory consumer protection laws of the Member State in which they are domiciled.

[48]Customers in the terms of the Electricity Market Directive 2009/72/EC include 'wholesale customers' and 'final customers', the latter meaning customers purchasing electricity for their own use, see Article 2 nos 7 and 8 of Directive 2009/72/EC.

[49]See the Telecommunications Universal Service Directive 2002/22/EC, as amended by Directive 2009/136/EC, which protects 'end-users'.

[50]OJ 2004, L 46/1.

[51]OJ 2007, L 315/14.

[52]OJ 2010, L 334/1.

[53]OJ 2011, L 55/1.

[54]ECJ, joined cases C-295/04 to C-298/04 Manfredi et al., ECLI:EU:C:2006:461, paras 60 f.

[55]OJ 2012, L 351/1.

[56]OJ 2008, L 177/6.

2.7 Current Developments and Debates

EU consumer law is constantly under reform. The re-regulation of financial services has surely played a major role in recent years, in particular following the financial crisis that started in 2008. However, the EU also continues work in the area of consumer sales law. Currently, proposals are pending for new Directives concerning the sale of goods[57] and the supply of digital content.[58]

More generally, the European Commission has reviewed the consumer acquis with a so-called Fitness Check. A Fitness Check is a comprehensive evaluation of a policy area that usually addresses how several related legislative acts have contributed (or otherwise) to the attainment of policy objectives. Fitness checks are particularly well-suited to identify overlaps, inconsistencies synergies and the cumulative impacts of regulation.

The Fitness Check of EU Consumer and Marketing legislation covered the following directives: Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market (Unfair Commercial Practices Directive); Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees (Sales and Guarantees Directive); Directive 93/13/EEC on unfair terms in consumer contracts (Unfair Contract Terms Directive). Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers (Price Indication Directive); Directive 2006/114/EC concerning misleading and comparative advertising (Misleading and Comparative Advertising Directive), and Directive 2009/22/EC on injunctions for the protection of consumers' interests (Injunctions Directive).[59] It led to two legislative proposals, published in April 2018: a proposal for a Directive on representative actions for the protection of the collective interests of consumers[60] and a proposal for a Directive on better enforcement and modernisation of EU consumer protection rules.[61]

3 The Institutional Setting

The main actors in EU law are the European Commission who is the only competent EU organ to initiate legislation, and the Council and the European Parliament who act together in what is now called the 'ordinary legislative procedure' of Article 289 TFEU to adopt legislation in the areas that can be regarded as consumer law.

[57] See the Commission's amended proposal for a Directive on certain aspects concerning contracts for the online and other distance sales of goods, COM (2017) 637 final.

[58] See the Commission's proposal for a Directive on certain aspects concerning contracts for the supply of digital content, COM (2015) 634 final.

[59] The Commission's report on the fitness check was published in May 2017, see SWD (2017) 209 final.

[60] COM (2018) 184 final.

[61] COM (2018) 185 final.

At the institutional level, the rise of consumer law towards a policy of its own became visible in 1995, when a Consumer Policy Directorate was established within the European Commission. Nowadays, if forms part of DG SANCO. In the meantime, however, DG SANCO has lost many of its competences to other directorates, namely, first, DG MARKT who acquired the (internal) lead in the area of financial services and electronic commerce and, nowadays, to DG Justice that has taken over responsibility for civil justice but also for contract law including consumer contract law. Finally, tribute is paid to the fact that consumer protection must also be considered, under the sectoral clause of Article 12 TFEU, by all other directorates. Therefore, each Commission department with a significant consumer interest has a consumer liaison officer to monitor the impact of its policies on consumers.

The European Parliament has a standing Committee on Internal Market and Consumer Protection; which, again, confirms that special feature of EU consumer law.

The EU has also dedicated an important political role to consumer organisations, most importantly to BEUC and to ANEC.

BEUC (Bureau Européen des Unions de Consommateurs) acts as the umbrella group for its members, which consist of 41 independent consumer organisations from the 31 Member States of the EU and the European Economic Area (Iceland, Norway and Switzerland). It has its seat in Brussels where also the European Commission has its seat but it gets much of its input from its member organisations that are situated in all Member States.

The European Association for the Coordination of Consumer Representation in Standardisation (ANEC) deals specifically with safety standards.[62] ANEC participates principally through its voluntary experts in the standards development work of the three European Standardisation Organisations (ESOs) recognised by the European Union and EFTA: the European Committee for Standardisation (CEN), the European Committee for Electrotechnical Standardisation (CENELEC) and the European Telecommunications Standards Institute (ETSI). However, ANEC also participates in other organisations which develop standards whose use could directly or indirectly affect the European consumer, including the International Organization for Standardization (ISO) and the International Electrotechnical Commission (IEC).[63] ANEC also has its central secretariat in Brussels.

The EU has no legislation over BEUC or ANEC but supports both organisations financially and regards BEUC as its main contact from the consumer side. The EU budget 2014–2019 provides for a budget line that allocates EU operational grants to European consumer organisations. Under this budget, BEUC receives a grant (to be applied for on a yearly basis) of €1,400,000; which in 2015 represented 37% of the operational BEUC budget and 28% of the total budget.[64] BEUC regards the support

[62]For details, see http://www.anec.eu/anec.asp. See also Schepel and Falke (2000), p. 112 ff.

[63]See ANEC, What is ANEC?, http://www.anec.eu/anec.asp?p=about-anec&ref=01-01.

[64]See BEUC, Financial information, http://www.beuc.eu/about-beuc/financial-information.

by the EU as recognition of the quality of its work in representing consumers at EU level.

ANEC is financed by the European Union (95%) and EFTA (5%) as an 'Annex III Organisation' under Regulation (EU) No. 1025/2012 on European standardisation.[65] In 2015, the ANEC budget totalled 1.32 Mio. Euro.[66] Other umbrella organisations complete the picture. COFACE, the Confederation of Family Organisations in the EU, takes a specific family perspective on EU legislation in general, including consumer law.[67] The European Community of Consumer Cooperative (Euro Coop) is primarily active in food and non-food retail. It was founded in 1957, and its members are the national organisations of consumer co-operatives in 19 European countries.[68]

BEUC and other consumer organisations have no formal competences at the level of EU consumer law, although they have certain rights as 'persons who claim a legitimate interest', for example, in EU competition law under Article 3(2) of Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty,[69] or as 'interested party' under Article 5(10) of Regulation (EC) No. 384/96 on protection against dumped imports from countries not members of the European Community.[70]

In the area of consumer law, BEUC is regularly invited to hearings on all kinds of consumer matters, and also representatives of national consumer organisations are often invited to Brussels, for example, as experts for substantive consumer law as well as for enforcement matters.

Finally, the European Consumer Consultative Group (ECCG) ensures consumer participation in all relevant policy groups.[71]

4 The General Influence of the EU on the Enforcement of Consumer Law

In the multi-level system of the EU, consumer law is enforced by the Member States. Thereby, as a starting point, Member States enjoy procedural autonomy, which means that they are free to decide on the suitable enforcement mechanisms. Nevertheless, the EU has had a major impact in two ways: first, by trying to ensure that Member States do enforce consumer law (Sect. 4.1), and second, by supporting the

[65] OJ 2012, L 316/12.

[66] See ANEC, What is ANEC?, http://www.anec.eu/anec.asp?p=about-anec&ref=01-01.

[67] See http://www.coface-eu.org/en.

[68] See http://www.eurocoop.org/en.

[69] See Court of First Instance, case T-37/92 BEUC and National Consumer Council v Commission, ECLI:EU:T:1994:54.

[70] See Court of First Instance, case T-256/97 BEUC v Commission, ECLI:EU:T:2000:21.

[71] See Commission, Consumer issues in other policies, http://ec.europa.eu/consumers/eu_consumer_policy/consumer_issues_in_other_policies/index_en.htm.

cross-border enforcement of EU consumer law (Sect. 4.2). More recently, however, the EU has become more directly involved in enforcement activities, and in crucial sectors in which Member States have failed to take sufficient control in the past, in particular the financial sector, the EU has acquired certain enforcement competences itself (Sect. 4.3).

4.1 Influence on Enforcement at the Domestic Level

The EU Commission is entrusted with safeguarding compliance of Member States with EU law in general,[72] and it has the power, under Article 258 TFEU, to sue Member States for non-compliance with EU law before the Court of Justice. Thus, the EU Commission is also an important player in ensuring that Member States implement EU consumer law correctly, and the EU Commission has initiated numerous proceedings in the Court of Justice so as to make Member States comply with their obligations in the area of consumer law.

At the same time, it should be noted that the EU Commission also enforces internal market policy, which consumer law forms part of under the specific design of EU law, and some of the proceedings brought by the EU Commission in the Court of Justice aimed at preventing Member States from affording a higher level of consumer protection than the level envisaged by EU legislation. This approach triggered criticism, in particular, in the area of product liability law where the EU Commission took France and Greece to the Court of Justice for providing stronger consumer protection than allowed under the Product Liability Directive 85/374/EEC.[73]

The EU has, of course, noticed that substantive law, including consumer law, is meaningless if it is not enforced by the Member States. Thus, safeguarding compliance of Member States with EU law includes safeguarding the enforcement of consumer law at the domestic level.

An important source of information in that respect is data on consumer complaints. The EU, and in particular the EU Commission, does not receive consumer complaints itself but complaints are normally directed to national authorities and/or consumer organisations. The EU Commission, however, strives at harmonising complaint classifications at EU level, so that complaints data will be directly comparable across the EU. This is meant to allow for a faster, better targeted, evidence-based policy response at the EU or the national level to real problems experienced by consumers. To that end, in May 2010 the Commission has adopted a Recommendation on the use of a harmonised methodology for classifying and

[72] See Article 17 TEU.

[73] See ECJ, case C-52/00 Commission v France, ECLI:EU:C:2002:252; ECJ, case C-154/00 Commission v Greece, ECLI:EU:C:2002:254. See also Schaub (2003), p. 562 ff.

reporting consumer complaints and enquiries.[74] The EU Commission also provides financial support and IT support to consumer organisations so as to facilitate the transmission of data to the EU Commission.[75]

Whilst the EU Commission does not have statistics on the number of consumer complaints or disputes, it does research into consumer complaints. More specifically, the Commission produces so-called Consumer scoreboards which show how the internal market is performing for EU consumers and warn of potential problems. They are used as a tool for evidence-based consumer policy, and allow European and national policymakers and stakeholders to estimate the impact of their policies on consumer welfare and to benchmark performance over time.

There are two scoreboard editions: The Consumer Conditions Scoreboard monitors Member States' consumer conditions and the integration of the single market from the consumer perspective. The Consumer Markets Scoreboard tracks the performance of over 50 consumer markets using indicators such as comparability of offers, trust in retailers, problems, complaints, satisfaction, switching and choice. The main data sources for the scoreboards are the EU-wide surveys.

With the consumer scoreboards, the EU Commission measures market performance, expressed in a Market Performance Indicator (MPI). The last report of 2013 saw the investment market as the lowest performer, followed by the mortgages market, the real estate services market, the electricity services market and the bank accounts market. Of the goods markets, the second hand cars market performed lowest but still higher than the above-mentioned services markets.[76]

Cross-border shopping is of special interest to the EU Commission, and they specifically monitor that market. The results of the 2014 survey were summarised in the Flash Eurobarometer 397 'Consumer attitudes towards cross-border trade and consumer protection' of September 2015.[77] According to this, in the last 12 months before the survey, around one in five consumers have experienced a problem buying or using goods or services that they felt was legitimate cause for complaint (22%). Seventy-six percentage of the consumers who had cause for a complaint took action to solve their problem. Of those who took action, most (83%) complained directly to the retailer or service provider, 18% complained to the manufacturer, 8% complained to a public authority, 7% to an out-of-court dispute resolution body and 3% took the business concerned to court.[78]

Generally speaking, enforcement of consumer law has been a problem in many Member States, and it is for this reason that enforcement has featured ever more

[74]SEC(2010) 572.

[75]See EU Commission, Data on consumer complaints, http://ec.europa.eu/consumers/consumer_evidence/data_consumer_complaints/index_en.htm.

[76]See EU Commission, Monitoring consumer markets in the EU, 2013, http://ec.europa.eu/consumers/consumer_evidence/consumer_scoreboards/market_monitoring/index_en.htm.

[77]See http://ec.europa.eu/COMMFrontOffice/PublicOpinion/index.cfm/ResultDoc/download/DocumentKy/67562.

[78]See EU Commission, Flash Barometer 397, p. 13.

prominently on the political agenda of the European Commission since about the year 2000. For example, the Commission report of March 2013 on the application of the Unfair Commercial Practices Directive 2005/29/EC[79] has devoted a special chapter on enforcement. The Commission points out that Member States and stakeholders consider that, at a national level, the enforcement of the Directive in the Member States is, in general terms, appropriate and effective but that, 'according to some, adequate enforcement at a national level may be hampered by the lack of resources to national enforcers, the complexity/length of enforcement procedures and the insufficient deterrent effect of the penalties.'[80] The EU legislator has reacted by adopting legislation not only in the area of substantive consumer law but also, as an annex, to their enforcement, and it interferes into enforcement mechanisms and enforcement authorities at the national level in various ways; which will discussed in more detail in the special sections on courts, specialised agencies, consumer organisations, private enforcement, collective redress, sanctions and alternative dispute resolution.

Moreover, as early as in 1976, the Court of Justice has recognised this by developing the principle of effectiveness in the cases of *Rewe* and *Comet*.[81] The principle of effectiveness prohibits Member States to frame the conditions for the enforcement of individual rights in such a way that it makes it virtually impossible or excessively difficult to obtain reparation.[82] In its positive form, which is perhaps of greater importance today, the principle of effectiveness has been codified in secondary law, including EU consumer law. For example, under Article 7(1) of the Unfair Contract Terms Directive 93/13/EEC, Member States shall ensure that, in the interests of consumers and of competitors, *adequate and effective means* exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers. More recent Directives refer to 'sanctions' or 'penalties'. The principle of effectiveness allows the Court of Justice to scrutinize the enforcement system of Member States even in the absence of any positive rules of EU law in the relevant field, and the Court has used that principle in a great number of cases, as will also be shown hereinafter.

4.2 Cross-Border Enforcement

Contrary to enforcement at the domestic level, cross-border enforcement within the EU is the natural domain of EU law. Relevant legislation includes the Injunctions

[79]COM (2013) 139 final.

[80]COM (2013) 139 final, p. 27.

[81]ECJ, case 33/76 REWE, ECLI:EU:C:1976:188, and case 45/76 Comet, ECLI:EU:C:1976:191. For detailed discussion see P Rott, Effektivität des Verbraucherrechtsschutzes: Rahmenfestlegungen des Gemeinschaftsrechts (2006). See also Reich (2014a), p. 344 ff.

[82]ECJ, case C-261/95 Palmisani, ECLI:EU:C:1997:351, para 27, with further references.

Directive, the Brussels I Regulation and the Consumer Protection Co-operation Regulation.

The Injunctions Directive was first adopted in 1998 and recast in 2009 with a consolidated Annex. It was a reaction to difficulties that consumer organisations faced when they tried to take action against traders from other Member States, or against traders from their own Member State that infringed on consumers' rights in other Member States.[83] The Directive imposes on Member States the obligation to enable so-called 'qualified entities' (consumer organisations and/or public bodies) from other Member States to seek an injunction in front of a court or of an administrative authority to stop an act contrary to the EU consumer laws (as listed in the Annex to the Directive and as transposed into the internal legal order of the Member States), which harms the collective interests of consumers. Accordingly, the Injunctions Directive provides for a tool of enforcement of the consumers' rights granted by other consumer legislation, among others, by the Unfair Commercial Practices Directive, the Consumer Sales Directive, and the Unfair Contract Terms Directive. It facilitates the use of injunctions in a cross-border context.

In practice, the Injunctions Directive has been rarely used. The complexity of cross-border injunction law-suits brought in the Member State where the trader is domiciled mainly stems from the application of foreign procedural law. According to the principles of international procedural law, each court applies its own procedural law (lex fori). Thus, a qualified entity would not reasonably sue in another Member State without seeking advice from a lawyer who is domiciled in that Member State. Still, the qualified entity would incur travel costs, costs for translations etc. Consumer organisations therefore prefer to litigate in the courts of their own Member States; which is possible through the system of the Brussels I Regulation.

The recognition of decisions of courts from other EU Member States in civil and commercial law matters and their cross-border enforcement goes back to the Brussels Convention of 1968. After the adoption of the Treaty of Amsterdam, which brought new legislative competences in the area of justice, the EU legislator adopted the Brussels I Regulation (EU) No. 2001/44/EC, which was replaced, in 2012, by Regulation (EU) No. 1215/2012. The Regulation is not only relevant for individual litigation but enables consumer organisations to bring legal proceedings against foreign traders in the Member State where the consumer organisation is domiciled. In a conflict with the German trader *Karl Heinz Henkel*, the Austrian consumer organisation *Verein für Konsumentenrecht* (VKI) tried this route, and sued Mr. Henkel in the Austrian courts; an approach that the Court of Justice confirmed. According to the Court of Justice, the VKI could rely on the special rules on jurisdiction in tort law matters.[84] According to

[83]For an account, see Micklitz (1993), p. 411 ff.

[84]See ECJ, case C-167/00 Verein für Konsumenteninformation v Karl Heinz Henkel, ECLI:EU:C:2002:555.

the old Article 5 No. 3 of Regulation (EC) No. 44/2001, now Article 7 No. 2 of Regulation (EU) No. 1215/2012, a person domiciled in one Member State can be sued in another Member State in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur. The relevant place in this context is the Member State in which consumers may suffer harm from an unlawful practice. Consequently, almost all law-suits with a cross-border element have been brought in the domestic courts of the Member State where the consumer organisation is domiciled.

In contrast, this option is not available to public law enforcement, due to the public international law principle of territoriality. Thus, consumer authorities can either bring claims in the civil courts, if their Member States allows so (for example, the UK Consumer and Markets Authority), or they have to resort to the system of the Injunctions Directive or to the so-called CPC Network.

The CPC Network was first established under Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation).[85] The CPC Network is not an authority itself but is composed of national enforcement authorities. The EU coordinates the cooperation between the Member States' enforcement authorities in the European enforcement network.

The CPC Network does not have competences by itself but the CPC Regulation has set minimum standards relating to the powers that the national enforcement authorities have within their cross-border cooperation. The EU Commission uses the CPC Network to identify common enforcement priorities and to carry out specific activities. In particular, the Network has been used to organise systematic checks carried out simultaneously in different Member States to investigate breaches of consumer protection law in particular on-line sectors, so-called 'sweeps'. Sweeps targeted, for example, car rental companies, travel websites, airline tickets or mobile phone contracts.[86]

The CPC cooperation framework and its scope have been under review since 2011. In May 2016, the Commission tabled a proposal for a new CPC Regulation.[87] In December 2017, the new CPC Regulation (EU) No. 2017/2394[88] was published. In particular, the Commission managed to introduce its own power to launch common activities of the competent authorities so as to address 'widespread infringements or widespread infringements with Union-dimension'. The new CPC Regulation also improves the enforcement measures available to the competent authorities. In particular, it introduces the possibility of proposing and accepting

[85]OJ 2004, L 364/1, as amended.

[86]See the Commission's Report on the functioning of Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation), COM (2014) 439 final, 4.

[87]Proposal for a Regulation on cooperation between national authorities responsible for the enforcement of consumer protection laws, COM (2016) 283 final.

[88]OJ 2017, L 345/1.

remedial commitments to consumers that have been affected by the infringement. Sweeps are now expressly regulated. These are defined as concerted investigations of consumer markets through simultaneous coordinated control actions to check compliance with, or to detect infringements of, Union laws that protect consumers' interests.

Individuals who encounter problems in cross-border shopping can turn to the European Consumer Centres network, which is however not part of the CPC Network. Whether or not consumers can turn to their national consumer protection authorities who would then take action through the CPC Network is subject to national law, and EU law takes no influence on national practice in that area.

4.3 Influence on Enforcement Through Sector-Specific Agencies and Authorities

EU law does not have its own enforcement mechanisms and authorities for sectors such as energy, telecommunications of financial services. However, it organises the cooperation of national regulators in these sectors.

For example, in 2003 the European Commission set up the European Regulators' Group for Electricity and Gas (ERGEG) as an advisory group to assist the Commission in consolidating a single EU market for electricity and gas.[89] ERGEG's members are the heads of the national energy regulatory authorities in the EU's 28 Member States. ERGEG was replaced in 2011 by the Agency for the Cooperation of Energy Regulators (ACER). ACER has a coordination function but is not directly involved in the enforcement of consumer law in the area of electricity and gas.[90]

In the area of financial services, the EU has obtained certain enforcement competences in the aftermath of the outbreak of the financial crisis in 2008. At EU level, three independent authorities were established in 2010: the European Banking Authority (EBA),[91] the European Securities and Markets Authority (ESMA)[92] and the European Insurance and Occupational Pensions Authority (EIOPA).[93] They replaced committees that had first been set up in 2003 in order to promote best

[89]See Commission Decision 2003/796/EC on establishing the European Regulators Group for Electricity and Gas, OJ 2003, L 296/34.

[90]See Regulation (EC) No 713/2009 establishing an Agency for the Cooperation of Energy Regulators, OJ 2009, L 211/1.

[91]See Regulation 1093/2010/EC establishing a European Supervisory Authority (European Banking Authority), OJ 2010, L 331/12, last amended by Regulation 806/2014/EU, OJ 2014, L 225/1.

[92]See Regulation 1095/2010/EC establishing a European Supervisory Authority (European Securities and Markets Authority), OJ 2010, L 331/84, last amended by Regulation 258/2014/EU, OJ 2014, L 105/1.

[93]See Regulation 1094/2010/EC establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), OJ 2010 L 331/48, last amended by Regulation 258/2014/EU, OJ 2014, L 105/1.

practices and to issue non-binding guidelines. These authorities do not concern the immediate relationship between traders and consumers but rather the macro-level. For example, the European Securities and Markets Authority (ESMA) has responsibilities and powers to deal with infringements by credit rating agencies[94] and trade repositories.

5 Courts in the EU and in the Member States

5.1 EU Level

The EU judicial system is special in that, regularly, the EU courts are only responsible for the interpretation of EU law but not for decisions on individual cases. Cases are ultimately decided at the national level, whereby the national courts are obliged, under EU law, to implement the supremacy of EU law over national law[95] and, in particular, to interpret national law in the light of EU law.[96]

The Court of Justice has the exclusive competence to determine the correct interpretation of EU primary law (the Treaty on European Union and the Treaty on the Functioning of the European Union) as well as secondary law (regulations and directives). Consumer law cases can reach the Court of Justice of the European Union only in two ways. First, as mentioned above, the European Commission may challenge non-compliance by a Member State with EU law, and in particular with an EU regulation or an EU directive in the area of consumer law. Second, the national court system and the Court of Justice are linked through the preliminary reference procedure of Article 267 TFEU. Under Article 267 TFEU, where a question on the interpretation of EU law is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court. The Court of Justice's interpretation of EU consumer law has binding effect not only for the law-suit at hand but generally for all current and future law-suits. By this mechanism, EU law wants to ensure that national law that is derived from EU law is applied uniformly in the Member States.

One possible shortcoming in the multi-level system of the EU is that the Court of Justice is only competent for the interpretation of EU law but not for the solution of the actual case. That latter competence lies with the national courts that must, of course, solve the cases before them on the basis of the interpretation as provided by the Court of Justice but that sometimes appear to misunderstand that interpretation.

[94] See Articles 21 ff. of Regulation (EC) No 1060/2009 on credit rating agencies, OJ 2009, L 302/1.
[95] See ECJ, case 106/77 Simmenthal, ECLI:EU:C:1978:49.
[96] Established case law since ECJ, case 14/83 von Colson and Kamann, ECLI:EU:C:1984:153.

In that instance, the EU Commission could again bring proceedings under Article 258 TFEU. In order to succeed, the Commission would, however, have to show a systematic failure to apply the law correctly.[97]

The Court of Justice is the general court dealing with all policy fields that are covered by the EU Treaties. It does not avail of a special chamber for consumer law. In fact, authors have sometimes criticized the Court for being dominated by public lawyers, with limited understanding of private law; which may, at the same time, be advantageous in the area of consumer law with its public interest dimension.

Consumers do not have direct access to the Court of Justice. They can, however, try to persuade the national court where their case is pending that the correct solution of the case depends on the interpretation of EU law. In that case, the preliminary reference procedure of Article 267 TFEU can, or has to be, used. In the legal systems of some of the Member States, the Court of Justice qualifies as lawful judge. For example, the German Federal Constitutional Court has decided that a German court which disregards Article 267 TFEU by not referring a case the correct solution of which depends on a question of EU law to the Court of Justice acts in breach of the right to the lawful judge as enshrined in Article 101(1) sentence 2 of the Basic Law (the German constitution).[98] In actual consumer law cases in which the Court of Justice gets involved by way of a preliminary reference, the costs of that interim procedure form part of the decision on costs by the national court that referred the case to the CJEU.

The question as to who has to bear the costs of the preliminary procedure under the applicable national procedural law was subject to the case of *Clean Car*. The Court of Justice confirmed the general competence of the Member States to determine the relevant cost rules but also reminded to the principle of effectiveness.[99] And whilst in *Clean Car*, the national rules were not in breach of the principle of effectiveness, Advocate General Geelhoed pointed out that a preliminary reference procedure produced extra costs, in particular travel costs, which national procedural law may have to consider when it comes to cost rules.[100]

5.2 *Influence on the Court System of the Member States*

As mentioned above, the Court of Justice has taken some degree of control over the enforcement systems of the Member States, including the court system.

[97] See, for example, ECJ, case 21/84 Commission v France, ECLI:EU:C:1985:184 (concerning an administrative practice that amounted to a breach of Article 30 TEEC).

[98] Established case law since Bundesverfassungsgericht, 31/5/1990, 2 BvL 12/88, 2 BvL 13/88, 2 BvR 1436/87 (1990), Entscheidungen des Bundesverfassungsgerichts 82, p. 159.

[99] ECJ, case C-472/99 Clean Car, ECLI:EU:C:2001:663, paras 27 ff.

[100] AG Geelhoed, case C-472/99 Clean Car, ECLI:EU:C:2001:413, para 34.

First and foremost, the Court of Justice had long established access to justice as a fundamental right under EU law.[101] It is now enshrined in Article 47 of the Charter of Fundamental Rights of the European Union.

One crucial factor of access to court is the cost of legal proceedings. The EU legislator has not yet introduced rules concerning the costs of consumer disputes. Only through the principle of effectiveness, the Court of Justice could exercise control on national cost rules that make it virtually impossible or excessively difficult to the consumer to obtain reparation. Whilst this has been spelt out in principle in the case of *D.*,[102] no specific national provision on the costs of consumer disputes has ever been successfully challenged for non-compliance with the principle of effectiveness.

Legal aid is one important element of access to court by consumers who are facing financial difficulties. EU law explicitly deals with legal aid in cross-border consumer disputes. Under Article 3(1) of Directive 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes,[103] 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 in accordance with the conditions laid down in this Directive. Legal aid is considered to be appropriate, under Article 3(2) when it guarantees: pre-litigation advice with a view to reaching a settlement prior to bringing legal proceedings, and legal assistance and representation in court, and exemption from, or assistance with, the cost of proceedings of the recipient, including the costs referred to in Article 7 (which relates to interpretation, translation and travel costs) and the fees to persons mandated by the court to perform acts during the proceedings. 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 in which the court is sitting.[104]

More generally, Article 47 of the Charter of Fundamental Rights of the European Union now determines that '(l)egal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice. This includes domestic cases which are not covered by Directive 2003/8/EC.

Access to justice shall also be improved by faster and cheaper instruments, in particular alternative dispute resolution, which is discussed below.

[101] See ECJ, case 222/84 Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary, ECLI:EU:C:1986:206; ECJ, case 222/86 Unectef gegen Georges Heylens, ECLI:EU:C:1987:442.

[102] See AG Ruiz-Jarabo Colomer, case C-376/03 D., ECLI:EU:C:2004:663, para 110.

[103] OJ 2003, L 26/41.

[104] For details, see Jastrow (2004), p. 75 ff.; Reich (2014a), p. 362 ff.

6 Specialised Agencies and the Enforcement of EU Consumer Law

As mentioned above, the EU does not by itself enforce consumer law, save through the general control by the European Commission of the Member States' compliance with their obligations stemming from EU law.

The EU has, however, included the Member States' obligation to set up regulatory bodies in various areas of law, such as the Electricity Market Directive 2009/72/EC or the Gas Market Directive 2009/73/EC. The regulatory agencies have to be independent and must have sufficient powers and discretion.[105] The requirement of independence has recently been summarised by Advocate General Campos Sánchez-Bonoma in the case of *Autorità per le Garanzie nelle Comunicazioni.* It includes institutional independence, functional independence, personal independence and financial independence.[106]

In the liberalised markets of telecommunications, energy and the like, the main task of the regulators that Member States have to set up is to safeguard competition. More recently, EU legislation has recognised the need for those regulatory bodies to play an active role in protecting consumers, and in particular the protection of vulnerable consumers. This is particularly visible in the area of electricity law. Under Article 36(g) of Directive 2009/72/EC, the regulatory authority shall take all reasonable measures to ensure that customers benefit through the efficient functioning of their national market, to promote effective competition and to help to ensure consumer protection. Moreover, Article 36(h) calls on regulatory authorities to help to achieve high standards of universal and public service in electricity supply, to contribute to the protection of vulnerable customers and to contribute to the compatibility of necessary data exchange processes for customer switching. Similarly, Article 16 of the Air Passengers Rights Regulation (EU) No. 261/2004[107] requires Member States to 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. Where appropriate, this body shall take the measures necessary to ensure that the rights of passengers are respected; although the Court of Justice has recently decided that this provision does not mean that the regulator has to protect the interests of individual consumers.[108]

The general idea would seem to be that the regulator that is in charge of a particular regulated market should have greater experience and expertise with the particularities of that market, including the relationship between traders and

[105] See, for example, Article 35 and recitals (33) and (34) of the Electricity Market Directive 2009/72/EC, OJ 2009, L 211/55.

[106] See AG Campos Sánchez-Bonoma, case C-240/15 Autorità per le Garanzie nelle Comunicazioni, ECLI:EU:C:2016:308.

[107] OJ 2004, L 46/1.

[108] CJEU, joined cases C-145/15 and C-146/15 Ruijssenaars and Dees-Erf, ECLI:EU:C:2016:187.

consumers. Member States usually confer public law enforcement powers on regulators that can therefore react speedily to problems.

EU law does not regulate the organisation of the agencies beyond the requirements of independence, power and discretion. To my knowledge, no Member State's organisation of the relevant agencies has been challenged until now by the European Commission. This is, however, well possible, and in the area of data protection the European Commission has sued Member States successfully for non-compliance with the independence requirement of the Data Protection Directive 95/46/EC[109]; cases which Advocate General Campos Sánchez-Bonoma referred to in his opinion in the above-mentioned case of *Autorità per le Garanzie nelle Comunicazioni*. Moreover, the EU can scrutinize the activities or otherwise of national regulators under the general principle of effectiveness.

7 The Role of Consumer Organisations in the Enforcement of EU Consumer Law

7.1 Cross-Border Injunctions

EU law deals with formal competences of consumer organisations in cross-border cases. Under the Injunctions Directive 2009/22/EC (formerly Directive 98/27/EC), so-called qualified entities can commence, in the courts or before administrative bodies of other Member States, proceedings in which they can (a) seek an order with all due expediency, where appropriate by way of summary procedure, requiring the cessation or prohibition of any infringement of collective consumer protection; (b) where appropriate, measures such as the publication of the decision, in full or in part, in such form as deemed adequate and/or the publication of a corrective statement with a view to eliminating the continuing effects of the infringement; and (c) in so far as the legal system of the Member State concerned so permits, an order against the losing defendant for payments into the public purse or to any beneficiary designated in or under national legislation, in the event of failure to comply with the decision within a time limit specified by the courts or administrative authorities, of a fixed amount for each day's delay or any other amount provided for in national legislation, with a view to ensuring compliance with the decisions.

Those qualified entities may be public bodies or consumer organisations, depending on the legal system of the home Member State. If a Member State has designated consumer organisations as qualified entities, other Member States cannot deny them legal standing in cross-border injunction procedures (even if national consumer organisations would not have legal standing in the same dispute).

[109] See ECJ, case C-518/07 Commission v Germany, ECLI:EU:C:2010:125; ECJ, case C-614/10 Commission v Austria, EU:C:2012:631; ECJ, case C-288/12 Commission v Hungary, EU:C:2014:237.

7.2 Domestic Injunction Procedures

As far as the national level is concerned, the EU leaves it to the Member State whether they want to grant legal standing to consumer organisations or public authorities or both; although there was some academic debate as to whether or not the above-mentioned Article 7(2) of the Unfair Contract Terms Directive, despite its wording ('persons or organizations, having a legitimate interest *under national law* in protecting consumers'), actually required Member States to grant legal standing to consumer organisations in the area of unfair terms law.[110] Also, Article 11(2) of the Distance Selling Directive 97/7/EC was widely interpreted in that sense.[111]

The UK consumer organisation Consumer Association/Which? had litigated in the English High Court to be granted legal standing, and the High Court had made a preliminary reference to the Court of Justice in 1996.[112] However, The Court of Justice, however, suspended the proceedings after the new UK government announced it was going to introduce legal standing of consumer associations in the field of the control of unfair terms. In the meantime, CA/Which withdrew its claim before the High Court so that the Court of Justice proceedings were cancelled.[113]

If a Member State decides to grant consumer organisations legal standing, a number of EU Directives specify enforcement competences, in particular legal standing to apply for injunctions against trader that breach the relevant consumer laws (see also the next question).

7.3 Other Procedures

Member States are not required to grant consumer organisations the right to intervene in individual litigation between a consumer and a trader. This has become clear in the Slovakian case of *Pohotovosť*. The Slovakian court had referred the question to the Court of Justice as to whether Article 7 of the Unfair Contract Terms Directive requires Member States to allow consumer organisations to intervene in individual litigation in order to assist the consumer in pursuing his or her claim. This is an issue that is not expressly regulated by the Directive, and the Court of Justice was of the opinion that effective protection could have been achieved in other ways, in particular, through direct representation by a consumer organisation of a consumer in any proceedings, including enforcement proceedings, if mandated to do so by the latter.[114] One could read this judgment, however, as requiring Member States to allow one of these options.

[110] See Micklitz and Rott (2005), A. 25, Article 3 margin notes 9 f.

[111] See, e.g., Reich (1997), p. 588.

[112] Case C-82/96 R v Secretary for Trade and Industry, ex parte CA/Which.

[113] See also Rott (2001), p. 402 ff.

[114] CJEU, case C-470/12 Pohotovosť, ECLI:EU:C:2014:101, paras 46 ff.

Moreover, it should be noted that it was the EU that pushed for consumer organisations to have the right to bring collective redress action; which until now failed due to the resistance of some Member States.[115] A new attempt is now being made with the above-mentioned proposal for a Directive on representative actions for the protection of the collective interests of consumers

7.4 Minimum Standards for Consumer Organisations?

Whether or not EU law establishes requirements for consumer organisations at national level is subject to academic debate. Clearly, there are no explicit requirements. EU legislation routinely refers to conditions to be set by the national legislators. For example, under Article 3 lit. (b) of the Injunctions Directive 2009/22/EC,[116] entities that are qualified to bring an action in the collective interest of consumers are defined as any body or organisation which, *being properly constituted according to the law of a Member State*, has a legitimate interest in ensuring that the provisions referred to in Article 1 [of that Directive] are complied with.[117] Article 7 (2) of the Unfair Contract Terms Directive 93/13/EEC requires Member States to enact 'provisions, whereby persons or organizations, having a legitimate interest *under national law* in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms.'[118]

In academic writing, Article 7(2) of Directive 93/13/EEC has sometimes been interpreted in such a way, that by the nature of their role under unfair contract terms law, consumer organisations that qualify for the enforcement of unfair contract terms law must at least have a stable structure and a permanent headquarter as well as a certain minimum size, and that they must pursue consumer protection as a permanent activity, which needs to be documented in their by-laws. Also, they should be independent from traders.[119]

In fact, national decisions on criteria to be satisfied by consumer organisations have never been challenged by the European Commission, although, for example, Germany has been very generous in recognising consumer organisations to be qualified to take action in court.[120] In fact, having noted the differences in the

[115] See Sect. 9.

[116] Directive 2009/22/EC on injunctions for the protection of consumers' interests, OJ 2009, L 110/30.

[117] Emphasis added.

[118] Emphasis added.

[119] See Micklitz and Rott (2018), margin note 13.

[120] See Micklitz and Rott (2018), margin note 31.

Member States' practice in recognising consumer organisations in its report of 6 November 2012 on the application of Directive 2009/22/EC, the European Commission saw no need for reform.[121] Article 4(1) of the new proposal for a Directive on representative actions for the protection of the collective interests of consumers specifies that qualified entities must have a non-profit making character.

7.5 Other NGOs

EU law does not require Member States to allow other NGOs the right to enforce consumer law. It should be noted, however, that consumer protection and other policy goals are interlinked, and, for example, environmental NGOs can be regarded as consumer organisations when they enforce rules on consumer information about environmental properties of products, such as cars.[122] Also, NGOs that are active in the area of non-discrimination may act in the interest of, for example, handicapped consumers that cannot access public transport.[123]

8 Private Regulation and Enforcement of EU Consumer Law

The relevance of private regulation is high in the area of product safety law. The EU places faith in the involvement of industry to produce standards that ensure safety, whilst allowing for innovation and competitiveness. Also, co-regulation generates rules more cheaply and more speedily than traditional law-making allows.[124]

Under the so-called 'new approach',[125] directives dealt with categories of products and set down safety expectations in broad terms backed up by annexes containing essential safety requirements which were in turn fleshed out by CEN standards. Producers could choose to adopt the standards or alternatively find their own way to achieve the required level of safety. More broadly, under the General Product Safety Directive of 1992,[126] standards were to be taken into account when

[121]COM (2012) 635, pp. 6 and 19.

[122]For examples from Germany, see LG Essen, 8/3/2006, Zeitschrift für Umweltrecht 2006, p. 605; LG Berlin, 21/3/2006, Zeitschrift für Umweltrecht 2006, p. 606.

[123]For an example from Germany, see OLG Schleswig, 11/12/2015, Verbraucher und Recht 2016, p. 190.

[124]For an account see Howells (2014), p. 525 ff.

[125]Council Resolution on a new approach to technical harmonisation and standards, OJ 1985, C 136/1.

[126]Directive 92/59/EEC on general product safety, OJ 1992, L 228/24; on which see Howells (1998), chapter 2.

assessing safety.[127] The role of standards was enhanced in its successor, Directive 2001/95/EC on general product safety[128] as compliance with voluntary national standards transposing relevant European standards led to a presumption of safety.[129] It also set down a procedure for European standards to be adopted, compliance with which will provide a presumption of conformity.[130]

The EU Commission had also envisaged a system of co-regulation in the area of unfair commercial practices law, according to which a breach of an EU-wide code of conduct would have automatically been an unfair commercial practice.[131] This idea was, however, not implemented in the Unfair Commercial Practices Directive 2005/29/EC. The Directive merely takes as an unfair commercial practice non-compliance by the trader with commitments contained in codes of conduct by which the trader has undertaken to be bound if, additionally, that commitment is not aspirational but is firm and is capable of being verified and the trader indicates in a commercial practice that he is bound by the code.

Moreover, although there is no formal competence of private bodies to establish rules that could as such be enforced through the court system, private regulation can gain indirect relevance through general clauses. For example, Article 5 of the Unfair Commercial Practices Directive 2005/29/EC requires, for the classification of a commercial practice as unfair, that it is 'contrary to the requirements of professional diligence'. When determining those requirements of 'professional diligence', courts may look at industry codes of conducts. Indeed, according to recital (20) of Directive 2005/29/EC, 'it is appropriate to provide a role for codes of conduct, which enable traders to apply the principles of this Directive effectively in specific economic fields', although courts would surely not felt bound by such codes of conduct as they could favour industry interests over the interests of consumers.[132] In that respect, the legitimacy and relevance of codes of conduct would be increased if consumer organisations were involved in their drafting, as recital (20) also indicates.[133]

EU law also shows some sympathy for private complaints systems. This is visible from the fact that under a number of directives, Member States are obliged to inform the consumer about the trader's complaint handling policy[134] Likewise, traders must inform consumers about the existence of relevant codes of conduct.[135] Under Article 10 of the Unfair Commercial Practices Directive 2005/29/EC, Member States may encourage, that unfair commercial practices shall primarily be enforced by code

[127] See Article 4(2) of Directive 92/59/EEC.

[128] OJ 2002, L 11/4; on which see Fairgrieve and Howells (2006), p. 59 ff.

[129] See Article 3(2) of Directive 2001/95/EC.

[130] Article 4 of Directive 2001/95/EC.

[131] See the Commission's Communication, Follow-up Communication to the Green Paper on EU Consumer Protection, COM (2002) 289 final, pp. 3 f und 6 ff.

[132] See Howells (2006), p. 214.

[133] For legitimacy considerations, see Glinski (2010), p. 283 ff.

[134] See, e.g., Articles 5(1)(d) and 6(1)(g) of the Consumer Rights Directive 2011/83/EU.

[135] See, e.g., Article 6(1)(n) of the Consumer Rights Directive 2011/83/EU.

owners if proceedings before such bodies are in addition to the court or administrative proceedings. Recital (20) confirms that the control exercised by code owners at national or Community level to eliminate unfair commercial practices may avoid the need for recourse to administrative or judicial action and should therefore be encouraged. EU law, however, takes no influence on the organisation of enforcement by private actors.

9 Enforcement Through Collective Redress

Collective redress has been subject to discussion at the EU level at least since 2005, with a starting point in competition law.[136] In November 2008, the EU Commission published the Green Paper on consumer collective redress.[137] It was mentioned in the EU Consumer Policy Strategy 2007–2013,[138] and the European Commission has organised public consultations and hearings[139] on that topic. Until now, however, resistance from some powerful Member States against the mandatory introduction of collective redress mechanisms at EU level was so strong, that even a finalised proposal for legislative acts disappeared in the drawers of the European Commission again.

The Commission has, however, adopted Recommendation 2013/396/EU on common principles for collective redress mechanisms in the Member States for injunctions against and claims on damages caused by violations of EU rights in 2013.[140] The Recommendation clearly distances itself from the US American class action. It favours representative entities and/or public authorities to bring collective redress claims. Designated entities should have a non-profit making character and avail of the financial resources, human resources, and legal expertise, to represent multiple claimants acting in their best interest. Admissibility of claims should be assessed at the earliest possible stage through a verification procedure. In case of a compensatory collective redress action, the Recommendation clearly advances an opt-in system and encourages collective settlements. The Recommendation opts for the 'loser pays principle'. For that reason, the claimant must have sufficient resources to meet any adverse costs should the collective redress procedure fail. Third party funding shall be allowed but the third party must, amongst others, not seek to influence procedural decisions of the claimant party, including on settlements. The Recommendation also

[136] See the Green Paper Damages actions for breach of the EC antitrust rules, COM (2005) 672 final, and the White Paper on Damages Actions for Breach of the EC antitrust rules, COM (2008) 165 final.

[137] COM (2008) 794 final.

[138] COM (2007) 99 final, 11.

[139] See the public consultation 'Towards a more coherent European approach to collective redress', COM (2010) 135.

[140] OJ 2013, L 201/60.

aims at avoiding a litigation industry by calling on Member States not to create incentives for litigation through the lawyers' fees system and/or punitive damages.

Whilst recommendations are non-binding, according to Article 288 TFEU, Recommendation 2013/396/EU already had catalyst effects in France and Belgium where long-lasting discussions on the introduction or the improvement of collective redress mechanisms finally led to the adoption of such instruments.[141] In the UK, In the UK, so-called "Enhanced Consumer Measures" have been introduced with the Consumer Rights Act 2015 for injunctions for the breach of consumer law. These include redress orders, aiming at the compensation of consumers where they can be identified or otherwise at measures intended to be in the collective interests of consumers. In Slovenia, legislation, according to which qualified entities shall obtain the right to claim compensation for consumers, was adopted in September 2017.

It should, moreover, be noted that we have seen some development in the area of collective redress through public law instruments. In particular, the United Kingdom has introduced the power of public authorities, namely the Financial Conduct Authority (FCA) and certain regulators, to issue consumer redress orders under which traders have to return unlawfully obtained money or pay damages to consumers.[142]

In some instances, Commission recommendations were soon followed by proper legislation if Member States ignored the recommendation. A recent example is retail banking, and the Commission Recommendation on access to a basic payment account of July 2011 that did not produce the desired results (for example, in Germany). In May 2013, the EU Commission published a proposal for a Directive on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features[143] that was adopted only 14 months later, in July 2014, as Directive 2014/92/EU.[144] And while Recommendation 2013/396/EU has not been followed by a legislative proposal yet, the abovementioned proposal for a Directive on representative actions for the protection of the collective interests of consumers includes certain elements of reimbursement and compensation resulting from the breach by traders of EU consumer law.

Beyond those legislative, or quasi-legislative, activities, one could again refer to the general principle of effectiveness. It has sometimes been argued that in some situations, only collective redress mechanisms could satisfy the principle of effectiveness. That argument has, however, never been tested before the Court of Justice. In fact, the Court of Justice has always emphasised that it is for the Member States to ensure the effective protection of consumers and that the principle of effectiveness does not call for the use of one particular instrument but that Member States can use

[141]For France, see Loi n°2014-344 du 17 mars 2014 sur la consommation, also known as 'Loi Hamon'. For Belgium, see Loi portant insertion d'un titre 2 "De l'action en réparation collective" au livre XVII "Procédures juridictionnelles particulières" du Code de droit économique et portant insertion des définitions propres au livre XVII dans le livre 1er du Code de droit économique of 28/3/2014; on which see Voet (2015), p. 121 ff.

[142]For the UK, see Hodges (2014), p. 241; Hodges (2015), p. 849 f. See also Rott (2017).

[143]COM (2013) 266 final.

[144]See also Rott (2016), p. 3 ff.

different instruments from private law, public law and criminal law, or a combination thereof, in their pursuit of effective consumer protection.[145]

10 Sanctions for Breach of EU Consumer Law

EU law instruments usually require Member States to determine sanctions that are adequate, dissuasive and proportional but leave the choice of sanctions to the Member States.

Arguably, however, the case law of the Court of Justice on individual rights may play a role here. According to the established case law of the Court of Justice, EU law can confer individual rights of consumers. This means that where a legislative act of EU consumer law, be it a regulation or a directive, is meant to confer individual rights on consumers, sanctions of which the consumer does not benefit, in particular fines that are to be paid to the State, are insufficient.[146] Moreover, Article 47 of the Charter of Fundamental Rights of the European Union now states that everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal.[147]

In fact, a number of legislative acts have introduced specific remedies, for example, remedies in case of the non-conformity of goods with the contracts under consumer sales law,[148] or termination rights and damage claims of consumers under package travel law.[149] In other cases, however, EU law merely defines the trader's obligations but leaves the determination of the consequences of a breach to the Member States.[150]

Otherwise, Member States have started from different traditions of dealing with consumer law infringements. Some Member States have relied on private law enforcement by individuals and by consumer organisations, others have entrusted public authorities or ombudsmen with the enforcement of consumer law.

Criminal law is another area that Member States can use, under the principle of effectiveness, to sanction the breach of EU consumer law. Examples for EU Member

[145] See, in particular, ECJ, case 14/83 von Colson and Kamann, ECLI:EU:C:1984:153, para 18. See also AG Kokott, joined cases C-387/02, C-391/02 and C-403/02 Berlusconi and others, ECLI:EU:C:2004:624, para 121.

[146] One recent example is the trader's obligation to assess the consumer's creditworthiness under EU consumer credit law. As the Court of Justice held, in case C-565/12 LCL Le Crédit Lyonnais, ECLI:EU:C:2014:190, that '[. . .] the creditor's obligation, prior to conclusion of the agreement, to assess the borrower's creditworthiness is intended to protect consumers against the risks of over-indebtedness and bankruptcy [. . .]', a mere public law control (as previously envisaged in German law) is insufficient; on which see Rott et al. (2011), p. 163 ff.

[147] See also Reich (2014b), p. 63 ff.

[148] See Article 3 of Directive 1999/44/EC.

[149] See Articles 12 and 14 of Directive 2015/2302/EU.

[150] For general critique, see Rott and Terryn (2009), p. 459 f.

States where criminal liability is used for the enforcement of consumer law are France, Belgium and the United Kingdom. EU law does not however require Member States to impose criminal sanctions for the breach of consumer law. In fact, criminal law is an area that the EU does not have the competence to regulate as such. The EU may only require Member States to impose criminal law sanctions in areas where the enforcement of the law would not work otherwise. This has been confirmed by the Court of Justice for the area of environmental law,[151] and one underlying reason has surely been that in the case of a breach of environmental law as such (for example, bird protection law), the immediate victims (that is, birds) are not able to litigate; which is normally different in consumer law. Thus, it would be more difficult for the EU in consumer law than in environmental law to argue that, under the principles of subsidiarity and proportionality, criminal law sanctions are necessary to ensure consumer protection.

Obviously, some of the most serious breaches of consumer law may amount to fraud. For example, the use of so-called subscription traps, where consumers initiate seemingly free of charge services on internet without realising that somewhere, in the small print at the bottom of the page, there is a statement according to which by pressing the button the consumer enters into a long-term contract with, for example, monthly payment obligations, has been treated as a criminal offence by the German Federal Supreme Court.[152]

Some Member States have over time added complementary instruments, and some were clearly influenced by EU law to do so. For example, the Netherlands that had a private law tradition but have added public law enforcement of consumer law in 2007.[153] Even nowadays, however, significant differences exist between the enforcement systems and the sanction mechanisms used in the Member States.

11 Alternative Mechanisms for the Resolution of Consumer Disputes

The EU itself does not offer ADR to consumers but values ADR highly, as one instrument for consumers to get access to justice. It is surely promoted by the EU as easier, faster and less expensive than resolving disputes before a court.

At a very early stage, the EU Commission has issued (non-binding) recommendations on out-of-court consumer dispute resolution: Commission Recommendation 98/257/EC on principles applicable to bodies responsible for out-of-court settlement of consumer dispute[154] and Recommendation 2001/310/EC on the principles

[151] ECJ, case C-176/03 Commission v Council, ECLI:EU:C:2005:542, paras 47 f.

[152] Bundesgerichtshof (BGH), 5/3/2014, 2 StR 616/12, Neue Juristische Wochenschrift 2014, p. 2595.

[153] See Heldeweg (2006), p. 67 ff.; Ammerlaan and Janssen (2007), p. 107 ff.

[154] OJ 1998, L 115/31.

applicable to the extra-judicial bodies charged with the consensual resolution of consumer disputes.[155] The Commission has also initiated the creation of a European Extra-Judicial Network (EEJ-Net) which has established national contact points, or 'Clearing Houses' in each Members State.[156] A specific network for disputes involving financial services has also been established. FIN-NET (Financial Services Complaints Network)[157] links alternative dispute resolution (ADR) schemes for financial services in each Member State.

In 2008, the Mediation Directive 2008/52/EC[158] was adopted. It promotes the amicable settlement of cross-border disputes by encouraging the use of mediation and by ensuring a sound relationship between the mediation process and judicial proceedings. 'Mediation' means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator.

Despite the frequent mentioning of ADR in policy documents and in EU directives, the availability of ADR systems and their efficiency still varied greatly between the individual Member States. Therefore, the EU adopted Directive 2013/11/EU on alternative dispute resolution for consumer disputes[159] in May 2013. With the ADR Directive, the EU required Member States to provide for ADR in all sectors of business to consumers relations and to ensure that consumers can find information about the relevant ADR system(s) easily. Thereby, Member States can build upon existing ADR systems but must at least fill the gaps, if necessary, with a state-run ADR body.

The ADR Directive has established minimum standards for ADR bodies and procedures but leaves some flexibility to the Member States. For example, the Directive does not prescribe the Member States whether the ADR bodies are run publicly or privately. Importantly, ADR is generally voluntary for the consumer, although Member States can provide for mandatory ADR if that procedure does not result in a decision which is binding on the parties, that it does not cause a substantial delay for the purposes of bringing legal proceedings, that it suspends the period for the time-barring of claims and that it does not give rise to costs—or gives rise to very low costs—for the parties, and only if electronic means is not the only means by which the settlement procedure may be accessed and interim measures are possible in exceptional cases where the urgency of the situation so requires.[160]

[155] OJ 2001, L 109/56.

[156] See Council Decision 2001/470/EC establishing a European Judicial Network in civil and commercial matters, OJ 2001, L 174/25, amended by Council Decision 568/2009/EC, OJ 2009, L 168/35.

[157] See http://ec.europa.eu/finance/fin-net/index_en.htm. See also Reich (2014a), p. 365.

[158] OJ 2008, L 136/3.

[159] OJ 2013, L 165/63; on which see Reich (2014a), p. 367 ff.

[160] See ECJ, joined cases C-317/08, C-318/08, C-319/08 and C-320/08 Alassini, ECLI:EU:C:2010:146.

Articles 6 to 10 of the ADR Directive 2013/11/EU require ADR bodies, or the natural persons in charge of ADR, to have the necessary expertise, to be independent and impartial. The procedures must be transparent, effective and fair. These general criteria are detailed out in the relevant provisions.

ADR decisions are not binding on the consumer. Thus, a consumer who is unhappy with the result of an ADR procedure can still take his case to the ordinary court system. Finally, in procedures on the enforcement of an ADR decision, the Member States' courts must still, of their own motion, apply the unfairness control under the Unfair Contract Terms Directive 93/13/EEC if the ADR decision is based on an unfair term.[161]

The decision as to whether or not the result of ADR is binding on the trader is left to the Member States, some of which again leave that decision to the individual ADR body.

The Consumer ADR Directive is complemented by Regulation 254/2013/EU on 'Consumer Online Dispute Resolution Regulation (Regulation on consumer ODR).[162] For consumers shopping online from another EU country, this Regulation envisages an EU-wide single online platform. This single European point of entry automatically sends the consumer's complaint to the competent national ADR entity and facilitates the resolution of the dispute within 30 days, for example by providing a uniform complaint form that is available in all the official languages of the EU. The whole dispute settlement procedure is conducted online.

12 Conclusions

Clearly, EU consumer law is not consistently enforced in the Member States, and enforcement of consumer law does not appear to enjoy the highest priority in all Member States. One should not overlook, however, that in the constitutional setting of the EU, enforcement of substantive law is primarily in the competence of the Member States. Thus, the EU itself is only in a reactive position. The EU Commission can react to failures of Member States with judicial proceedings in the Court of Justice, under Article 258 TFEU, and it can use patterns of insufficient levels of protection or of enforcement to propose the inclusion of provisions related to remedies or sanctions into EU legislation; always within the limits set by the principles of proportionality and subsidiarity.

Still, it is special that a supranational organisation gets involved into enforcement issues at all. In that sense, the EU has performed remarkably in that it has established procedural minimum standards for consumer protection, and it still intensifies its take on the Member States to improve enforcement of consumer protection. It might,

[161] See ECJ, case C-168/05 Mostaza Claro, ECLI:EU:C:2006:675, on which see Reich (2007), p. 41 ff.

[162] OJ 2013, L 165/1.

however, be helpful if the EU was conferred the express competence to regulate in the area of consumer protection including its enforcement.

The main trend in recent years appears to be a move towards public enforcement of consumer law. This applies, in particular, to cross-border enforcement, with the reform of the CPC Regulation, and to regulated markets including services of general interest.

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L'effectivité du droit français de la consommation

Sabine Bernheim-Desvaux et Patricia Foucher

1 Introduction

L'effectivité du droit est généralement entendue comme son application.[1] Est effectif, ce qui est réel, ce qui est appliqué. C'est la définition classique que l'on retrouve dans les différents dictionnaires et qui est retenue par nombre d'auteurs dans la lignée de Kelsen.[2,3] L'effectivité est ainsi comprise comme le caractère d'une règle de droit qui est réellement appliquée. De cette définition générale, il est possible de retirer deux acceptions de l'effectivité : la règle de droit est appliquée parce que ses destinataires adoptent la conduite requise d'une part, parce que la sanction est ordonnée faute d'une bonne conduite des destinataires de la règle d'autre part. Il convient de vérifier, par ce présent rapport, comment la France met en œuvre concrètement ces deux acceptions de l'effectivité. Or, force est de constater que s'il existe de nombreux facteurs d'effectivité (2), le dispositif français révèle également quelques faiblesses (3) que la France vise à réduire par différentes initiatives (4).

[1]Un auteur québécois, Madame Valérie Demers, parle de « *paradigme dominant de la notion d'effectivité du droit* », Demers (1996), p. 15.

[2]Baumgartner and Ménard (1997), v. Effectif, emprunté au latin *effectivus* « qui produit un effet » ; Cornu (2007), p. 339 ; Dictionnaire Larousse, v. Effectif, effective.

[3]Kelsen (1962), p. 15; Kelsen (1996), p. 4.

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2 Les facteurs d'effectivité du droit français de la consommation

Le droit français de la consommation présente de nombreux avantages qui tiennent tant à son contenu normatif (2.1) qu'à sa mise en œuvre concrète (2.2), contribuant ainsi à son effectivité.

2.1 Les principaux atouts du droit français de la consommation

2.1.1 Un contenu normatif développé

La France est un pays développé qui connaît un droit de la consommation très étoffé.[4] Si, dès 1905, il existait une loi sur les fraudes et falsifications, sorte d'embryon d'un droit de protection du consommateur, c'est spécialement à partir des années 1970 que les textes vont se multiplier. Ainsi, en 1971, on trouve une loi sur l'enseignement à distance ; en 1972, une loi sur le démarchage à domicile ; en 1978, une loi sur le crédit à la consommation et une loi sur les clauses abusives ; en 1979, une loi sur le crédit immobilier. Aussi, force est de constater que, depuis quarante ans, le droit de la consommation s'est inexorablement développé. Il fait aujourd'hui partie du paysage juridique, pour reprendre une expression de Monsieur le Professeur Jean Calais-Auloy, considéré en France comme le « père » du droit de la consommation.[5] C'est en effet à lui que l'on doit l'existence, depuis 1993, d'un Code de la consommation. Le droit de la consommation a ainsi accédé à l'autonomie, spécialement par rapport au droit commun des contrats du Code civil, en raison de l'axiome suivant : un code, un droit.

De surcroît, le champ d'application du droit de la consommation est étendu. D'une part, il vise à protéger les intérêts économiques du consommateur, tant dans les contrats portant sur la vente de biens que dans les contrats portant sur la fourniture de services.[6,7] D'autre part, il comporte des règles ayant pour objectif de protéger la santé et la sécurité du consommateur.[8] Ce champ d'application,

[4] V. sur l'historique du développement du droit français de la consommation Extrait du « Guide du consumérisme » – Institut national de la consommation – 2016 (site www.conso.net) ; V. également Mainguy and Depincé (2013).

[5] Calais-Auloy and Temple (2015).

[6] V. par exemple les art L. 217-4 et suivants du Code de la consommation sur les garanties dans la vente.

[7] V. par exemple les art L. 215-1 et suivants du Code de la consommation relatifs au dispositif protecteur en cas de reconduction tacite des contrats de prestation de service.

[8] V. par exemple le Livre IV du Code de la consommation (art L. 411-1 et suivants) comportant les règles relatives à la conformité et à la sécurité des produits et des services.

actuellement large, sera encore étendu dans les années à venir car entrent progressivement dans son périmètre le droit de l'environnement, le développement durable, le collaboratif, etc.[9,10,11]

Les principaux objectifs de la politique en matière de consommateurs visent à protéger le consommateur mais aussi, et ce de plus en plus à travers l'influence de l'Union européenne, à réguler le marché, à contribuer à la croissance économique. Si ladite politique a d'abord eu pour raison d'être la protection du consommateur, l'ensemble des règles étant destinées à protéger le consommateur profane dans ses relations avec les professionnels, elle devient de plus en plus un outil de régulation du marché. En effet, sur le plan européen, la Commission européenne souhaite que le consommateur devienne un véritable acteur économique qui contribue par ses actes de consommation à la réalisation du Marché intérieur. Marché au sein duquel la libre concurrence, la libre circulation des marchandises et de prestation de service doivent être assurées. « *Cette fonction économique du droit de la consommation est, depuis une dizaine d'années, appliquée par la Commission européenne au marché intérieur de l'Union. L'idée assénée est que, pour développer la croissance, il faut favoriser la consommation en assurant la libre circulation des biens et des services au sein de l'Union. Le droit de la consommation, au service de cette nouvelle politique, change alors de registre. Il devient un instrument de régulation du marché intérieur devant participer activement à la circulation des biens de consommation, par l'harmonisation des législations nationales* ».[12]

2.1.2 Une implication importante des pouvoirs publics

Outre un contenu normatif très développé, le droit de la consommation français se caractérise également par une implication importante des pouvoirs publics dans la protection du consommateur.

Les administrations, spécialement la Direction Générale de la Concurrence, de la Consommation et de la Répression des Fraudes (DGCCRF), ont un rôle majeur dans la mise en œuvre du droit de la consommation. D'une part, elles contribuent à l'élaboration des normes. Ainsi, c'est la DGCCRF qui a écrit intégralement le nouveau Code de la consommation en vigueur depuis le 1 juillet 2016, date d'entrée en vigueur de l'ordonnance N° 2016-301 du 14 mars 2016, avec pour ambition

[9]V. par exemple l'art L. 122-11 du Code de la consommation sur le classement énergétique des produits.

[10]V. par exemple l'art L. 441-2 du Code de la consommation sur le délit d'obsolescence programmée.

[11]V. par exemple les art L. 111-7 et suivants du Code de la consommation sur les plateformes en ligne dont la définition englobe toute personne physique ou morale proposant, à titre professionnel, de manière rémunérée ou non, un service de communication au public en ligne reposant sur la mise en relation de plusieurs parties en vue de la vente d'un bien, de la fourniture d'un service ou de l'échange ou du partage d'un contenu, d'un bien ou d'un service.

[12]V. Bernheim-Desvaux (2012), n° 3945.

d'assurer une meilleure lisibilité des textes.[13] D'autre part, elles contrôlent l'application des règles. La refonte du Code de la consommation opérée par cette ordonnance a permis de créer un nouveau Livre V consacré aux pouvoirs d'enquête et aux suites données aux contrôles. Cette réforme des pouvoirs des agents était devenue inévitable depuis 1985, date de la création de la DGCCRF par la fusion de deux directions : la Direction générale de la concurrence et de la consommation et le Service de la répression des fraudes. Cette fusion des administrations ne s'était pas accompagnée d'une uniformisation des pouvoirs des agents. Par conséquent, suivant que les agents tenaient leurs habilitations du Code de commerce ou du Code de la consommation, ils ne bénéficiaient pas des mêmes pouvoirs d'enquête. Le Livre V a donc regroupé, harmonisé et unifié les dispositions relatives aux pouvoirs d'enquête jusqu'à présent dispatchées entre ces deux Codes et a ainsi créé un régime unique des pouvoirs de contrôle de l'administration en droit de la consommation. A été privilégiée une présentation didactique qui suit le déroulement d'une enquête avant de préciser quelles suites peuvent être données par l'administration.[14]

Les organisations de consommateurs sont aussi très présentes en France et assurent tant par le biais de leurs missions informatives, de conseil et de représentation, que par leurs actions judiciaires, un rôle primordial dans la défense des consommateurs. En France, la notion d'organisation de consommateurs n'est pas définie légalement. Toutefois, il existe des organisations de consommateurs qui sont officiellement reconnues. Pour cela, elles doivent être agréées par les pouvoirs publics. Quinze organisations nationales de consommateurs le sont en 2016.[15] Elles sont issues de trois grands mouvements différents : un mouvement familial, un mouvement syndical, et un mouvement consumériste spécialisé. Sept d'entre elles se sont regroupées en une association *Conso-France* qui a pour objet la défense des intérêts des citoyens consommateurs, y compris sur le plan environnemental et social et la coordination des actions. Les associations de consommateurs accomplissent de nombreuses missions : (1) la représentation des consommateurs dans de nombreuses instances[16] ; (2) la représentation des consommateurs par des actions de lobbying, notamment devant les ministères et le Parlement[17] ;

[13]V. ci-dessous le paragraphe L'accessibilité et la lisibilité des règles.

[14]V. également pour une présentation des missions de la DGCCRF : www.economie.gouv.fr/dgccrf/La-DGCCRF/Missions.

[15]V. la liste des associations agréées sur le site de l'INC : www.conso.net/ et plus précisément www.conso.net/content/trouvez-lassociation-de-consommateurs-la-plus-proche-de-chez-vous.

[16]Par exemple, elles sont membres du Conseil national de la consommation ; site web www.economie.gouv.fr/cnc. Cet organisme consultatif réunit professionnels et consommateurs, adopte des avis notamment pour préconiser la mise en œuvre de bonnes pratiques. Des représentants des associations sont nommés membres de la Commission des clauses abusives, site web www.clauses-abusives.fr. Cet organisme a pour mission d'examiner les modèles de conventions habituellement proposés par les professionnels et de recommander la suppression ou la modification des clauses qui ont pour objet ou pour effet de créer, au détriment du non-professionnel ou du consommateur, un déséquilibre significatif entre les droits et obligations des parties au contrat ; article L. 822-4).

[17]Ainsi, de nombreuses questions parlementaires évoquent des sujets qui sont présentés par les associations. Elles interviennent sur les textes en discussion, etc.

(3) l'information des consommateurs sur les produits et les services, à travers leurs médias[18], afin que le consommateur fasse un choix éclairé, sur ses droits et obligations, ainsi que sur les moyens de les faire valoir ; (4) l'information et l'aide aux consommateurs individuels lors des permanences "Consommation" ; (5) la représentation des consommateurs en justice[19] ; (6) l'assistance aux consommateurs en cas de recours à la médiation de la consommation.

Enfin, des institutions telles l'Institut national de la consommation (INC) contribuent à mettre en œuvre la politique générale d'accès au droit et à assurer une meilleure connaissance des règles consuméristes[20] : réalisation de fiches pratiques, création de site web dédié (www.conso.net), édition de magazine (*60 millions de consommateurs*), réalisation de spots télévisés (Consomag diffusés sur les chaines publiques appartenant au groupe France Télévisions), etc. Tout ceci contribue, dans les faits, à une conscience des consommateurs et des professionnels dans l'existence de ces règles consuméristes.

2.1.3 L'accessibilité et la lisibilité des règles

Avoir conscience qu'il existe de nombreuses règles consuméristes est cependant insuffisant si ces règles ne sont pas aisément accessibles. Il est donc notable qu'existe en France un Code de la consommation depuis 1993 qui, malgré sa jeunesse, a fait l'objet d'une refonte complète par l'ordonnance n° 2016-301 du 14 mars 2016 relative à la partie législative et le décret n° 2016-884 du 29 juin 2016 relatif à la partie réglementaire.[21,22] L'ordonnance est entrée en vigueur le 1er juillet 2016. Cette refonte était devenue inévitable en raison, d'une part des modifications et adjonctions successives d'origine européenne, d'autre part de la multiplication des dispositions internes visant à protéger le consommateur. L'article 161 de la loi n° 2014-344 du 17 mars 2014 relative à la consommation avait ainsi habilité le Gouvernement français à refondre à droit constant le Code de la consommation,

[18]Par exemple, le magazine *Que Choisir*, les sites Internet, les émissions Consomag produites par l'Institut national de la consommation mais auxquelles elles participent, etc.

[19]V. les articles L. 621-1 et suivants sur les actions en justice des associations de consommateurs : action en intervention, action civile, action en cessation des agissements illicites, action en représentation conjointe, action de groupe. A noter cependant que l'association de consommateurs n'est pas habilitée au regard des textes à assister un consommateur devant un tribunal (V. la liste limitée de l'article 828 du Code de procédure civile).

[20]Sur l'INC et son rôle dans l'effectivité du droit de la consommation, V. Foucher (2015), pp. 49 et suivants.

[21]*Journal Officiel de la République française* du 16 mars 2016 ; V. le Rapport au Président de la République relatif à l'ordonnance n° 2016-301 du 14 mars 2016 relative à la partie législative du code de la consommation, JORF n° 0064 du 16 mars 2016, texte n° 28 ; Bernheim-Desvaux and Raymond (2016), étude n° 7; Sauphanor-Brouillaud (2016); Bernheim-Desvaux (2016b); Sauphanor-Brouillaud and Aubry (2016), p. 392; Piédelièvre (2016).

[22]*Journal Officiel de la République française du 30 juin 2016 ;* Bernheim-Desvaux (2016a), com. n° 199.

dans un délai de vingt-quatre mois, sous réserve des modifications nécessaires pour assurer le respect de la hiérarchie des normes, améliorer la cohérence rédactionnelle des textes, harmoniser l'état du droit, remédier aux erreurs et insuffisances de codification et abroger les dispositions, codifiées ou non, obsolètes ou devenues sans objet.[23] L'architecture du nouveau Code de la consommation est totalement remaniée. Aux cinq Livres alors existant (Information et formation des contrats ; Conformité et sécurité ; Endettement ; Associations de consommateurs ; Institutions), sont substitués huit nouveaux Livres (Information et pratiques commerciales ; Formation et exécution des contrats ; Crédit ; Conformité et sécurité ; Pouvoirs d'enquêtes et suites données aux contrôles ; Règlement des litiges ; Traitement des situations de surendettement ; Associations agréées de défense des consommateurs et institutions de la consommation). L'objectif affiché est de contribuer à améliorer l'intelligibilité et l'accessibilité de la loi pour les différents utilisateurs du droit de la consommation qu'ils soient consommateurs, professionnels ou agents de l'administration. En outre, chacun de ces nouveaux Livres est organisé selon une présentation identique: les règles générales sont d'abord énoncées, puis les règles spéciales, ensuite les sanctions, et enfin les dispositions particulières aux départements d'Outre-mer.

Afin d'assurer une meilleure lisibilité des textes, le nouveau Code de la consommation comporte un nombre d'articles très élevé (1089 articles compris entre L. 111-1 et L. 823-2, outre un article liminaire comportant les définitions du consommateur, du non professionnel et du professionnel). Il s'appuie ainsi sur une méthode cartésienne qui conduit à exprimer les règles simplement et à les ordonnancer clairement en utilisant l'axiome suivant : une règle = un article. Toujours pour assurer une meilleure lisibilité, des articles ont été créés afin de rappeler certaines règles européennes issues de Règlements européens qui sont directement applicables. Par exemple, l'article L. 221-19, énonçant les règles applicables aux délais, aux dates et aux termes pour l'exercice du droit de rétractation du consommateur dans un contrat à distance ou hors établissement, est le strict énoncé du règlement n° 1182/71/CEE du Conseil du 3 juin 1971. On retrouve la même volonté de faciliter l'accès aux règles applicables.

Disposer, en France, d'un contenu normatif important, accessible et lisible ne signifie cependant pas que les acteurs du droit de la consommation le respecteront spontanément, même s'ils en ont conscience. D'où l'existence de plusieurs mécanismes d'application des règles consuméristes particulièrement efficaces.

[23] *Journal Officiel de la République française* du 18 mars 2014 ; V Arcelin Lécuyer (2015).

2.2 *Les principaux avantages des mécanismes d'application des règles du droit français de la consommation*

2.2.1 L'existence d'une régulation privée

Tout d'abord, mentionnons que le droit français de la consommation est souvent spontanément mis en œuvre par les professionnels, avec l'appui éventuel de leur fédération professionnelle. Il existe ainsi une sorte de régulation privée qu'il est difficile de quantifier mais qui existe réellement. Chaque professionnel veille à ce que ses concurrents se plient aux règles légales afin de ne pas pâtir d'une mauvaise réputation de l'un d'entre eux. Les instances professionnelles, telles les fédérations mettent également en œuvre une régulation. A titre d'exemple, l'Autorité de régulation professionnelle de la publicité (ARPP) est une association interprofessionnelle régie par la loi de 1901 qui constitue un organisme privé d'autorégulation de la publicité en France. Créé en août 1935 sous le nom d'Office de contrôle des annonces, l'organisme devient Bureau de vérification de la publicité (BVP) en 1953, avant de prendre le nom d'ARPP en 2008. L'ARPP a pour but de mener toute action en faveur d'une publicité loyale, véridique et saine, dans l'intérêt des consommateurs, du public et des professionnels de la publicité. Le dispositif de régulation professionnelle de la publicité est un système concerté, ouvert à la société civile et aux consommateurs. Il regroupe, autour des services opérationnels de l'ARPP, trois instances associées : le Conseil de l'Ethique Publicitaire, le Conseil Paritaire de la Publicité et le Jury de Déontologie Publicitaire.[24] En outre, par le biais des boycotts de produits ou des avis de consommateurs, les associations de consommateurs et les consommateurs exercent un effet considérable sur le marché afin d'inciter les autres consommateurs à orienter leurs choix de consommation et les professionnels à mieux se conformer à leurs obligations légales.[25]

[24] www.arpp.org/ ; V. M Depincé, « La discipline collective : l'exemple de l'ARPP et du JDP », in actes du colloque *Quels moyens pour un droit de la consommation effectif et efficace à l'ère numérique ?*, Centre d'Études Juridiques et Politiques (CEJEP), Université de La Rochelle, 10 octobre 2014 (vidéo).

[25] L'importance revêtue par les avis consommateurs a légitimé une intervention législative fin de lutter contre les faux avis consommateurs, V. le nouvel article L. 111-7-2 du Code de la consommation : « *Sans préjudice des obligations d'information prévues à l'article 19 de la loi n° 2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique et aux articles L. 111-7 et L. 111-7-1 du présent code, toute personne physique ou morale dont l'activité consiste, à titre principal ou accessoire, à collecter, à modérer ou à diffuser des avis en ligne provenant de consommateurs est tenue de délivrer aux utilisateurs une information loyale, claire et transparente sur les modalités de publication et de traitement des avis mis en ligne. Elle précise si ces avis font ou non l'objet d'un contrôle et, si tel est le cas, elle indique les caractéristiques principales du contrôle mis en œuvre. Elle affiche la date de l'avis et ses éventuelles mises à jour. Elle indique aux consommateurs dont l'avis en ligne n'a pas été publié les raisons qui justifient son rejet. Elle met en place une fonctionnalité gratuite qui permet aux responsables des produits ou des services faisant l'objet d'un avis en ligne de lui signaler un doute sur l'authenticité de cet avis, à condition que ce signalement soit motivé* ».

2.2.2 L'efficacité des mécanismes nationaux d'application

Ensuite, et parce que cette logique de marché n'est certainement pas suffisante, le droit français a mis en place des mécanismes visant à forcer les acteurs du droit de la consommation qui ne respectent pas spontanément les règles. Les points forts de ces mécanismes nationaux d'application du droit de la consommation peuvent être rapidement énumérés : il s'agit de la généralisation de la médiation de la consommation, de l'existence d'un droit procédural de la consommation et de l'admission des actions de groupe.

Généralisation de la médiation de la consommation
La Directive européenne 2013/11/UE du Parlement européen et du Conseil du 21 mai 2013 relative au règlement extrajudiciaire des litiges de consommation[26] a été transposée en France par l'ordonnance n° 2015-1033 du 20 août 2015.[27] Deux décrets d'application ont ensuite été pris : le premier daté du 30 octobre 2015 et le second du 7 décembre 2015 (textes publiés au Journal officiel de la République française du 31 octobre et du 31 décembre 2015). Désormais et depuis le 1er janvier 2016, chaque professionnel a l'obligation de proposer un système de médiation au consommateur et ce système de médiation doit être référencé par la Commission nationale d'évaluation et de contrôle de la médiation de consommation (CECMC) (site web www.economie.gouv.fr/mediation-conso/commission). Cette Commission, régie par les articles R. 615-1 et suivants du Code de la consommation, est présidée par un magistrat de la Cour de cassation et est composée de membres représentatifs des consommateurs et des professionnels, outre des personnes qualifiées dans le domaine de la médiation et du droit de la consommation. Son rôle est de référencer tous les médiateurs qui respectent les critères de qualité et de compétence exigés par la Directive de 2013, et de contrôler le respect par les médiateurs référencés des règles légales relatives au processus de médiation. La France vise l'objectif d'une généralisation de la médiation de la consommation à tous les secteurs de l'économie le plus rapidement possible et la CECMC a déjà référencé plus de soixante médiateurs à ce jour (www.economie.gouv.fr/mediation-conso/saisir-mediateur). Cette généralisation et cette uniformisation présentent l'avantage de faciliter l'accès des consommateurs à un médiateur, sachant qu'en outre le recours à la médiation de la consommation est gratuit pour le consommateur

[26] Directive n° 2013/11/UE du 21 mai 2013 et Règlement n° 524/UE du 21 mai 2013 [2013] *JOUE* L165 ; V. Aubert de Vincelles (2013), p. 575; Bernheim-Desvaux (2013a); Bernheim-Desvaux (2013b), étude 12. Poillot (2014), p. 20.

[27] *Journal Officiel de la République française du 21 août 2015;* Bernheim-Desvaux (2016c), dossier 23; Bernheim-Desvaux (2015a), étude 11; Gorchs-Gelzer (2015), p. 174; Landel (2015); Mollard-Courtau (2016).

(art L. 612-1 du Code de la consommation) et n'est subordonné à aucun seuil minimal de litige.[28]

Existence d'un droit procédural de la consommation

Le droit français a mis en place des règles de procédure spécifiques pour les conflits entre un professionnel et un consommateur qui permettent un recours facilité au juge. Ainsi, il n'existe pas de seuil minimum de litige pour saisir le juge ; la représentation par avocat n'est pas obligatoire devant le juge d'instance, ce qui permet à tout consommateur de saisir la justice sans avoir à supporter des frais de représentation importants[29] ; aucune taxe ou frais de dossier n'est à payer par le consommateur saisissant ce qui permet à tout consommateur de saisir la justice sans avoir à supporter des frais de procès importants, sauf en cas de recours à une expertise ; le juge peut être saisi par une procédure simplifiée de déclaration au greffe[30] ; le consommateur français peut toujours saisir la juridiction du lieu où il demeurait au moment de la conclusion du contrat ou de la survenance du fait dommageable.[31] De plus, une fois le juge saisi, son office est particulier. D'une part, et en vertu de l'article R. 632-1 du Code de la consommation, il peut relever d'office toutes les dispositions du Code de la consommation dans les litiges nés de son application. Et il doit même relever d'office les clauses abusives. Le juge devient ainsi le garant de l'application des règles du droit de la consommation, afin de pallier l'ignorance du consommateur qui ne connaît pas toujours les règles consuméristes qui s'appliquent dans son litige. D'autre part, le juge peut mettre à la charge du professionnel l'intégralité des droits proportionnels de recouvrement et d'encaissement, par application de l'article R. 631-4 du Code de la consommation.

Existence d'actions collectives en droit français

Deux sortes d'actions collectives existent en droit français, chacune de ces catégories étant des facteurs d'effectivité du droit de la consommation. D'une part, existent les actions collectives en défense de l'intérêt individuel des consommateurs. Les modes collectifs de résolution des litiges de consommation contribuent à rendre effectif l'accès des consommateurs au juge grâce à la mutualisation des coûts et des contraintes de l'action en justice. En outre, en permettant à des consommateurs liés par une communauté d'intérêts de se regrouper, les modes collectifs de résolution des litiges de consommation corrigent l'inégalité matérielle qui oppose

[28]En effet, la possibilité accordée par la Directive de fixer un seuil minimal d'accès à la médiation n'a pas été reprise dans le texte français ; Comparer art L. 612-2 et l'article 5-4 de la Directive de 2013.

[29]Selon l'article 827 du Code de procédure civile, « Les parties se défendent elles-mêmes ».

[30]Elle permet de saisir directement le juge sans avoir à passer par la voie de l'assignation qui nécessite de recourir à un huissier de justice. Elle peut être mise en œuvre pour les litiges dont le montant de la demande n'excède pas 4 00 €, soit le taux de compétence en dernier ressort du tribunal d'instance. Elle est régie par les articles 843 et 844 du Code de procédure civile auxquels renvoie l'article R. 631-1 du Code de la consommation.

[31]C'est ce que l'on appelle une exception de compétence prévue à l'article R. 631-3 du Code de la consommation.

consommateurs et professionnels. Ils participent au droit des consommateurs au procès équitable. Le droit français connaît ainsi plusieurs actions collectives qui permettent aux consommateurs d'obtenir en justice le règlement de leur litige : les actions de groupe et les actions en représentation conjointe.[32,33] D'autre part, existent les actions collectives en défense de l'intérêt collectif des consommateurs. Ces actions sont extrêmement importantes en pratique car elles contribuent à l'éradication des clauses abusives des contrats et ont pour objectif de contraindre les professionnels à appliquer les règles du droit de la consommation. Il s'agit des actions en suppression des clauses abusives ou illicites intentée par la DGCCRF (art L. 524-1 et suivants du Code de la consommation) ou par les associations agréées de consommateurs (art L. 621-2 et L. 621-8 du code de la consommation), des actions civiles en réparation de l'atteinte à l'intérêt collectif (art L. 621-1 et suivants du code de la consommation) et des actions en intervention (art L. 621-9 du code de la consommation) intentées par les associations agréées de consommateurs, des actions en cessation de l'illicite intentée par la DGCCRF (art L. 524-1 et suivants du code de la consommation) ou par les associations agréées de consommateurs (art L. 621-2 et L. 621-7 du Code de la consommation).

[32]L'action de groupe « Consommation » a été introduite par la loi du 14 mars 2014, après plus de trente ans de débats ! Elle permet à un groupe de consommateurs placés dans une situation similaire ou identique (abonnés, clients), victimes d'un manquement d'un ou des mêmes professionnels à leurs obligations légales ou contractuelles, leur ayant causé un préjudice matériel, d'obtenir réparation par une seule action en justice. Le dispositif permettant sa mise en œuvre est entré en vigueur le 1er octobre 2014. Cette action doit être introduite par l'une des associations agréées au niveau national. Toutefois, dans certaines collectivités territoriales (Outre-mer notamment), les associations de consommateurs représentatives au niveau local peuvent également agir. Au 15 décembre 2016, neufs actions ont été introduites (V. P Foucher 'L'action de groupe « Consommation » : 9 actions introduites en deux ans », 2016, site de l'INC www.conso.net). D'autres actions de groupe concernent les consommateurs. De nouvelles actions ont été créées ou sont en cours de création, l'une dans le domaine de la santé (La loi n° 2016-41 du 26 janvier 2016, dite loi « Santé », a introduit une action de groupe dans le domaine de la santé, V. articles L. 1143-1 à L. 1143-22 du Code de santé publique), les autres dans des domaines variés (la loi n° 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXIe siècle a créé un socle commun pour les actions de groupe qu'elle a étendu aux discriminations, discrimination au travail, environnement, et protection des données à caractère personnel, V. art 60 et suivants de la loi). L'action de groupe étend ainsi son champ d'application.

[33]L'action en représentation conjointe a été créée par la loi du 18 janvier 1992, les demandes relatives à la création d'une véritable action de groupe ayant été écartées. Elle a en conséquence toujours été présentée comme un "ersatz" d'action de groupe. Elle est codifiée aux articles L. 622-1 à L. 622-4 du Code de la consommation. Il s'agit d'un recours collectif dont l'objet est la réparation de préjudices subis par un « groupe déterminé de consommateurs », c'est-à-dire identifiés, et causés par le fait d'un même professionnel. Cette action est exercée par une association nationale agréée, mandatée par écrit par au moins deux des consommateurs concernés. L'*opt in* y est donc obligatoire. Le dommage peut être matériel, mais également corporel ou moral. Une telle action a rencontré très peu de succès en raison de la lourdeur de la procédure nécessitant le recours au mandat et les contraintes liées à la collecte dudit mandat (interdiction de la sollicitation par voie d'appel public télévisé ou radiophonique, par voie d'affichage, de tract ou de lettre personnalisée). La responsabilité de mandataire mise à la charge des associations et le coût de ces actions ont été des facteurs d'insuccès. Moins de 15 actions ont été intentées.

La multitude de sanctions

Enfin, pour sanctionner les acteurs qui ne respectent pas les règles du droit de la consommation, le droit français a prévu de multiples sanctions. La sanction a une place plus importante en droit français de la consommation que dans d'autres disciplines juridiques, d'une part pour assurer une police du comportement, d'autre part pour réguler le marché.[34] Ces sanctions sont de trois ordres : administratif, pénal et civil. La sanction pénale a longtemps été, en droit français, la reine des sanctions car elle assurait la protection de la santé publique, la santé du plus faible ou de l'ignorant. Mais, ce droit pénal exclusivement sanctionnateur était source d'un foisonnement d'infractions pénales qui n'étaient pas souvent appliquées. D'où l'apparition des sanctions administratives qui se substituent aux sanctions pénales. La répression existe toujours mais elle devient administrative. Parallèlement, existent les sanctions civiles : nullité, réputé non écrit, dommages et intérêts, interprétation *in favorem*, etc. Cette multiplication des sanctions révèle une vision répressive du droit français de la consommation, dans le but de faire cesser toute infraction. Cette vision est renforcée par la nouvelle présentation du Code de la consommation. En effet, les sanctions sont systématiquement regroupées dans un Titre isolé. L'avantage de cet ordonnancement est d'assurer une meilleure visibilité des sanctions susceptibles de s'appliquer en cas de non-respect des règles, pour les professionnels notamment. Il offre un aperçu plus clair de la panoplie des sanctions. Mais, formellement, cette modification met en exergue la dimension répressive du droit de la consommation.

Cette évaluation globale du droit de la consommation en France ne saurait cependant être complète si l'on ne relevait pas quelques lacunes.

3 Les faiblesses du dispositif français d'application du droit de la consommation

Si la principale lacune ne tient pas à notre système national d'application du droit de la consommation, mais aux moyens humains et financiers qui lui sont consacrés (3.1), on ne peut cependant nier que le dispositif d'application du droit français de la consommation comporte quelques faiblesses (3.2).

[34] V. Blanchard (2015), p. 70.

3.1 Les manques de moyens humains et financiers nécessaires à l'application du droit français de la consommation

Des manques importants de moyens se font sentir à tous les niveaux.

Tout d'abord, on note le nombre décroissant d'agents de la DGCCRF, la principale administration en charge de contrôler le respect du droit de la consommation par les professionnels. Elle veille ainsi au bon fonctionnement des marchés, au bénéfice des consommateurs et des entreprises, en exerçant des actions de contrôle au service de l'efficacité économique. Ainsi, sur la base des trois derniers bilans de la DGCCRF (tableau 1), nous pouvons constater une diminution du nombre de contrôles effectués.

Les chiffres clés 2013 Les contrôles de la DGCCRF:	Les chiffres clés 2014 Les contrôles de la DGCCRF:	Les chiffres clés 2015 Les contrôles de la DGCCRF:
721 000 vérifications effectuées	589 000 vérifications effectuées	575 200 vérifications effectuées
137 000 établissements contrôlés	126 000 établissements contrôlés	119 200 établissements contrôlés
268 000 analyses réalisées	417 000 analyses réalisées	294 000 analyses réalisées
10 200 sites internet contrôlés	10 300 sites internet contrôlés	10 450 sites internet contrôlés

Ensuite, le manque de magistrats est à déplorer. Les temps de procédure sont par conséquent importants et de nombreux consommateurs ne cherchent pas à faire valoir leurs droits devant les tribunaux car ils souhaitent une réponse rapide à leur litige, souvent de faible ampleur. Il suffit sans doute, pour s'en convaincre, de citer un extrait du rapport « Le juge du 21ème siècle - Un citoyen acteur, une équipe de justice » remis par Monsieur le conseiller à la Cour de cassation Delmas-Goyon à la Ministre de la Justice en décembre 2013 (www.justice.gouv.fr/publication/rapport_dg_2013.pdf) et qui a largement inspiré la loi n° 2016-1547 du 18 novembre 2016 de modernisation de la justice du 21ème siècle (publiée au Journal officiel de la République française du 19 novembre 2016) :

> Il faut bien garder présent à l'esprit que l'on ne peut indéfiniment demander à notre justice d'être l'une de celles qui doit traiter le plus de choses, alors que les moyens qui lui sont consacrés sont largement inférieurs à ceux des autres pays développés. Cela résulte des études comparatives menées sous l'égide du Conseil de l'Europe[35], amplement reprises dans le débat public. Ajoutons à ce constat qu'impose le droit comparé, celui d'un accès rendu volontairement aussi large que possible, tant au premier degré de juridiction qu'en appel, et l'on mesure la tension qui s'exerce sur notre système judiciaire. Le prix à payer est lourd. La tentative de faire toujours plus avec des moyens insuffisants ne permet pas au juge de répondre, par son intervention, à toutes les attentes des parties à un conflit. Le malaise des tribunaux tient pour une bonne part au profond sentiment d'injustice ressenti par les

[35] Systèmes judiciaires européens : efficacité et qualité, rapport réalisé à partir d'une enquête menée auprès de 47 pays par la Commission européenne pour l'efficacité de la justice (CEPEJ) (éd. du Conseil de l'Europe, Les études de la CEPEJ, n° 18, septembre 2012).

> magistrats et les fonctionnaires, confrontés à une opinion critique sur ce mode de fonctionnement et sur les performances de leur institution alors que, ayant pour la plupart une haute conscience de l'importance de leur mission, ils ont le sentiment d'accomplir un effort sans précédent pour ne pas se laisser déborder par leurs tâches. Il faut le dire avec force : notre justice judiciaire a largement atteint ses limites.

Enfin, certaines organisations de consommateurs sont confrontées à des difficultés financières. Elles sont exposées d'une part aux diminutions des subventions publiques, tout comme les institutions de droit de la consommation d'ailleurs. Elles pâtissent d'autre part de la faible indemnisation qui leur est allouée par les tribunaux lorsqu'elles agissent en réparation des atteintes à l'intérêt collectif des consommateurs. Certes, parce que les dommages et intérêts sont alloués, non pas aux consommateurs victimes, mais à l'association elle-même, leur évaluation est particulièrement difficile. Par conséquent et bien souvent, les juges n'octroient qu'une indemnité symbolique ou très inférieure à la somme réclamée. Or, de telles indemnisations symboliques ou faibles emportent deux effets pervers. Non seulement elles n'ont pas une vertu répressive pour les professionnels condamnés et une vertu dissuasive pour les professionnels du secteur, mais de plus elles sont un frein aux actions futures des associations de consommateurs qui utilisent ces dommages et intérêts versés afin de financer les frais de procédure. L'introduction de l'action de groupe en France depuis la loi du 17 mars 2014 ravive ce besoin crucial de fonds nécessaires à l'introduction de telles actions.

Il serait cependant faux de laisser croire que le système français d'application du droit de la consommation est exempt de critiques. Quelques faiblesses du dispositif peuvent être relevées.

3.2 Les critiques substantielles du dispositif français d'application du droit de la consommation

3.2.1 Les faiblesses normatives

En premier lieu, si le droit de la consommation a un contenu normatif important, on peut regretter que la législation devienne de plus en plus technique et pointilleuse. A titre d'exemple, le Titre III du Livre IV du Code de la consommation, consacré à la valorisation des produits et des services, comporte un tel degré de spécificité technique que l'on se demande s'il ne devrait pas être éliminé du Code de la consommation.[36]

En outre, le renforcement des obligations d'information à destination des consommateurs a un effet pervers et contreproductif : trop d'information tue

[36] V. en ce sens Raymond (2016), étude n° 7.

l'information, le consommateur n'étant plus incité à lire les informations données tant leur volume est important et leur lecture fastidieuse.[37]

Toujours sur un plan normatif, on peut déplorer que le droit de la consommation dépasse le Code de la consommation. En effet, en raison du caractère pluridisciplinaire du droit de la consommation, de nombreuses dispositions relevant de la protection du consommateur figurent dans d'autres Codes (Assurances, monétaire et financier, rural et pêche maritime, collectivités territoriales, tourisme, construction et habitation, éducation, etc.). Pour en faciliter l'accès, sont alors mentionnées, dans le Code de la consommation, les dispositions qui figurent dans ces autres Codes, sans les reproduire, par simple renvoi. Cette méthode du renvoi conduit à deux difficultés. L'usager est obligé de se référer constamment à plusieurs Codes, ce qui peut se retourner contre l'objectif de lisibilité. En outre, la méthode contribue à accentuer les difficultés de circonscription du droit de la consommation. En effet, alors que le Code de la consommation est érigé comme le siège du droit commun des rapports entre professionnels et consommateurs dans le Titre I du Livre II, il est conçu comme un Code « suiveur » dans le Titre II en raison des nombreuses dispositions qui ne font que renvoyer à d'autres Codes « pilotes ». Si l'on veut encore illustrer cette dilution des règles dans différents Codes, on peut également citer les clauses abusives. Trois textes prévoient des règles particulières pour éradiquer les clauses abusives : les articles L. 212-1 et suivants du Code de la consommation, l'article 1171 du Code civil et l'article L. 442-6 du Code de commerce. Spécialement, la question se pose de savoir comment coordonner les articles L. 212-1 et suivants du Code de la consommation et le nouvel article 1171 du Code civil applicable aux contrats conclus à compter du 1er octobre 2016, issu de l'ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations.[38] En vertu de ce dernier texte, toute clause insérée dans un contrat d'adhésion qui crée un déséquilibre significatif entre les droits et obligations des parties au contrat sera réputée non écrite. En d'autres termes, ce n'est pas le critère personnel de la qualité des cocontractants qui est pris en compte pour déterminer le champ d'application du texte du Code civil, mais la condition que la clause engendrant un déséquilibre significatif n'ait pas été

[37] V. Fenouillet (2015), n° 6, p. 50.

[38] *Journal officiel de la République française* du 11 février 2016 ; Blog Dalloz Réforme du droit des obligations : www.reforme-obligations.dalloz.fr/ (cliquez sur le lien pour y accéder) ; « Le nouveau droit français des contrats, du régime général et de la preuve des obligations », sous la direction de D Mainguy (UMR-CNRS 5815 « Dynamiques du droit »), (cliquez sur le lien pour y accéder) ; Jurisclasseur Concurrence consommation, « Réforme du droit des contrats, du régime général et de la preuve des obligations », Fasc. 16 par D Mainguy (LexisNexis) ; Contrats, concurrence, consommation mai 2016, Dossier spécial : « La réforme du droit des contrats, du régime général et de la preuve des obligations », sous la dir. de L Leveneur (LexisNexis) ; *Revue des contrats* mars 2016, n° Hors-série : « La réforme du droit des contrats, du régime général et de la preuve des obligations » (Lextenso).

négociée.[39] Il est dommage que ni l'ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations, ni l'ordonnance n° 2016-301 du 14 mars 2016 de recodification de la partie législative du Code de la consommation, n'aient pensé l'articulation de ces textes.

3.2.2 Le « désintérêt » pour le droit pénal de la consommation

En deuxième lieu, bien que de nombreuses sanctions pénales soient prévues par les textes, en pratique, elles sont très peu utilisées. On sait notamment que la loi Consommation du 17 mars 2014 a renforcé les sanctions pénales applicables aux délits les plus graves pour les consommateurs : pour les pratiques commerciales trompeuses, les tromperies et falsifications, et les infractions de gravité équivalente, le montant maximal des amendes pour les personnes physiques a été porté à 300 000 euros (contre 37 500 euros précédemment) et peut aller jusqu'à 10 % du chiffre d'affaires, de manière proportionnée aux avantages tirés du manquement, pour les personnes morales. Mais, les parquets, débordés, ne poursuivent que rarement les infractions au droit de la consommation et seulement les plus graves. La très grande majorité des plaintes en droit de la consommation sont classées sans suite.

3.2.3 La présentation confuse des acteurs

En troisième lieu, la multiplication des organismes, administrations et institutions nuit à la recherche du bon interlocuteur pour le consommateur. Il ne sait pas toujours à qui s'adresser et éprouve des difficultés à distinguer les canaux d'information fiables et de qualité, des canaux commerciaux voire détracteurs.

3.2.4 Une délimitation imprécise du champ d'application du droit de la consommation

En dernier lieu, si le droit de la consommation a vocation à régir les relations entre professionnels et consommateurs, il n'est pas toujours aisé de définir les destinataires des règles du droit de la consommation. Ainsi, certaines dispositions légales sont applicables aux consommateurs, d'autres aux consommateurs et aux non-professionnels, d'autres encore aux emprunteurs, aux cautions, etc. Chacun de

[39] V. le nouvel article 1110 al. 2 du Code civil posant la définition des contrats d'adhésion : contrats dont les conditions générales, soustraites à la négociation, sont déterminées à l'avance par l'une des parties.

ces destinataires a alors une définition particulière posée soit par la loi[40], soit par la jurisprudence.[41] Ces destinataires multiples, pas toujours identifiés, participent aux incertitudes tenant à la délimitation précise du périmètre du droit de la consommation. La question reste ainsi pendante en ce qui concerne le client de certaines professions libérales (médecin, avocat en particulier). Ce client est-il ou non un consommateur ? Le renvoi au Code de la santé publique par l'article L. 224-105 ne résout pas la question car il ne permet que de dire que le contrat conclu entre le professionnel de santé et son client n'est pas un contrat de consommation. En revanche, l'article L. 611-4 permettrait de dire que les clients des professions de santé ne relèvent pas du droit de la consommation car il énonce que *« ne sont pas considérés comme des litiges de consommation, les services de santé fournis par des professionnels de la santé aux patients pour évaluer, maintenir ou rétablir leur état de santé, y compris la prescription, l'administration et la fourniture de médicaments et de dispositifs médicaux* ». Tout aussi prégnantes sont les questions relatives aux personnes morales n'ayant pas d'activité professionnelle (comités d'entreprise, syndicats de copropriétaires, associations caritatives) ou encore aux personnes physiques professionnelles mais contractant hors du cadre de leur activité professionnelle (professions libérales concluant un contrat sans rapport avec leur activité professionnelle). Ces personnes doivent-elles être considérées comme des consommateurs, des non professionnels ou des professionnels ?

4 Prospective : la promotion de l'effectivité du droit de la consommation par la France

Trois tendances s'observent actuellement en droit français. Elles convergent vers un objectif commun : promouvoir l'effectivité du droit de la consommation.

4.1 Devenir la référence en matière de médiation

Tout d'abord, la France souhaite être une référence européenne en matière de médiation de la consommation. Il suffit pour s'en convaincre de consulter la liste des médiateurs de la consommation aujourd'hui référencés au sein de l'Union

[40]Par exemple, dans l'article liminaire du Code de la consommation, sont posées les trois définitions du consommateur, du non-professionnel et du professionnel.

[41]Par exemple, la caution, personne physique bénéficiant d'une protection particulière par la loi (art L. 333-1 et suivants du Code de la consommation), a fait l'objet de nombreuses décisions judiciaires et il a finalement été décidé que la personne physique dirigeant d'une société pouvait prétendre à cette protection ; V. spéc. Cass. civ. 1ère, 8 mars 2012, pourvoi n° 09-12.246.

européenne (webgate.ec.europa.eu/odr/main/index.cfm?event=main.home.show&lng=FR) pour se rendre compte que la France a, aujourd'hui, accompli un travail conséquent en la matière grâce à la Commission d'évaluation et de contrôle de la médiation (CECMC). Le Gouvernement français communique également beaucoup sur la médiation de la consommation[42] et a organisé un colloque sur la médiation de la consommation au Ministère de l'Economie et des finances le 29 novembre 2016 au cours duquel la secrétaire d'Etat chargée du commerce, de l'artisanat, de la consommation et de l'économie sociale et solidaire a déclaré que ce colloque serait désormais annuellement organisé (www.economie.gouv.fr/colloque-sur-la-mediation-consommation).

4.2 Développer la répression administrative

Ensuite, la répression pénale est largement abandonnée au profit d'une répression administrative, jugée plus efficace.[43] Concrètement, et depuis 2014, les sanctions administratives ont été créées dans le but de sanctionner les professionnels non respectueux du droit de la consommation. La création de sanctions administratives en droit de la consommation repose sur un constat et une certitude. Le constat : la répression des manquements des professionnels à leurs obligations n'est qu'imparfaitement assurée par les sanctions pénales.[44] La certitude : la procédure des amendes administratives garantit une réponse plus efficace et plus rapide aux manquements constatés. Elle facilite l'établissement d'un dialogue entre l'autorité de contrôle et le contrevenant, favorable à une meilleure régulation. Ainsi les manquements formels aux règles d'affichage des prix, d'information du consommateur, ou encore d'application du délai de rétractation pour la vente à distance, peuvent faire l'objet d'une injonction et d'une amende administrative jusqu'à 75 000 euros pour les personnes morales. La première mesure enjoint à un professionnel de se mettre en conformité avec la réglementation dans un délai imparti, tandis que la seconde sanctionne le manquement constaté. Le prononcé des injonctions et des amendes est précédé d'un échange contradictoire avec le professionnel et peut être contesté devant les juridictions administratives.

[42] www.economie.gouv.fr/dgccrf/interview-martine-pinville-secretaire-detat-en-charge-consommation ; V. également la lettre d'information de la DGCCRF : kiosque.bercy.gouv.fr/alyas/view/news/concurrenceetconsommation/F03/html.

[43] Colloque de l'université d'Angers 2015 - sous la direction de Bernheim-Desvaux and Blanchard (2015).

[44] V. ci-dessus le paragraphe Le « désintérêt » pour le droit pénal de la consommation.

4.3 S'adapter aux nouveaux modes de consommation

Enfin, le droit français de la consommation s'adapte constamment aux nouveaux modes de consommation émergeants. Deux exemples sont particulièrement prégnants : la consommation collaborative et le développement du numérique.

La consommation collaborative désigne les nouveaux modes de partage, d'échange, de prêt, d'offre que les particuliers mettent en œuvre grâce au développement d'internet.[45] Elle s'est inexorablement développée dans un contexte de crise économique et par le biais des réseaux sociaux. Juridiquement, la particularité de la consommation collaborative réside dans la relation tripartite qu'elle présuppose. Un particulier conclut un contrat avec un autre particulier qu'il a connu grâce à une plateforme. Se posent alors toute une série de questions (le particulier offreur est-il un professionnel qui doit respecter les règles du droit de la consommation ? la plateforme est-elle responsable de la bonne exécution du contrat ? etc.). Le droit de la consommation tente d'y apporter des réponses. La loi n° 2015-990 du 6 août 2015 pour la croissance, l'activité et l'égalité des chances économiques, dite loi Macron, s'y est intéressé en créant une obligation d'information spécifique à charge des plateformes, que la loi n° 2016-1321 du 7 octobre 2016 pour une République numérique (publiée au Journal officiel de la République française du 8 octobre 2016) a précisé et aménagé aux nouveaux articles L. 111-7 et suivants du Code de la consommation dans une section relative à la loyauté des plateformes et à l'information des consommateurs. Désormais,

> tout opérateur de plateforme en ligne est tenu de délivrer au consommateur une information loyale, claire et transparente sur : « 1° Les conditions générales d'utilisation du service d'intermédiation qu'il propose et sur les modalités de référencement, de classement et de déréférencement des contenus, des biens ou des services auxquels ce service permet d'accéder ; 2° L'existence d'une relation contractuelle, d'un lien capitalistique ou d'une rémunération à son profit, dès lors qu'ils influencent le classement ou le référencement des contenus, des biens ou des services proposés ou mis en ligne ; 3° La qualité de l'annonceur et les droits et obligations des parties en matière civile et fiscale, lorsque des consommateurs sont mis en relation avec des professionnels ou des non-professionnels.

Le développement du numérique renvoie aux mêmes considérations. Que ce soit le commerce électronique ou le commerce des objets connectés[46], la France essaie d'adapter le droit de la consommation à ces nouvelles formes d'échanges économiques, tout en faisant entendre à Bruxelles sa spécificité, par exemple dans le cadre des discussions sur l'adoption d'une Directive portant sur le contrat de fourniture de contenu numérique. En droit interne, elle a adopté la loi n° 2016-1321 du 7 octobre 2016 pour une République numérique qui comporte de nombreuses dispositions visant à passer de la confiance dans l'économie numérique au besoin de

[45] V. Bernheim-Desvaux (2015b), études n° 2 et 3 ; V. également les actes du colloque organisé par l'INC organisé en novembre 2014 "Consommation collaborative : quels enjeux et quelles limites pour les consommateurs ?" (site www.conso.net).

[46] V. Bernheim-Desvaux (2017), étude n° 1 ; V. également le colloque organisé par l'INC en 2015 et intitulé : Santé connectée : quelles perspectives pour les consommateurs.

confort dans l'économie numérique, à savoir notamment être informé du sort de ses données personnelles et ne pas être harcelé par la publicité.[47]

5 Conclusion

En conclusion, le droit français de la consommation est un droit abouti qui tire profit d'une tradition historique ancienne. Il est dense et s'intéresse tant à la protection des intérêts économiques, qu'à la protection de la santé et de la sécurité des consommateurs. Il prévoit des dispositifs administratifs, amiables, judicaires et pénaux afin de s'assurer de son respect et/ou de sanctionner les contrevenants. Sur le terrain, les consommateurs et les professionnels ont conscience de l'existence des règles et ont la volonté de les respecter. Les organisations de consommateurs, les fédérations professionnelles et les institutions spécialisées en droit de la consommation veillent à les informer le plus précisément possible. L'effectivité du droit français de la consommation repose ainsi sur de solides bases!

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[47] V. pour une présentation des nouvelles mesures issues de la loi pour une République numérique : www.conso.net/sites/default/files/pdf/Tableau-economie-numerique-INC.pdf.

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Enforcement and Effectiveness of Consumer Law in Greece

Alexandra E. Douga and Vassiliki P. Koumpli

1 National Legal Framework for Consumer Protection

In Greece, legislation on consumer protection has been mainly the result of the country's obligation to implement relevant EU law. Thus, the basic law on consumer protection (Law 2251/1994—hereinafter: ConsPL)[1] has embodied in national law the most important EU Directives[2] in this area. ConsPL regulates various consumer issues, such as general terms and conditions of consumer contracts, unfair contract terms, distance selling, doorstep selling, misleading and comparative advertising, distance marketing of consumer financial services, product liability etc. It establishes a State obligation to protect consumer interests and rights and introduces, after the

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[1]Law 2251/1994, in force since 16 November 1994 (Government Gazette A 191) substantially amended by Law 3587/2007, in force since 10 July 2007 (Government Gazette A 152). The 1994 Law replaced the first Greek consumer protection Law 1961/1991 (Government Gazette A 132). Last amendment of ConsPL by Law 4314/2014, in force since 23 December 2014. For a short presentation of ConsPL in the English language, see among others Douga (2011), pp. 223–247.

[2]Consumer acquis directives transposed to national law by the ConsPL are: Directive on distance selling (97/7/EC), Directive on injunctions (98/27/EC), Directive on doorstep selling (87/577/EEC), Directive on sale of consumer goods and guarantees (99/44/EC), Directive on unfair contract terms (93/13/EEC), 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). Directives outside the scope of the acquis transposed to Greek legislation by the ConsPL are: Directives on misleading advertising and comparative advertising (84/450/EC–97/55/EC), Directive on unfair commercial practices (2005/29/EC) and Directive on the distance marketing of consumer financial services (2002/65/EC).

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reform of 2007, the concept of sustainable consumption to the Greek legal order. In addition to ConsPL, Law 3297/2004 provides for the establishment of the Consumer Ombudsman. The Consumer Code of Ethics,[3] introduced by virtue of Article 7 of Law 3297/2004, also establishes a set of rules determining the principles that should govern transactional behaviour and the relationships among consumers, suppliers and their associations. It constitutes a legally binding document, the violation of which results in administrative sanctions.[4] Apart from these core pieces of legislation, sources on consumer protection can also be found in other provisions of laws dealing with particular issues, such as Law 3043/2002 on the seller's liability for actual faults and lack of agreed qualities,[5] Law 3758/2009 on companies informing debtors on overdue claims,[6] Law 3869/2010 on debt arrangements for over-indebted individuals,[7] Law 4001/2011 on the functioning of energy markets of electricity and natural gas,[8] etc. Presidential decrees 339/1996, 182/1999, 100/2000 and 131/2003,[9] along with more than a dozen joint ministerial decisions, complete the current legal framework on consumer protection.[10]

An overview of the existing legal framework as well as extended information on consumer rights in various sectors, including guidelines as regards dispute resolution procedures, can be found on the websites of the Consumer Ombudsman[11] and the General Secretariat of Consumer Affairs of the Ministry of Economy, Development and Tourism.[12] The latter is competent to take initiatives and actions to inform and educate consumers about their rights. In this respect, it has published and distributed a "Consumer Guide", covering a wide range of consumer issues, and a large amount of informative and educational leaflets and brochures on several topics of interest of consumers such as safety during vacations, unfair commercial practices, banking services, insurance contracts, traveling, etc. Trying also to raise public awareness, its representatives regularly participate in seminars in cooperation with local administrations and consumer organizations, and also give lectures in schools about consumer issues. Even though a consumer education system has not been officially established so far, consumer associations regularly organise seminars aiming at

[3] Available on the website of the Consumer Ombudsman www.synigoroskatanaloti.gr.

[4] Karakostas (2012), pp. 47–48.

[5] Government Gazette A 192.

[6] Government Gazette A 68.

[7] Government Gazette A 130.

[8] Government Gazette A 179.

[9] Accordingly transposing to national legislation the following directives: Directive on package travel (90/314/EEC), Directive on timesharing (94/47/EC), Directive on pursuit of television broadcasting activities (89/552/EEC), Directive on injunctions (98/27/EC) and Directive on electronic commerce (2000/31/EC).

[10] Douga (2010), p. 245; Douga (2015), p. 841.

[11] See www.synigoroskatanaloti.gr.

[12] See www.efpolis.gr.

educating consumers about their rights.[13] Furthermore, the subject of 'Consumer Education at School' has been included in the curriculum of schools of primary and secondary education of the country. It is not an extra class led, tested and evaluated in the traditional way, but rather an interdisciplinary activity with active and creative involvement.[14]

2 The General Design of the Enforcement Mechanism

Enforcement of consumer law is possible through both judicial and administrative mechanisms. Nevertheless, the enforcement design is mainly oriented towards consumer protection through administrative authorities. Indeed, as it will be thoroughly explained below, there is no special judicial mechanism for the enforcement of consumer law. Disputes between consumers and suppliers are heard under ordinary proceedings, which at the moment are time-consuming and relatively costly. The availability of collective actions in consumer disputes can be considered as an innovative feature of the existing judicial enforcement framework, but unfortunately in practice it seems to be a limited choice for the consumers.

In contrast, consumer rights can be efficiently protected by imposition of sanctions to suppliers in case of no compliance with consumers' legislation and out of court dispute resolution through administrative mechanisms. The design of the administrative enforcement of consumer's rights is based on two distinctive pillars. The imposition of sanctions and the out of court dispute settlement accordingly fall into the competence of two distinctive authorities, as it will be immediately explained: there exist two special administrative authorities for monitoring compliance with and enforcement of the regulatory framework on consumer protection, namely the General Secretariat of Consumer Affairs, which administratively belongs to the Ministry of Economy, Development and Tourism, and the Hellenic Consumer Ombudsman. The General Secretariat of Consumer Affairs was first established by Presidential Decree 197/1997[15] and it is directed by a General Secretary, appointed by the Government. The Consumer Ombudsman, an independent authority for the extrajudicial dispute resolution in the area of consumer disputes, also supervised by the Minister of Economy, Development and Tourism, was established by virtue of Law 3297/2004.[16] The authority's main institutional role is to intervene in consumer disputes and seek their out-of-court consensual settlement. Furthermore, the Minister of Economy, Development and Tourism may decide compliance of the transactional conduct of suppliers to the *res judicata* of irrevocable judgments relating to actions

[13] See, for instance, the education program provided by the Union of Working Consumers of Greece (information available on the Union's website eeke.gr/publication_cat/ekpedefsi/).

[14] Information available at www.efpolis.gr.

[15] Government Gazette A 156.

[16] Government Gazette A 259.

brought by individual consumers or consumer associations, when such judgments are of a broader public interest for the good operation of the market and consumer protection.[17]

Other administrative authorities are also competent for monitoring the smooth application of consumer legislation, falling into the sector of their activity. Thus, indicatively but not restrictively, the National Organization for Medicines, the Hellenic Data Protection Authority, the National Council for Radio and Television, the Regulatory Authority for Energy, are all competent to receive complaints on infringements of the relevant provisions on consumer protection and subsequently to either transmit them to the Consumer Ombudsman or to impose administrative sanctions. Specifically:

(a) The National Council for Radio and Television is an independent administrative authority that supervises and regulates the radio/television market, founded in 1989.[18] It is a seven-member body, consisting of a President, a Vice President and five members, all appointed by the Greek Parliament by consensus of all the political parties. The National Council for Radio and Television oversees and regulates the radio and television market. The National Council for Radio and Television, *ex officio* or following a complaint, will rule on an alleged infringement of the provisions of Presidential Decree 109/2010,[19] implementing Directives 2010/13/EC and 2007/65/EC on audiovisual media services including audiovisual commercial communication, sponsorships and product placement. It may accordingly proceed to impose sanctions of an administrative, civil and/or penal nature for any proved offence, mainly in line with Law 2328/1995,[20] regarding private television and local radio, or Law 2644/1998,[21] regarding pay-TV.
(b) The National Telecommunications and Post Commission is an independent self-funded administrative authority, which regulates, supervises and monitors the electronic communications and postal services market in Greece. It was established in 1992 under Law 2075/1992[22] and its institutional purpose is to promote the development of the two sectors, to ensure the proper operation of the relevant market in the context of sound competition and to provide for the protection of the interests of the end-users. Among its various duties pertains the regulation of issues of consumer protection both in the electronic communications and the postal services sector, the supervision and monitoring of the implementation of the relevant legislation and the imposition of sanctions. The

[17]Article 10(21) ConsPL. This provision has been considered consistent with the Greek Constitution by decision no. 1210/2010 of the Council of State (2010). Χρονικά Ιδιωτικού Δικαίου (Chronika Idiotikou Dikaiou), 545.

[18]By Law 1866/1989, in force since 6 October 1989 (Government Gazette A 222).

[19]Government Gazette A 190.

[20]Government Gazette A 159.

[21]Government Gazette A 233.

[22]Government Gazette A 129.

National Telecommunications and Post Commission is using consumers' complaints in order to improve the exercise of its supervisory and monitoring role. Although it has no authority for out-of-court dispute resolution related to contracts on the provision of electronic communications networks and services or postal services, it has nevertheless the power to impose sanctions to the suppliers who don't comply with their obligations towards the consumers and to issue codes of conduct.

(c) The Personal Data Protection Authority is another independent administrative authority functioning under the auspices of the Ministry of Justice, established by Law 2472/1997.[23] Main task of the Authority is to monitor the implementation of the legislation on the protection of individuals from the processing of personal data. The Personal Data Protection Authority may impose on the Controllers, namely any natural or legal person who determines the purpose and means of the processing of personal data, administrative sanctions for breach of their duties arising from all legal provisions on the protection of individuals from the processing of personal data.

(d) Furthermore, according to Ministerial Decree 22261/2002[24] on the advertisement of non-prescription medicinal products, and Joint Ministerial Decision 83657/2005[25] implementing EC Directive 2001/1983 on the Community Code relating to medicinal products for human use, advertising to the general public of a medicinal product must contain a minimum amount of information regarding the specific product and must also comply with specific prohibitions. For the purpose of ensuring that the foregoing regulatory framework is followed by regulated entities, the National Organization for Medicines,[26] a public law entity under the auspices of the Ministry of Health, may take any necessary action to prohibit an advertisement, impose fines or other sanctions provided by law.

(e) Finally, the Regulatory Authority for Energy is competent to receive complaints on infringements of the relevant provisions on consumer protection and subsequently to transmit them to the Consumer Ombudsman.

[23]Government Gazette A 50. Subsequently amended by Law 3471/2006, in force since 28 June 2006 (Government Gazette A 133), transposing Directive on the processing of personal data and the protection of privacy in the electronic communications sector (2002/58/EC).

[24]Government Gazette B 284.

[25]Ministerial Decision 83657/30.12.2005 (Government Gazette B 59), harmonizing Greek legislation with that of the Community in the Field of Production and Marketing of Medicinal Products for Human Use, in compliance with Directive on the Community Code for Medicinal Products for Human Use (2001/1983/EC), as amended by Directives on Traditional Herbal Medicinal Products (2004/27/EC, 2004/24/EC) and Art. 31 of Directive on setting Standards of Quality and Safety for the Collection, Testing, Processing, Storage and Distribution of Human Blood and Blood Components (2002/1998/EC). Replaced by Joint Ministerial Decision 32221/29.4.2013 (Government Gazette B 1049).

[26]Established by Law 1316/1983 (Government Gazette A 3). The President, the Vice-Presidents and the Members of the Board are appointed by the Minister of Health.

3 Specialised Agencies and the Enforcement of Consumer Law

As already explained above, there exist two specialised administrative authorities in the enforcement of consumer law, namely the General Secretariat of Consumer Affairs and the Consumer Ombudsman:

(a) The General Secretariat of Consumer Affairs was established by Presidential Decree 197/1997, while at present its function is mainly regulated by Presidential Decree 116/2014.[27] The Secretariat is not an independent institution; it appertains administratively to the Ministry of Economy, Development and Tourism, along with another five General Secretariats. Head of the Secretariat is the General Secretary of Consumer Affairs, who is directly appointed by the Government. The Secretariat, as part of the Ministry of Economy, Development and Tourism, belongs to the central government; thus disposing no branches in other regions or cities of Greece. It is structured in several General Directorates: the most important for consumers' protection is the General Directorate of Consumers Protection and Market Supervision which consists of the Directorate of Consumers Policy and Information, the Directorate of Consumers Protection and the Directorate of Institutional Regulations and Supervision of Market Products and Services. The General Secretariat is competent to design policies which will secure the smooth operation of the market, to moderate public contracts of goods and services and of course to enforce consumer law. The strategic objectives of the General Secretariat regarding consumers are the protection of consumers' rights, the advocacy of information on consumers' issues, the promotion of their organization in consumers' associations and the protection of consumers' health, safety and economic interests. The Secretariat also aims at the consumers' welfare through enhancing business competition and market regulation. In general, it is in charge of the overall protection of consumers, disposing powers in all areas relating to consumers, e.g. food law, environmental law, competition law, etc. The main competencies of the Secretariat in order to achieve the above mentioned objectives are (a) to monitor the application of the existing special legislative framework on consumers' protection, (b) to investigate consumers' reports and/or complaints, and (c) to impose administrative sanctions on suppliers in case of infringement of the relative legislation. It should be stressed out that the General Secretariat of Consumer Affairs is no competent for dispute resolution: consumer disputes can be resolved through judicial mechanisms or through alternative mechanisms for the out-of-court resolution of consumer disputes.
(b) The most important mechanism of extrajudicial dispute resolution in the area of consumer law is the Consumer Ombudsman, an independent authority supervised by the Minister of Economy, Development and Tourism, established by

[27] Government Gazette A 185.

Law 3297/2004.[28] The authority's main institutional role is to intervene in consumer disputes and seek their out-of-court consensual settlement; however, the Ombudsman is also legally endowed with the power to issue public recommendations and directives to providers in order to ensure the smooth operation of the market and the effective protection of consumers' rights from misleading and unfair commercial practices. Additionally, the Consumer Ombudsman operates as a legal consultant to the State, making concrete propositions and detailed legislative suggestions for tackling various market dysfunctions and promoting consumer protection.

4 The Role of Consumer Organisations in the Enforcement of Consumer Law

ConsPL provides for the establishment of consumer associations, which are governed by Article 10 thereof and the general provisions of the Greek Civil Code. Their exclusive purpose is the protection of consumers' rights and interests. Furthermore, they represent consumers in organisations in which consumer representation is required and they inform and advise consumers.

Consumer associations are constituted at first and secondary level. Members of consumer associations at first level shall only be individuals. Members of consumer associations at secondary level shall only be consumer associations at first level. In order to form a consumer association at first level, at least 100 founding members are required (in municipalities with population up to 5000 residents at least 50 founding members are required). Each individual is allowed to participate in only one consumer association at first level. In order to form a consumer association at secondary level, at least five consumer associations at first level are required. Similarly, each consumer association at first level is allowed to participate in only one consumer association at secondary level. Consumer associations are also allowed to be organised beyond second level, in accordance with the organisation of associations at first and secondary level.[29] They acquire legal personality once registered with the Consumer Associations Registry,[30] which is kept by the General Secretariat of Consumer Affairs of the Ministry of Economy, Development and Tourism, a public

[28] In force 23 December 2004; last amended by Law 3769/2009, in force 1 July 2009. The establishment of the Consumer Ombudsman followed a series of legal texts of the European Union, such as the Commission Recommendation of 30 May 1998 (98/257/EC) on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes and the Commission Recommendation of 4 April 2001 (2001/310/EC) on the principles for out-of-court institutions involved in the consensual resolution of consumer disputes. The Consumer Ombudsman is the most important alternative dispute resolution scheme regarding consumer disputes.

[29] Article 10(2) ConsPL.

[30] Article 10(4) ConsPL.

book to which any interested person shall have access.[31] So far, there have been certified and registered with the Consumer Associations Registry two consumer associations at secondary level, both based in the capital, and forty two consumer associations at first level based in the capital and other cities of the country.[32]

ConsPL imposes certain bookkeeping obligations, according to which consumer associations shall keep in written or electronic form the following books (numbered and sealed by the Secretary of the Court of First Instance of their seat): (a) Book of Member Registry, (b) Book of General Assembly Minutes, (c) Book of Administration Assembly Minutes, (d) Book of Funds and (e) Book of Property.[33] The resources of consumer associations shall derive exclusively from: (a) member registration rights, subscriptions and voluntary contributions, (b) income from the exploitation of their property, (c) inheritances and bequests, (d) state aids or sponsoring by Local Government Organisations, (e) allowances by the European Union, international organisations or international consumer associations, (f) a percentage of the amounts adjudicated as compensation for moral damages and (g) income from the selling of publications and the organisation of public events.[34] Consumer associations are prohibited from accepting donations, contributions or aid of every kind from suppliers or their organisations as well as from political parties or other political organisations.[35] They are also prohibited from advertising in any method enterprises of suppliers.[36]

Persons irrevocably convicted for infidelity, fraud, forgery, misappropriation, bribery and violation of provisions regarding intermediaries and drugs are prohibited from participating in the board of directors of consumer associations. Members of such board of directors shall also not receive any kind of remuneration for their services—with the exception of amounts of money covering expenses.[37]

A special five-member committee at the General Secretariat of Consumer Affairs of the Ministry of Economy, Development and Tourism is entrusted with the certification and monitoring of the operation of consumer associations.[38] The violation of consumer protection provisions as well as the announcement of untrue information to consumers entails the revocation of their certification, the fall of their board of directors, the interruption of their financing, their exclusion from collective organs of representation and, ultimately, their removal from the Consumer Associations Registry.[39] Moreover, the court may order the dissolution of a consumer association

[31] Article 10(4) ConsPL.
[32] See www.efpolis.gr.
[33] Article 10(5) ConsPL.
[34] Article 10(6) ConsPL.
[35] Article 10(8) ConsPL.
[36] Article 10(10) ConsPL.
[37] Article 10(11) ConsPL.
[38] Article 10(12) ConsPL.
[39] Article 10(27) ConsPL.

when such association has repeatedly filed actions for compensation for moral damages, which have been finally dismissed as obviously groundless.[40]

ConsPL provides that all consumer associations are entitled to request the legal protection of their members' rights before courts and administrative authorities, without receiving any fees from their members for this purpose.[41] Specifically, they are entitled to bring actions, ask for provisional measures, bring applications for annulment or for substantive judicial review against administrative acts and make representations in civil proceedings. They are also entitled to intervene in pending legal proceedings involving their members, in order to support their consumer rights.[42] Furthermore, consumer associations, which have at least 500 active members and have been entered to the Consumer Associations Register for at least 1 year are also entitled to bring class actions.[43] The relevant provisions introduce two exceptions to the rules on standing to sue, i.e. the ability of a person to become a proper party with regard to a given proceeding. Normally, standing to sue is granted only to persons whose substantive rights constitute the object of the relief sought in action. Third persons having only indirect or remote interest or fighting *pro bono publico* are not allowed to institute civil proceedings. Such actions, brought by a third party other than the holder of the subjective right in question, are admissible only when expressly permitted by law,[44] which is the case of Article 10(15) and (16) ConsPL establishing the exceptional right of consumer associations to institute civil proceedings, asking for the protection of a specific right belonging to one of their members or consumers. In this case, standing to sue is characterized not only as exceptional, but concurrent as well: the actual owner of the right can bring an action in his own name, even if an action brought by a consumer association for the same cause is pending. *Vice versa* is not possible: *lis pendens* of the action brought by the owner of the right impedes consumer associations to ask for the judicial protection of this right as well.[45] Nevertheless, consumer associations can always intervene in the pending proceeding. Intervention is regularly permissible to third parties, only if they claim a legal interest in the victory of one of the original parties. The condition of legal interest is not only connected to the *res judicata* effect or other binding effects of the decision against the third party, but also extends to any other interest related to the legal rights of the intervener.[46] Thus, the right of intervention of consumer associations in a pending case between a consumer and a supplier would be doubtful if it was not expressly provided by the ConsPL.[47]

[40] Article 10(29) ConsPL.

[41] Article 10(25) ConsPL.

[42] Article 10(15) ConsPL.

[43] Article 10(16) ConsPL.

[44] Kerameus (2008), p. 349; Yessiou-Faltsi (2011), p. 125.

[45] Alexandridou and Apalagaki (2008), pp. 549–586.

[46] Yessiou-Faltsi (2011), p. 146.

[47] Alexandridou and Apalagaki (2008), no. 39. To the best of our knowledge, there are no other associations, such as NGO's etc., playing a role in the enforcement of consumer law.

5 Private Regulation and Enforcement of Consumer Law

Private bodies that regulate their activities in the market, playing also an important role in protecting consumers, are the Advertising Self Regulation Agency and the Hellenic Bank Association. The Hellenic Ombudsman for Banking-Investments Services is the only private body dealing with the enforcement of consumer law. Specifically:

The Advertising Self Regulation Agency was founded in 2003 by the Hellenic Association of Communication Agencies and the Hellenic Advertisers Association. It is a non-profit legal entity of private law, which has undertaken to implement the Hellenic Advertisement and Communication Code and to operate a self-regulation mechanism.[48]

The Hellenic Bank Association (H.B.A.) is also a non-profit legal entity of private law representing Greek and foreign credit institutions operating in Greece. It was founded in 1928 and today has 16 members, of which 7 are regular and 9 are associated. It seeks to promote the Greek banking and financial system and to contribute to the development of the Greek economy, to protect and represent the interests and rights of its member banks and to undertake the amicable and out-of-court settlement of disputes between its member banks and parties in transaction therewith via the services offered by the Hellenic Ombudsman for Banking-Investments Services.[49]

The Hellenic Ombudsman for Banking-Investments Services (H.O.B.I.S.) is the only "private ADR scheme" in Greece with regard to the enforcement of consumer law. It is a private non-profit entity, which was set up in 2005, following the merger of the Banking Ombudsman and the Investment Ombudsman. It considers fairly, impartially and openly, disputes arising from the provision of banking and investment services, aiming at their amicable settlement. It examines disputes that arise from the supply of banking and investment services provided by the banks and investment companies situated in Greece as well as cross border disputes as member of FIN-NET and complaints of consumers of other Member States who make transactions with banks situated in Greece.[50] Complaints should be submitted to the H.O.B.I.S. in writing. Under no circumstances does the H.O.B.I.S. complaint handling procedure interrupt or suspend any legal time limits with respect to bringing the case to court. The H.O.B.I.S. proposes an amicable settlement of the dispute. If the parties accept it, the process is completed. In the event that the complaint is not resolved this war, the H.O.B.I.S. issues a written recommendation to the parties, which should be accepted or rejected by the parties. If the

[48]Papaioannou (2008), pp. 614–615. Extensive information can be found on the Advertising Self Regulation Council's website www.see.gr.

[49]Extensive information can be found on the Hellenic Bank Association's website www.hba.gr.

[50]Being also a registered ADR entity under Joint Decision No 70330οικ./2015, Government Gazette B 1421.

recommendation is not accepted by either one of the parties, the complaint can be taken to court instead. The H.O.B.I.S. services are free of charge for consumers.[51]

6 Courts and the Enforcement of Consumer Law

Judicial organization and procedure have always possessed clear constitutional underpinnings and the right of access to courts has been raised to constitutional pre-eminence: under Article 20 I of the Constitution, everyone is entitled to legal protection by the courts and may plead before them his position on his rights or interests, as specified by law. Furthermore, the judiciary is genuinely separated from the other two state powers, *i.e.* the legislative and the executive branch of state authority.

The law governing judicial organization is not contained in a single enactment. Relevant provisions are to be found not only in the Constitution, but also in the Code on Judicial Organization and on the Status of Judicial Officers, as well as in other special laws, some of them quite extensive. Justice is administered by three hierarchies of courts: administrative, civil and criminal.[52] Greek procedural law, developed under the basic civil law concept of distinction between substance and procedure, is accordingly divided into several branches, each corresponding to the equivalent field of substantive law, mainly comprising Administrative Procedure, Civil Procedure and Criminal Procedure. The above three separate systems of hierarchies and procedures correspond to a twofold scheme in terms of judges: while ordinary justice includes civil, criminal and administrative courts, the judiciary is the same for both civil and criminal courts.[53]

All private matters, contentious and non-contentious, pertain to the ordinary civil courts. Justices of the peace, one-member district courts and multi-member district courts are the three types of civil courts, which adjudicate cases at first instance. All civil disputes are principally subject to an ordinary appeal before the one-member or three-member court of appeal; one-member district courts adjudicate over appeals against decisions of the justices of peace. Areios Pagos is the civil and criminal Supreme Court of Greece, acting only as a court of cassation, confining its extraordinary review to questions of law, having no authority to reverse findings of fact.

There are no special courts for consumer cases, nor special commercial courts. Disputes between consumers and suppliers, due to breach of private rights stemming from consumer legislation, are heard in ordinary civil courts under ordinary proceedings according to the general provisions on subject-matter and territorial competence of the Code of Civil Procedure. As a rule, subject-matter competence depends on the amount in controversy. The current lines of demarcation run at

[51] See Bolos (2008), pp. 1493, 1506 et seq. Extensive information can be found on the Hellenic Ombudsman for Banking-Investments Services' website www.hobis.gr.

[52] Kerameus (2008), pp. 342–343; Yessiou-Faltsi (2011), p. 73.

[53] Yessiou-Faltsi (2011), pp. 36–37.

20,000 Euros as between justices of peace and one-member district courts; and at 250,000 Euros as between one-member and multi-member district court. Territorial competence usually depends on the defendant's domicile within the court's district. Business domicile is an additional ground for related claims.

Pursuant to Article 9(i) of ConsPL, all consumers or consumer associations shall be entitled to initiate court action in case of infringement of the provisions on the prohibition of unfair and aggressive commercial practices (Article 9a-9h ConsPL). The provided remedies are the termination of the unfair commercial practice by court decision and its future omission, as well as pecuniary and non-pecuniary damages. The above legal remedies may be exercised jointly or separately, against one or more suppliers of the same economic sector, or against a code owner, in case he promotes a code of conduct that encourages no compliance with the ConsPL provisions. The Court may upon request order the publication of its decision on the termination of the unfair commercial practice through the press or other media, as well as the publication of a corrective statement by the infringer. The accused of infringement supplier shall be obliged to provide the Court with evidence on the accuracy of the alleged facts concerning the commercial practice, if it is deemed necessary by the Court. If the evidence is not submitted or it is considered inadequate, the claimant's allegations shall be deemed to be true. It should be noted that according to Article 338 of the Code of Civil Procedure on the burden of proof each party is obliged to prove the facts which are required to support his self-contained claim or counter-claim. The provision of Article 9i ConsPL introduces at the court's discretion a reversal of the burden of proof in favour of the consumer, who is deemed to be the weaker party in litigation.

No specialised court tariffs or free legal aid for consumer disputes exist. The general provisions of Article 194 et seq. of the Code of Civil Procedure on the 'benefit of poverty' and Law 3226/2004 on legal aid in civil and commercial disputes[54] are applicable to consumer litigation. Law 3226/2004 has been promulgated to implement Directive 2002/8/EC of the Council of 27 January 2003[55] to improve access to justice in cross-border disputes by establishing minimum common rules relating legal aid for such disputes. It introduced a complete system of legal aid for civil and commercial matters covering both internal disputes as well as disputes with cross-border implications when the parties are citizens of a Member State of the European Union or have their domicile or residence in a Member State. Legal costs of natural persons with low income, including the costs for the appointment of lawyers, notaries, or bailiffs, if requested, are undertaken, totally or partly, by the State, once they have been allocated by the Court to these parties. Legal aid is granted through a special proceeding, designed to verify the economic situation of the applicant through documentary or other means of evidence, and extends to all instances as well as to enforcement proceedings. A request for legal aid shall additionally satisfy the condition that the legal remedy is admissible and not manifestly unfounded, whereas the significance of the case for the applicant should

[54]Law 3226/2004. Legal aid to citizens with low income etc. (Government Gazette A 24).

[55]EE L 26, 31.1.2003, 41.

be also estimated by the court. After the enactment of Law 3226/2004 the application of the provisions of Article 194 et seq. of the Code of Civil Procedure has been limited to legal entities as well as to individuals who are not citizens of a Member State of the EU and have their domicile or residence outside the EU.[56]

Statistic facts about the percentage of consumers and traders who are satisfied with the outcome and timing of judicial consumer disputes are unfortunately not available. Court costs could be characterized as relatively low, however procedures may be complex. The main disadvantage of the state-administered justice is its time-consuming character in order not only to obtain a final court decision, i.e. a decision with *res judicata* effect which is enforceable, but in terms of its enforcement as well. However, a very recent and extensive modification of the Code of Civil Procedure[57] provides for a much speedier first-instance process, mainly based on documentary evidence, which hopefully will prove to be much less time and money consuming than the existing procedure.

7 Enforcement Through Collective Redress

Greek procedural law in principle does not provide for the admissibility of collective redress. However, Article 10(16) ConsPL provides that consumer associations having at least 500 active members and entered to the Consumer Associations Register for at least 1 year may bring any kind of action in order to protect consumers' general interests (collective action—*Verbandsklage* according to German law).[58] Such action may also be brought if a certain illegal conduct infringes the interests of at least thirty consumers. Collective actions may be brought jointly by more than one consumer associations at first level, even if the number of active members of each of them is smaller than the provided standard as long as the total number of active members exceeds this standard. Similarly, collective action may be filed jointly by more than one consumer associations at first and secondary level. A decision of the Board of Directors of the consumer association is required for the

[56]Yessiou-Faltsi (2011), p. 206.

[57]By virtue of Law 4335/2015, in force since 1 January 2016.

[58]Karakostas (2016), pp. 419 et seq.; Douga (2010), p. 253; Douga (2015), pp. 844–845. In collective actions against suppliers the general rules on standing to sue shall apply, since consumer association is regarded as the actual owner of the right in dispute, although in reality it is not a contractual party (see Alexandridou and Apalagaki 2008, nos. 38, 50). According to contrary opinions, collective action is a short of *actio popularis*: consumer associations are not the actual owners of the right in question but merely defendants of general interests: Nikas (2003), p. 314; Koussoulis (2002), p. 1099.

initiation of the relevant proceedings.[59] In no case, however, are individual consumers eligible to bring such actions.[60]

In this framework, a number of claims—of non-restrictive character—are mentioned in ConsPL, such as claims against the supplier to cease and desist from any illegal conduct, even prior to its materialisation, regarding the use of unfair standard terms, contracts negotiated away from business premises, contracts negotiated at a distance, after-sales services, defective products, misleading, unfair, comparative or direct advertising, etc., as well as claims for the compensation of moral damages. Consumer associations can also demand for interim protection of their members' rights while the judicial decision is still pending.

The collective action shall be filed in an exclusive time limit of 6 months as from the last manifestation of the illegal conduct constituting its basis.[61] The multimember court of first instance of the residence or seat of the defendant has exclusive competence for the hearing. In the event that the subject matter of the action is a radio or TV advertisement, the multimember court of first instance where the radio or TV station has its seat shall be exclusively competent.[62] Collective actions concerning claims for the omission of illegal conduct of the supplier and compensation for moral damages are heard under the non-contentious proceedings, while the rest are heard under the ordinary proceedings, with the exception of claims for interim protection, which are heard under the special proceedings of interim measures.[63]

The judgment of a collective action heard under the non-contentious proceedings has an *erga omnes* effect, also applying to persons who were not litigants. A judgment declaring the right of compensation for damages applies also in favor of all damaged consumers, even if they were not litigants. Provided that the judgment in the latter case becomes irrevocable, any damaged consumer can notify his claim to the supplier against whom the judgment has been issued; if the consumer is not compensated within 30 days as form the notification, he can claim the issuance of a payment order against the supplier. The right of individual consumers to bring an action shall not be prejudiced by the dismissal of a collective action.[64]

[59] After the last amendments of ConsPL, collective action may also be brought by commercial, industrial and professional chambers in the event of claims for moral damages against their suppliers, as well as by eligible entities of other EU Member States in the event of claims against a supplier's illegal conduct and claims for interim protection. Article 10(17) and (30) ConsPL.

[60] Bolos (2008), p. 1584.

[61] Article 10(18) ConsPL. With the exception of claims for the recognition of the right of restitution of damages, which shall be filed within a prescription time of 5 years as from the time the injured person has had knowledge of the damage and in any case 20 years after the damaging conduct occurred, according to Article 937 of the Greek Civil Code.

[62] Article 10(19) ConsPL.

[63] Article 10(20) ConsPL. For an assessment of this provision see Bolos (2008), pp. 1586 et seq.

[64] Article 10(20) ConsPL.

At the moment, there exist no official data as regards the number of cases of collective redress that have occurred in Greece. On its website,[65] consumer association 'E.K.PI.Z.O.' mentions that it is the only Greek consumer association having brought collective actions since 1996: 35 out of total 45 actions filed in this period of time had a positive outcome.

8 Alternative Mechanisms for the Resolution of Consumer Disputes

Alternative mechanisms for the out-of-court resolution of consumer disputes are provided by (a) Article 11 ConsPL providing for the establishment of committees of amicable settlement of consumer disputes in the municipalities of the country, (b) Law 3297/2004 providing for the establishment of the Consumer Ombudsman and (c) Joint Decision No 70330οικ./2015 of the Minister of Economy, Development and Tourism and the Minister of Justice, Transparency and Human Rights implementing Directive 2013/11/EU on alternative dispute resolution for consumer disputes and providing for additional measures for the implementation of Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes. Committees of amicable settlement and the Consumer Ombudsman are purely publicly operated mechanisms, whereas the ADR mechanisms introduced by Joint Decision No 70330οικ./2015 may also be privately operated. In addition to these sector-specific ADR schemes, the general provisions of Law 3898/2010 on mediation in civil and commercial matters (hereinafter: MedL) are also applicable. Specifically:

8.1 Committees of Amicable Settlement

In accordance with Article 11 ConsPL, three-member committees of amicable settlement of disputes between suppliers and consumers or consumer associations shall be established in each of the municipalities into which Greece is structured administratively. Such committees are supervised by the Consumer Ombudsman. They consist of a lawyer appointed by the board of directors of the local bar association, a representative of the local chamber of commerce or industry appointed by the board of directors of the chamber and a representative of the local consumer associations nominated by their boards of directors. Cases are brought before the committees upon request of consumers, consumer associations and the Consumer Ombudsman, and are heard within a maximum of 15 days following submission of the plea; interested parties must be invited in writing at least 5 days before the hearing. Whenever special conditions so require, the chairman of a committee can

[65] See www.ekpizo.gr.

extend the time limits by a maximum of 5 days. Interested parties can represent themselves at the hearing or they can appoint a lawyer or authorize a third person for this purpose.

The decisions of such committees, which must be notified to the Consumer Ombudsman and the parties within a maximum of 15 days after the hearing, are not binding for the parties and are not considered as enforceable instruments.

8.2 Consumer Ombudsman

By virtue of Law 3297/2004, the Consumer Ombudsman, as the main "public ADR scheme",[66] has been appointed the authority responsible for the out-of-court consensual resolution of consumer disputes.

The Consumer Ombudsman undertakes cases *ex officio* or upon a signed request submitted by at least one of the interested parties (natural or legal persons or associations) within 3 months from the day the complainant was fully informed about the harmful and damaging act. He also undertakes requests of consumers or consumer associations rejected in the framework of previous out-of-court dispute settlement proceedings and is entrusted, in particular, with the review of decisions of committees of amicable settlement. Nevertheless, he does not intervene in cases pending before regular courts.[67]

The Consumer Ombudsman examines the case in an objective, impartial and confident manner and promotes the amicable settlement of the dispute, endeavoring to reconcile the parties. The interested parties can communicate their views to the Consumer Ombudsman and be informed about the arguments of the opposite party. If a settlement is achieved, a relevant record is drawn up and signed by both parties or by their representatives. Once such settlement is submitted to competent court, it also becomes enforceable, having the same legal effects as an in-court settlement. If no settlement is reached, the Ombudsman makes a written recommendation to the parties in order to solve their dispute. If one of the parties does not comply with the recommendation, the Ombudsman has the right to disclose the facts and notify the relevant findings to the competent sanctioning authorities.[68]

[66] Bolos (2008), p. 1493.

[67] Article 3(1)–(2) of Law 3297/2004.

[68] Article 4 of Law 3297/2004.

8.3 ADR Mechanism Under Joint Decision No 70330οικ./2015

Transposing Directive 2013/11/EU on ADR for consumer disputes and taking the necessary measures for the implementation of Regulation (EU) No 524/2013 on ODR for consumer disputes, Joint Decision No 70330οικ./2015 of the Minister of Economy, Development and Tourism and the Minister of Justice, Transparency and Human Rights is intended to ensure access to simple, efficient, fast and low-cost ways of resolving disputes arising from sales or service contracts when both supplier and consumer are located in the European Union.

The Decision provides for the establishment of permanent ADR entities, which should conclude online and offline dispute resolution proceedings concerning both domestic and transnational disputes in a fair and effective way.[69] ADR entities shall operate in a transparent way and shall ensure the expertise, the independence and the impartiality of their members.[70] The parties shall have access to such procedures free of charge and without being obliged to retain a lawyer; at the same time, however, the parties are not deprived from their right to independent advice or to be represented or assisted by a third party at any stage of the procedure.[71] The parties shall be informed in detail about the process and the legal effects of a possible settlement, and shall also have the possibility of withdrawal from the procedure at any stage if they are dissatisfied with the performance or the operation of the procedure.[72]

The filing of an application for dispute resolution shall interrupt the statute of limitations and the prescription period for as long as the procedure lasts. Limitation and prescription period that has been interrupted restarts once the procedure is terminated in any way.[73] The whole process should normally not exceed 90 days.[74]

In the event a settlement is achieved, a relevant record is drawn up by the ADR entity. Once such settlement is submitted to competent court, it also becomes enforceable, having the same legal effects as an in-court settlement. If no settlement is reached, a relevant record is also drafted.[75]

ADR entities under this scheme shall be registered in the relevant Registry, which is kept by the General Secretariat of Consumer Affairs of the DG Consumer Protection and Market Supervision of the Ministry of Economy, Development and Tourism and contains information on the specific ADR entities. They should, furthermore, publish annual reports on their websites and provide the General

[69] Article 6 of Joint Decision No 70330οικ./2015.

[70] Article 7 of Joint Decision No 70330οικ./2015.

[71] Article 9 of Joint Decision No 70330οικ./2015.

[72] Article 10 of Joint Decision No 70330οικ./2015.

[73] Article 11 of Joint Decision No 70330οικ./2015.

[74] Article 9 of Joint Decision No 70330οικ./2015.

[75] Article 9 of Joint Decision No 70330οικ./2015.

Secretariat of Consumer Affairs with biennial reports concerning their activities.[76] So far, there are two ADR entities entered to the Registry, a public one, namely the Consumer Ombudsman, and a private one, namely the Hellenic Ombudsman for Banking-Investment Services.

With regard to the implementation of the ODR Regulation, Joint Decision No 70330οικ./2015[77] appoints as from 9 January 2016 the European Consumer Centre Greece[78] as contact point for the out-of-court resolution of disputes concerning contractual obligations stemming from online sales and service contracts between a consumer resident in the EU and a trader established in the EU, in the framework of the ODR platform which has been established by the European Commission and is accessible for consumers and traders as of 15 February 2016.[79]

8.4 Mediation

According to Article 3(2) of Joint Decision No 70330οικ./2015, the provisions of MedL are also applicable to consumer disputes.[80] Implementing Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters, MedL establishes a coherent legal framework for the regulation of both domestic and cross-border mediation and applies to mediations taking place in Greece.

The parties may in principle agree to have recourse to mediation before or during *lis pendens* (mediation *ex voluntate*) or they may be invited by the court to do so during the pendency of a suit (mediation *ex juditio*). Mediation may further be ordered by another EU court as well as be imposed by another provision of law (mediation *ex lege*).[81] The recourse to mediation interrupts the statute of limitations and the prescription period for as long as the mediation procedure lasts. Limitation and prescription period that has been interrupted restarts once the report of failure is drafted or a party serves the statement abandoning the mediation to the other party and the mediator or the procedure is in any other way terminated.[82] The commencement of the mediation process presupposes the existence of an agreement to mediate. Such agreement is evidenced by virtue of a written document or the court records.[83]

MedL defines the mediator as "a third person in relation to the parties, who is asked to conduct mediation in an effective, competent and impartial way, regardless of the way in which that third person has been appointed or requested to conduct the

[76] Article 17 of Joint Decision No 70330οικ./2015.

[77] Article 5 of Joint Decision No 70330οικ./2015.

[78] See www.eccgreece.gr.

[79] The link to the ODR platform is ec.europa.eu/odr.

[80] See Koumpli (2015), pp. 961–978.

[81] Article 3 MedL.

[82] Article 11 MedL.

[83] Article 2 MedL.

mediation", providing also that he shall be accredited by the Ministry of Justice, Transparency and Human Rights.[84]

The mediation process is regulated in a spirit of flexibility; however, there are framework provisions and basic principles governing its conduct. In this respect, it is provided that (a) the mediator shall be appointed by the parties or a third person of their choice; (b) the parties shall attend the mediation process accompanied by authorized attorneys; (c) the mediator can communicate and meet in private each party; (d) no records are kept during the mediation process; (e) the parties are free to terminate the mediation procedure whenever the wish.[85] Confidentiality[86] as well as independence and impartiality[87] are also described as core obligations of the mediator, in an attempt to ensure the fairness of the process.

After the successful conclusion of the mediation process, the mediator, the parties and their attorneys sign the relevant minutes. Upon request of at least one of the parties, the mediator shall submit the original document of the minutes to the court of first instance of the jurisdiction where the mediation took place. Since their filing to the clerk of the court of first instance, the minutes recording a mediation agreement constitute an enforceable title.[88,89]

9 Sanctions for Breach of Consumer Law

ConsPL provides for the imposition of administrative sanctions in the event of infringement.[90] Following a complaint or ex officio, the Minister of Economy, Development and Tourism may impose on the breaching supplier one or more of the following sanctions: (a) recommendation for compliance within specific time limit; (b) a fine of fifteen hundred (1500) to one million (1,000,000) Euros; (c) temporary interruption of the business operation for a period of 3 months to 1 year when more than three enforcement ministerial decisions have been issued against the same supplier. Moreover, in case a supplier does not respond to consumer complaints, the Minister of Economy, Development and Tourism may impose the following sanctions: (a) recommendation for compliance within specific time limit, notifying that a fine may be imposed; (b) a fine of five hundred (500) to five thousand (5000) Euros; (c) a fine of five thousand (5000) to fifty thousand (50,000) Euros in

[84] Article 4 MedL.

[85] Article 8 MedL.

[86] Article 10 MedL.

[87] Article 4 MedL.

[88] Article 9 MedL.

[89] For an analysis in the English language, see among others Diamantopoulos and Koumpli (2014), pp. 361–394; Diamantopoulos and Koumpli (2015), pp. 313–343.

[90] Article 13a ConsPL.

the event of relapse.[91] Taking into account the nature and gravity of the infringement as well as its impact on consumers, the Minister of Economy, Development and Tourism may also publicize through the press or other appropriate means the administrative sanctions imposed.[92] On the website of the General Secretariat of Consumer Affairs of the Ministry of Economy, Development and Tourism,[93] one may find a list of the administrative fines imposed as from 2013, which appears to be the most common form of sanctions in practice. On an overall assessment, the application of such sanctions should be considered satisfactory at the moment.

Despite the adequate provision of administrative sanctions, ConsPL does not provide for criminal liability in case of its infringement. Relevant criminal law provisions are scattered in various special pieces of legislation. At the same time, certain provisions of the Greek Criminal Code are also applicable (e.g. Article 302 on homicide, Article 314 on negligent body injury, Article 386 on fraud, Article 279 on sources and food poisoning, Article 281 on food adulteration, Article 422 on neglect of prevention of poisoning damages, Article 429 on infringement of provisions concerning foods, etc.[94]).

10 External Relations and Cooperation of the State, Enforcers and Consumer Organisations

Greece is member of both OECD and the European Union. As it has already been stressed out at the very beginning of this report, the existing consumer legislation is mainly the result of transposition into Greek law of the European Union's legislative initiatives on consumers' protection. Thus, OECD's policies and actions, but especially European Union's legislation, are of a major impact on the development of consumers' protection and on the formation of its main features. Apart from the overall significance of European law on Greek legislation, the establishment of the European Consumer Centre of Greece, as part of the European Consumers Centers Network is a direct effect.

The European Consumer Centres Network (ECC-Network) is a EU-wide institution, co-sponsored by the European Commission and national governments. Funding of the Network, on the EU side, is provided under the European programme for consumer policy, aiming to support the cooperation between member-states

[91]The amounts of the fines imposed may be readjusted by joint decision of Ministers of Finance and Economy, Development and Tourism.

[92]When the infringement of the provisions of ConsPL is committed by financial institutions, insurance companies or companies of investment services, the above mentioned administrative sanctions are imposed following an opinion of the Bank of Greece or the Hellenic Capital Market Commission.

[93]See www.efpolis.gr.

[94]For a thorough analysis see Papaneofytou (1996).

concerning information, advice and appeals in consumer protection matters. The ECC-Network, in its present form, is a result of the merger of two previously existing consumer protection networks, namely the Network for the extra-judicial settlement of consumer disputes (EEJ-Net), which was created following a Council Resolution of 25 May 2000 with a view to enable consumer complaints to be processed amicably, and the Network of Euroguichets, which was created in the early 1990s at the Commission's initiative, in order to inform consumers about the possibilities of the internal market and their associated rights. The European Consumer Centre of Greece (ECC-Greece) was first launched in 2005, under the auspices of the General Secretariat of Consumer Affairs, while as from 2012 ECC-Greece has been operating under the auspices of the Hellenic Consumer Ombudsman. ECC-Greece operates as contact point for providing information to consumers as regards the requirements applicable relating to consumer protection, the means of redress available in the case of a dispute between a trader and a consumer, and the contact details of associations or organisations, from which consumers may obtain practical assistance. Additionally, ECC-Greece is since 2016 contact point for the out-of-court resolution of disputes concerning contractual obligations stemming from online sales or service contracts between a consumer resident in the EU and a trader established in the Union. In general, consumers from EU member-states, Norway and Iceland facing a cross-border dispute in relation to products or services obtained from traders based in the EU, Norway and Iceland may refer to the European Consumer Centre operating in the member-state of their current residence.

Greece is also a member of ICPEN but it does not participate to London Action Plan. It should be noted though that since European Union started to be represented and directly participate in the relative networks, their influence on EU member-states is filtered and transposed through the Union's policies and institutions. Consumer Organisations in Greece are members of various international networks such as ANEC, the European consumer voice in standardization, BEUC, the European Consumer Organization, Consumers International (CI), European Consumer Debt Network (ECDN), and Transatlantic Consumer Dialogue (TACD). Unfortunately the rate of their participation can be described as extremely low.

11 Conclusions

Summing up, the regulatory framework on consumer protection in Greece, highly in line with EU and international trends in this field, is accompanied by a coherent enforcement mechanism. Such mechanism, on the one hand, provides for the imposition of administrative sanctions and criminal penalties in case of infringement and, on the other hand, enables easy access to both court and out-of-court procedures for the resolution of consumer disputes by public authorities and private entities as well, often free of charge or at a nominal cost for consumers. In this framework, consumer protection legislation, including enforcement regulation, has been

constantly evolving in order to comply with the country's EU and international obligations and to take the necessary steps towards the optimum result.

Given these considerations, the existing enforcement mechanism of consumer protection in Greece can be described as effective and satisfactory from an institutional and functional point of view, particularly with regard to the sanctioning system and the availability of ADR schemes. Certain delays in the state administered justice can be expected to significantly diminish after the last modification of the Greek Code of Civil Procedure, which attempts to ensure the acceleration of most proceedings and their ultimate effectiveness.

One should bear in mind, nonetheless, that apart from the institutional and regulatory framework, effective consumer protection heavily depends on consumer conscience and maturity. This means that consumers should be aware of their rights and eager to take action for their protection. However, despite the adequacy of the current consumer protection framework and the sources of information available, it appears that Greek consumers do not sufficiently contribute to the implementation of this framework. As a matter of fact, some alarming data are contained in the 2015 edition of the Consumer Conditions Scoreboard[95] in this respect. In spite of the prolonged financial crisis, which has caused a significant decrease in consumer income and in many cases an increase in consumer legislation infringements, Greek consumers have the lowest knowledge of consumer rights among EU consumers. Their trust in organisations and NGOs is also the third lowest in the EU. What is more, Greece has the highest percentage of consumers that did not complain while having encountered a non-negligible problem. Such findings inevitably remind us that the effective protection of consumer rights and interests, in addition to institutions, also presupposes citizen maturity and education and a necessary shift in consumer mentality and attitude.

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[95] Available at ec.europa.eu/consumers/consumer_evidence/consumer_scoreboards/11_edition/docs/ccs2015scoreboard_en.pdf.

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Enforcement of Consumer Law in Hong Kong

Vivian Tang

1 Introduction

Hong Kong is a city with a total population of 7.4 million (as of end-2017).[1] Its consumer policy has transformed over the years owing to rapidly changing concerns and developing economy. In the 1970s, the consumer policy focused on protection in the area of sales of goods, attributed to high inflation on essential daily commodities caused by the worldwide oil crisis. As the rapid economic development transformed Hong Kong from an industrial society to a financial centre, the focus of protection shifted to the area of provision of services.[2] Later, travel agencies proliferated and became an area of growing concern.[3] In the 1990s, focus turned to cases involving significant consumer interests and regulation on sales practices.[4] In the millennium, there was a shift to consumer protection in the financial services (owing to the Lehman Brothers mini-bond default).[5] Another decade later, the policies focused

[1]Census and Statistics Department, 'Population' (*Census and Statistics Department*, 19 December 2016) www.censtatd.gov.hk/hkstat/sub/so20.jsp.

[2]Consumer Council, Landmark Events of the Council in 40 Years, in Consumer Council Annual Report 2014–2015, www.consumer.org.hk/sites/consumer/files/yearbook/2014/AnnualReport%201415_1.pdf.

[3]Ibid.

[4]Ibid.

[5]Ibid.

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more on business practice issues concerning first-hand sales of residential properties[6] and fair competition[7] in the market.[8]

The current focus of Hong Kong's consumer policy is on sustainable consumption and personal privacy, owing to the fast-paced technology development and rise of online consumerism.[9] There are also increasing concerns over unfair sales tactics, particularly in beauty salons and fitness centres.[10]

2 Legal Framework for Consumer Protection

The Commerce, Industry and Tourism Branch of the Commerce and Economic Development Bureau has policy responsibilities over consumer protection.[11] Its main goals are to regulate consumer contracts, consumer safety, consumer credit, consumer health and trade practices. More recently, in the policy address in 2015, it stated that one of its policies was to enhance protection for consumers by the full implementation of the amended Trade Descriptions Ordinance.[12]

[6]The Residential Properties (First-hand Sales) Ordinance (Cap 621) came into effect in 2013 and contained provisions on sales brochures, price lists, show flats, disclosure of transaction information, advertisements, sales arrangements and certain mandatory provisions in agreements for sale and purchase.

[7]The Competition Ordinance (Cap 619), which came into full operation in 2015, aims to bring a cross-sector competition regime that prohibits a range of anti-competitive practices in Hong Kong. The term "consumers" is mentioned in the Competition Ordinance: s 21 and sch 1. Furthermore, it was the view of the Competition Commission that the Ordinance will bring "the benefits of a level-playing field to Hong Kong consumers, businesses and the wider economy': Competition Commission, Competition Ordinance Comes Into Full Effect Today (2015) www.compcomm.hk/en/media/press/files/Competition_Ordinance_Comes_into_Full_Effect_Today_EN.pdf. The term "consumers" is also mentioned in the guidelines published by the Competition Commission: see, e.g., the Guidelines to the Applications for a Decision under Sections 9 and 24 (Exclusions and Exemptions) and Section 15 Block Exemption Orders (27 July 2015), para 1.2.

[8]Consumer Council, Landmark Events of the Council in 40 Years, in Consumer Council Annual Report 2014–2015.

[9]Ibid.

[10]The Hong Kong government is considering enhancing protection in this aspect in response to the recent growing number of complaints against a gym chain for deploying aggressive sale tactics: C Lau. 'Hong Kong chief executive looks to improve consumer protection in wake of California Fitness collapse' *South China Morning Post* (14 July 2016) www.scmp.com/news/hong-kong/law-crime/article/1989868/hong-kong-chief-executive-looks-improve-consumer-protection.

[11]Commerce, Industry and Tourism Branch, Commerce and Economic Development Bureau, 'Consumer Protection' (*Commerce, Industry and Tourism Branch, Commerce and Economic Development Bureau*, 2017), www.cedb.gov.hk/citb/en/Policy_Responsibilities/consumer_protection.html.

[12]Legislative Council Panel on Economic Development, '2015 Policy Address Policy Initiatives of the Commerce, Industry and Tourism Branch, Commerce and Economic Development Bureau' LC Paper No. CB(4)363/14-15(04).

Consumers in Hong Kong are generally educated about their rights. The government has embarked on publicity and education work through various channels, aiming to increase public awareness of consumer rights and obligations under the law. Non-governmental organisations also play a role in public awareness, such as the Consumer Council and the Community Legal Information Centre.

The Hong Kong consumer protection regime has been inspired by a number of regulatory models. There are also influences from laws and policies from common law jurisdictions. Consultation documents of legislation and legislative reforms commonly contain discussion of other jurisdictions. The most common ones include England, United States of America, and Australia.[13]

While there is no principal statute on consumer protection in Hong Kong, there are a number of separate and independent pieces of legislation for consumer protection.[14] For example, in the area of consumer contracts, relevant rules on consumer contracts can be found under Sales of Goods Ordinance (Cap 26) (SOGO), Control of Exemption Clauses Ordinance (Cap 71) (CECO), Supply of Services (Implied Terms) Ordinance (Cap 457) (SSO) and Unconscionable Contracts Ordinance (Cap 458) (UCO).

The UCO empowers courts to give relief in certain contracts found to be unconscionable. The term "unconscionable" is not defined in the statute. The court refers to a non-exhaustive list in section 6(1)[15] and common law definitions[16] which tend to focus on the totality of the circumstances and conduct that give rise to unfairness in the bargaining process.

The statute has been criticized for being ineffective in protecting consumers against unfair terms.[17] Unlike the UK Unfair Terms in Consumer Contracts Regulations 1999, the court will focus on the totality of the circumstances instead of the meaning and effect of contractual terms.[18] So long as there is procedural fairness in the way the contract has been formed, then any substantive unfairness would be over-looked and not considered sufficient to be unconscionable. The burden of proof is on the party seeking to rely on the unfairness.[19] The court may choose to (a) refuse

[13]See, e.g., the Law Reform Commission of Hong Kong, 'Report on the Control of Exemption Clauses' (1986) www.hkreform.gov.hk/en/docs/rexemption-e.pdf.

[14]Consumer Council, 'Hong Kong Consumer Protection Legislations'(*Consumer Council*, 2015). www.consumer.org.hk/ws_en/legal_protection/hk_consumer_protection_legislations/Index.html.

[15]See *Hang Seng Credit Card v Tsang Nga Lee* [2000] 3 HKC 269 where the provisions concerned are credit card agreements indemnity costs provisions. The court held the agreement to be unconscionable, having considered the bank's bargaining position, the standard form of agreements, and the extortionate interest rate.

[16]See *Shum Kit Ching v Caesar Beauty Centre Ltd* [2003] 3 HKC 235 in which the Court cited *Chitty on Contracts* (28th ed, 1999) vol 1, para7-078.

[17]Mason (2014), p. 85.

[18]Consumer Council, 'Report on Unfair Terms in Standard Form Consumer Contract' (Consumer Council, 2012) www.consumer.org.hk/sites/consumer/files/competition_issues/20130304/2012040301Full_en.pdf.

[19]*南洋商業銀行有限公司及另一人對黃永光及另一人*HCA 19541/1999, para 106.

to enforce the contract; (b) enforce the remainder of the contract without the unconscionable part; or (c) limit the application of, or revise or alter, any unconscionable part so as to avoid any unconscionable result.[20]

The statute came into force for around two decades but there have only been four successful challenges to unfair terms under UCO (as of July 2014).[21] One possible reason suggested is that there is no enforcement body to pursue claims in a representative action.[22]

There is no specific legislation controlling consumer unfair terms in Hong Kong. An unfair term on its own is not sufficient to make out a case for unconscionable contract. In practice UCO is ineffective in protecting consumers from unfair terms in standard form contracts, due to ineffectual legislation, lack of specific enforcement body and restrictions on accessing legal aid.[23] The Consumer Council has recommended the introduction of a legislation modeled on the UK Unfair Terms in Consumer Contracts Regulations 1999, with appropriate modifications in view of the differences in culture and marketplace.[24] But such a legislation has not been passed in Hong Kong.

3 The General Design of the Enforcement Mechanism

3.1 Courts and the Enforcement of Consumer Law

Courts play a significant role in the enforcement of consumer law in Hong Kong. Judicial enforcement of consumer rights provide aggrieved consumers with a legally binding decision. The courts also have the power to make various orders.

The major law courts in Hong Kong include the Magistrate's Courts, the District Court, the High Court (comprises the Court of Appeal and the Court of First Instance) and the Court of Final Appeal. There is no specialised court in charge of consumer disputes, no specialized procedure before the court for consumer disputes, nor is there specialized court tariffs or taxes (or their exemption). Owing to the

[20]Unconscionable Contracts Ordinance, s 5. See, e.g., *Cheung Kam Sing & Another v International Resort Developments Ltd* [2003] 2 HKLRD 113 where the court refused to enforce an unconscionable contract. It did apply section 5(1) of the UCO, more specially section 5(1)(a), by rescinding the contract after finding it unconscionable.

[21]L Mason, 'Hong Kong consumers deserve fairer deal in goods and services contracts' (*South China Morning Post*, 14 July 2014) www.scmp.com/comment/article/1553978/hong-kong-consumers-deserve-fairer-deal-goods-and-services-contracts.

[22]Mason (2014), p. 93.

[23]Ibid.

[24]Consumer Council, 'Unfair Terms in Standard Form Consumer Contract (Full Report)' (*Consumer Council,* April 2012), www.consumer.org.hk/website/ws_en/competition_issues/model_code/2012040301FullText.html.

different jurisdictions of the courts, a consumer may address his consumer protection to different courts under different conditions.

The Court of Final Appeal is the highest appellate court in Hong Kong. It hears appeals on civil and criminal matters from the High Court. The Court of Appeal hears appeals on all civil and criminal matters from the Court of First Instance and the District Court, as well as various tribunals. The District Court hears civil disputes of a value over $50,000 but not more than $1 million. Its criminal jurisdiction is limited to 7 years' imprisonment. The Magistrates' Courts exercise criminal jurisdiction over a wide range of indictable and summary offences meriting up to 2 years' imprisonment and a fine of $100,000, subject to certain exceptions.

There are also special courts and tribunals, particularly the Small Claims Tribunal. The Small Claims Tribunal provides an informal, quick and inexpensive means to deal with claims up to HK$50,000. The main types of claims handled by the Tribunal include debts, services charges, damage to property, goods sold and consumer claims. However, no person can be represented by a lawyer in the Small Claims Tribunal. Before commencing a formal trial at the Tribunal, the Adjudicator (Tribunal's judge) and the Tribunal Officer will attempt to mediate the dispute between the parties. If both parties agree to settle, the Tribunal will grant a written consent order and further trials or hearings can be avoided. If the parties cannot reach an amicable settlement at the first hearing, they need to get ready for the subsequent trial.

There are a number of financial assistance and free legal services available to consumers who do not have the financial ability to pursue their claims: the Legal Aid; the Bar Free Legal Service Scheme; and Free Legal Advice Scheme.

3.1.1 Legal Aid

Consumers faced with financial difficulties are offered a free legal aid. If the consumer is not submitting the claim to the Small Claims Tribunal, and wish to have it tried in the District Court or the High Court, he may apply for legal aid if certain conditions set out by the Legal Aid Department are satisfied. For civil cases, consumers must pass the merits test and the means test[25]:

- Merits test—one needs to show that one has reasonable grounds for taking or defending proceedings.
- Means test—where one's financial resources do not exceed the financial eligibility limit. The current limit is HK$290,380. The Director may waive the financial eligibility limit in meritorious cases in which a breach of the Hong Kong Bill of Rights Ordinance or an inconsistency with the International Covenant on Civil and Political Rights is an issue.

[25]Legal Aid Scheme, 'Ordinary Legal Aid Scheme' (*Legal Aid Scheme*, 29 December 2016) www.lad.gov.hk/eng/las/civil/olas.html.

Consumers with financial resources lower than HK$36,297.51 will receive free legal aid. Those with financial resources higher than the said amount are required to pay contributions according to a scale.[26]

3.1.2 The Bar Free Legal Service Scheme

The Bar Free Legal Service Scheme aims to provide free legal advice and representation in court proceedings (1) where Legal Aid is not available; (2) where the applicant cannot reasonably afford private legal services; and (3) the applicant has reasonable grounds for taking or defending the proceedings.

3.1.3 Free Legal Advice Scheme

The Free Legal Advice Scheme is provided by the Duty Lawyer Service. The scheme offers preliminary legal advice to members of the public as to their legal position in genuine cases. The objective of the Scheme is to enable members of the public having genuine legal problems to have preliminary advice as to their legal position. The Scheme does not offer any follow-up service nor representation to the applicants. Unlike the Legal Aid, there is no means test. The Duty Lawyer Service is fully funded by the Government but is independently managed and administered by the Bar Association and the Law Society through the Council of the Duty Lawyer Service.

3.2 Specialised Agencies and the Enforcement of Consumer Law

There are specialized agencies and non-judicial institution in Hong Kong in charge of enforcement of consumer law. Aggrieved consumers may choose to seek assistance or make complaints to these agencies. Compared to courts, these agencies afford consumers a cheaper, simpler and quicker resolution. However, these agencies are limited to certain areas of complaints.

Some examples of these specialized agencies are the Competition Commission, the Office of the Privacy Commissioner for Personal Data, the Customs and Excise Department, the Communications Authority, and the Food and Environmental Hygiene Department (discussed below). These agencies also deal with areas of law other than consumer law. For example, the Competition Commission and the Communications Authority also deal with competition law. The Customs and Excise Department also deals with anti-drug law enforcement, intellectual property rights

[26]Ibid.

protection and customs co-operation. The Office of the Privacy Commissioner for Personal Data and the Food and Environmental Hygiene Department also deals with personal data privacy.

4 The Role of Consumer Organisations in Enforcement of Consumer Law

There is only one consumer organization in Hong Kong—the Consumer Council. The Council was established in 1974[27] and was originally tasked with the function to deal with issues of consumer rights related to sale of goods. In 1975, its functions was extended to also cover services.

The functions and powers of the Council is governed by the Consumer Council Ordinance (Cap 216). There is no mandatory legal condition for the establishment and operation of a consumer organisation in Hong Kong (e.g. impartiality, independence, qualification of the management, number of members).

The Council is not a law enforcement agency and does not possess the power of investigation or adjudication.[28] Instead, it handles complaints by means of conciliation, providing a platform for the consumer and the trader to resolve disputes by mutually acceptable agreements.[29] In the year 2014–2015, it received a total of 29,547 cases, in which 20,622 cases had pursuable grounds.[30] It resolved 13,894 cases, with the resolution rate being 73%.[31] From 2012–2013 to 2014–2015, it received a total of 87,836 cases and resolved 43,166 cases.[32] In the last 10 years, it received over 350,000 cases and resolved over 240,000 cases.[33] The most common

[27]Consumer Council, 'History of Council' (*Consumer Council*, 2015) www.consumer.org.hk/ws_en/history.

[28]Consumer Council, 'Frequently Asked Questions' (*Consumer Council*, 2015) www.consumer.org.hk/ws_en/faq.

[29]There are official statistics on the number of consumer complaints: see Consumer Council, 'Complaints Statistics' (*Consumer Council*, 16 December 2015) www.consumer.org.hk/ws_en/statistics/complaints.

[30]Consumer Council, 'Consumer Council Annual Report 2014–15' (*Consumer Council*, 2015), p 17 www.consumer.org.hk/sites/consumer/files/yearbook/2014/AnnualReport%201415_1.pdf.

[31]Ibid.

[32]Ibid.

[33]Consumer Council, 'Consumer Council Annual Report 2004-05' (*Consumer Council*, 2005), p. 18 www.consumer.org.hk/sites/consumer/files/yearbook/2004/AnnualReport20042005PDF.pdf; Consumer Council, 'Consumer Council Annual Report 2005-06' (*Consumer Council*, 2006), p. 20 www.consumer.org.hk/sites/consumer/files/yearbook/2005/CCAR2005-2006.pdf; Consumer Council, 'Consumer Council Annual Report 2006-07' (*Consumer Council*, 2006), p. 12 www.consumer.org.hk/sites/consumer/files/yearbook/2006/PDF20062007_0.pdf; Consumer Council, 'Consumer Council Annual Report 2007-08' (*Consumer Council*, 2008), p. 14 www.consumer.org.hk/sites/consumer/files/yearbook/2007/pdf20072008_0.pdf; Consumer Council, 'Consumer Council Annual Report 2008-09' (*Consumer Council*, 2009), p. 20 www.consumer.org.hk/sites/

types of consumer complaints are telecommunication services, followed by travel matters and furniture & fixtures.[34] The main problems with telecommunication services are contract termination and overcharging,[35] with the most popular subject of complaint being price/charge dispute.[36]

The Council is active in conducting research and submitting its comments to the Government. For example, in 2013, the Consumer Council announced a 3 year strategic plan with sustainable consumption being an important focus in the future (i.e. promoting greater environmental awareness).[37] The Council undertook a major study to establish consumers' knowledge of, behavior in and the priorities for sustainable consumption so as to form a baseline for designing education efforts and ongoing tracking.[38] In 2014, the Council also studied how the electricity sector could be reformed to increase the use of renewable electricity and energy efficiency, and submitted their views to the Government.[39]

The Consumer Council also runs a Consumer Legal Action Fund (CLAF) which assists consumers to pursue their matters in courts. It gives greater consumer access to legal remedies by providing financial support and legal assistance. Legal assistance may be in the form of advice, assistance and legal representation. In order to be eligible for the CLAF, normally one must have already exhausted all other means of resolving the dispute in question, and be unable to qualify for any form of legal aid.

consumer/files/yearbook/2008/pdf20082009a_0.pdf; Consumer Council, 'Consumer Council Annual Report 2009-10' (*Consumer Council*, 2010), p. 22 www.consumer.org.hk/sites/consumer/files/yearbook/2009/pdf20092010_0.pdf; Consumer Council, 'Consumer Council Annual Report 2010-11' (*Consumer Council*, 2011), p. 21 www.consumer.org.hk/sites/consumer/files/yearbook/2010/ar20102011-3_0.pdf; Consumer Council, 'Consumer Council Annual Report 2011-12' (*Consumer Council*, 2012), p. 19 www.consumer.org.hk/sites/consumer/files/yearbook/2011/03_0.pdf; Consumer Council, 'Consumer Council Annual Report 2012-13' (*Consumer Council*, 2013), p. 16 www.consumer.org.hk/sites/consumer/files/yearbook/2012/03_0.pdf; Consumer Council, 'Consumer Council Annual Report 2013-14' (*Consumer Council*, 2014), p. 20 www.consumer.org.hk/sites/consumer/files/yearbook/2013/03_0.pdf; Consumer Council, 'Consumer Council Annual Report 2014-15' (*Consumer Council*, 2015), p. 17 www.consumer.org.hk/sites/consumer/files/yearbook/2014/AnnualReport%201415_1.pdf.

[34]See footnote 65 above.

[35]Consumer Council, 'Overall Consumer Complaints Down 12% amidst Travel Complaints Rising 41%' (*Consumer Council*, 2 February 2016) www.consumer.org.hk/ws_en/news/press/2015/yearender.html.

[36]Ibid.

[37]Consumer Council, '3-YEAR STRATEGIC PLAN - New Goals, Strategies and Initiatives Unveiled' (*Consumer Council*, 30 May 2013) www.consumer.org.hk/ws_en/news/press/20130530.html.

[38]See footnote 65 above, p. 6.

[39]Ibid.

5 Private Regulation and Enforcement of Consumer Law

Private regulation helps to protect consumers and enforce consumer law by setting various sets of rules. There are a number of private bodies in Hong Kong that play a role in private regulation, such as (1) the Travel Industry Council of Hong Kong and (2) the Insurance Claims Complaints Bureau.

5.1 Travel Industry Council of Hong Kong

The Travel Industry Council of Hong Kong (TIC) is entrusted with the responsibility to regulate outbound and inbound travel agents under the Travel Agents Ordinance (Cap 218).

The TIC has developed a number of schemes to regulate travel agencies. For example, under the Refund Protection Scheme (Registered Shops) for Inbound Tour Group Shoppers, group visitors taken to registered shops by their travel agents registered with the Council are entitled to a full refund if they are not satisfied with their purchases and make a refund request within 6 months (for mainland visitors) or 14 days (for overseas visitors) after purchase.[40] Travel agents must register the shops with the Council before taking visitors to these shops. Those shops must honour a number of pledges made to the Council. Shops in breach of any pledges will be given demerits by the Committee on Shopping-related Practices. Shops which accumulated 30 demerits will have their registration revoked and travel agents will be prohibited to arrange for visitors to visit the deregistered shops.[41] The TIC regulates the travel agents through its Code of Conduct for Members.[42]

The Council mediates in disputes between members and related sectors of the industry and the public. Where there is any alleged infringement of the General Code of Conduct, the TIC Executive Office will carry out preliminary investigation. Where the Executive Office finds that there is prima facie infringement, the facts will be submitted to the Compliance Committee which has absolute discretion to penalise the member in accordance with the TIC Articles of Association.

[40]Travel Industry Council, 'Advice for Travellers – Inbound Travellers' (*Travel Industry Council of Hong Kong*, undated) www.tichk.org/public/website/en/travellers/in_advice/html.

[41]Ibid.

[42]Travel Industry Council, 'Code of Conduct for Members – Preamble' (*Travel Industry Council of Hong Kong*, undated) www.tichk.org/public/website/en/codes/codes_of_conduct/part_one/html.

5.2 The Insurance Claims Complaints Bureau

The Insurance Claims Complaints Bureau (ICCB) is a self-regulatory initiative implemented by the insurance industry to protect consumer interest. One of the main objectives of ICCB is to receive referrals for complaints relating to claims arising out of personal insurance policies and to facilitate the settlement or withdrawal of such complaints, disputes or claims whether by the making of awards (decisions/verdicts), or by such means as shall seem expedient. It regulates the insurance industry through the Code of Conduct for Insurers issued by the Hong Kong Federation of Insurers.[43]

ICCB was established to determine disputes between insurers and individual (not corporate) policyholders relating to rejected or partially-rejected claims. Its Complaints Panel can make a ruling in dealing with complaints against insurers.[44] Following any meeting or hearing of a complaint, the Complaints Panel may upon resolution by the members of the Complaints Panel facilitate the satisfactory settlement or withdrawal of the complaint by making an award against the member against whom the complaint is made, or making a recommendation, or dismissing the complaint.[45]

6 Enforcement Through Collective Redress

Collective redress generally involves a group of persons involved in the action against a trader and may be classified in four major categories: the representative action, the group action, the model or test case and the US style class action. It is an effective means of consumer law enforcement that overcomes many disadvantages of conventional individual enforcement.

The only type of collective redress permitted in Hong Kong is representative proceedings under Order 15 rule 12 in the Rules of the High Court (Cap 4A) ("RHC") introduced on 1 May 1988.[46] Order 15 rule 12 RHC provides that, where numerous persons have the same interest in any proceedings, the proceedings may be begun, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing any or all of them. This has been held to mean that all the members of the alleged class should have a common interest and a common

[43]The Hong Kong Federation of Insurers, 'The Code of Conduct for Insurers' (*The Hong Kong Federation of Insurers*, undated) www.hkfi.org.hk/pdf/en/download/e_abt.code.pdf.

[44]The Insurance Claims Complaints Bureau, 'Powers of the Complaints Panel' (*The Insurance Claims Complaints Bureau*, 2006) www.iccb.org.hk/en_powercomplaints.htm.

[45]The Insurance Claims Complaints Bureau, 'Complaints Handling Procedures' (*The Insurance Claims Complaints Bureau*, 2006) www.iccb.org.hk/en_complaintshandling.htm.

[46]The Law Reform Commission of Hong Kong, 'Report on Class Actions' (May 2016), ch 1, www.hkreform.gov.hk/en/docs/rclassactions_e.pdf.

grievance, and that the relief is in its nature beneficial to all.[47] In addition, under this rule the Court may, at any stage of proceedings, on the application of the plaintiff and on terms as appropriate, appoint any one or more of the defendants or other persons to represent the defendants.

The Law Reform Commission's Class Actions Sub-committee published on 5 November 2009 a consultation paper proposing the introduction of a mechanism for class action in Hong Kong, in order to enhance access to justice and provide an "efficient, well-defined and workable mechanism".[48]

The paper proposed that the new class action regime should adopt an "opt-out" approach. Where the court certifies that a case is suitable for a class action, any member of the class, as defined in the court order, would be automatically bound by the subsequent litigation, unless he "opts out" of the class action within the time limits prescribed by the court order. If the proceedings involve parties from outside Hong Kong, an "opt-in" procedure should be the default position with a discretion given to the court to adopt an "opt-out" procedure in the relevant circumstances. So far these proposals have not been adopted in Hong Kong.

7 Sanctions for Breach of Consumer Law

Sanctions plays an important role in a modern regulatory system as it is a precondition to an effective enforcement of the law. Enforcement tools can range from pecuniary fines and imprisonment to the prohibition of business activities for a specific period of time.

Under Hong Kong consumer law, the most common forms of sanction in practice are pecuniary fines and imprisonment. Most, if not all, of the major legislations for consumer protection provide for pecuniary fines and/or imprisonment.[49] Forfeiture and/or disposal of goods can also be seen in some legislations.[50] In certain legislations, there may be some form of disqualification or suspension of registration required for the related business.[51]

Furthermore, breach of consumer legislation can lead to criminal liability in Hong Kong. Situations where one may face criminal liability include manufacturing or

[47] *Pan Atlantic Insurance Co. and Republic Insurance v Pine Top Insurance Co* [1989] 1 Lloyd's Rep 568.

[48] See footnote 92 above.

[49] See, e.g., Sales of Goods Ordinance (Cap 26), section 52; Consumer Goods Safety Ordinance (Cap 456), section 28; Money Lenders Ordinance (Cap 163), section 32; Undesirable Medical Advertisements Ordinance (Cap 231), section 6; Travel Agents Ordinance (Cap 218), section 48.

[50] Gas Safety Ordinance (Cap 51), section 32; Pesticides Ordinance (Cap 133), section 18; Weights and Measures Ordinance (Cap 68), pt VI.

[51] Electricity Ordinance (Cap 406), section 41; Money Lenders Ordinance (Cap 163), section 32; Estate Agents Ordinance (Cap 511), section 55.

importing a product not up to the statutory standards[52]; where a person carries on the related business without a licence[53]; or where fraud is involved.[54]

8 Alternative Mechanisms for the Resolution of Consumer Disputes

Alternative dispute resolution (ADR) of consumer disputes refer to a variety of mechanisms other than by referring cases to the courts. Aggrieved consumers may be deterred from resorting to legal action owing to the possibility of mental strains, complicated procedures and prolonged delays. ADR are said to have advantages in being more affordable and accessible as well as less costly and stressful to parties.

In Hong Kong, there are currently two organizations which provide a platform for alternative means of settlement of consumer disputes, namely, the Hong Kong Financial Dispute Resolution Centre and the Consumer Council.

8.1 Hong Kong Financial Dispute Resolution Centre

The Hong Kong Financial Dispute Resolution Centre (FDRC) is a non-profit making organisation governed by a Board of Directors. It has established the privately-operated Financial Dispute Resolution Scheme (FDRS) which aims to provide consumers with an alternative method for resolving monetary disputes with the financial institution amicably and efficiently.

Consumers who have disputes with a financial institution involving monetary loss may lodge a complaint with the relevant institution or report the case to the regulators (e.g. Hong Kong Monetary Authority, the Securities and Futures Commission). Independent and impartial mediators and arbitrators will provide mediation and arbitration services to financial institutions and their individual customers in Hong Kong. Disputes are handled by way of "mediation first and arbitration next".[55] However, these regulators do not adjudicate on any financial remedy for the aggrieved consumers. Thus consumers may have to take the monetary claim through the court system where necessary.

[52]Toys and Children's Products Safety Ordinance (Cap 424), section 31; Consumer Goods Safety Ordinance, sections 6, 22.

[53]Money Lenders Ordinance (Cap 163), sections 29, 32; Pawnbrokers Ordinance (Cap 166), section 6; Pesticides Ordinance (Cap 133), section 17; Travel Agents Ordinance (Cap 218), section 48; Estate Agents Ordinance (Cap 511), section 55.

[54]Chinese Medicine Ordinance (Cap 549), section 107; Weights and Measures Ordinance (Cap 68), section 32.

[55]Financial Dispute Resolution Centre, 'Financial Dispute Resolution Scheme' (Financial Dispute Resolution Centre, 2015) www.fdrc.org.hk/en/html/aboutus/aboutus_fdrs.php.

8.2 Consumer Council

8.2.1 By Conciliation

The Consumer Council handles complaints by means of conciliation, providing a platform for the consumer and the trader to resolve disputes by mutually acceptable agreements. This privately-run mechanism is established by the Consumer Council, an independent statutory authority in Hong Kong.

The resolution process is initiated by complaints from consumers. Where the Consumer Council finds that the complaint is a consumer dispute, it will contact the trader and request prompt follow-up on the case. The progress of the case is dependent on the voluntary cooperation of the trader. The consumer will then receive the outcome when the trader gives a substantive reply.

The Consumer Council can censure trade malpractices by naming or publicizing the traders concerned. It usually names the trader on its website and states its malpractices together with the details of the cases. Previous instances of the "name and shame" are as follow:

- On 28 April 2016, a fitness centre chain was named for deploying intimidating and misleading sales practices to pressure consumers into purchasing membership and high-priced private lessons. Existing members and new customers were all subjected to the heavy handed sales pressure of the centre which resulted in their monetary loss and mental suffering. There have been many complaints against the chain and the number has been increasing. The chain was uncooperative with the Council. As a result, to prevent further consumer entrapment, the Council decided to publicly name and sanction the centre.[56]
- On 13 February 2012, a beauty salon was named for its repeated engagement in unscrupulous sales tactics, involving misrepresentation and high pressure sales. Despite the Council's efforts in mediation, the salon was reluctant to offer settlement to complainants. Their unscrupulous sales tactics remain. To avoid more consumers falling into the sales traps, the Council decided to take action.[57]
- On 9 August 2011, two audio-video shops were named for persistent adoption of bait-and-switch and misrepresentation sales tactics against the tourists (with over 140 complaints in less than 2 years).[58]

Conciliation is not the most effective means of enforcement of consumer law. Although the Council is willing to assist in the mediation of consumer complaints, it

[56]Consumer Council, 'Council Names California Fitness for Aggressive Sales Practices Calls for Cooling-off Period to Safeguard Consumer Rights' (*Consumer Council,* 28 April 2016) www.consumer.org.hk/ws_en/news/press/fitness.html.

[57]Consumer Council, 'Beauty Salon Named for Unscrupulous Sales Tactics' (*Consumer Council,* 13 February 2012) www.consumer.org.hk/ws_en/consumer_alerts/malpracticesshoplist/20120213.html.

[58]Consumer Council, 'Naming 2 AV shops in Tsimshatsui' (*Consumer Council*, 9 August 2011) www.consumer.org.hk/ws_en/consumer_alerts/malpracticesshoplist/20110809.html.

acknowledges that "aggrieved consumers … are faced with the daunting task of taking civil action on their own as the only redress option".[59]

Furthermore, since consumer disputes are settled out of court privately, while they may satisfy that individual aggrieved consumer, there is no judicial precedent set for the benefit of all other consumers who are subjected to the same mistreatment (e.g. unfair standard form contract terms[60]).

8.2.2 By Arbitration

Arbitration and adjudication provide redress with a legally binding decision, while conciliation and mediation do not. There are on average around 5000 complaint cases handled by the Consumer Council which are unresolved every year.[61] Having studied the potential demand for an alternative consumer adjudicative process, the Consumer Council is now proposing to implement consumer arbitration by way of establishing a government-funded Consumer Dispute Resolution Centre.[62]

From its report published in August 2016, having considered overseas ADR models, the Consumer Council proposes the use of arbitration in conjunction with mediation, offering parties a chance to "make recourse to a consensual process more likely to be cost-effective and capable of maintaining amicable relationship" before entering into arbitration which may be more contentious and costly.[63] It recommended capping the claimable amount at HK$200,000 (25,000 US$) which should cover most consumer complaints. The Consumer Dispute Resolution Centre aims to have a diverse panel of mediators and arbitrators.[64] There will also be a referral mechanism for the Consumer Council and the courts to refer suitable consumer disputes to the Centre, which helps to relieve the burden on the judiciary and enhance better allocation of resources.[65]

[59]See Consumer Council, 'Fairness in the Marketplace for Consumers and Business – Executive Summary' (February 2008) para 7, www2.consumer.org.hk/2008022501/exec_sum_e.pdf cited in Mason (2014), p. 90.

[60]Mason (2014), p. 90.

[61]Consumer Council, "Advocating for Establishing a 'Consumer Dispute Resolution Centre' to achieve triple wins in consumer dispute resolution for Hong Kong" (*Consumer Council*, 31 August 2016) p 1, www.consumer.org.hk/sites/consumer/files/competition_issues/20160831/summary_e.pdf.

[62]Ibid.

[63]Ibid., pp. 79–80.

[64]Ibid., p. 86.

[65]Ibid., pp. 91–92.

9 External Relations and Enforcement of Foreign Judgments

Hong Kong is not part of any regional or international organisation of states that has a common consumer policy, nor is it part of any regional or international network of enforcers of consumer law. It does not have bilateral or multilateral agreements with other countries on consumer law enforcement. However, its consumer organization, the Consumer Council, is part of international networks such as the Consumers International and International Consumer Research & Testing. Furthermore, the Council publishes international best practices on its website from time to time to seek the voluntary cooperation of Hong Kong businesses.[66] It also participates in international consultations, such as the revision of the United Nations Guidelines on Consumer Protection and the G20 High-level Principles on Financial Consumer Protection.[67] It also has produced the Good Corporate Citizen's Guide to further its objectives which are influenced by the international standards (e.g. electronic commerce complying with OECD guidelines for Consumer Protection in the Context of Electronic Commerce).[68]

10 Assessment of the Existing Enforcement Mechanism

The existing system of consumer protection is effective to an extent, owing to the efforts made by the Consumer Council. The Council, although limited in its power by not being an enforcement body, has performed its functions effectively by researching on consumer matters, disseminating information and helping aggrieved consumers. It has also consistently provided independent and useful advice to the government on issues of consumer interests.

However, the current system of consumer law enforcement has many shortcomings. First, the Hong Kong government often adopts the "wait and see" approach and only reacts to problems as they emerge.[69] Since the early 1990s, laws were introduced or existing laws amended to address obvious concerns over unconscionable conduct, deception in the supply of services and the widespread use of exemption

[66]Consumer Council, 'Policy & Research' (*Consumer Council*, 2015) www.consumer.org.hk/ws_en/competition_issues/international_best_practices.

[67]Consumer Council, 'Hong Kong Consumer Council's Comments on the OECD's Draft G20 High-level Principles on Financial Consumer Protection Public Consultation' (*Consumer Council*, 26 August 2011) www.consumer.org.hk/ws_en/competition_issues/policy_position/2011082601.html.

[68]Consumer Council, 'Consumer Council Good Corporate Citizen's Guide' (*Consumer Council*, 15 March 2005) www.consumer.org.hk/ws_en/competition_issues/model_code/2005031501.html.

[69]South China Morning Post, 'Consumers in Hong Kong deserve stronger laws to protect their interests' (*South China Morning Post*, 19 August 2015) www.scmp.com/comment/insight-opinion/article/1850607/consumers-hong-kong-deserve-stronger-laws-protect-their.

clauses. However, when there are legislative loopholes and deficiencies, there is a lack of implementation of the reform proposals from the Law Reform Commission and the Consumer Council (as discussed above, such as proposals for reform on civil liability for unsafe products and unfair contract terms).

For example, the Hong Kong Law Reform Commission published a report in 1998 which proposed reforms to the law governing compensation for injury and damages caused by defective or unsafe goods. Under the existing law, a person who suffered injury caused by an unsafe product can only sue under contract or negligence. If there is no contractual relationship between the two parties, the injured person is denied a contractual claim. A claim on the basis of negligence might also present difficulties for the claimant, with the likelihood that expert evidence would be required.

The Commission took into consideration of the deficiencies of the existing law and overseas developments. It proposed that the law governing compensation for injury and damage caused by defective or unsafe goods should be expanded beyond the existing spheres of contract law and negligence law. This new form of liability should be based on the "defect approach". A product would be regarded as defective if it did not meet the standard of safety that persons generally are entitled to expect. The standard of safety required should be judged at the time the product was put into circulation. Any injured person should be covered by the proposed new form of liability, whether or not he is a party to the contract, a user of the product or a mere bystander.

However when the then Trade and Industry Panel of the LegCo was consulted in 1999, strong objection to the proposal was raised from trade representatives. Some considered it unfair to hold a party, such as an importer, liable if that party did not have full control over the safety of the product, while others were concerned about the likely increase in litigation and compliance costs. The Commerce and Economic Development Bureau has stated its stance to be: "As the community is unlikely to reach any consensus on this matter in the near future, the Bureau does not intend to take forward the LRC's proposal at this juncture."[70]

Second, there is a lack of institutional capacities. There is no consumer rights body that can pursue claims, bringing a representative action, on behalf of aggrieved consumers. Hong Kong's Consumer Council has made clear that it is not a law enforcement agent and has made a "conscious decision. . . not to be involved in the enforcement of any specific piece of legislation".[71] An enforcement body should be set up to take representative action on behalf of aggrieved consumers. Alternatively,

[70]The Hong Kong Law Reform Committee, 'Report on Civil Liability for Unsafe Products: Administration's response' (*The Hong Kong Law Reform Committee*, November 2010) www.hkreform.gov.hk/en/news/newsArchiveXML.htm?newsDate=2010&selectedSubSection=4&jumpToDetails=#unsafe.

[71]Consumer Council, 'Consumer Council Ordinance Review – Submission of the Consumer Council' (*Legco*, February 2001), paras 4(1) and 4(2) www.legco.gov.hk/yr00-01/english/panels/es/papers/a1046e01.pdf.

the Consumer Council should be given enforcement powers to perform its function more effectively.

Third, the enforcement mechanisms are difficult to access. Although the Council is able to assist in the mediation of consumer complaints, where the amount of claim is higher than HK$50,000 (below which the claim can be handled by the Small Claims Tribunal), aggrieved consumers are faced with the daunting task of taking civil action on their own as the only redress option.[72] As a result, consumers may arguably be discouraged from bringing such a claim for fear of losing and/or incurring substantial legal costs. This problem may be resolved by having an enforcement body dedicated to consumer claims.

Lastly, consumers have to overcome complicated procedures when they apply for financial assistance. For example, the CLAF appears to be grossly underutilised,[73] owing to the many hurdles that an applicant must overcome in order to qualify for funding. These hurdles include (a) the payment of a non-refundable application fee even if the application is rejected; (b) the requirement of an applicant to show that they have exhausted all other means of dispute resolution; and (c) the possibility that assistance from CLAF can be terminated at any time. There should be amendments to CLAF, to simplify or remove the above procedures and requirements.[74]

Reference

Mason L (2014) Inadequacy and ineffectuality: Hong Kong's consumer protection regime against unfair terms in standard form contracts. Hong Kong Law J 44:85

[72]Consumer Council, Advocating for Establishing a "Consumer Dispute Resolution Centre" to achieve triple wins in consumer dispute resolution for Hong Kong (Consumer Council, 31 August 2016).

[73]There have been, on average, only two or three successful applications per year since 1995: see Law Reform Commission of Hong Kong (n 95), para 8.117.

[74]Mason (2014), p. 92.

In Search of an Effective Enforcement of Consumer Rights: The Italian Case

Giacomo Pailli and Cristina Poncibò

1 Introduction

From its origins, Italian consumer law has been the product of the implementation of European Union Law. A confused stratification of domestic legislative instruments, inside and outside the Italian civil code, was eventually rationalized in 2005 with the enactment of the Legislative Decree 6 September 2005 no. 206 (the Italian Consumer Code, 'ICC').[1] The systematization that has been achieved in 2005 is undoubtedly remarkable: the restatement of consumer law, based on the French experience with the *code de la consommation*, made the rules more accessible to consumers and traders, favouring a homogeneous and systematic interpretation.[2] The ICC, as amended, represents today the main legal framework for consumer protection in Italy. It should be noted that there are still many other provisions

Cristina Poncibò is the author of Sects. 2 and 3, with the exclusion of Sects. 3.4 and 3.5. Giacomo Pailli is the author of Sects. 1, 3.4, 3.5 and 4. The co-authors jointly drafted the conclusion.

[1]Practitioners and academics generally indicate the Legislative Decree 6 September 2005 no. 206 by the expression 'Italian Consumer Code'. We follow such practice, although this expression is inaccurate because the Legislative Decree does not have the structure and the content of a code, but it is a restatement of the laws in the field of consumer protection.

[2]Pasa and Weitenberg (2007), pp. 295–308.

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outside the ICC with respect to sectorial consumer protection, e.g. in the fields of data protection,[3] energy and gas,[4] telecommunications.[5]

In 2011, the scope of the ICC was expanded to encompass the protection of micro-enterprises (defined as "entities, companies or associations, which exercise an economic activity employing less than 10 people with a turnover not exceeding two million euros") against unfair trade practices implemented by traders. The Law of 24 March 2012 no. 27, converting with modifications the Law Decree of 24 January 2012, no. 1, also vested the Italian Competition Authority (ICA) with new powers to protect consumer rights against unfair terms in contracts.[6]

2 Actors Involved in the Enforcement Regimes

Many actors take part to the enforcement of consumer's right in Italy. The following sub-paragraphs describe the main players, starting with public actors, and specifically the ICA, then considering consumer associations and the legal profession. The last sub-paragraph contains a few remarks on the role and coordination between these actors.

2.1 Public Actors

A number of public bodies include within their institutional responsibilities the protection of consumers. To begin, the General Directorate for Market, Competition, Consumers, Supervision and Technical Standards at the Ministry of Economic Development promotes policies with the aim of granting consumer protection in the domestic market. In addition, several Independent Authorities promote sectorial initiatives for consumer protection in specific markets (especially the ICA, but also the Bank of Italy, the Authority for Communication—AGCOM, the Authority for Energy and Gas—AEEG, the Authority for prices surveillance, the Authority for the Insurance Market etc.). Regional authorities are also involved in advancing consumer protection by promoting, often in cooperation with consumer associations, local initiatives. Public prosecutors (*Pubblici Ministeri*) are in charge of the criminal aspects of violations of consumer rights.

[3]Legislative Decree of 30 June 2003, no. 196.

[4]Law of 14 November 1995, no. 481 creating an independent Authority for Electric Energy, Gas and Water.

[5]Law of 31 July 1997, no. 249 creating an independent Authority for Telecommunications; Legislative Decree of 31 July 2005, no. 177 (Unified Text on Television), and Law 30 April 1998, no. 122 on television activities.

[6]Law Decree of 2 December 2011, no. 214 (so-called "Salva Italia").

Among all public players, the ICA stands out. Since 1992, the ICA was entrusted with the duty to target misleading advertising by any means (TV, newspapers, leaflets, posters, tele marketing) and, starting from 2000, also to assess comparative advertising. In 2007, following the implementation of Directive 29/2005/EC into Italian law (by the Art. 21–26 of the Consumer Code), ICA's competences in the consumer protection field have been broadened to include the protection of consumers against unfair commercial practices by undertakings.[7] As noted above, since 2012 ICA also deals with unfair commercial practices targeting 'micro-firms'. The ICA may also declare contractual terms to be unfair and order its decision to be published on the ICA's and trader's own websites, to ensure a broad information to consumers and to prevent traders from inserting such terms in their standard forms. The ICA has made only a very limited use of its power (and duty) to verify unfair contract terms (e.g. 14 cases in 2013, 15 cases in 2014 and 3 in 2016). Traders may also ask in advance an opinion to the ICA about the fairness of the terms that they intend to use in their standard contracts with consumers.[8]

ICA is entitled to investigate unfair contract practices, unfair contract terms and CRD violations not only upon reception of consumers' complaints, but also ex officio. For example, ICA can issue interim measures against grave infringements, or make use of its cease and desist powers, without the need to go to the Court and relay on long, complex decision-making by the Courts.[9] In addition, ICA may proceed to inspections (in cooperation with Financial Police), may accept commitments by traders to end an infringement[10] and adopt "moral suasion" procedures. ICA may also issue fines (from € 5000 up to € 5 million for each unfair practice—for deceptive or comparative advertising the fine is between € 5000 and € 500,000). In the field of unfair contract terms, Italy represents an example of a "fully administrative competence". ICA final decisions are published and can be appealed to the system of Italian Administrative Tribunals (in two steps, at first instance before the Regional Tribunal, and final appeal to the *Consiglio di Stato*).

The Legislative Decree 21 February 2014 no. 21, implementing the Directive 2011/83/UE of 25 October 2011, that entered into force as of 13 June 2014, constitutes one of the last steps towards the strengthening of the consumers' protection applicable framework. The law completely replaced Chapter I, Title III, Part III (Articles 45–67) of the ICC with a new Chapter, entitled "Consumer rights in contracts".[11] The new provisions deal with both distance contracts and traditional contracts, although the main changes concern distance and off-premises contracts.

[7] If an undertaking try to distort the economic choices of a consumer by, for instance, omitting relevant information, spreading out untruthful information or even using forms of undue influence, the ICA may act, also via interim measure, and impose fines which (since August 2012) could range up to 5 million euro (previously, the maximum was 500,000.00 euro).

[8] See Battelli (2014a), p. 207.

[9] Article 27(3) ICC and Article 8(3) of Legislative Decree no. 145/2007.

[10] Article 27(7) ICC and Article 8(7) of Legislative Decree no. 145/2007.

[11] See Battelli (2014b), p. 927.

Other developments (such as the introduction of a collective redress mechanism or the creation of a comprehensive ADR scheme) are discussed *infra* in this paper.

2.2 Consumer Associations

Article 139 ff. ICC assign to consumer associations a central role in judicial enforcement of consumer's rights. While ICC also does not prevent injured consumers to act individually (under ordinary rules) or collectively (through an *azione di classe* as described *infra* at Sect. 3.4), only consumer associations may file an action for injunction pursuant to Article 140 ICC and, in practice, consumer associations have been lead plaintiffs in most *azione di classe* brought so far. Such a broad standing of associations confirms the historical bias of the Italian legal system towards assigning a central role to *quasi-public* actors, as opposed to the US *private attorney general* model.[12]

The *quasi-public* aspect is further stressed by the fact that not every consumer association has standing to sue (Article 139 ICC), but only those association that are registered in a list kept by the Ministry for Economic Development pursuant to Article 137 ICC. The criteria are explained below. The Italian State and local authorities provide very limited public funding to consumer associations, which mostly rely on association quotas. This in turn means that these consumer associations often have (perhaps only implicitly) as their primary goal that of increasing their influence and visibility. They may aim to increase their own visibility because part of their power and resources comes from their reputation and the widening of their association base. Thus, the ability to draw publicity is likely to be a crucial factor in selecting a case.

In addition, Italian consumer associations are required by the law to be not-for-profit and do not stand to gain directly from settlements or judicial awards. Thus, they may see consumer welfare as a broader concept than the simple compensation of damages, and aim at sending a signal to the entire industry or pushing for changes in current business practices. As a result, associations are less likely to pursue settlements, at least on purely monetary terms.

Moreover, the lack of economic resources, and sometimes of adequate expertise, of associations are an obstacle to an effective pursuit of injunctive and collective litigation. Italian associations are adopting different strategies with respect to enforcement. Some, like *Codacons*, have tried to exploit the new collective mechanism, filing a comparatively high number of actions and announcing potential claims for millions of Euros. Then, also due to a few of unsuccessful and costly attempts, have decided to focus their activity on political and social activities, as well as joining affected victims in criminal proceedings seeking civil compensation. Others, such as *Altroconsumo*, one of the most active association in filing suits

[12]See, Burbank et al. (2011), pp. 153 ss; Buxbaum (2001), p. 219.

before Italian courts under the new procedure, have been able to gradually produce classes encompassing thousands of participants. Thus, there seems to be a trend towards specialization among associations: only few organisations are (effectively) representing consumers in judicial collective redress with the aim of recovering economic damages. Others appear more inclined towards bringing an injunctive action according to Article 139 ICC, or to provoke the intervention of the ICA or of public prosecutors, as well as being generally active at the policy-making level.

3 Enforcement Practices: An Overall Picture

The article aims to present an overall picture of the various enforcement practices of consumer rights in Italy. The picture include, for example, judicial mechanisms, the first device crafted was the quasi-public actions of consumer association for injunctive relief (Articles 139–140 ICC).[13] When over time it became clear that this approach was not sufficient to grant the effectiveness of consumer rights, new approaches were designed, including judicial collective redress (e.g. the *azione di classe* under Article 140-bis ICC—Sect. 3.4) and a collective injunctive action against the public administration (see at Sect. 3.2). Recent developments have encouraged non-judicial mechanisms (e.g. conciliation, arbitration and mediation—Sect. 4).

Accordingly, the mechanisms could be categorised by following the traditional distinctions, including, for example, ex ante and ex post mechanisms, public and private actions, more in details, administrative, judicial and non-judicial mechanisms, and compensatory and the injunctive actions.

In considering these mechanisms, we note, in particular, that, quite often, the enforcement mechanisms are based on a combined *approach* to include both private and public actors and mechanisms. For example, on one hand, some private organisations (i.e. consumer associations) are entrusted to act before the Courts for the protection of the collective interests of the consumers (and are the most common plaintiffs in the azione di classe). On the other hand, the ICA, a public actor, has now the competence to protect consumer rights against unfair terms in contracts.

Our point here is to stress the enforcement regimes in the Italian legal system are the result of a combination of public and private enforcement. Such integration process is becoming more evident—and discussed by legal scholars—in the last years, while before enforcement regimes were considered as separate and working in parallel without a connection. Nevertheless, the point is that our understanding of the integration processes, and its dimensions, remains limited in legal scholarship and further developments in this field deserve attention. In Italy, the said process is occurring without being part of an overall strategy for consumer protection, because it is the result of a piecemeal approach. In Sects. 3.2 and 3.3, and 4 dealing with civil

[13]Chiarloni and Fiorio (2005).

actions in criminal proceeding, quasi-public actions and alternative dispute resolution, we examine some cases of integrated approaches to consumer protection.

3.1 Administrative Consumer Protection

First of all, consumer protection in Italy mainly rests upon a number of administrative authorisations, registrations, licenses, approvals and other sectorial requirements aimed at guaranteeing *ex ante* the safety and quality of products and services that traders make available to consumers on the market.

For example, the governmental oversight on consumer protection falls under the competence of the National Council of Consumers and Users (*Consiglio Nazionale dei Consumatori e degli Utenti*).[14] Article 136 of the Consumer Code gives administrative authority to the Council to represent the consumers' and users' associations nationwide. It is part of the Ministry of Productive Activities and its chair is held by the Minister or one of his delegates. At the moment the council is composed of 17 recognized associations and a representative member of the Regions and Autonomous Provinces elected by the Regions-State Conference.[15]

With reference to public actors considered as a whole, the first remark is that the public enforcement regime appears to be fragmented due to the concurring competence of many sectorial public authorities (e.g., energy, telecommunications, insurance, banking services, etc.).[16] Secondly, there is no clear coordination between public players, nor between the public and the private component of enforcement of consumer rights. In this respect, new EU-derived rules may encourage the private sector to complete the public activity by requesting damages in follow-on actions, at least in the field of damages caused by an infringement of competition law by an undertaking or by an association of undertakings.[17]

Because of the limitations, shortcomings and obstacles mentioned above, as well as of other factors, the Italian regime is characterised by a significant under-enforcement both as to public authorities, as well as the private (or *quasi-public*)

[14]The Council Website is available at http://www.tuttoconsumatori.it.

[15]The Council invites representatives from recognized Environmental Protection Associations and National Consumer Co-Operative Associations to its meetings. Representatives from bodies and organs with the functions of regulating or standardizing the market, of the economic and social sectors concerned, competent public authorities, and experts in the subjects under consideration may also be invited to attend.

[16]Interestingly, a recent reform in Italian law conferred the antitrust authority an exclusive competence to combat unfair commercial practices also in regulated sectors, after having consulted the sector specific regulator, 'apart when the breach of sector specific regulation does not result in an unfair commercial practice' (Article 23(12) Legislative Decree 6 July 2012, No. 95). Unfortunately, the case law of the administrative tribunals still shows a significant degree of uncertainty about the overlapping competencies of the ICA and sectorial authorities.

[17]Article 9 of Directive 2014/104/EU, implemented as Article 7 of the Legislative Decree of 19 January 2017, no. 3.

sector, that has not been adequately empowered, as it will be explained in more details in the next paragraphs.

3.2 Civil Claims in Criminal Proceedings

Over the last two decades or so, damaged consumers have advanced a significant number of cases of mass torts by joining criminal proceedings and seeking compensation of individual damages for victims of a crime as *parte civile* (i.e., a civil claim brought by a harmed individual inside the criminal trial), an institution influenced by the French Code of Criminal Procedure.[18]

Somehow surprisingly, notwithstanding the various enforcement mechanisms described in this paper, damage claims by consumer continue to be lodged in criminal proceedings. To be sure, criminal proceedings are not designed for mass torts, and there are many wrongs that do not meet the threshold of a criminal offence. Regardless, in a way, criminal proceedings still play an important role in the enforcement of consumer rights, acting as a substitute for collective redress. To name but one, a widely-known mass tort case pursued through criminal proceedings is the 2007 crack of Parmalat (the infamous financial scandal that also gave momentum to the introduction of the *azione di classe* in Italy), in which thousands of investors took part to criminal proceedings as (formally individual) *parti civili*. Such a confirmed role of the criminal component, on one side shows a strong cultural resistance of Italian lawyers and judges, who prefer to dwell with well-established mechanisms, on the other is further evidence of the procedural shortcomings of the *azione di classe* and of the other enforcement mechanism that seem to have failed to conquer the "market" for enforcement of consumer's rights. Needless to say, many cases that do not represent a criminal offence do not fall under the competence of the Pubblico Ministero. Here, the institute of *litisconsorzio* (i.e. joinder of parties) has been adapted as a device for mass litigation in cases concerning blood infection and asbestos where a settlement has followed the courts' decisions in favour of consumer claims.[19] In such context, individual actions still play a major role in protecting consumer rights, but certain characteristics of the Italian judicial system reduce the effectiveness of private actions.

[18]Coggiola and Graziadei (2014), p. 29.

[19]Coggiola and Graziadei (2014), p. 29.

3.3 *Quasi-Public Judicial Actions: Injunctive Relief and the Action for the Efficiency of the Public Administration*

3.3.1 Injunctive Relief

Consumers association are granted standing by the ICC and special laws to bring *quasi-public* action aimed not at compensating damages, but at obtaining injunctive relief against wrongdoers. In this case, the goal is not an *ex post* compensation of damages for a group of consumers, but to solve an issue *pro futuro*, for consumers considered as a whole (Articles 139–140 of the ICC).

In the light of the practical experience with this action, we note that the system of government accreditation for consumer associations provided under the Article 140 ICC is not convincing. While 'court certification' concerns the conduct of the representative in a specific lawsuit, the government accreditation has resulted to be generic: the association is accredited as a 'fit representative', irrespective of the existence of an actual lawsuit.[20]

Before applying to the Court, consumer associations are required to pursue a conciliatory procedure before the Chamber of commerce (Article 140(2) ICC) or before an institution regulated by Article 141 ICC (see *infra* Sect. 4). The agreement is then filed with the court that renders it an enforceable title.

If the conciliatory procedure has a negative outcome (or if 60 days have expired), the association may apply to the Court to obtain a limited set of remedies. Precisely: (a) prohibition order against actions harming consumers' interests; (b) suitable measures to remedy or eliminate the harmful effects of any breaches; (c) orders to publish measures in one or more national or local daily newspapers where publicising measures may help to correct or eliminate the effects of any breaches.[21]

The Court, when it grants the action, specifies a deadline for compliance with the order and, upon request by the plaintiff, sets a penalty between € 516 and € 1032 for each instance of non-compliance or each day of delay, in proportion to the seriousness of the breach. These sums are paid to the State to finance initiatives for the benefit of consumers.

There is no need to stress that such mechanism suffers from some shortcomings, including the limited standing, the limitations of consumer associations in funding

[20]Poncibò (2002), pp. 659–669. In particular, the Ministry of Economic Development keeps the list of the national consumers and users' associations.

Currently, 18 associations are registered in the said list.

[21]Article 139 and followings of Consumer Code implementing Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, OJ, L 166, 11 June 1998, 51–55.

the actions, and having the relevant legal expertise. About 25–30 cases have been reported since the adoption of this mechanisms in the ICC.[22]

3.3.2 The Action for the Efficiency of the Public Administration

The action for the efficiency of the public administration introduced with the Legislative Decree of 20 December 2009, no. 198, commonly referred to as "public class action", a somewhat misleading term, is another injunctive action. Under the extended name of 'collective action for the effectiveness of the action of government entities and the providers of public services', this action may be brought by holders of relevant identical interests, such as citizens, consumers, or users, or any association. The action aims at protecting consumers and users against violations of quality standards of public services, regardless of the public or private nature of the entities providing such services. This action is an implementation of the principles contained in Article 97 of the Italian Constitution, according to which the Public Administration, and by extension private providers of public services, should ensure 'quality performance' and 'impartiality'.

Unlike the *azione di classe*, which is brought before civil courts, exclusive jurisdiction for actions for the efficiency of the public administration lies with Italian administrative courts (Article 1(7) Leg. Decree 198/2009).

The actions for the efficiency of the public administration may be directed only to obtain the removal of the inefficiency in the public service caused by the relevant violation, and does not include compensation of damages (Article 1(6) Leg. Decree 198/2009). Hence, a decision upholding plaintiffs' request will merely order the defendant to remedy its proven wrongdoing. Notice of the decision is then duly given in the same fashion as the statement of claim at the outset of the action (Articles 4(2), 1(2) Leg. Decree 198/2009).

Since the introduction of this action, a few cases have been decided by Italian administrative courts, which gave their interpretation of some of the rules governing such procedural tool.[23]

[22]C. Poncibò and E. Rajneri have reported the leading cases (precisely a summary of the facts and legal arguments in English) in the Italian Report prepared for the research project on Collective Redress coordinated by the British Institute of International and Comparative Law. The Italian Report is available at https://www.collectiveredress.org/collective-redress/member-states.

[23]C. Poncibò and E. Rajneri have reported the leading cases (precisely a summary of the facts and legal arguments in English) in the Italian Report prepared for the research project on Collective Redress coordinated by the British Institute of International and Comparative Law. The Italian Report is available at https://www.collectiveredress.org/collective-redress/member-states.

3.4 Individual Judicial Mechanisms

Especially when it comes to judicial mechanisms, a remark by a legal scholar in 1999 is still valid today: "In Italy there seems to be a sharp contrast between the law as it is written in the books and its operation in reality".[24] The Italian "machinery of justice" remains slow and inefficient[25] and the constant increase in the number of cases on each judge's docket list has, in time, created a large backlog.[26] This endless increase as well as the lack of resources (i.e. number of judges, court personnel, access to technology) seriously affects the average duration of civil proceedings, as well showed by the many decisions of the European court of human rights finding Italy in breach of the right to a reasonable duration of judicial proceedings.[27]

In a situation characterized by the abnormal duration of civil proceedings and their uncertain outcome, consumers can quite rationally decide that the cost of attempting to secure redress is not justified if the amount involved is not substantially higher than the cost of litigating, notwithstanding the presence of the "loser pays all" rule in Article 91 of the Code of Civil Procedure. Accordingly, since any defendant is fully cognizant of this state of thing, the threat of litigation by an aggrieved consumer is often not credible. This, in turns, also means that since no or limited recoveries will be sought in the absence of some collective enforcement action, leading to a predictable and generalised under-deterrence of wrongdoings.

Here, we analyse small claims courts and legal aid as elements that may ease some of the obstacles for individual judicial actions by aggrieved consumers. According to the EC Regulation on European Small Claims Procedure the establishment of an efficient and effective "small claims" court mechanism might contribute greatly in furthering the goal of consumer protection.[28] Within the Italian legal system, small claims (up to € 5000) are presently dealt with by the Justices of Peace (*Giudici di pace*) instead of ordinary courts (*Tribunali*), including consumer's claims.[29] Typically, small claims consumer cases involve issues of commercial law, private contracts, property rights and minor personal injuries.[30] Procedure before the Justice of Peace is designed to be simplified with little costs, no complex legal briefs

[24]Chiarloni (1999), p. 263. Resources on Italian civil procedure in English are Cappelletti and Perillo (1965); Varano (1997), pp. 657 ff.; Chiarloni (1999); Taruffo (2002); Colvin and Vigoriti (2008); Trocker and De Cristofaro (2010); Pailli and Trocker (2014), pp. 163–183.

[25]See Marchesi (2003).

[26]See Benvenuti (2014). See, also, Reynolds (2003), article 1. Accessed the 21st August 2007 at: http://www.bepress.com/gj/advances/vol3/iss2/art1.

[27]See Tarzia (2001), pp. 1 ss.; Didone (2002); Martino (2001), pp. 1068 ss.; Biavati (2012), p. 475.

[28]Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, OJ n. L 199, 2007, pp. 1–22, as amended by Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015.

[29]The Legislative Decree 5 has reformed the access to the role of Giudice di Pace in May 2017. The reform is aimed to a global revision of the status of non-professional judges and prosecutors (recruitment, functions, competence, and allowances).

[30]Lewis (2006), pp. 52–69.

and less strict rules on evidence. Assistance of a lawyer, otherwise compulsory in civil procedure, is not required if the value of the dispute is below € 1100. The *Giudice di pace* should simply hear the testimony of both the parties and third parties who have knowledge of the dispute, and either attempt to mediate a compromise or decide the case. Decision may be based on equitable principles, and not on a strict application of the law, if the value is below € 1100. Appeals against decision by small claim courts are heard by the *Tribunali* (the first-instance court under ordinary rules), which apply ordinary rules of civil procedures.[31] As a practical matter, not many small claim cases are appealed, as the appeal will often cost more than the amount in dispute.

The system of *Giudici di pace* addresses the consumer access to justice problem firstly because it reduces legal costs. Anyway, the system has come under strong criticism for the low level of training of *Giudici di pace* and the very limited accuracy of their decisions. Furthermore, in practice, this simplified procedure often develops in a more complex and structured procedure and rarely a consumer will be able to navigate through it without the assistance of a lawyer, thereby rising overall costs.

In consideration of this situation, one may expect that consumers are at least granted access to justice by way of some form of legal aid from the State. Italian legal aid scheme consists in exemption by certain costs and taxes, with the State paying other costs and (diminished) lawyer's fees.[32] The State has the right of reimbursement and, where it does not recover the money from the loser party, it may claim repayment from the party eligible for legal aid, if the recipient wins the case or settlement of the dispute and receives at least six times the cost of the expenses incurred, or if cases are discontinued or barred. Applicants granted legal aid might choose a lawyer from a list of authorised lawyers kept by the local Bar associations. They may also appoint expert witnesses where allowed by law. the crucial point is that legal aid[33] is granted only to parties with a taxable income not exceeding Euro 9723.84, as shown on his or her latest tax return.[34] Such a scheme is so limited, and the criteria so stringent, that only a few and seriously indigent consumers may benefit from it.

In conclusion, enforcement of consumer's rights through individual judicial action, although an option on the books, is in practice not a viable route unless the

[31] See Pailli and Trocker (2014).

[32] The State pays the following: (a) counsel's fees and expenses; (b) travel costs and expenses incurred by judges, officials and judicial officers for performing their duties outside the court; (c) travel costs and expenses incurred by witnesses, court officials and expert witnesses who incurred expenses when performing their duties are also reimbursed; (d) the cost of publishing any notice regarding the judge's ruling; (e) the cost of official notification.

[33] President of the Republic's Decree of 30 May 2002 no. 115, Unified text of laws and regulations on judicial costs (*Testo unico delle disposizioni legislative e regolamentari in materia di spese di giustizia*), in OJ n. 139, 15 June 2002—Suppl. ordinario n. 126 as amended.

[34] The income threshold is adjusted every 2 years by order of the Ministry of Justice to take account of variations in ISTAT's consumer price index.

damage claimed is of substantial nature, thereby justifying the costs of defending an ordinary action.

3.5 *Collective Judicial Mechanisms: The Failed Promise of the* azione di classe

Before the enactment of the *azione di classe* in 2007–2009, the only option to litigate mass torts, beside participating as *parte civile* in criminal proceedings as discussed *supra* at Sect. 3.1, was through the institute of joinder of parties (*litisconsorzio*), which has been employed in a few cases, such as those concerning blood infection or asbestos. However, simple joinder—where each plaintiff becomes a formal part to the proceedings—is not either designed, nor effective to manage mass cases.

Discussions around the enactment of a proper collective judicial redress in Italy have been going on for years.[35] At the end of 2007, on the wave of the Parmalat scandal, the Parliament introduced a collective mechanism as Article 140-bis of the ICC.[36] In July 2009, before it even entered into force, the original text of Article 140-bis was replaced in its entirety with the current one, introducing a brand new *azione di classe* starting from January 1, 2010.[37] In 2012 there was a further set of amendments,[38] lowering one of the admissibility thresholds. While in its original structure, the *azione di classe* was inadmissible if the group members' rights were not 'identical', these rights now need only to be 'homogeneous', a wider concept already developed by some courts under the previous law.

Azioni di classe can be brought by any consumer or user, or by an association or committee empowered by them. The action can only be brought for declaration of liability and compensation of damages in relation to: (1) contractual claims, including based on standard terms, against a company brought by consumers and users who are found in a similar situation; (2) homogeneous claims by end-consumers (*consumatori finali*) of a specific product or service against the relevant manufacturer/provider, even in the absence of a direct contractual relationship; (3) homogeneous claims for damages by consumers and users as a consequence of unfair business practices or violation of competition law.

[35]For critical remarks in English on the azione di classe, see recently, R. Caponi, "Italian 'Class Action' Suits in the Field of Consumer Protection: 2016 Update" (June 16, 2016). Available at SSRN: https://ssrn.com/abstract=2796611. Poncibò (2015) and Caponi (2011), pp. 61–77.

[36]Legislative Decree no. 206 of 6 September 2005, OJ 8.10.20015 no. 235 ('Consumer Code'). Article 2(446) of the Law 24 December 2007, no. 244 (Financial Law for 2008). Publications discussing the old draft bill are still available, of course, and they could generate some confusion in readers less experienced with the Italian system.

[37]Article 49 of the Law 23 July 2009, no. 99, OJ 31.07.1999 no. 176.

[38]Article 6 of the Law Decree 24 January 2012, no. 1, ratified by Law 24 March 2012, no. 27, OJ 24.01.1992, no. 19.

At the end of the first hearing, after having heard the parties and collected summary information, the Court decides on the admissibility of the action by way of an order. The order denying admissibility may be challenged before the Court of Appeal. The *azione di classe* is admissible when: (1) it is not manifestly unfounded; (2) there is no conflict of interests; (3) the individual rights are homogeneous; (4) the plaintiff appears to be fit to represent the interests of the whole class. If the Court allows the action, it (a) defines the characteristics of the individual rights claimed within the proceedings; (b) sets terms and procedures for the most appropriate publicity; and (c) sets a mandatory term for expression of intention to participate by class members (the participation mechanism is strictly "opt-in"). Upon expiration of the deadline for participation, the Court hears the merits and, if granting the claim, specifies the amounts owed by the defendant to any individual consumer that joined the action. In the alternative, the Judge may set the homogeneous criteria for the computation of such amounts, encouraging parties to agree on liquidation of damages. The decision on the merits may be challenged in front of the Court of Appeal, and the appellate judge has the power to stay the decision of first instance, which, as a general rule of Italian civil procedure, is provisionally enforceable. There is no provision on punitive damages and/or other economic sanctions.

Beside a description of its normative structure, we briefly examine here how the *azione* fared in practice. First, numbers. Short of any official statistics, already a shortcoming, the *Osservatorio Antitrust* of the University of Trento maintains the more reliable source on the action brought according to Article 140-bis.[39] According to their data, as of January 2016, 58 actions were filed in the courts of first instance, out of which 10 were declared admissible and 18 inadmissible.[40]

In the vast majority of the proceedings scrutinized,[41] the promoter of the *azione di classe* were consumers' associations, with two standing out: Codacons (with four actions) and Altroconsumo (with eight actions). Individual or closed groups of consumers promoted only a few actions, as the first *azione di classe* to be successful on the merits, which involved a group of consumers who sought compensation against a travel agency for the damages suffered. Three other cases brought without consumer's association related to problems with water supply to certain well-defined areas, while one last action targeted a service company that failed to properly remove

[39]The Competition Law Observatory is available at the following address: http://www.osservatorioantitrust.eu/it/azioni-di-classe-incardinate-nei-tribunali-italiani/ (last visited, 13 Jan 2017).

[40]C. Poncibò and E. Rajneri have reported the leading cases (precisely a summary of the facts and legal arguments in English) in the Italian Report prepared for the research project on Collective Redress coordinated by the British Institute of International and Comparative Law. The Italian Report is available at https://www.collectiveredress.org/collective-redress/member-states.

[41]Despite the number of 58 actions filed according to the *Osservatorio Antitrust*, we located actual judicial orders and decisions only for 20 cases (for a total of 38 between orders and decisions, including by courts of appeal and the Supreme Court). The following analysis is based on these documents only.

the snow in the city of Florence, having among the plaintiff a member of the city council.

In most cases the court of first instance initially ruled for the inadmissibility of the action, while in a few of them, the court of appeal overturned the decision and declared the action admissible (sending it back to the first judge for the proceedings on the merits). Focusing on the reasoning given by these courts, appellate judges appear to be much more ready to understand and apply the *ratio* of the new law than first-instance judges.

There is also a handful of decisions by the Italian Supreme Court (*Corte di cassazione*), but mostly on technical aspects, such as the possibility of appealing a declaration of inadmissibility of an *azione di classe* issued by a court of appeal.[42] Among these, in 2015, submitting a matter to the attention of the First President of the Court for a possible decision of the issue by the Joint Chambers, not yet made, a simple chamber of the Supreme Court interestingly noted[43]:

> . . . it is not appealing to conclude that the *azione di classe* is merely a *procedural form* of judicial protection of rights, alternative and equal to individual action, so that once declared admissible the former, the possibility to bring the latter would prevent to consider a declaration of inadmissibility to have the effect of a decision and to be final. If, in fact *scire leges non est verba earum tenere, sed vim ac potestatem*, the Court deems it reductive to read in [. . .] art. 140 bis just an alternative procedural 'form' [. . .] A collective action, indeed, due to the increased economic and psychological pressure that may be exerted on the [traders], offers to the plaintiff an 'added value' with reference to an ordinary action: it is more persuasive, may more effectively bring compliance, and it is cheaper for those who participate to it. The court also notes that [. . .] The individual action, on the other hand] as noted has content, goals and effects that are very different from the collective action: has a different content, because it cannot promote the protection of "collective interests" [. . .]. It has different goals, because an individual action on consumer's rights leave the plaintiff in a position of clear disadvantage *vis-à-vis* the defendant, whereas the *ratio* of the collective action is clearly to level the playing field, implementing the rule [of substantive equality] of article 3, paragraph 2, of the Constitution.

[42]Cassazione civile sez. I, 21.11.2016, n. 23631*, Intesa San Paolo S.p.A. C. G.F. e altri*, (2016) Diritto & Giustizia (the order of the Court of Appeal declaring an *azione di classe* admissible cannot be appealed, because it does not end the proceedings, but on the contrary it gives instructions on its continuation); Cassazione civile sez. I, 14.06.2012, n. 9772, *Codacons C. Soc. Intesa Sanpaolo*, (2012) 9, I, Foro it. 2304 (the order of the Court of Appeal declaring an *azione di classe* inadmissible is merely procedural and cannot be appealed to the *Corte di cassazione*, because it does not prevent to file individual actions) *contrast* with Cassazione civile sez. III, 24.04.2015, n. 8433, *Codacons C. Soc. Bat Italia*, (2016) 2 Responsabilità Civile e Previdenza, 550 (the Third Chamber of the *Corte*, disagreeing with the First chamber, submits to the Joint Chambers the question of whether an order of the Court of Appeal declaring an *azione di classe* inadmissible can or cannot be appealed to the *Corte di cassazione*).

See also the *obiter* in Cass. n. 23631/2016 *supra*, disagreeing with the earlier decision of the First chamber (but different judges) n. 9772/2012. Along these lines, the chambers of the *Corte* disagree on whether a declaration of inadmissibility prevents to file again the same *azione di classe*.

[43]Cass. n. 8433/2015, *supra*.

Such a statement, "business as usual" in an American court, coming from Italy's highest court is a promising sign that something may be changing in the judges' mind-set.

So far, at least four actions reached a decision on the merits, out of which two were successful and two were dismissed. In the two successful cases, the first decided in Napoli, and mentioned above, saw around twelve participants compensated out of around forty, while in the action decided in Torino the court eventually admitted only three out of 110 participants, on purely bureaucratic reasons.

As to the subject matter of the action, the areas with more than one actions (which means 2 or 3, not 10 or 20) have been banking practices, transportation, failure to provide public services (snow, water supply, schools' canteen) and diesel emissions (unfair practices). Two actions tried to stretch the boundaries of this judicial collective redress mechanism to reach securities claims, but unsuccessfully.[44] Single actions focused on damages from smoking, false advertising of medical vaccines, package travel, a telecommunication blackout and false advertisement of the storage space available on Samsung mobile devices.

Below we will examine a few of the more interesting cases so far.[45] In the first class action decided on the merits, the plaintiffs and the participants to the class (it is not clear how many) claimed that a travel agency breached their rights in relation to an "all-inclusive" travel package. In short, the consumers bought a package specifying certain facilities and services in Zanzibar, but once arrived, they have been hosted for 3 days in a different facility, of lesser quality. They have also spent the rest in the resort, which—however—was still under construction. The Tribunale di Napoli, after admitting the action, ordered the defendant to compensate each of the twelve members of the class admitted to the action a sum of € 1300.00 (in relation to a package whose cost was € 1950.00), and a cost order of total € 8850.00 (for all participants).[46] Soon thereafter, the travel agency filed for bankruptcy. The court adopted a quite restrictive notion of homogeneity, requiring that both the *an* and *quantum* of damages being identical/homogeneous. It, therefore, excluded from the class around thirty consumers who were hosted in a different structure because their damages were found not to be identical as to the *quantum* (and due to lack of evidence, that such facility was not adequate).

In the second class action to reach a decision on the merits, promoted by the reputed consumer association Altroconsumo, the Tribunale di Torino found that a

[44]One is Corte appello Firenze 15.07.2014, *Masciullo e altro C. Monte dei Paschi Siena* (2015) 9, I Foro it. 2778; see Iacomin (2015), pp. 89–95. The other is Tribunale di Genova, 13.06.2014, *Comitato Tutela del Risparmio v. Banca Carige Spa*, available at http://www.osservatorioantitrust.eu/it/wp-content/uploads/2014/06/Ord-Trib-GE_Comitato-c-Carige-2014.pdf (last visited 13 Jan 2017).

[45]As the reader surely knows, the Italian legal system does not apply the doctrine of binding precedent, and hence previous decisions are not binding. They may well have a persuasive value, especially if coming from the Supreme Court or a well-reputed lower court. See, e.g., Taruffo and La Torre (1997).

[46]Tribunale Napoli sez. XII 18.02.2013 n. 2195, *M. v. W.,* (2013) 12 *Guida al diritto,* 16.

bank had in fact inserted unfair terms in its contracts, but rejected most of the 104 participants to the class due to a defect in their participation documents.[47] In fact, the Tribunale required each participant's signature to be authenticated by a public officer, but many did not do it.[48] In the end, thus, the Tribunale granted the claim of the three "named" plaintiffs and of only three out of 104 participants, ordering the bank to pay sums between € 50.00 and € 430.00 and legal costs of € 36,000.00. The Court of Appeal recently confirmed the decision of the Tribunale.[49]

Following the renowned diesel-gate scandal, Altroconsumo has launched two actions (Article 140-bis) against car manufacturers in Italy. The first is against FCA in Torino, where the Court of Appeal, with a very well-reasoned decision, overturned the Tribunale order of inadmissibility and directly admitted the action, mandating for the first-instance to carry out the merits phase.[50] Altroconsumo claims that it filed with the Tribunale di Torino 21,031 declarations of participation.

The second action, against Volkswagen, has been filed before the court of Venezia. Once again, at first the Tribunale declared the action inadmissible.[51] The judge rejected, in a well-written opinion, all defences raised by Volkswagen, but then (mistakenly) concluded that the evidence submitted by the plaintiff were not enough to support the claim, and thus declared the action inadmissible as manifestly ungrounded. The Court of Appeal, in an equally good decision, following the Corte d'appello di Torino's decision in Altroconsumo/FCA, criticized the Tribunale for confusing the admissibility and the merits phase, admitted the group, and referred the parties back to the Tribunale for the continuation of the proceedings on the merits.[52]

[47]Tribunale Torino 10.04.2014, *Gasca et al. v. Intesa Sanpaolo* (2014) 9 I Foro it. 2618: "the bank that after August 15, 2009 [date of entry into force of class action] has applied overdrawn fees in consumers' bank accounts, pursuant to contractual terms that are void, must be ordered to return to the plaintiffs and all legitimate participants these undue sums".

[48]In the specific case, such a requirement was specified in the order of admissibility. Regardless, we hope that no other court will ever impose such a cumbersome procedure: bringing an *azione di classe* is already hard enough without this judge-made addition.

[49]Corte d'appello Torino, 30.06.2016, Gasca et al. v. Intesa Sanpaolo, available at https://www.altroconsumo.it/organizzazione/-/media/lobbyandpressaltroconsumo/images/in-azione/class-action/intesa%20sanpaolo/sentenza%20corte%20appello%202016/sentenza%20nella%20causa%20civile%20d'appello%20r,-d-,g,-d-,%20n,-d-,%201505_2014.pdf (last visited 13 Jan 2017).

[50]Corte d'appello di Torino, 17.11.2015, Altroconsumo v. FCA (2016) I Foro it., 1017.

[51]Tribunale di Venezia, 12.01.2016, *Vighenzi v. Volkswagen*, available at https://www.altroconsumo.it/organizzazione/-/media/lobbyandpressaltroconsumo/images/media-e-press/comunicati/2016/consumi%20bugiardi%20ricorso%20altroconsumo%20tribunale%20ve%20non%20ammette%20class%20action/ordinanza%20tribunale/ordinanza%20tribunale%20ve%2012_01_2016.pdf (last visited 13 Jan 2017).

[52]The Press Release is available at https://www.altroconsumo.it/organizzazione/-/media/lobbyandpressaltroconsumo/images/in-azione/class-action/fuel%20consumption%20volkswagen/ordinanza/ordinanza%20corte%20appello%20venezia%20class%20action%20vw%20ammessa%2017_06_2016.pdf (last visited 13 Jan 2017).

While we are far, far away, from the speedy and billionaire settlements that Volkswagen reached in the US for the same fraud, both actions are a sign that something is slowly starting to change in the playing field. On the "Dieselgate", there is also a criminal investigation going on by the Procura di Verona, and other consumer associations (e.g., Codacons, Adiconsum and Federconsumatori), are gathering potential victims for participation in the criminal proceedings.

4 Non-judicial Mechanisms

In recent years, Italy has developed a comprehensive scheme of ADR that revolves around a mediation law (encompassing voluntary and mandatory mediation) and certain consumer-specific schemes, such as mandatory conciliation for disputes between users and telecommunication providers (*Corecom*), the voluntary scheme of the Financial and Bank Arbiter (*ABF*),[53] a Bank Ombudsman (*Giurì Bancario*) and the conciliation attempt provided by Article 140 ICC (see *supra* Sect. 3.3). Arbitration of consumer's matters is not encouraged and is generally not legally admissible.[54]

The law defines mediation as an activity carried out by a neutral and impartial third-party—the professional mediator—with the aim of assisting two or more parties in reaching an amicable agreement for the resolution of a dispute, including by making use of forms. As for the mediator, the law specifies that he has no power to adjudicate the dispute or render binding decision for the parties (Article 1(1) (a) and (b)).

Following the guidelines and the language of the EU Directive (52/2008/EU), the same Article 1, in its para. 1, lett. c, clarifies that mediation and conciliation are considered not as two different types of ADR, but rather as, respectively, the proceedings which parties go through to solve their dispute and the result of such proceedings. Conciliation, is defined as the positive result of mediation, the agreement which eventually settles the dispute between the parties.

While most of Italian mediation law is EU-derived, the country went further by implementing a mechanism of mandatory pre-trial mediation scheme designed to operate in an extensive area of civil and commercial matters (insurance, finance and banking contracts, property law, medical malpractice,[55] tenancy, wills and

[53]Finocchiario (2012); see, also, Giovannucci Orlandi (2009), pp. 1229 ff.; Marinaro (2013), p. 105.

[54]See, e.g., the decisions of the CJEU in cases C-240/98, *Océano Grupo Editorial SA v. Roció Murciano Quintero*, 2000 E.C.R. I-4941; C-168/05, *Elisa María Mostaza Claro v. Centro Móvil Milenium SL*, 2006 E.C.R. I-10421 and C-243/08, Pannon GSM Zrt. v Erzsébet Sustikné Győrfi, 2009 E.C.R. I-4713. See Micklitz and Cafaggi (2008), pp. 391, 400–401 for the treatment of arbitration clauses in consumer contracts in some Member States.

[55]Under the new law of 8 March 2017, n. 17, medical malpractice is now subject to a mandatory pre-trial medical expertise and conciliation attempt (art. 696-*bis* of the Italian code of civil procedure).

successions, and others).[56] As to numbers[57] (including both mandatory and voluntary mediation), in 2016 some 183,000 mediation proceedings were filed, and 173,000 concluded, with an overall success rate of around 26%. Across the years, mediation mandated by a judge during judicial proceedings (where mediation was not a mandatory pre-trial attempt) has risen sharply from 700 cases in 2011 to 19,128 cases in 2016, but with a low success rate (only 15%): a sign that judges are paying greater attention to mediation, but perhaps mainly as a way of easing their overcrowded dockets. Around 20% of all mediation proceedings started are in bank matters, of whose only 7% reached an agreement, signalling that mediation in this area is largely ineffective. This contrasts with other areas (such as property law, tenancy and wills and succession) where the success rate is around 30%. As to the value of the dispute, success rate is higher (over 30%) when the matter at stake is valued between € 1000 and € 10,000, and gradually decreasing after that to 7–9% when the matter is valued € 500,000 or more.

Some have criticised the legislator's approach to consider mediation mainly as a tool to reduce courts' caseload and thereby cut the duration of typical court proceedings.[58] At the same time, in a system that is plagued with heavy delay and backlogs in court, mandatory schemes have the potential of facilitating a cultural shift and, in the end, improving access to justice and ensuring that disputants are able to resolve their matters within a reasonable time. Still, the road is a long one, particularly in countries, such as Italy, where the right to sue is seen as the right to a judge and a decision of the judge and where the emphasis traditionally placed on judicial adjudication as the "normal" way of disposing of civil controversies is strengthened by Article 24 of the Constitution, which guarantees that individuals have a right of action and defence in court for the protection of their rights and legitimate interests.[59] As seen *supra* in relation to the *azione di classe*, to be successful, the mediation scheme requires the support of the legal profession and the judiciary, and above all it needs to be accompanied by a shift in the prevailing dispute resolution culture.

Several statutes, concerned with the protection of consumers, are supporting experiments with various other forms of ADR services through resort to institutions like the Banking Ombudsman set up by private institutions or to conciliation/arbitration

[56]The scheme is currently regulated by the law of August 9, 2013, no. 98. See Pailli and Trocker (2013), pp. 75–102. A case is currently pending before the CJEU on whether the Italian regime is compatible with the Directive 2013/11/EU on consumer ADR, especially where the Italian law provides for compulsory representation by a lawyer when the pre-trial attempt is mandatory.

[57]All numbers are taken from the 2016 Annual report on mediation in civil matters prepared by the Ministry of Justice and available at https://webstat.giustizia.it/Analisi%20e%20ricerche/forms/mediazione.aspx (also in English language).

[58]Lupoi (2012), p. 41.

[59]Notably, the Court of Justice of the EU in Joined cases C-317/08, C-318/08, C-319/08 and C-320/08, *Alassini and others*, [2010] ECR I-2213, noted that mandatory pre-trial mediation does not necessarily contrast with the principle of access to courts, recognizing that : "no less restrictive alternative to the implementation *of a mandatory procedure exists*, since the introduction of an out-of-court settlement procedure *which is merely optional is not as efficient* a means of achieving those objective" (par. 65).

procedures set up by the Chambers of Commerce, managed by professionals formed within the Chambers, not necessarily among lawyers. One of the most successful examples is represented by the mandatory pre-trial conciliation procedure in telecommunications, delegated by the ICA to the "Corecom" (one for each Region). Before bringing an action against a telephone and Internet services provider, consumers (and traders) must file a complaint with the regional Corecom, where an attempt to conciliate the dispute will be made. The scheme does not provide for compensation of damages suffered by the user, but the provider may write-off debt and offer a (usually small) sum of money as partial indemnification. If the attempt fails, the parties are free to go before a judge or request the Corecom to issue a decision on the matter. The success rate of this procedure is reported at 78–79% over around 90,000 complaints, with an overall € 32 million of indemnification to users.[60] Some Corecoms are switching their platforms online. With less impressive numbers, but still a very high success rate of 81%, the Italian Authority for Energy provides for an online conciliation procedure that helped settling some 3174 disputes in the years 2013–2016.[61]

Notwithstanding the numerous legislative initiatives, the development of a true ADR culture still faces in Italy, as it does in much of Continental Europe, significant restraining factors; above all, the widespread perception of the intervention by the judge as the normal way of disposing of civil controversies.

The last in time legislative addition is the Legislative Decree of 6 August 2015, no. 130, implemented Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes.[62] The Decree included new provisions (Article 141 ff.) in the ICC establishing a homogeneous legal framework for consumer ADR with a view of encouraging domestic and cross-border amicable settlement of consumer disputes, both online and in traditional settings. The law also describes the requirements for institutions to be registered as authorised ADR providers and specifies that in such procedures consumers do not need the assistance of a lawyer. The procedures envisaged by the new Decree are voluntary and not mandatory (i.e. a legal action may be commenced even if the procedure has not been previously attempted), but when a request for ADR is filed, the statute of limitation is interrupted avoiding the risk that participating to the ADR procedure may result in a forfeiture of consumer's rights. It is expressly stated in the Decree that certain earlier provisions, such as the mandatory mediation requirement of the Legislative Decree 28/2010 discussed above, prevail on the new voluntary scheme. Although it is yet too early to assess the impact of the new mechanism, it is noteworthy that the Decree provides for an extensive collection of statistic data by the Government, allowing close monitoring of the development of the new scheme.

[60]See, e.g., the Annual Report prepared by the ICA for 2016, available at https://www.agcom.it/relazioni-annuali.

[61]See the details at the official website at http://www.autorita.energia.it/it/consumatori/conciliazione.htm.

[62]See Desiato (2016), p. 1793B.

5 Conclusions

This paper notes the central role of the ICA, but also the fragmentation that characterises the public enforcement of consumer rights in Italy. The Italian regulatory system relies on a diffuse set of regulators, rather than on a centralized bureaucracy for the effectuation of its substantive aims. Nevertheless, the picture is so fragmented that this may undermine the effectiveness of the various tools. Some sort of rationalisation is, thus, necessary. In this respect, a positive development recently occurred when the ICA gained an exclusive competence to combat unfair commercial practices also in regulated sectors, after having consulted the sector specific regulator, 'apart when the breach of sector specific regulation does not result in an unfair commercial practice'. Unfortunately, the case law of the administrative tribunals still shows a significant degree of uncertainty about the overlapping competencies of the ICA and sectorial authorities.[63]

On the other side, the level of the private enforcement is not satisfactory. The new action for the judicial collective redress of consumers (i.e., *azione di classe*) remains a failed promise not only due to certain procedural shortcomings (i.e., limited standing, certification issues), but also because of the cultural resistance of the main actors in the field (i.e., associations, lawyers, judges). The analysis confirms the shortcomings of a system where the main actors are, in practice, consumer associations., Italian lawyers do not consider themselves as entrepreneurs and, thus, the Italian legal profession, one of the largest in the EU, is not effectively promoting actions for damages in consumer and competition law. No other private actor has emerged. As a result, private enforcement remains underdeveloped, confirming the traditional preference of the Italian legal system for public enforcement of consumer protection.

Equally importantly, we underlined the overlap between the public and the private actors and tools in enforcing consumer rights and collective interests (e.g., *quasi-public* actions). Consequently, the article stresses the need of further understanding and developing such emerging integration of the enforcement regimes. For example, the ICA's new competence on unfair terms in consumer contract grounds on the idea of empowering public agencies to enforce private law rights for the benefit of the consumers.[64] Another example of the relationship between the enforcement regimes consists in follow-on actions, that are still rare in Italy: the ICA is mainly issuing administrative pecuniary sanctions (fines) against the wrongdoers to enforce some of the rights granted by the Consumer Code. Follow-on

[63] Article 23(12) Legislative Decree 6 July 2012, No. 95.

[64] Similarly, the Office of Fair Trading can file for injunctive relief with regard to unfair terms in consumer contracts. See: Regulation 8 Unfair Terms in Consumer Contracts Regulations 1994; Regulation 12 of the Unfair Terms in Consumer Contracts Regulations 1999; Part 8 of the Enterprise Act 2002. OFT, Enforcement of consumer protection legislation, Guidance on Part 8 of the Enterprise Act, Office of Fair Trading (2003) 18 ff., p. 76 f. Usually, the threat of OFT seeking an order is sufficient to prompt businesses to change their general clauses.

individual or collective actions by consumers claiming for damages are rarely following ICA's decisions.[65] The same applies when consumers have suffered a damage for a breach of Competition Law sanctioned by the ICA.[66]

Amidst a not very encouraging picture, the recent two class actions filed in the diesel gate scandal, both drawing a larger participation by (allegedly) injured consumers, seem to cautiously open the way for further promising developments.

Finally, the article examines the increasing interest for alternative resolution mechanisms in consumer disputes, noting certain successful experiments in the field of telecommunications, but an overall lack of cultural confidence and of judicial alternatives to strengthen the consensual role of ADR.

To conclude, the mix of enforcement instruments is here to stay, challenging Italian policymakers and legal scholars to find the right balance between the different instruments, and, also important, to integrate them by designing a coherent strategy, with the aim of ensuring an effective enforcement of consumer rights.

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[65] See *supra* Sect. 3.1.

[66] See Legislative Decree of 19 January 2017, no. 3 implementing the Directive 2014/104/EU on antitrust damages actions and especially Article 7 of follow-on actions (see also *supra* Sect. 3.1).

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La Mise en Œuvre et l'Effectivité du Droit de la Consommation au Japon

Aya OHSAWA

1 Introduction

1.1 Émergence du droit de la consommation au Japon

La population totale du Japon est de cent vingt-six millions neuf cent quatre-vingt-dix-huit mille habitants (126 980 000) (au 1er avril 2016). Nous avons connu, au Japon, des problèmes de nuisance et de tromperie concernant l'étiquetage d'alimentaire dans les années 1960 éveillant « la conscience politique des consommateurs ».[1] La loi fondamentale pour la protection des consommateurs de 1968 et la constitution du Centre National des Affaires des Consommateurs (CNAC)[2] en 1970, sont des symboles de l'ouverture de la politique en matière de consommation.

Dans les années 1980, des actions pour la protection des consommateurs ont décliné dans un climat de dérégularisation, mais la politique en matière de consommation a été développé les années 1990 : tout d'abord, à la différence de la politique de « protection » des consommateurs, nous avons accordé plus d"importance à l'« autonomie » des consommateurs. Ce changement de politique en matière de consommation a conduit à voter la « loi fondamentale des consommateurs » (en 2004) qui établit « des droits des consommateurs » et leur « autonomie ». Par la suite, « l'époque de la législation »[3] sur la politique en matière de

[1] Omura (2011), pp. 5 et s.

[2] V. http://www.kokusen.go.jp/e-hello/about_ncac/data/ncac_hello.html.

[3] Tsuneo Matsumoto, *Gendai-no shohisya-seisaku-ni-miru houritsu-to-syakaiteki-sekinin-no-kankei (La relation entre les lois et la responsabilité sociale dans la politique en matière de consommation)*, Housei-Kenkyu (Revue de l'Université Kyushu), 81-4, pp. 484 et s.

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consommation a débuté, établissant la « loi sur la responsabilité des produits » (en 1994)» et la « loi sur les contrats des consommateurs » (en 2000), deux lois qui sont influencées par la politique en matière de consommation de l'UE (par exemple : Directive 85/374/CEE en matière de responsabilité du fait des produits défectueux, et Directive 93/13/CEE concernant les clauses abusives dans les contrats conclus avec les consommateurs). Les consommateurs japonais poursuivent en justice sur la base de ces lois.

De plus, dans les années 2000, beaucoup de nouvelles lois et de réformes ont été mises en place pour adopter les changements relatifs aux problèmes des consommateurs (par exemple, des problèmes relatifs à Internet) et pour instituer des procédures spéciales pour protéger l'intérêt des consommateurs. Finalement, l'Agence des Affaires des Consommateurs (AAC) a été créé en 2009. C'est tant un point d'arrivée qu'un point de départ de la politique en matière de consommation au Japon.

1.2 La Loi fondamentale des consommateurs

Le cadre général de la politique en matière de consommation au Japon est présenté dans la loi fondamentale des consommateurs de 2004[4]. Cette loi est une édition revue de la loi fondamentale pour la protection des consommateurs de 1968. La loi fondamentale des consommateurs de 2004 a stipulé les droits des consommateurs au Japon : le droit à la sécurité, le droit de choisir, le droit d'être informé, le droit à l'éducation, le droit d'être entendu, le droit à des recours sont des droits à la consommation.

Considérant le déséquilibre des informations et de la capacité de négociation entre professionnels et consommateurs, cette loi établit les principes de la politique en matière de consommation au Japon, et aussi, détermine la responsabilité d'Etat, des collectivités locales et des professionnels sur la loyauté des contrats des consommateurs, la sécurité des produits, le respect des qualités et des informations, l'assurance de la concurrence, les recours du consommateurs ou encore l'organisation de consommateurs. En outre, des dispositions ont été prises sur la responsabilité des associations de consommateurs et des consommateurs.

Pour promouvoir la politique en matière de consommation présentée ci-dessus, l'Etat prescrit un plan fondamental pour des consommateurs tous les cinq ans (mais il le révise chaque année). Le plan le plus récent a été prescrit en mars 2015 et a pour but de faire face aux changements de la vie des consommateurs, par exemple, l'augmentation des problèmes des personnes âgées et celui des affaires mondiales des consommateurs.

[4] http://www.japaneselawtranslation.go.jp/law/detail/?id=2040&vm=04&re=01.

1.3 Sources du droit de la consommation

Au Japon, il n'y a pas le Code de la consommation comme en France. La politique en matière de consommation est établie par quelques Codes, lois, et règlementations : le Code civil, le Code de procédure civile, et quelques lois spéciales sur la politique en matière de consommation.

D'abord, s'agissant de droit civil, la loi sur les contrats des consommateurs qui a été adoptée en 2000 joue un rôle essentiel. Cette loi met en œuvre des dispositions à l'encontre des invitations injustes (art. 4) et des listes des clauses abusives de non-responsabilité (art. 8), des clauses ne reconnaissant pas au consommateur le droit de resilier un contrat (art.8-2), et des clauses pénales (art. 9), ainsi qu'une disposition sur les clauses générales (art. 10)[5]. De plus, il existe une loi sur la responsabilité des produits défectueux (en 1994)[6].

Ensuite, il y a beaucoup de lois administratives ayant un rapport direct avec le droit de la consommation. Certes, beaucoup de ces lois ont pour objet de contrôler les professionnels, particulièrement dans le domaine industriel, mais certaines contribuent directement à la politique en matière de consommation : La loi sur des certain types des affaires commerciales (sur la vente à domicile, les ventes ou prestations « boule de neige » ou la prestation de service, par exemple)[7], la loi sur la sécurité des consommateurs (en 2009)[8], et la loi sur des indications alimentaires (en 2013).

Finalement, s'agissant de droit judiciaire, il existe dans la loi sur les contrats des consommateurs des dispositions sur les actions exercées par les associations de consommateurs. De plus, la loi sur la procédure spéciale pour le recouvrement des dommages massifs des consommateurs a été adoptée en 2013.

Toutefois, des consommateurs ne comprennent pas bien leurs droits et la politique en matière de consommation. Alors, pour assurer l'éducation des consommateurs, la loi de promotion de l'éducation des consommateurs a été adoptée en 2012. Elle définit le principe et la responsabilité de l'"Etat pour l'éducation des consommateurs.

1.4 Le nombre et la caractéristique des plaintes des consommateurs

Les plaintes des consommateurs, qui sont entendues par tous les Centres locaux des affaires des consommateurs au Japon en 2014, ont été au nombre de 954 591 (contre

[5] http://www.consumer.go.jp/english/cca/index.html: Sur des clauses abusives, Ohsawa (2010).

[6] http://www.japaneselawtranslation.go.jp/law/detail/?id=86&vm=04&re=02.

[7] http://www.japaneselawtranslation.go.jp/law/detail/?id=2065&vm=04&re=02.

[8] http://www.japaneselawtranslation.go.jp/law/detail/?id=2023&vm=04&re=01.

939 800 en 2013)[9]. Ces caractéristiques sont les suivantes : d'abord, les plaintes émises par des personnes âgées sont en augmentation. En fait, le pourcentage des plaintes émises par des personnes de plus de soixante ans est d'environ 35% pour l'année 2014 (en 2005, le pourcentage était d'environ 23%). Ensuite, les plaintes à propos du service de la communication sont les plus nombreuses et concernent par exemple, Internet (service de connexion), des demandes fictives et les Smartphones. Finalement, les plaintes concernant la résiliation des contrats et sur les pratiques commerciales sont également nombreuses.

1.5 Plan

D'abord, nous devrons observer les institutions et organismes de la consommation, qui sont les acteurs de la mise en œuvre du droit de la consommation. Ensuite, en analysant le mécanisme de la régulation et la résolution des conflits de consommation, c'est-à-dire, les procédures judiciaire, les procédures extrajudiciaires, et quelques types de sanctions, nous devrons prendre en considération de la diversification de la mise en œuvre du droit de la consommation.

2 Les acteurs de la mise en œuvre du droit de la consommation

2.1 Organisme publique et la mise en œuvre du droit de la consommation

2.1.1 Organisme administrative pour la défendre des intérêts de consommateurs

2.1.1.1 Organisme d'autorité

Avant tout, la protection des intérêts des consommateurs est exercée par des voies judiciaires. Cependant, les actions en justice concernant le droit de la consommation sont peu nombreuses. En fait, la mise en œuvre du droit de la consommation est assurée par le pouvoir administratif, notamment par l'Agence des affaires des consommateurs (AAC) [10]qui est la « tourelle de commandement de droit de la consommation » au Japon.

L'AAC a été créé en 2009. Jusque-là, plusieurs ministères avaient traité des affaires des consommateurs, qui avaient causé la dispersion des informations sur

[9]CNAC (dir.), *Syohi-seikatsu-nenpo 2015*, p. 8.
[10]http://www.caa.go.jp/en/.

des accidents et des dommages des consommateurs et le retard à prendre des mesures.

L'AAC se constitue de deux sections principales : celle qui projette et pousse la politique en matière de consommation et l'harmonise avec autres ministères, et celle qui exécute les lois relevant de ses compétences. Il y a environ trois cents fonctionnaires, pour la plupart, des fonctionnaires en contrat à durée déterminée qui sont détachés par d'autres ministres, ainsi que des avocats.

L'AAC a la compétence d'exécuter des lois en matière de sécurité, affaires, et indications.

- D'abord, plusieurs accidents concernant des produits alimentaires survenus dans le courant de l'année 2000 ont été l'occasion de créer l'AAC. Alors, sur la base de la loi sur la sécurité des consommateurs, l'AAC rassemble des informations sur les accidents, analyse leurs causes (il y a Commission d'enquête sur la sécurité des consommateurs dans l'AAC), les diffuse, et prend des mesures contre les accidents qui ne relèvent pas des autres ministères. En outre, l'AAC établi les principes de sécurité alimentaire en se basant sur la loi de principe de sécurité alimentaire (adoptée en 2003)[11].
- Ensuite, la loi sur les contrats des consommateurs et la loi sur la responsabilité du fait des produits sont placées sous l'autorité de l'AAC. De plus, celle-ci a le pouvoir tant de projeter et de formuler un projet de la loi sur certains types d'affaires commerciales que de faire une inspection sur place et d'ordonner sur la base de cette loi.
- Enfin, l'AAC a pour mission d'établir des normes sur des indications et de constater des infractions à la loi contre les primes injustifiables et les indications trompeuses[12]. En outre, l'AAC a un pouvoir d'exécuter de la loi sur des indications alimentaires.

Selon un sondage d'opinion effectué en 2014, 11.1% des gens ne connaissent pas l'AAC. Cependant, 21.4% des gens connaissent le nom "AAC" mais ne pas au fait de ses activités[13].

2.1.1.2 Organisme consultatif

L'administration a une grande importance : La Commission des Consommateurs (CC), qui relève de l'Administration centrale du Cabinet[14] est composée de dix membres : personnalités qualifiées en matière de droit de la consommation, représentants des consommateurs, représentants des professionnels, ou encore

[11] http://www.japaneselawtranslation.go.jp/law/detail/?vm=04&re=01&id=1839.

[12] http://www.japaneselawtranslation.go.jp/law/detail/?id=2303&vm=04&re=01.

[13] AAC, *Heisei 27 nen-do Syohisya Hakusyo* (http://www.caa.go.jp/policies/policy/consumer_research/white_paper/2015/), p. 91.

[14] http://www.cao.go.jp/consumer/en/e-index.html.

avocats. La CC a pour fonction d'administrer les problèmes des consommateurs dont l'AAC s'occupe en délibération, et de faire une proposition au Premier ministre et aux autres ministres, suite à ses consultations. La CC est une administration indépendante qui exerce une surveillance totale sur la politique en matière de consommation. En plus, quelques membres spéciaux sont souvent nommés. En fait, la reforme sur la loi des contrats des consommateurs mise en place en 2016 a été réalisée après délibération de la commission spéciale de la CC.

2.1.2 Les institutions spéciaux pour la défense des intérêts des consommateurs

2.1.2.1 Services locaux de la politique de protection des consommateurs

Les Centres locaux des affaires des consommateurs, institués dans tous les départements, villes et arrondissements principaux, jouent un rôle important pour mettre en œuvre le droit de la consommation. Ils diffusent des informations et offrent des occasions d'études pour des consommateurs. La mission la plus importante est de conseiller les consommateurs en face-à-face ou par téléphone. En téléphonant au « 188 » (la « Hotline des consommateurs »)[15], ils sont mis en relation avec Centre local des affaires des consommateurs le plus proche. Cette ligne a été instaurée par l'AAC en 2010. Avant tout, les conseils aux consommateurs ont pour but de les aider à résoudre leurs problèmes eux-mêmes. Mais, le Centre local des affaires des consommateurs procède souvent à une médiation entre les professionnels en quelques semaines ou en un ou deux mois, mais elle prend parfois jusqu'à six mois[16].

2.1.2.2 Centre National des Affaires des Consommateurs (CNAC)

L'institution spéciale la plus importante pour la mise en œuvre du droit de la consommation est le Centre National des Affaires des Consommateurs (CNAC), créé en 1970. C'est un établissement autonome de droit public et le noyau de la mise en œuvre du droit de la consommation au Japon[17]. Ses missions principales sont les suivantes :

– il diffuse des informations aux consommateurs et il demande aux organisations publiques et aux professionnels de régler et prévenir les problèmes des consommateurs.
– il assiste les missions du conseil des Centres locaux des affaires des consommateurs. Il conseille par exemple tous les consultants au Japon, et il

[15] http://www.caa.go.jp/region/shohisha_hotline.html.
[16] Institute sur la Recherche et l'Entrainement de Droit (2011), p. 8.
[17] http://www.kokusen.go.jp/e-hello/about_ncac/data/ncac_hello.html.

conseille directement les consommateurs durant leurs jours de congés et lors de leur repos de midi dans les Centres locaux des affaires des consommateurs.
– il a une mission d'étude.
– il rassemble des informations par le système en ligne établi entre le CNAC et les Centres locaux des affaires des consommateurs, appelé « PIO-NET (système en ligne des informations sur la vie des consommateurs) ». Le CNAC utilise ainsi les informations collectées par des consultants locaux et rassemblés dans PIO-NET.
– Il a une mission d'essai des produits pour prévenir la récurrence d'accidents.

Grâce à PIO-NET, les missions du conseil des Centre locaux des affaires des consommateurs sont significatives non seulement pour résoudre les litiges des consommateurs mais aussi pour leur mission d'information et de prévention.

2.1.2.3 Méconnaissance et insatisfaction de consommateurs

Cependant, les consommateurs ne connaissant bien les systèmes et les établissements décrits ci-dessus. Selon un sondage d'opinion sur la politique en matière de consommation mené en 2015, seulement 34,6% des consommateurs connaissaient la « Hotline des consommateurs »[18]. En outre, selon le même sondage effectué en 2008, le pourcentage des consommateurs qui connaissaient tant le nom du CNAC que les missions du CNAC étaient de 15,3%, dont seulement 39,2% étaient satisfaits du CNAC. Plusieurs consommateurs ont été mécontents du CNAC à cause des limites de consultation, de l'insuffisance de la spécialisation, et de la brièveté de la consultation. De plus, seulement 22% des consommateurs connaissaient tant l'existence des Centres locaux des affaires des consommateurs que leurs activités, et parmi eux, 43,5% étaient satisfaits de ses activités[19]. Il semble que ces insuffisances proviennent du manque de consultants réguliers et spécialisés en droit.

2.2 Organismes privés et la mise en œuvre du droit de la consommation

2.2.1 Les associations de consommateurs et la mise en œuvre du droit de la consommation

2.2.1.1 État actuel

2430 associations de consommateurs au Japon ont répondu à une enquête effectuée par l'AAC en 2011[20] : 166 sont de niveau national ou régional, 418 sont de niveau préfectoral, 1846 sont locales.

[18] http://survey.gov-online.go.jp/h27/h27-shouhisha/index.html.
[19] http://survey.gov-online.go.jp/h20/h20-shohisha/2-3.html.
[20] http://www.caa.go.jp/region/pdf10/120525_26.pdf.

Cependant, il nous semble que les activités des associations des consommateurs au Japon sont freinées plus que dans d'autres pays pour les raisons suivantes.

Premièrement, leurs moyens financiers et leurs ressources humaines sont très limités. Il est difficile pour elles de publier des revues (comme par exemple « Que choisir ? » de UFC en France), et par conséquent beaucoup de ces associations dépendent des cotisations de leurs membres.

Deuxièmement, elles ne sont pas suffisamment reconnues par l'Etat. Selon l'enquête citée précédemment, seulement 805 des associations (33,1%) sont dotées de personnalité morale, dont 649 sont des organisations à but non lucratif. Aucune règle spéciale pour la fondation de ces associations et leurs fonctions n'a été instituée au Japon.

2.2.1.2 Historique

L'émergence des associations de consommateurs a été un mouvement principalement soutenu par les femmes au foyer (comme par exemple l'Association des femmes au foyer (Shufuren)[21]) contre la hausse des prix et le manque des matériels après la Seconde Guerre mondiale. De plus, durant l'époque d'exaltation des mouvements citoyens dans les années 1960, les associations de consommateurs se sont développées. Cependant, dans les années 1980, les mouvements des associations de consommateurs ont décliné à cause des tendances conservatrices de la société. Par conséquent, les activités principales des associations de consommateurs sont désormais d'informer et de conseiller les consommateurs, de même que des achats groupés qui sont une des activités favorites des associations de consommateurs.

2.2.1.3 Associations de consommateurs « pour l'action civile »

Actuellement, il existe un autre type d'associations de consommateurs : il s'agit des associations de consommateurs agréées pour défendre l'intérêt collectif des consommateurs. Depuis la réforme de la loi sur des contrats des consommateurs en 2006, beaucoup d'actions ont été exercées par les associations de consommateurs. Cependant, parce qu'il est difficile d'être agréée pour la plupart des associations de consommateurs, elles sont encore faibles, bien que certaines soient comme « la groupe pour l'action civile » constituées autour d'avocats. Cela suscite des associations des consommateurs « bipolaires »[22].

[21] http://www.shufuren.net/.

[22] Maruyama (2012), p. 19.

2.2.1.4 Associations organisées par des consultants

En outre, il y a des associations organisées par des consultants des affaires en matière de consommation : l'Association Japonaise des Consultants pour des Consommateurs (AJCC) et l'Association Japonaise des Consultants pour les Affaires des Consommateurs (AJCAC). Elles font des missions de conseil et diffusent des informations elles-mêmes, ce qui caractéristique du Japon[23].

2.2.2 Les organisations professionnelles et règlementation privée

2.2.2.1 Règlementation privée par les organisations professionnelles

On pourrait dire que le droit de la consommation est construit par les règlementations privées, notamment par les organisations professionnelles. Nous allons présenter trois exemples.

D'abord, il existe des modèles de contrats et des directives concernant les quatre sections des industries des services (salon de beauté, école de langues étrangères, cours privés, professeur particuliers) portant sur, par exemple, l'obligation d'information, la publicité, la durée de contrat, le délai de réflexion et la clause pénale. Ils ont été établis en 1994 sous la direction de l'ancien Ministère du Commerce international et d'Industrie (désormais Ministère d'Economie, Commerce et Industrie). Ainsi, les réglementations par les organisations professionnelles sont souvent établies sur l'initiative de l'administration, ce qui signifie le contrôle indirect par l'administration pour la protection des consommateurs[24].

Ensuite, l'Association de la Sécurité des Produits des Consommateurs (ASPC)[25] établit des réglementations privées pour la sécurité des produits, marquant de la « marque SG » des produits qui satisfont à ces réglementations, et offrant une garantie contre des dommages occasionnés par ces mêmes produits. Ce sont des produits qui ne sont pas désignées comme « produits spéciaux » par la loi sur la sécurité (régie par une réglementation spéciale et marqués « PSC ». Actuellement, il en existe dix), qui seraient marqués « SG ».

Enfin, des professionnels et des organisations de professionnelles peuvent établir des règlements sur la base de l'article 31 de la loi contre les primes injustifiables et les indications trompeuses pour prévenir les indications trompeuses et assurer le libre et raisonnable choix des consommateurs et la loyauté de la concurrence, autorisée par Premier ministre et Commission pour l'équité des pratiques commerciales.

[23] Matsumoto (1998), p. 108.
[24] Ohashi (1998), p. 126.
[25] http://www.sg-mark.org/english_1.html.

2.2.2.2 Rôle de réglementations privées

On peut dire que les réglementations privées sont non seulement destinées aux professionnels mais aussi aux consommateurs, et ce, pour les protéger. Par exemple, il existe un règlement sur l'indemnisation en cas d'accident causé par blanchissage, ce qui est utilisé comme règle de litiges.

Cependant, les réglementations privées ne contrôlent que des entreprises adhérentes. Afin de contrôler tous les professionnels, la réforme de la loi sur la vente à domicile (maintenant, la loi sur des certains types d'affaires commerciales) a notamment été mise en place cinq ans après l'établissement la réglementation des industries des services présentée ci-dessus, introduisant quelques dispositions de cette réglementation dans cette loi.

2.3 Les relations internationales et la collaboration entre l'Etat, les autorités et les associations de consommateurs

2.3.1 Les collaborations internationales pour des consommateurs

Le Japon est un des vice-présidents du Comité de l'OCDE concernant la politique en matière de consommation et se réfère aux lignes directives de ce Comité, par exemple, sur le commerce électronique et les pratiques commerciales transfrontières frauduleuses et trompeuses pour la législation et la réforme des lois[26]. En outre, le Japon participe au Réseau International de la Protection des Consommateurs et de la Mise en œuvre[27] et à la Comité de l'ISO pour la politique en matière de consommation[28].

Au niveau asiatique, la Réunion de concertation sur la politique en matière de consommation entre la Chine, le Japon et la Corée du Sud s'est régulièrement tenue depuis 2004 (dernièrement, en 2014)[29] pour échanger des informations sur cette politique, dans laquelle elles se sont accordées pour la collaboration sur la protection des consommateurs en 2006.

S'agissant des associations de consommateurs, le Comité de la Liaison Nationale des Associations des consommateurs (SHODANREN)[30] est un membre du Consommateurs International et trois associations en sont des filiales.

[26] http://www.oecd.org/fr/sti/consommateurs/.

[27] En anglais, c'est ICPEN https://www.icpen.org/.

[28] http://www.iso.org/iso/copolco.

[29] http://www.caa.go.jp/policies/policy/consumer_policy/international_affairs/pdf/0704soukatu.pdf.

[30] http://www.shodanren.gr.jp/: http://www.consumersinternational.org/our-members/member-directory/SHODANREN%20-%20National%20Liaison%20Committee%20of%20Consumer%20Organisations.

2.3.2 Résolution des conflits transfrontaliers

En 2011, le Centre National des Consommateurs Transfrontalier (CNCT), qui était le secteur privé et était charge par AAC, a été instaurée. Depuis 2015, le CNCT est dans le CNAC dont le secrétariat est privé[31]. En collaborant avec des organisations étrangères (maintenant, 8 organisations), le CNCT aide la résolution des litiges transfrontaliers communiquant aux professionnels les plaintes des consommateurs. Avant la fin de 2015, le CNCT a accepté plus de 15000 plaintes de consommateurs.

3 La diversification de la mise en œuvre du droit de la consommation

3.1 Procédure judiciaire et la mise en œuvre du droit de la consommation

3.1.1 Mise en œuvre du droit de la consommation par l'action judiciaire individuelle

3.1.1.1 Difficultés d'accès des consommateurs à la justice

Au Japon, des affaires en matière de consommation relèvent du tribunal de première instance ou du tribunal sommaire, comme les affaires civiles ordinaires. Le consommateur peut saisir un tribunal s'il a un intérêt à agir et a qualité pour agir. C'est un tribunal sommaire qui est compétent pour les litiges inferieurs à un million quatre cent mille yens (1 400 000 yens). Et, c'est un tribunal de première instance qui est compétent pour litiges supérieurs à cette somme. Les parties peuvent faire de pourvoi en appel contre un jugement en première instance, et faire un pourvoi en cassation contre un jugement en seconde instance.

Cependant, en général, les consommateurs hésitent à agir en justice parce qu'il y a deux obstacles principaux : premièrement, le coût du procès. Les frais de justice sont généralement à la charge de la partie qui perd le procès, mais un demandeur doit avancer les frais pour saisir un tribunal. De plus, les honoraires des avocats pèsent sur le plaideur. Deuxièmement, la lenteur de la justice dissuade les consommateurs d'agir.

En réalité, selon l'enquête que le Séminaire sur le système de procès civil (organisé par quelques professeurs de droit procédure civile) a fait auprès des parties civiles (d'août 2011 à octobre 2011)[32], 52.5% des demandeurs (personne physique)

[31] https://ccj.kokusen.go.jp/.

[32] Séminaire sur le système de procès civil (dir.), *Minji-sosyou-riyousya-chosa 2011 (L'enquête auprès des parties civiles en 2011),* Syoujihoumu, Tokyo, 2012.

ont répondu qu'un procès était couteux[33]. Et, 52.5% d'entre eux ont fait remarquer la lenteur de la procédure justiciaire[34]. De plus, 47.4% des demandeurs (personne physique) et 55.1% des défendeurs (personne morale) ont été bien ou peu satisfaits du résultat de leur action en justice[35].

3.1.1.2 Moyens de l'accès à la justice pour les consommateurs

Pour améliorer l'accès à la justice, les mesures suivantes ont été prises.

Tout d'abord, il existe désormais une procédure pour toute petite demande dans un tribunal sommaire (Code de procédure civile, art. 368). Les demandes de paiement inférieures à 600 000 yens dans laquelle il n'y a peu de points juridiques en litige sont l'objet de cette procédure. En principe, les parties peuvent obtenir un jugement en un jour. Cependant, elles ne peuvent pas faire de pourvoi en appel. Elles peuvent seulement contester la décision du tribunal sommaire.

Ensuite, il existe des aides financières pour supporter le coût du procès :

- Une aide juridictionnelle portant sur les honoraires des avocats est apportée par le Centre Japonais de Soutien Juridique (CJSJ)[36]. Le CJSJ a été créé en 2006 afin d'améliorer l'accès à la justice et diffuse des informations, conseille les citoyens par l'intermédiaire de ses avocats dans ses bureaux disséminés à travers tout le pays. Pour permettre aux personnes qui demandent l'aide juridictionnelle, le CJSJ examine ses revenus et la probabilité de gain après une consultation juridique gratuite. Toutefois, s'ils sont aidés, ils doivent toujours rembourser l'argent.
- L'aide est accordée par quelques arrêtés préfectoraux. Par exemple, selon l'Arrêté des consommateurs de Tokyo (la métropole du Japon), des consommateurs peuvent recevoir une aide financière compte tenu de la difficulté d'agir en justice pour ces consommateurs et l'existence de dommages collectifs, et lorsque ces affaires sont en délibération dans la Commission d'ADR à Tokyo.
- Il existe également des secours juridiques prévus dans le Code de procédure civile (art. 82 et s.). Cependant, ils se limitent aux affaires avec probabilité de gains.

3.1.1.3 Le nombre et la caractéristique des conflits des consommateurs

Au Japon, il n'y a pas de statistiques officielles portant sur les conflits des consommateurs puisqu'ils font l'objet d'une procédure civile ordinaire. À cet égard, les contentieux en matière civile que tous les tribunaux sommaires ont reçus en 2014 étaient au nombre de 319 070 (parmi eux, des affaires résolues étaient au

[33] Séminaire sur le système de procès civil (dir.), supra note 32, p. 267.
[34] Séminaire sur le système de procès civil (dir.), supra note 32, p. 270.
[35] Séminaire sur le système de procès civil (dir.), supra note 32, p. 166.
[36] http://www.houterasu.or.jp/en/index.html.

nombre de 317 720)[37]. De plus, ceux que tous les tribunaux de première instance ont reçus en 2014 étaient au nombre de 142 487 (parmi lesquels 141 006 affaires résolues)[38]. En outre, selon CNAC, depuis la mise en vigueur de La loi sur les contrats des consommateurs (avril 2001) jusqu'en septembre 2015, les jugements principaux sur la base de cette loi étaient au nombre de 344[39].

En réalité, la résolution des affaires civiles en première instance prend 9,2 mois en moyenne au Japon[40].

3.1.2 Mise en œuvre du droit de la consommation par la réparation collective

3.1.2.1 Généralités

Au Japon, il y a deux catégories d'actions à caractère collectif qui sont engagées par les associations de consommateurs : d'une part, les actions en cessation d'agissements illicites dans la loi sur des contrats des consommateurs (article 12 et suivants), d'autre part, les actions de groupe qui a été mis en vigueur le premier octobre 2016.

3.1.2.2 Actions exercées dans l'intérêt collectif des consommateurs

D'abord, les articles 12 et suivants de la loi sur des contrats des consommateurs, résultant d'une reforme de cette loi en 2006, permet aux associations de consommateurs agréées de demander la cessation d'agissements illicites, c'est-à-dire, des invitations injustes (art. 4) et des utilisations des clauses abusives (art. 8, 8-2, 9, et 10) (maintenant, l'objet de ces actions est élargi à des invitations injustes dans la loi sur certains types d'affaires commerciales (art. 58-4 et s.), des indications illicites dans La loi contre les primes injustifiables et les indications trompeuses (art. 30), et ceux dans la loi sur des indications alimentaires). Ces associations peuvent aussi demander la prévention d'agissements décrits ci-dessus lorsque ces agissements sont susceptibles d'être commis.

Ce sont des associations de consommateurs agréées par le Premier ministre qui peuvent représenter les consommateurs et agir en justice. Cet agrément peut être accordé à des associations qui ont réunies les conditions suivantes : être doté de personnalité morale ; avoir pour but la défense des intérêts des consommateurs et continuer pendant une durée conséquente ; avoir des bases financières et d'organisation suffisantes, et pouvoir être conseillé par des personnalités qualifiées

[37] http://www.courts.go.jp/app/files/toukei/894/007894.pdf.
[38] http://www.courts.go.jp/app/files/toukei/893/007893.pdf.
[39] http://www.kokusen.go.jp/news/data/n-20151126_1.html.
[40] http://www.courts.go.jp/vcms_lf/hokoku_06_gaiyou.pdf.

(par exemple des avocats). La durée d'agrément est de 3 ans. 17 des associations de consommateurs agrées exercent actuellement.

Avant d'agir en justice, les associations de consommateurs doivent demander une cessation extrajudiciaire par écrit (art. 41 et s.), pour une résolution amiable ou volontaire par les professionnels. Ces associations ne peuvent agir en justice qu'une semaine après l'arrivée de ce document.

De plus, une association ne peut pas agir en justice à l'encontre d'un professionnel contre lequel d'autres associations ont déjà obtenu un jugement (art. 12-2).

Les résultats extrajudiciaires et les jugements sont publiés par le Premier ministre ou le CNAC (art. 39). Entre 2007 et juillet 2015, 8 de ces jugements ont été déclarés, et 111 affaires ont été résolues dans les tribunaux ou de manière extrajudiciaire[41].

3.1.2.3 Action de groupe

Ensuite, l'action de groupe qui a été mise en application le premier octobre 2016. Cette action est basée sur la loi de procédure civile spéciale pour le recouvrement des dommages massifs des consommateurs adoptée en 2013. Afin d'assurer l'efficacité du recouvrement des dommages des consommateurs, une action est exercée par « des associations de consommateurs agréées spéciales » (qui sont spécialement agrées, parmi des associations de consommateurs déjà agréées, pour poursuivre cette action), pour une procédure en deux phases (ce qui ressemble aux actions de groupe en France).

Première phase de la procédure : l'action pour confirmer une obligation pécuniaire commune des professionnelles pour un groupe de consommateurs. Le champ d'application de cette action est l'obligation d'exécution, de dommages et intérêts, et de restitution ordonnée à des professionnels en matière de consommation, à l'encontre d'un grand nombre de consommateurs ayant une cause commune. Cependant, cette action ne peut porter sur la réparation de préjudices moraux ou corporels, de dommages causés par un défaut de produit, ou de gain manqué.

Deuxième phase de la procédure : la procédure simplifiée fixant une créance à chacun des consommateurs concernés. Si une association de consommateurs spéciale agréée gagne durant la première phase, elle doit demander le lancement d'une procédure simplifiée au tribunal dans un délai d'un mois après de jugement. Après que le tribunal a décidé le lancement de la procédure simplifiée, cette association notifie les consommateurs concernés. Les consommateurs qui veulent profiter de ce jugement adhèrent alors à cette procédure. Après la déclaration des créances des consommateurs concernés par cette association, le tribunal détermine la créance des consommateurs et son montant.

[41] http://www.caa.go.jp/policies/policy/consumer_system/collective_litigation_system/about_system/case_examples_of_injunction/pdf/00sashitomejirei.pdf (v. p. 3).

3.2 Procédure extrajudiciaire et la mise en œuvre du droit de la consommation

3.2.1 Généralités

Des litiges liés à la consommation peuvent être réglé en dehors d'un tribunal. Ces procédures extrajudiciaires peuvent être divisées en deux catégories : d'une part, examinés par des organisations publiques, d'autre part, par des organisations privées.

3.2.2 Procédures extrajudiciaires nationales

S'agissant de l'organisation publique, il faut tout d'abord citer la Commission de règlement des litiges de la consommation (Commission ADR de consommation)[42] relevant du CNAC. Dans cette commission, les procédures de médiation pour faciliter une conciliation et de l'arbitrage sont exercées pour le règlement des « litiges graves de consommation (qui causent ou causeraient des dommages multiples, des préjudices patrimoniaux ou corporels graves subis par les consommateurs, et qui sont litiges compliques entre professionnels et consommateurs) ». Des litiges sont réglés après deux ou trois rencontres (qui prennent environ quatre mois en moyenne) par un ou au plus deux médiateurs ou arbitres. Cette commission peut publier ces résultats pour attirer l'attention des consommateurs. Si les parties ne parviennent pas à un accord et que les consommateurs intentent une action devant un tribunal, la CNAC fournit les documents relatifs à cette action.

1,082 affaires ont été adressées par des consommateurs entre avril 2009 et avril 2016 (environ 150 en moyenne par un an), dont 551 ont été conciliées, 320 non conciliées et 119 sont retirées[43].

3.2.3 Procédures extrajudiciaires locales

De plus, dans les principales villes du pays, il existe des commissions pour l'ADR de consommation, comme par exemple la Commission de la résolution des dommages subis par des consommateurs à Tokyo[44], dont membres sont des personnalités qualifiées représentants les professionnels et les consommateurs. Elle met en place une procédure de médiation et de conciliation des litiges qui ont ou auraient une influence importante sur les consommateurs et qui sont entendus par les Centres locaux des affaires des consommateurs à Tokyo. Depuis l'instauration de ces

[42] http://www.kokusen.go.jp/e-hello/about_ncac/data/ncac_adr.html.
[43] http://www.kokusen.go.jp/adr/hunsou/index.html.
[44] https://www.shouhiseikatu.metro.tokyo.jp/sodan/kyusai/.

commissions, entre 1975 et 2014, 70 litiges ont été renvoyées (5 en 2014), dont 7 litiges sont parvenus à des actions aidées par cette commission[45].

3.2.4 Rôle des procédures extrajudiciaires

Les procédures publiques ci-dessus, d'abord, incitent les professionnels à collaborer avec les pouvoirs publics. Puis, elles permettent de développer la politique en matière de consommation par des informations récoltées durant ces procédures[46].

3.2.5 Procédures extrajudiciaires privées

En outre, des procédures extrajudiciaires par des organisations privées sont appropriées à la résolution des litiges très particuliers. Ainsi, la loi sur la promotion de l'utilisation de procédure extrajudiciaire a été instituée en 2004. Sur la base de cette loi, le Ministre de Justice donne une authentification à une organisation qui exerce une procédure extrajudiciaire. Cette organisation bénéficie de l'interruption de la prescription, décision exécutoire.

Certaines organisations de fabricants ont par exemple instauré des centres de responsabilité du fait de produits défectueux, auxquels les consommateurs peuvent s'adresser et être dédommagés à l'amiable[47]. Cependant, il nous semble que ces centres ne sont pas bien connus du grand public et manque de personnes compétentes.

Il existe enfin des Centres de médiation et de résolution des litiges par des associations d'avocats à travers tout le pays, qui s'occupent de toutes affaires civiles. Le nombre des déclarations était de 990 en 2014, 1012 en 2013, 1046 en 2012. En 2014, 71% ont été acceptées par les autres parties, dont 52.9% ont été réglées[48].

3.3 Sanction et la mise en œuvre du droit de la consommation

3.3.1 Généralités

Il existe au Japon des sanctions civiles, des sanctions administratives, et des sanctions pénales, tout comme des autres pays.

[45] https://www.shouhiseikatu.metro.tokyo.jp/sodan/kyusai/funsou.html.

[46] Yamamoto (2016), p. 304.

[47] http://www.caa.go.jp/policies/policy/consumer_safety/other/plcenter/.

[48] http://www.nichibenren.or.jp/library/ja/legal_aid/consultation/data/statistical_yearbook2014.pdf.

3.3.2 Sanctions administratives

Traditionnellement, les sanctions sont principalement administratives dans le droit de la consommation. Par exemple, selon la loi sur certains types d'affaires commerciales, les autorités administratives peuvent mener une instruction pour prendre ensuite les mesures nécessaires et enjoindre une suspension d'exploitation. De plus, elle peut enquêter et constater les infractions sur place, ainsi que demander justification aux professionnels.

3.3.3 Sanctions pénales

De plus, les infractions constatées touchant la publicité exagérée, le devoir de fournir un document, le devoir d'information, l'offre d'informations mensongère, la violence dans la loi sur certains types d'affaires commerciales sont assorties de sanctions pénales (article 70 et s). En punissant pénalement les infractions de sanctions administratives citées ci-dessus, les sanctions pénales ont pour rôle d'assurer l'efficacité des pouvoirs administratifs. Toutefois, il nous semble que ces sanctions pénales ne sont pas correctement exercées à cause du manque de moyen des forces de police[49].

3.3.4 Sanctions civiles

Les sanctions civiles ont pour objectif de mettre en œuvre le droit de la consommation. Contre des invitations injustes, les consommateurs peuvent demander l'annulation du contrat conformément à l'article 4 de la loi sur des contrats des consommateurs et sur la base de la fraude dans le Code civil, ainsi que sur la nullité de contrat reposant sur une erreur dans le Code civil. De plus, ils peuvent demander des dommages- intérêts sur la base de la disposition de la responsabilité civile du Code civil. Des clauses abusives sont réputées non écrites par la loi sur des contrats des consommateurs. En outre, le fabriquant est tenu responsable des dommages causés par un défaut de son produit par la loi sur la responsabilité du fait des produits défectueux.

3.3.5 Sanctions nouvelles et effectives

De plus, il existe les nouvelles et intéressantes sanctions suivantes.

D'abord, l'action en cessation par des associations de consommateurs agrées dans la loi sur des contrats des consommations contribue tant au recouvrement des dommages qu'à leur prévention.

[49] Saeki (2016), p. 48.

Ensuite, le Premier ministre doit prononcer la surtaxe de 3% de la vente contre les professionnels qui fournissent ces indications mensongères. Cette surtaxe a été instaurée par la réforme de la loi contre les primes injustifiables et les indications trompeuses en 2014 (article 8 et s.). Cependant, si ces professionnels rapportent eux-mêmes les infractions ci-dessus, la surtaxe est réduite de moitié (art. 9), et s'ils restituent volontairement les bénéfices illicites aux consommateurs selon la procédure définie par cette loi, le montant de la restitution est déduit de la surtaxe (art. 11). Il nous semble que ce système de surtaxe contribue non seulement à la prévention des indications mensongères mais aussi au recouvrement des dommages des consommateurs[50].

Finalement, dans la loi sur certains types d'affaires commerciales, il a été pris quelques dispositions assortissant une sanction administrative d'une annulation de contrat (par exemple, une offre d'informations mensongère (art. 9-3)). En outre, malgré que cette loi relève du droit administratif, il existe des dispositions avec effet civil : le délai de réflexion et la clause pénale, par exemple.

4 Conclusion

En analysant l'état actuel de la politique en matière de consommation, un système pour défendre les intérêts des consommateurs a été développé notamment dans les années 2000. D'abord, grâce au développement d'une législation, les consommateurs peuvent agir en justice plus efficacement qu'avant. Ensuite, elles peuvent aussi réaliser ses intérêts en dehors des tribunaux. Elles sont mieux informées qu'avant grâce à l'AAC et au CNAC.

Cependant, nous pensons que la politique en matière de consommation est encore insuffisante, pour les raisons suivantes.

D'abord, s'agissant de la législation, des dispositions de quelques lois spéciales pour protéger les consommateurs sont très limitées. Par exemple, la loi sur des contrats des consommateurs ne contient de listes que sur les clauses de non-responsabilité (art. 8), les clauses ne reconnaissant pas au consommateur le droit de resilier un contrat (art.8-2), les clauses pénales (art. 9) et sur les clauses générales (art. 10), puisque le législateur a limité les dispositions dans un souci de clarté. Nous croyons que c'est notamment pour la sécurité juridique des professionnels.

Ensuite, il nous semble que la base financière et le nombre d'hommes de talent concernant la politique en matière de consommation est encore insuffisant. S'agissant de l'AAC, il manque des personnes compétentes en droit de la consommation.

Nous pensons que la politique en matière de consommation au Japon pourrait être évaluée à 5 sur 10 actuellement. Mais, il nous semble que cette politique est « en train de développer » et devra être efficace à l'avenir. S'agissant de la législation,

[50]Nakagawa (2016), p. 38.

suivant de la réforme de la loi sur des contrats des consommateurs de mai 2016, un projet de deuxième réforme a ete proposée debut mars 2018. De plus, la Loi sur certains types d'affaires commerciales a été reformée en mai 2016 pour une mise en œuvre plus efficace. En outre, nous discutons maintenant pour améliorer l'activité des associations des consommateurs.

Il nous semble donc que, pour prendre des mesures adoptées à l'augmentation des problèmes des personnes âgées, nous devrons prendre en considération de la diversification des « consommateurs ». Autrement dit, il existerait un « consommateur particulièrement fragile »[51]. Pour cette raison, nous pourrions examiner une mise en œuvre du droit de la consommation plus efficace.

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[51] Je me suis inspire de, Payet (2001), p. 137.

Enforcement and Effectiveness of Consumer Law: The Netherlands

Vanessa Mak

1 Introduction and Outline

It is a fact universally acknowledged that consumer rights, even if they exist, are often not invoked by consumers. The enforcement of consumer law is unsatisfactory in many cases, and therefore fails to achieve the effective protection of consumers that the legislator who introduced the rights had envisaged. Existing empirical studies on consumer dispute resolution sustain that picture, albeit in various places and at various times.[1]

Is that conclusion still accurate for consumer law in the twenty-first century? The reports presented at the Montevideo conference of the *Académie de droit internationale comparé* in 2016 will seek to answer that question for a number of selected countries. This report focuses on the Netherlands and is structured as follows. Since the enforcement of consumer rights requires, before anything else, that consumers are aware of their rights, the first part of the report will look into the awareness that consumers have of their rights (Sect. 2). It will also consider the awareness of traders of consumer rights, seeing that consumers often—rightly or wrongly—rely on the information that they obtain from the trader with regard to their rights. Section 3 then briefly describes which organisations are involved in the enforcement of consumer rights in cases where consumers and traders cannot resolve a dispute between themselves. These two parts provide an introduction to the heart of the report: the presentation of empirical data on consumer dispute resolution in the

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[1] See e.g. de Hoon and Mak (2011), p. 518.

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Netherlands. To determine whether the combination of legal rights and the institutional framework for enforcement provide *effective* means for consumer protection, an enquiry into the number of consumer complaints and consumer disputes, and the number of resolved cases, can provide some material for assessment (Sect. 4). Further relevant data concern the types of consumer disputes (Sect. 5) and, in relation to the practical side of dispute resolution, the average duration of proceedings and the availability of legal aid (Sect. 6). Finally, the report explores available data on how satisfied consumers and traders are with dispute resolution in the Netherlands (Sect. 7). The report wraps up with a brief conclusion (Sect. 8).

It should be noted that the report, although it mostly follows the order of questions of the general survey, has integrated the questions on alternative dispute resolution (ADR) in a manner that puts them on par with other, public forms of dispute resolution. The reason for choosing to integrate the questions in this manner is that ADR is one of the primary forms of consumer dispute resolution in the Netherlands, if not the primary form, in particular through its system of consumer complaint commissions (*geschillencommissies*). It therefore seems more accurate to present the statistics on ADR in the same section as those on dispute resolution through the courts and complaints brought to other, public organisations.[2]

2 Consumer Rights and Consumer Education in the Netherlands

The Netherlands—population of approx. 17 million people[3]—has a relatively well-developed framework for the enforcement of consumer rights. Enforcement nonetheless first requires that consumers are aware of the rights they have against a trader. Only a few studies have been conducted to establish whether consumers are aware of their rights. The overall picture that emerges from those studies is that consumers generally are not aware of the rights they have—and neither are traders.

A 2008 study carried out under the aegis of the Dutch Ministry of Economic Affairs reveals that consumers often lack specific knowledge of their rights. Of the group of respondents taking part in the study, 59% (wrongly) thought that consumers lose the right to repair or replacement of goods after the expiry of a guarantee period. 33% even believed that consumers lose all rights after the expiry of the guarantee.[4] Interestingly, 48% of the respondents indicated that they, in their own perception,

[2]For an overview of the relevant organisations in the Netherlands, see Sect. 3.

[3]On 17 May 2016 the number was estimated at 17,010,320 people. See <https://www.cbs.nl/nl-nl/visualisaties/bevolkingsteller>.

[4]L. Nikkels, W. Wittenberg, S. Mulder and M. van Diepen, *Kennen consumenten hun rechten en plichten? Onderzoek naar het kennisniveau van consumenten*, Report TNS-NIPO for the Dutch Ministry of Economic Affairs 2008, 21. The full text of the study is available at <https://www.tweedekamer.nl/kamerstukken/detail?id=2009D27770>.

did not have sufficient knowledge of their rights as consumers. The study estimates that this number reflects 26% of the total population of the Netherlands (of course at the time that the study was conducted, i.e. in 2008).[5]

A more recent study carried out on behalf of the European Commission suggests that these numbers are fairly similar today. When confronted with the question '[i]magine that an electronic product you bought new 18 months ago breaks down without any fault on your part. You didn't buy or benefit from any extended commercial guarantee. 'Do you have the right to have it repaired for free?', many consumers did not know that the correct answer was 'yes'.[6] Of all respondents in the study, representing all EU member states, 41% correctly said that they have the right to free repair or replacement of the item. For the Netherlands, that number was only 29%, with 36% indicating that they did not think that they had such a right, 34% saying 'it depends on the product', and 1% saying 'I don't know'.[7] Interestingly, an earlier study carried out in 2013 got much higher numbers of correct responses on an almost similar question.[8] An average of 56% of respondents for all member states answered the question correctly, with the Dutch respondents being very close to that average at 55%.[9] A possible explanation of the different outcomes might be that the 2013 study only gave as options for potential answers 'yes', 'no' or 'I don't know', and other than the 2015 study did not give the option 'it depends on the product'. Consumers might be in doubt as to whether they have similar rights for electronic products or other types of goods, or the additional 'it depends' option might have created room for doubt where consumers would otherwise have been more sure of their answer. These are of course speculations. What can be gleaned from the reports is that the awareness that consumers have of their rights is in most cases very low.

On the side of the consumer's counterparty, the trader, the numbers are not much better. In this case too, for the Netherlands mostly older data are available. A study published in 2000 indicated that the majority of traders is not sufficiently aware of their duties towards consumers. For example, only 22% of the respondents in that study knew that consumers can still have a right to repair or replacement after the expiry of a guarantee.[10] The fact that many traders are not fully, or incorrectly

[5]Ibid.

[6]Eurobarometer 397, 'Consumer Attitudes towards Cross-Border Trade and Consumer Protection' (September 2015), pp. 11–12. The report is available for download at <http://ec.europa.eu/consumers/consumer_evidence/consumer_scoreboards/survey_consumers_retailers/index_en.htm>.

[7]Ibid., p. 12.

[8]The only difference was the product: in that case a fridge. See Eurobarometer 358, 'Consumer Attitudes towards Cross-Border Trade and Consumer Protection' (June 2013), pp. 59–60. The report can also be downloaded at <http://ec.europa.eu/consumers/consumer_evidence/consumer_scoreboards/survey_consumers_retailers/index_en.htm>.

[9]Ibid.

[10]J.P.J. de Jong and D. Snel, *Kennen consumenten en leveranciers hun rechten en plichten? Inventariserend onderzoek naar basisbescherming, ordening en transparantie*, 'EIM-Report' 2000. The report used to be available on the website of the Dutch Ministry of Economic Affairs and references to it appear in various parliamentary documents. The full report is however no longer

informed about consumer rights can of course have direct repercussions for consumers who seek to obtain a remedy. If the seller says that repair is no longer possible free of charge because the contractual guarantee has expired, many consumers will believe the trader to be correct. Those who do wish to argue differently have to be very well-informed themselves and sufficiently vocal and confident to make their claim.[11]

The Dutch government and consumer organisations continuously look for ways to improve the awareness of consumers about their rights. The key strategy in that respect is to provide consumers with low-cost and easily accessible information portals, in particular through the internet. Websites such as ConsuWijzer (operated by the Authority for Consumers and Markets (ACM)),[12] the website from the consumer organisation *Consumentenbond*,[13] the government operated *Juridisch Loket*,[14] the website of the Dutch organisation of the judiciary,[15] and the EU website Is it fair?[16] Since not all consumers have access to the internet, or regularly check relevant consumer websites, the online information is complemented by tv commercials, brochures, and information provided by telephone.[17] Presumably, the increasing 'digitalisation' of society will mean that more consumers will over time have internet access and an awareness of where to find information.

3 Organisations Involved in the Enforcement of Consumer Law

The enforcement of consumer rights in the Netherlands can take place through one of two routes: individual enforcement and collective enforcement. Whilst collective enforcement through a supervisory authority is often the most effective route for tackling bad practices of a trader, a significant number of individual consumers in the Netherlands make use of dispute resolution through ADR to obtain relief in

available online and the numbers quoted here are obtained from Loos (2009), pp. 22–23. A modified version of Loos' paper has appeared in English as M.B.M. Loos, 'Individual private enforcement of consumer rights in civil courts in Europe', Centre for the Study of European Contract Law Working Paper Series No 2010/01, available at <http://ssrn.com/abstract=1535819>.

[11] See also Loos (2010), p. 4.

[12] See <https://www.consuwijzer.nl>.

[13] See<http://www.consumentenbond.nl>.

[14] See <https://www.juridischloket.nl>.

[15] See <https://www.rechtspraak.nl/Hoe-werkt-het-recht/Paginas/default.aspx>.

[16] See <www.isitfair.eu>. Another EU website, the eYouGuide, can still be accessed but it has ceased to be updated. See <http://ec.europa.eu/archives/information_society/eyouguide/index_en.htm#>.

[17] Loos (2010), p. 5. It might well be that more consumers have access to the internet than at the time of Loos' report.

individual cases. In both instances, i.e. individual or collective enforcement, various organisations are involved in the enforcement of consumer rights.

Individual enforcement concerns cases in which a consumer takes individual action to give effect to consumer rights against a trader, or in which the consumer seeks to defend himself against an action brought against him by the trader.[18] In the Netherlands, individual consumer actions can be pursued in a number of ways. First, a consumer can directly contact the trader to discuss a solution for a problem with the goods or services rendered by that trader. This route of 'self-help' is the option most often chosen by consumers.[19] In many cases the two parties will be able to negotiate an acceptable solution.[20] Second, a consumer can file a complaint with a representative organisation, such as the Authority for Consumers and Markets (ACM).[21] Third, either of the parties—consumer or trader—may bring a legal action before the court. In the majority of the consumer cases taken to court, the judge competent to hear the case will be the *kantonrechter*, a judge in the court of first instance to whom cases are allocated with a claim of a low monetary value (below 25,000 EUR) or of a certain character (since 1 July 2011 the competence of the *kantonrechter* extends to consumer sales contracts and consumer credit agreements up to 40,000 EUR).[22]

Fourth, a consumer or a trader can pursue a claim through alternative dispute resolution, which in the Netherlands will often be in the form of an action through a consumer complaint commission (*geschillencommissie*).[23] The largest organisation for consumer complaint commissions, the *Geschillencommissie*, encompasses over 50 commissions.[24] Consumer complaint commissions provide speedy and relatively cheap access to dispute resolution and the Dutch government actively encourages the use of such commissions.[25] The ruling of the commission will mostly take the form of a so-called 'binding advice' or 'binding third-party' ruling, meaning that the parties are bound to the outcome of the proceedings and will only in very limited circumstances be able to challenge it in court.[26] Consumer complaint bodies are financed in part by government funds, but primarily by payments from traders.[27]

[18]Cf. Loos (2009), p. 2.

[19]Cf. Nikkels, Wittenberg, Mulder and van Diepen (2008), pp. 13–14. See also B.C.J. van Velthoven and C.M. Klein Haarhuis, *Geschilbeslechtingsdelta 2009* (WODC Report, Boom 2010) 121. The full text of the report is available at <www.rvr.org/binaries/content/assets/rvrorg/informatie-over-de-raad/onderzoeken-en-rapportages/toegang-tot-het-recht/ob283-volledige-tekst_tcm44-261681.pdf>.

[20]See further below, Sect. 7.

[21]See <https://www.acm.nl/nl/contact/tips-en-meldingen/uw-tip-of-melding-doorgeven-aan-acm/>.

[22]See the Dutch procedural code, *Wetboek van Burgerlijke Rechtsvordering*, Article 93.

[23]See <https://www.degeschillencommissie.nl/consumenten/>. For a comprehensive description of consumer ADR in the Netherlands, see Weber and Hodges (2012), pp. 129 ff.

[24]<https://www.degeschillencommissie.nl/over-ons/over-de-organisatie>.

[25]See Loos (2009), p. 25, fn 3, with references there cited.

[26]Weber and Hodges (2012), pp. 134, 160.

[27]See Weber and Hodges (2012), p. 138 for a more detailed description of the financing structure of the complaints commissions.

For financial services, a designated consumer complaint commission exists: the *Klachteninstituut Financiële Dienstverlening* (Kifid).[28] The Kifid offers four steps towards dispute resolution. The first three have been in place since its inception in 2007 and are: (1) mediation through an Ombudsman service; (2) a consumer complaint commission that deals with cases in which mediation by the Ombudsman is unsuccessful; and (3) an appeal commission where consumers and traders can challenge decisions from the consumer complaint commission. Since July 2015 the Kifid also has a webpage for online dispute resolution called *Mijn Kifid* ('My Kifid').[29] The decisions of Kifid's consumer complaint commissions mostly take the form of 'binding advice', but exceptions are possible (e.g. where a trader has not indicated prior to the dispute that he wishes Kifid's decision to be binding).[30] Contrary to most other consumer complaint commissions, Kifid is not financed by the (in this case: financial) industry. The organisation is an independent public body, which is financed, regulated and monitored by the Dutch Ministry of Finance.[31]

ADR in the Netherlands can further, depending on the agreement between the parties in individual cases, take the form of arbitration, mediation or other forms of binding third-party rulings. Data on procedures in individual cases outside the *Geschillencommissie* or the Kifid are however hard to come by and such procedures will therefore not be discussed further in this paper.

Collective enforcement of consumer rights can occur through designated organisations or through collective actions in court. Organisations in the Netherlands to which the government has assigned monitoring and enforcement duties in relation to consumer rights are the Authority for Consumers and Markets (ACM) and, for retail financial services, the Authority for Financial Markets (AFM).[32]

Collective actions in court can be instigated in two ways. First, Article 3:305a of the Dutch Civil Code enables collective proceedings in court. It provides that a foundation or association with full legal capacity, that has as its object the protection of specific interests, may bring a legal action on behalf of others with similar interests. In practice sometimes claims of individual consumers are picked up by a stakeholder or consumer organisation who initiates proceedings on behalf of a larger group of consumers. Importantly, however, the action cannot result in compensatory damages but only in the publication of the judicial decision. On the basis of that decision, individuals whose interests are affected can bring a damages claim to

[28]See <https://www.kifid.nl>.

[29]Kifid, *Jaarverslag 2015*, pp. 14 and 21. The annual report is available online at <http://jaarverslag.kifid.nl/kifidjaarverslag2015>.

[30]This is laid down in the regulations of the Kifid; see *Reglement Ombudsman en Geschillencommissie financiële dienstverlening*, art 44.3 and 14. The regulations are available online at <https://www.kifid.nl/fileupload/reglementen/20140110_Reglement_Ombusman_en_Geschillencommissie_Financiele_Dienstverlening.pdf>.

[31]See <https://www.kifid.nl/kifid/organisatie>.

[32]The ACM exists since 1 April 2013 and merges three pre-existing organisations: the Consumer Authority, the Competition Authority (*NMa*), and the supervisor for telecom markets, OPTA.

court.[33] Second, another route for collective enforcement of consumer rights is on the basis of the Dutch *Wet collectieve afwikkeling massaschade (WCAM)*. On the basis of this Act—transposed in Articles 7:907–910 DCC and Articles 1013–1018 of the Dutch Civil Procedure Code—parties who reach a settlement out of court can ask for its affirmation by the Amsterdam Court of Appeal.

In practice, however, the collective enforcement of consumer rights mostly occurs through the monitoring and enforcement of the Authority for Consumers and Markets (ACM). The ACM for example monitors the rules on unfair commercial practices and in case of breach can sanction the trader with a fine to a maximum of € 900,000—until recently the maximum was € 450,000[34]—or by imposing an injunction forcing the trader to discontinue his practices, breach of which can also result in a fine.[35] The ACM can also obtain a court order for an injunction through a special private law procedure before the Court of Appeal in The Hague.[36]

4 Statistics on Consumer Complaints and Consumer Disputes (Incl. ADR)

How effective is consumer protection in the Netherlands? The following sections of this report will present an overview of empirical data on the enforcement of consumer rights, starting with the number of complaints and disputes registered in the Netherlands in the past 3 years (2013–2015). Statistics show that, even if consumers are not the most litigious group in society, a fair number of consumer complaints and consumer disputes reaches the organisations involved in the enforcement of consumer rights each year. While the text below presents the statistics for the past 3 years, the Tables 2, 3 and 4 in the Appendix to this report present a more comprehensive overview of the complaints and disputes dealt with by the consumer complaint commissions, the Kifid and the courts in the past 10 years.

The term ‘consumer complaints’ requires some clarification. It can refer to all complaints brought by consumers to traders, to ADR bodies, or to supervisory authorities such as the ACM or the AFM. It does not normally refer to claims brought in court, the difference being that legal actions in court always result in a judgment even if the case is regarded as inadmissible for further hearing, whereas complaints do not necessarily lead to a procedure but may be dismissed on

[33] A bill on collective redress was submitted to the Dutch parliament at the end of 2016 that, if it is adopted, will make it possible for parties to claim damages through a collective redress procedure. See *Kamerstukken II 2016–2017, 34 608*, Wetsvoorstel collectieve afwikkeling van massaschade in een collectieve actie.

[34] The new rules entered into force on 1 July 2016. See *Kamerstukken I 2015–2016, 34 190* and *Besluit inwerkingtreding,* Stb 2016, 22.

[35] Wet handhaving consumentenbescherming (Whc), *Stb* 2006, 591, Articles 2.9 and 2.15.

[36] Article 3:305d Dutch Civil Code.

administrative grounds before they reach the commission. The administrative department of consumer complaint commissions—the most common type of ADR in the Netherlands—make a preliminary assessment of the admissibility of incoming complaints so as to decide which ones fulfil the requirements for being taken up by a commission. They verify, for example, that the complaint concerns a dispute between a consumer and a trader, and that the trader is affiliated with the relevant consumer complaint commission.[37] Not all statistical reports distinguish between complaints received and complaints that lead to a procedure. The overview presented here will therefore adopt a broad scope, including all complaints received by ADR bodies and supervisory authorities (Sect. 4.1). Complaints made by consumers directly to traders in individual cases will not be included, due to a lack of available data on direct actions. The overview of consumer disputes will focus on proceedings in court only (Sect. 4.2). Finally, the number of collective proceedings is briefly discussed (Sect. 4.3).

4.1 Consumer Complaints

4.1.1 Consumer Complaint Commissions (*Geschillencommissie*)

The *Geschillencommissie* encompasses over 50 consumer complaint commissions for themes as diverse as energy, telecom, travel, pet animals, bicycles and bridal wear.[38] The commissions combined received 4627 complaints in 2015.[39] That number is almost equal to the number of complaints submitted in 2014, which amounted to 4759[40] and in 2013, which amounted to 5023.[41] Interestingly, the number of overall complaints in the period 2013–2015 is significantly lower than it was in earlier years, e.g. in 2006–2008 when the average number of complaints was well over 11,000.[42] The decline in complaints brought to the consumer complaint commissions operating under the umbrella of the *Geschillencommissie* has been attributed to several factors: the creation of a separate body for financial

[37]The *Geschillencommissie* also requires the submission of a questionnaire and the payment of a complaint fee; see <https://www.degeschillencommissie.nl/consumenten/klachtenprocedure/>. See for the Kifid: <https://www.kifid.nl/consumenten/hoe-wordt-uw-klacht-behandeld>. The assessment stage in the Kifid procedure also involves a decision as to whether a complaint is forwarded to the Ombudsman for mediation or whether it is sent to the consumer complaint commission for a decision on the basis of 'binding advice'.

[38]A full overview of the commissions can be found online at <https://www.degeschillencommissie.nl/over-ons/commissies>.

[39]Geschillencommissie, *Jaarverslag Consumenten 2015*, p. 19. The full report, as well as the reports of 2013 and 2014, is available at <https://www.degeschillencommissie.nl/over-ons/publicaties>.

[40]Geschillencommissie, *Jaarverslag Consumenten 2014*, p. 14.

[41]Geschillencommissie, *Jaarverslag Consumenten 2013*, p. 14.

[42]Loos (2009), pp. 27–28.

disputes—Kifid—in 2007, the introduction of a digital complaint system that early on informed consumers of the (un)likely chance of success of their complaint,[43] and the economic recession in the years since the financial crisis.[44] The reports over 2013–2015 however indicate that there seems to have been an increase in complaints again in recent years.[45]

Of the total number of complaints pending in 2015—including 1204 carried over from the previous year—1188 of 5831 complaints were dismissed for not passing the criteria for admissibility.[46] That number represents 21% of the total complaints pending and is an increase in comparison to 2014, when 18% of the then pending complaints were dismissed.[47] In 2013, 998 out of 6292 (16%) of pending complaints were dismissed.[48]

The statistics on the outcomes of cases were as follows. In 2015 1187 complaints ended in a settlement between the parties, rather than a decision by the consumer complaint commission. A further 135 complaints were settled with the assistance of a mediation expert. The consumer complaint commissions made a final or interim ruling, in the form of a 'binding advice', in 2108 cases.[49] By comparison, in 2014 1386 complaints were settled by the parties, 149 complaints were settled with the assistance of a mediation expert, and 2268 cases received rulings from the consumer complaint commissions.[50] For 2013 the numbers were: 1657 settlements reached by the parties, 178 settlements reached with the assistance of a mediation expert, and 2162 final or interim rulings of the consumer complaint commissions.[51]

4.1.2 Financial Services ADR (Kifid)

The *Klachteninstituut Financiële Dienstverlening* (Kifid) is a consumer complaint commission responsible for complaints relating to retail financial services. The organisation also encompasses a financial Ombudsman service.[52] Furthermore, since 1 July 2015 it operates a webpage for online dispute resolution.

The number of complaints submitted to Kifid has been relatively stable in the last three report years, although a slight decrease can be observed. The commission

[43]Ibid.

[44]This factor is mentioned in the annual reports of the *Geschillencommissie* for 2013, 2014 and 2015. See pages cited in the footnotes above.

[45]Ibid.

[46]Geschillencommissie, *Jaarverslag Consumenten 2015*, p. 19.

[47]In 2014 1087 out of 6069 (18%) complaints were dismissed at this stage. See Geschillencommissie, *Jaarverslag Consumenten* 2014, p. 14.

[48]Geschillencommissie, *Jaarverslag Consumenten 2013*, p. 14.

[49]Geschillencommissie, *Jaarverslag Consumenten 2015*, p. 19.

[50]Geschillencommissie, *Jaarverslag Consumenten 2014*, p. 14.

[51]Geschillencommissie, *Jaarverslag Consumenten 2013*, p. 14.

[52]See above, p. 5.

received 6549 complaints in 2015, 7095 complaints in 2014, and 7318 complaints in 2013.[53] The number of complaints saw a steep increase in 2012—from 6451 to 7095 complaints, or an increase of 10%–but has stabilised since then. The initial increase might be attributed to a growing awareness amongst consumers of the existence of Kifid, due to increasing media coverage of the commission's work.[54] The current decrease might indicate that providers of financial services have become more attuned to the interests of consumers and have improved their products and/or their internal complaints handling procedures.[55]

Of the total of number of complaints received by Kifid the majority is dealt with by the Ombudsman. Until recently, the Ombudsman had the possibility to offer mediation to the parties or to make a decision in cases where parties did not reach a solution after mediation. Seeing that parties had a possibility to continue their procedure with the Kifid's complaints commission, the institute effectively worked with two substantive stages of dispute resolution—the Ombudsman and the complaints commission. The delays that resulted from this double treatment of cases gave rise to a restructuring of the Kifid's complaints handling procedures. As of 1 October 2014, the procedural structure of Kifid stipulates that Ombudsman only mediates between parties and no longer decides cases. The cases in which the parties wish to receive a third-party decision are submitted to Kifid's consumer complaint commission. The restructuring of the procedure was introduced in anticipation of the EU Directive on ADR.[56] Its aim is to shorten the time of procedures and to enhance the quality of the Ombudsman service, who will from now on focus solely on mediation between parties.[57]

The 'new structure' means that complaints are reported in a new format as of 2014. In 2015 the complaints received under the new structure amounted to 6205 and those received by the Ombudsman to only 10.[58] 278 complaints were sent on to the complaints commission and 56 to the appeals' commission.[59] By comparison, in 2014 the numbers were 1601 complaints under the new structure and 4755 complaints received by the Ombudsman. The report for 2014 also lists that 657 complaints in which the Ombudsman could not reach a solution with the parties were sent to the consumer complaint commission, and a further 83 reached Kifid's appeal commission.[60] In 2013 6365 complaints were dealt with by the Ombudsman,

[53]Kifid, *Jaarverslag 2015*, p. 14; Kifid, *Jaarverslag 2014,* p. 14; *Jaarverslag 2013*, p. 14. All annual reports of Kifid can be downloaded from its website at <https://www.kifid.nl/kifid/publicaties/jaarverslagen>.

[54]Kifid, *Jaarverslag 2012*, p. 34.

[55]See Kifid, *Jaarverslag 2015*, pp. 7 ff.

[56]Directive 2013/11/EU on alternative dispute resolution for consumer disputes [2013] OJ L165/63. The Netherlands implemented the directive on time and the implemented legislation entered into force on 9 July 2015. See *Implementatiewet buitengerechtelijke geschillenbeslechting consumenten*, Stb. 2015, 160.

[57]Kifid, *Jaarverslag 2014*, pp. 20–21.

[58]Kifid, *Jaarverslag 2015*, p. 16.

[59]Ibid.

[60]Kifid, *Jaarverslag 2014*, p. 15.

887 were sent on to the consumer complaint commission and 66 were submitted to the appeals' commission.[61]

The number of resolved cases for the financial Ombudsman was reported as 689 for 2015, 3511 for 2014, and 4233 for 2013.[62] Kifid's consumer complaint commission gave a decision in 503 cases in 2015, 761 cases in 2014, and 612 cases in 2013.[63] The appeal commission resolved 45 cases in 2015, 54 cases in 2014, and 72 cases in 2013.[64] It is interesting to see that the number of inadmissible cases is high in all of the reported years, totalling 2430 in 2015, 2599 in 2014, and 2472 in 2013.[65] Kifid recognizes this problem and estimates that approx. one-third of the complaints submitted to it is inadmissible, in many cases (approx. 15% in 2013)[66] because the consumer has omitted to contact the other party before submitting a complaint to Kifid. The Kifid procedure is only available once consumers have gone through the internal complaint procedure of their financial service provider.[67] Kifid tries to decrease the number of inadmissible complaints by actively seeking to inform consumers about the procedure.

4.1.3 Complaints Submitted to the ACM and AFM

The supervisory authorities involved in monitoring the compliance with consumer rights in the Netherlands, the ACM and the AFM, keep track of notifications received from consumers with regard to traders' compliance. Complaints can be a ground for investigative action by the supervisory body, but can also simply be used to monitor the behaviour of traders in the market.

The ACM receives a large number of notifications on an annual basis. Without distinguishing between complaints and questions, the ACM received the following numbers of notifications from consumers in the past 3 years: 58,369 in 2015,[68] 64,103 in 2014,[69] and 71,932 in 2013.[70]

The AFM does not publish statistics on the number of notifications that it receives in its annual reports. It does, however, regularly publish a press release with an

[61] Kifid, *Jaarverslag 2013*, p. 15.

[62] See the reports at pp. 16, 15, and 15 respectively.

[63] Ibid.

[64] Ibid.

[65] Ibid.

[66] Kifid, *Jaarverslag 2013*, p. 14.

[67] Kifid, *Jaarverslag 2015*, p. 15.

[68] ACM, *Jaarverslag 2015*, pp. 121–122. The ACM's annual reports can be downloaded from the organisation's website at <https://jaarverslag.acm.nl/downloads-pdf>.

[69] ACM, *Jaarverslag 2014*, p. 98. The report is also available in English; see ACM, *Annual Report 2014*, p. 127.

[70] ACM, *Jaarverslag 2013*, p. 120. This report is also available in English; see ACM, *Annual Report 2013*, p. 117.

overview of the number of notifications received from consumers. Like the ACM, it regards the notification system as an important aspect of consumer empowerment, and as a way for itself to better monitor the market. The AFM was contacted 11,717 times by consumers in 2015, and 12,349 times in 2014.[71] These numbers include complaints, questions and other notifications.

4.1.4 Other Complaints

Consumers can also submit complaints to the consumer organisation *Consumentenbond*, who is qualified to instigate collective actions on behalf of consumers in accordance with art. 3:305a of the Dutch Civil Code.[72] The organisations' annual report does not list the number of complaints received from consumers. A report of the number of complaints is however included in the monthly report 'Klachtenkompas', which lists 4121 complaints for March 2016, 3616 for April 2016, 3541 complaints for May, and (so far) 394 complaints for June 2016.[73]

4.2 Consumer Disputes

Whereas data on the number of consumer complaints are well-reported, the number of consumer disputes that is taken to court is much harder to determine from the available documents and reports. A very rough indication can be obtained from the statistics published annually by the judiciary. It should be noted, however, that those reports only provide aggregated data for cases dealt with by the *kantonrechter* (judge at first instance) and the civil section of the district courts. The numbers refer, therefore, to larger categories than just consumer cases.

Many consumer cases that are taken to court will fall within the competence of the *kantonrechter*, since they either concern a value below 25,000 EUR or relate to a claim based on a consumer sales contract or a consumer credit agreement below 40,000 EUR.[74] The reported data on cases submitted to, and decided by the *kantonrechter* however only record family cases, criminal cases and so-called

[71]See AFM, 'Meer meldingen van consumenten bij AFM over binaire opties en beleggen buiten toezicht', 5 January 2016, at <https://www.afm.nl/nl-nl/consumenten/nieuws/2016/jan/meldingen-consumenten>. The statistics for 2014 were also published in AFM, 'Meldingen van consumenten voor financieel toezicht belangrijk voor eerlijke markt', 22 January 2015, at <https://www.afm.nl/nl-nl/professionals/nieuws/2015/jan/meldingen-consumenten>.

[72]See p. 6 above.

[73]The numbers are displayed in the top right hand corner of the website <http://www.klachtenkompas.nl>. Since they are updated regularly and only display the numbers for current and the previous month, it is not possible to obtain older data through this website.

[74]See above, p. 5.

'Muldercases'[75] as a separate category and place all other cases under the general heading 'commercial cases', which also includes employment and tenancy cases, 'in absentia proceedings' (*verstekzaken*) and summary proceedings. That general category, in which consumer cases are included, encompassed 465,350 newly submitted cases in 2015. 466,980 cases in that category were resolved in 2015.[76] The numbers for 2014 were 484,900 and 488,990. Those for 2013 were 501,160 and 506,060.[77]

As an aside, the decrease in the number of cases is explained by a temporary stop on detention cases involving unpaid traffic fines and uninsured driving, a decrease in commercial disputes and a decrease in asylum cases.[78] The decrease in asylum cases might seem surprising, but it can be explained by the fact that many of the refugees that entered the Netherlands in 2015 came from Syria or other countries that are regarded as unsafe. Their asylum applications were granted by the immigration services and therefore did not reach the courts. It is expected that an increase of cases will be seen in 2016.[79]

The civil law department of the district court also has competence to deal with consumer cases, e.g. those of a value over 25,000 EUR, but it is unclear here too how many cases exactly came before the court in a given year. The reported data for these cases distinguish between family cases, proceedings before the president of the district court, and commercial cases. Consumer cases are reported under the third, general category. The total numbers in this category were 83,990 newly submitted cases in 2015, and 85,290 resolved cases. For 2014 the numbers were 90,100 and 91,760, and for 2013 97,490 new cases and 99,200 resolved cases.[80]

4.3 Collective Redress

The routes towards collective redress in consumer cases have been set out above (Sect. 3). An analysis of reported judgments reveals that between 2006 and now—June 2016—a total of 55 procedures has been litigated in the Dutch courts on the basis of Article 3:305a DCC.[81] Not all of these procedures concern consumer law.

[75]Cases concerning minor traffic offences. Such cases are dealt with through administrative law in accordance with the 1989 *Wet administratiefrechtelijke handhaving verkeersvoorschriften (Wet Mulder)*, Stb 1990, 435.

[76]Raad voor de Rechtspraak (Council for the Judiciary), *Jaarverslag Rechtspraak 2015*, pp. 22 and 26. The full annual report is available for download at <www.jaarverslagrechtspraak.nl/files/rechtspraak2015/Jaarverslag_2015_web.pdf>.

[77]Ibid.

[78]Ibid, p. 17.

[79]Ibid.

[80]Ibid., pp. 22 and 26.

[81]The analysis used the database of reported judgments on <www.rechtspraak.nl>. The search for judgments where a claim was based on art. 3:305a Dutch Civil Code came up with 80 results, of which 55 referred to individual procedures. Cases in which judgments were given by several

Claims brought before the courts range from collective employment disputes, to disputes about the introduction of English in the curriculum of Dutch school children at the cost—or so it is felt by some—of education in Dutch, to collective claims against the government with regard to privacy concerns in relation to the decentralized storage of personal data (fingerprints) connected to passports.[82] Of the 55 collective procedures, 27 can be regarded as consumer cases.[83] The number of consumer collective actions on the basis of Article 3:305a DCC currently stands at 4. In 2015 the number was also 4.[84] Notably, the majority of collective actions concern claims related to retail investment services, in particular combined credit/investment products (so-called *aandelenlease*) which were sold to consumers on a large scale in the late 1990s.[85]

The number of reported cases concerning claims brought under the *Wet collectieve afwikkeling massaschade* (WCAM) in the time period 2006 until now is well over 300.[86] Only 7 of those concern cases in which the Amsterdam Court of Appeal affirms a settlement reached by the parties in accordance with Article 7:907 DCC. These cases are the settlement between bankrupt bank DSB and its clients; the settlement between DES victims, pharmaceutical companies and the insurance companies of the victims[87]; the settlement between Converium and its shareholders; the settlement between Vedior and its shareholders; the settlement between Shell and investors who suffered harm as a result of potentially incorrect information with regard to Shell's oil and gas reserves; the settlement of life insurance company Vie d'Or and its clients; and the settlement between Dexia and retail investors who suffered financial losses related to complex credit/investment products.[88] The

courts—e.g. the court of first instance, the Court of Appeal, and the Supreme Court—have been counted as 1 procedure.

[82]See District Court Rotterdam 24 November 2010, ECLI:NL:RBROT:2010:BP2355 (English language education); Dutch Supreme Court 22 May 2015, ECLI:NL:HR:2015:1296 (passports).

[83]Although in some instances the class of claimants is not limited to consumers, but e.g. represents shareholders or investors in general.

[84]Data analysis on file with author (in Dutch).

[85]See Tzankova and Hensler (2013), p. 91; also Mak (2013), pp. 333–356.

[86]The main database of reported cases, available at <www.rechtspraak.nl>, does not index cases concerning WCAM systematically and it is therefore difficult to find an exact number. A full text search for the period 2006–2016 with the search term 'WCAM' gives approx. 311 reported cases. A more specific search for 'WCAM' in the headings of the cases gives 54 results, but does not include four of the settlement cases of the Amsterdam Court of Appeal (it misses out Vedior, Shell, Vie d'Or and Dexia).

[87]DES was a sedative prescribed to pregnant women to prevent miscarriages. Instead it caused a specific cancer in the daughters of women who had used the drug during pregnancy. See Hondius (1994), p. 40.

[88]Court of Appeal Amsterdam 4 November 2014, ECLI:NL:GHAMS:2014:4560 (DSB compensation settlement); Court of Appeal Amsterdam 24 June 2014, ECLI:NL:GHAMS:2014:2371 (DES settlement); Court of Appeal Amsterdam 17 January 2012, ECLI:NL:GHAMS:2012:BV1026 (Converium); Court of Appeal Amsterdam 15 July 2009, ECLI:NL:GHAMS:2009:BJ2691 (Vedior); Court of Appeal Amsterdam 29 May 2009, ECLI:NL:GHAMS:2009:BI5744 (Shell);

majority of the other cases deal with the question whether a claimant has successfully made use of the opt-out possibility laid down in Article 7:908 DCC. Of the 7 reported settlements, the groups of claimants in the DES case, in the DSB case and in Dexia can be regarded as consumers. The classes of claimants in the other cases concern business shareholders, or sometimes a mix of business and retail shareholders. As noted above,[89] the primary route for the collective enforcement of consumer rights is not through private law, but rather through enforcement by the supervisory authorities, ACM and AFM, under administrative law.

4.4 Interim Analysis

The statistics on consumer complaints reveal that consumer complaints are submitted to ADR in approx. 4000–5000 consumer complaint commission case per year, and approx. 7000 Kifid cases per year. Whilst a significant number of complaints is inadmissible—between 16% and 21% of the *Geschillencommissie* cases, and one-third of the Kifid cases—that still leaves a few thousand consumer complaints per year. In relation to consumer disputes brought before the courts, unfortunately, exact data are much harder to get hold of. Presumably they constitute a fair number of the overall category of 'commercial cases' reported for the lower courts.

Whether consumer rights are effectively enforced in the Netherlands cannot be gleaned only from these data. For that assessment, one would need to know how the numbers compare to the overall number of consumer problems in the Netherlands, on which data are hard to obtain. Another important question is how satisfied consumers are with the outcomes of cases. That question will be discussed in this report, together with an assessment of the duration of proceedings, but not before a brief overview has been given of the most common types of consumer complaints and consumer disputes in the Netherlands.

5 Types of Consumer Complaints and Consumer Disputes

The main types of consumer complaints reported for each of the organisations discussed in Sects. 3 and 4 are the following.

The *Geschillencommissie* reports high numbers of cases on energy, matters related to the consumer's house and living (e.g. installation of kitchens), travel, telecom, vehicles and electronic communication.[90]

Court of Appeal 29 April 2009, ECLI:NL:GHAMS:2009:BI2717 (Vie d'Or); Court of Appeal Amsterdam 25 January 2007, ECLI:NL:GHAMS:2007:AZ7033 (Dexia).

[89] See p. 7.

[90] Geschillencommissie, *Jaarverslag Consumenten 2015*, table on p. 20. These were also the major categories of cases in 2014 and 2013, see the annual reports for these years on pp. 16–17.

Kifid, the consumer complaint commission for retail financial services disputes, reports statistics for five separate categories: investment cases, banking cases, life insurance, mortgage credit and property insurance. The number of cases in each of these categories used to be more or less similar—between 800 and 1100—apart from the category of investment cases, which with approx. 200 cases stands out as lower.[91] In 2015 the numbers are slightly different, with almost twice as many cases on property insurance reported in comparison to each of the other categories (and even six times higher in comparison to investment cases).[92] It is not immediately clear how this difference can be explained, and perhaps an analysis over a longer time-period will see an evening out between the categories again.

The ACM indicates that its 'top 5' of sectors for which complaints c.q. notifications were received are: telecom, energy, electronics and domestic appliances, home decor retailing, and travel.[93] Those sectors largely overlap with the categories of cases dealt with by the consumer complaint commissions. The ACM also reports the 'top 5' of topics of complaint or notification that they received: unsatisfactory products or services and warranty, bills and payments, advertising, termination and cancellation of contracts, and questions about legislation, competition and privacy.[94]

The AFM reports that it has received notifications on mortgage credit, insurance, and consumer credit. It also has seen some increase in notifications about pensions and about investment products (binary options) in recent years.[95]

No specific data are available on the types of consumer cases that are dealt with in civil courts.

6 Practicalities of Dispute Resolution: Average Time and Legal Aid

The (satisfactory) enforcement of consumer rights also depends on practical factors, such as the duration of the proceedings and the availability of legal aid. Statistics on the duration of the procedures before complaints commissions and courts in the Netherlands will be presented below (Sect. 6.1). Also, the criteria for the availability of subsidised and free legal aid will be discussed (Sect. 6.2).

[91] Kifid, *Jaarverslag 2014*, p. 15.

[92] Kifid, *Jaarverslag 2015*, p. 17.

[93] ACM, *Jaarverslag 2015*, p. 123. The same categories were reported in 2014; see ACM, *Annual Report 2014*, p. 127.

[94] Ibid.

[95] See footnote 70 for references cited there.

6.1 Average Duration of Proceedings

The average duration of proceedings through ADR is relatively short. The *Geschillencommissie* reports that the average time for dispute resolution is 3 months, most of which is used for giving parties the opportunity to present their points of view in the case and where necessary to obtain an expert opinion.[96] The average time between a hearing and the dispatch of the commission's ruling is on average 3 weeks.[97] These time periods have been stable over the last years. In 2014 the average time for dispute resolution was 2.9 months and the time in between hearing and ruling 0.8 month (approx. 3.5 weeks),[98] and in 2013 3 months and 0.9 months (approx. 4 weeks).[99]

The Kifid also aims for a quick turnover of cases, but the proceedings take slightly longer than those of the other consumer complaint commissions. The target for the financial Ombudsman service is to resolve cases within 6 months. In 2014 the Ombudsman and his team succeeded in completing 77% of the cases within this time, which is an increase from the 52% reported for 2012.[100] Kifid's consumer complaint commission aims for dispute resolution within 12 months. That target was reached for 74% of the complaints in 2014, which was an increase of 20% in comparison to 2012.[101]

Court cases are often presumed to take longer than ADR procedures. For consumer cases that might indeed be true, but it depends on the type of proceeding. The annual report of the judiciary over 2015 indicates that the duration of consumer cases will often be relatively short if the case is dealt with by the *kantonrechter*. In the majority of consumer cases that come before the *kantonrechter*, the consumer does not show up in court or respond to the claim—often for late payment—submitted by the trader.[102] 98% of such 'in absentia proceedings' is resolved within 6 weeks.[103] Commercial cases in which both parties submit standpoints are aimed to be dealt with within 6 months or within 1 year, and that target is reached for approx. 75–95% of cases.[104] The average duration of proceedings is higher for cases that are litigated

[96]It should be noted that the *Geschillencommissie* puts the time of the start of the procedure at the moment when all formalities for a complaint have been fulfilled by the consumer. The preceding actions—filing a complaint form, paying the required fee etc.—have been estimated to take an additional 6 weeks and are likely to be perceived by the consumer as part of the duration of the proceedings. See Klapwijk and ter Voert (2009), pp. 64–65.

[97]Geschillencommissie, *Jaarverslag Consumenten 2015*, p. 8.

[98]Geschillencommissie, *Jaarverslag Consumenten 2014*, p. 8.

[99]Geschillencommissie, *Jaarverslag Consumenten 2013*, p. 8.

[100]Kifid, *Jaarverslag 2014*, p. 14.

[101]Ibid.

[102]80–90% of consumer cases coming before the *kantonrechter* are in absentia proceedings. See Loos (2009), p. 27, with reference to Jongbloed (2006), p. 425. [CHECK nieuwe druk 2015]

[103]Raad voor de Rechtspraak (Council for the Judiciary), *Jaarverslag Rechtspraak 2015*, p. 36, table 13.

[104]Ibid.

in the civil divisions of district courts, and can be 2 years or more, although many are decided within similar time frames as the *kantonrechter* cases.[105] The duration of the procedure depends on many factors, such as the complexity of the case, the need to obtain expert opinions, and the cooperative attitude of the parties.[106]

6.2 Legal Aid

Legal aid is available for consumer disputes in some circumstances. The conditions under which consumers are entitled to legal aid are laid down in the *Wet op de Rechtsbijstand* (Legal Aid Act). The primary condition for obtaining legal aid is that the consumer's income does not exceed the amounts fixed for 'maximum total income' and 'exempt assets' as set out in the Table 1 below.

Legal aid in the Netherlands is subsidized legal aid, and therefore not entirely free. Those who receive legal aid will usually have to cover a small amount of the costs of the proceedings out of their own means.[107] Advice from the *Juridisch Loket*, however, can be obtained for free and entitles the claimant to a discount on the other costs that they may be required to pay.[108]

The Netherlands does have a means of obtaining *free* legal aid through so-called '*Rechtswinkels*', advice bureaus who employ law students to assist with small claims, e.g. in relation to consumer, employment, or tenancy disputes. These are a legacy of the 1970s, when public opinion criticized the lack of free legal aid and access to courts for weaker members of society.[109] Many cities in the Netherlands, in particular university cities, currently have their own *rechtswinkel*. The conditions for obtaining free legal aid through one of those bureaus are not available online, but an inquiry with *Rechtswinkel Tilburg* reveals that the following criteria are used: (1) free legal aid is available for citizens with a low income or who are otherwise vulnerable, or citizens who only wish to obtain advice; (2) the maximum income for obtaining free legal aid is set at the same level as the income requirement for subsidized legal aid (see Table 1), but assets are not taken into account; (3) vulnerable citizens include young people between 16 and 21 years of age, elderly people over

[105] Ibid, p. 37, table 15.

[106] Raad voor de Rechtspraak (Council for the Judiciary), *Kengetallen gerechten 2014*, p. 17. The full text of the report can be downloaded at <https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Raad-voor-de-rechtspraak/Jaardocumenten>.

[107] For a full overview of the rules on legal aid, see <www.rvr.org/nieuws/2015/december/inkomen-vermogen-en-eigen-bijdrage-2016.html>.

[108] See the url in the previous footnote, as well as <https://www.juridischloket.nl/over-het-juridisch-loket/werkwijze>.

[109] See <www.rechtswinkel.nl/over-ons>.

Table 1 Income and assets limits for legal aid as of 1 January 2016[a]

	Single	Married of living together	Single-parent families with underage children
Maximum total income	€26,000 = per year	€36,800 = per year	€36,800 = per year
Exempt assets	€21,139 = per year	€42,278 = per year	€21,139 = per year

[a]The amounts are subject to annual indexation. See Article 34 *Wet op de rechtsbijstand* (Legal Aid Act)

75, those who receive social assistance from other organisations, those with problematic debts (e.g. people who are subject to a personal bankruptcy arrangement), students up to 30 years of age, persons who do not have Dutch nationality and whose residency status is uncertain, and people who are otherwise vulnerable (e.g. because of mental disabilities).

7 Consumer and Trader Satisfaction with Outcomes and Timing

Consumer and trader satisfaction with the outcome and timing of individual claims has rarely been tested through empirical studies in the Netherlands. Not many studies look particularly at consumer cases and it is therefore hard to find specific details on those. Some general data on litigants' satisfaction with court procedures or the satisfaction of ADR users with the proceedings and outcome are nevertheless available.

For court proceedings, general data are available concerning litigants' satisfaction with adjudication and the duration of the procedure. The latest available data indicate that in 2014 84% of litigants were satisfied with the quality of adjudication of courts of first instance.[110] 58% of litigants were satisfied with the duration of the procedure.[111] It should be noted that the choice to report numbers of satisfied litigants does not mean that the rest were dissatisfied; a significant group of respondents was neutral about the quality of adjudication.[112] Nevertheless, the numbers give a strong indication that few litigants are satisfied with the duration of the procedure. The judiciary's report indicates that there has been no improvement on this point between 2011 and 2014.[113] The data are however applicable to all litigants and do not specifically relate to consumers or to traders dealing with consumers.

[110]Raad voor de Rechtspraak (Council for the Judiciary), *Kengetallen gerechten 2014*, p. 14.
[111]Ibid, p. 14.
[112]Ibid, p. 6.
[113]Ibid., p. 14.

In terms of satisfaction with outcomes, other relevant data are available from studies that connect the perception of 'justice being done' of the respondents of the study to the outcomes of disputes. These types of studies reveal that the perception of justice of the respondents is strongly connected to the outcome of the case. The introduction of procedural elements that might help parties better understand the proceedings or make it possible for them to have a say about their standpoint have some influence on how they perceive the justness of the procedure but the outcome is a significant factor.[114] Similar findings have been confirmed for studies on consumers' trust in dispute resolution and the proceedings before consumer complaint commissions.[115] That the outcome is of such significant importance for litigants is interesting, since it is often thought that—at least in theory—parties will find the outcome of a dispute more palatable if they have been informed and heard during the process.[116]

8 Conclusion

What do the data presented in this report say about the enforcement of consumer law in the Netherlands? It might well be that the report raises more questions than answers. For example, it is hard to answer the question in the abstract, without knowing how many consumers did *not* bring a complaint or file a dispute, even though they were unsatisfied with the performance rendered by the trader. Further, the data would probably have more meaning if we knew how the Netherlands compares to other legal systems. The ADR system in the Netherlands is often praised for giving consumers access to a relatively cheap, quick and often effective route towards dispute resolution.[117] Does the system live up to this reputation and provide consumers with satisfying outcomes in more cases than in legal systems that do not have such a developed ADR system?

Appendix: Statistics on Consumer Complaints and Consumer Disputes[118]

[114] Van Velthoven and Klein Haarhuis (2010), p. 176.

[115] Klapwijk and ter Voert (2009), p. 75. See also Eshuis (2009), p. 92, who finds that 'winners' are more positive about final judgments whereas 'losers' tend to be more positive about settlements.

[116] See van der Linden (2010) for an empirical study on perceptions of justice of professionals involved in civil litigation.

[117] Weber and Hodges (2012).

[118] The tables were created by Lynn Erkens on the basis of the annual reports listed in the main text.

Table 2 Consumer complaint commissions (*Geschillencommissie*)

	2015	2014	2013	2012	2011	2010	2009	2008	2007	2006
Complaints received	4627	4759	5023	5073	6894	7826	10,483	11,067	11,280	11,973
Cases resolved by complaint commission	2108	2268	2162	2470	3896	3046	3117	3417	3504	4786

Table 3 Consumer complaints financial services (*Kifid*)

	2015	2014	2013	2012	2011	2010	2009	2008
Complaints received Ombudsman	10	4755	6365	6461	5794	Data not available	7818	6411
Complaints received complaints commission *Kifid*	278	657	887	595	621	609	443	347
Complaints received appeal commission *Kifid*	56	82	66	39	36	19	14	6
Complaints received new structure	6205	1061	N.a.	N.a.	N.a.	N.a.	N.a.	N.a.
Total complaints received	6549	7095	7318	7095	6451	6719	7818	6411
Resolved cases Ombudsman	689	3511	4233	3963	2926	4355	3720	2422
Resolved cases complaint commission *Kifid*	503	761	612	588	605	476	264	Data not available
Resolved cases appeal commission *Kifid*	45	54	72	37	20	15	Data not available	Data not available
Resolved cases new structure	2366	130	N.a.	N.a.	N.a.	N.a.	N.a.	N.a.
Total of resolved cases	3603	4456	4917	4588	3551	4846	Data not available	Data not available
Inadmissible cases Ombudsman	22	2000	2401	2854	2300	3083	Data not available	Data not available
Inadmissible cases complaint commission *Kifid*	10	43	64	47	2	3	Data not available	Data not available
Inadmissible cases appeal commission *Kifid*	25	18	7	7	4	7	Data not available	Data not available
Inadmissible cases new structure	2373	538	N.a.	N.a.	N.a.	N.a.	N.a.	N.a.
Total inadmissible cases	2430	2599	2472	2908	2306	3093	Data not available	Data not available

Table 4 Consumer disputes before the courts

	2015	2014	2013	2012	2011	2010	2009	2008	2007	2006
Commercial cases *kantonrechter*	466,980	488,990	506,060	545,690	609,640	661,600	650,550	561,900	490,160	517,940
Commercial cases of civil court	85,290	91,760	99,200	102,450	115,750	118,420	111,740	102,010	108,780	113,580
Total per year	552,270	580,750	605,260	648,140	725,390	780,020	762,290	663,910	598,940	631,520

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Enforcement and Effectiveness of Consumer Law in New Zealand

Trish O'Sullivan

1 Introduction

This chapter contains an overview of consumer law in New Zealand, how it operates and how it is enforced.[1] The government agencies responsible for consumer interests and the sources of consumer protection law are identified. The chapter highlights the deficiencies in the enforcement mechanisms for consumers in New Zealand and makes suggestions for improvement. In particular it is noted that New Zealand needs to provide more cost effective and efficient forms of redress including access to online dispute resolution systems.

2 National Legal Framework for Consumer Protection

2.1 National Consumer Policy

New Zealand[2] has national consumer laws but no national "consumer policy." The government department responsible for consumer policy is the Ministry of Business, Innovation and Employment ("MBIE"). The Consumer Protection team forms part of the Consumer Protection and Standards branch within MBIE. Consumer Protection is responsible for providing information and advice to consumers and businesses to ensure that consumers are protected and that consumers and businesses

[1] See generally: Tokeley (2014).

[2] New Zealand has a population of 4,769,426. See: www.stats.govt.nz (accessed 28 February 2017).

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participate confidently in the marketplace. Consumer Protection also: carries out research on consumer issues; advises Government on matters that affect consumers; and works with policy advisors to monitor how laws and practices affect consumers.[3] Consumer Protection has recently changed its name from "Consumer Affairs" (January 2016).

Much consumer protection regulation in New Zealand is similar to Australia. Both countries are parties to the Closer Economic Relations ("CER") trade agreement signed in 1983.[4] For example: the misleading and deceptive conduct provisions in New Zealand's Fair Trading Act 1986 were essentially copied from the Australian Trade Practices Act 1974 (now repealed)[5] and Australia copied much of New Zealand's Consumer Guarantees Act 1993 when the Australian Consumer Law[6] was enacted in 2011. There are important differences between the laws in each country—for example the definition of "consumer" differs[7] and New Zealand has no statutory regulation of unconscionable conduct[8] but in essence the sentiment of the laws is very similar.

2.2 *Consumer Education and Awareness of Consumer Rights*

Information about consumer rights is freely available from the government Consumer Protection website.[9]

The Commerce Commission is the regulatory body responsible for enforcing and educating in relation to the Fair Trading Act 1986 and the Credit Contracts and Consumer Finance Act 2003 which contain much consumer protection law. The Commerce Commission website[10] contains much information about consumer rights under the Fair Trading Act 1986 and the Credit Contracts and Consumer Finance Act

[3]See http://www.consumerprotection.govt.nz/.

[4]The agreement is available at: <http://mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Australia/index.php>.

[5]Most of the provisions in Australia's Trade Practices Act 1974 (now repealed) are now contained in the Australian Consumer Law which is set out in Schedule 2 of the Competition and Consumer Act 2010.

[6]The Australian Consumer Law is set out in Schedule 2 of the Competition and Consumer Act 2010 (Australia).

[7]See Consumer Guarantees Act 1993, section 2 and Australian Consumer Law, set out in Schedule 2 of the Competition and Consumer Act 2010, section 4—definitions of "consumer".

[8]Unconscionable conduct directed at consumers is controlled in Australia by Part 2.2 of the Australian Consumer Law which is set out in Schedule 2 of the Competition and Consumer Act 2010.

[9]See http://www.consumerprotection.govt.nz/.

[10]See http://www.comcom.govt.nz/.

2003. Recently the Commerce Commission has loaded simple video clips showing how animated characters deal with consumer problems.[11]

Consumer NZ is a private body which operates a website[12] which contains free advice and offers an advisory service to paid up members of the organisation. Consumer NZ frequently highlights current consumer issues in the media.

Some social studies programmes at high school cover the basics of the Consumer Guarantees Act 1993—these are not compulsory.

2.3 The Principal Legal Framework for Consumer

New Zealand has a variety of separate consumer protection statutes:

- Consumer Guarantees Act 1993
- Credit Contracts and Consumer Finance Act 2003
- Fair Trading Act 1986
- Motor Vehicle Sales Act 2003
- Weights and Measures Act 1987
- Auctioneers Act 2013
- Sale of Goods Act 1908.

Many of these statutes are backed up by regulations which contain detailed rules which support the statutory provisions.

Major consumer law reform was introduced in 2013 with the passing of the Fair Trading Amendment Act 2013 which added new rules and repealed the following statutes:

- Door to Door Sales Act 1967
- Layby Sales Act 1971
- Unsolicited Goods and Services Act 1975

The majority of the rules in the repealed statutes are now incorporated into the Fair Trading Act 1986 which is policed by the Commerce Commission. The reform increased the enforcement powers of the Commerce Commission including the giving the Commission the ability to issue infringement notices to offenders which operate like "parking fines".

The reform added new provisions to the Fair Trading Act 1986 which regulate:

- unfair terms in consumer contracts[13];
- unsubstantiated representations[14]; and

[11] Available at <http://tv.comcom.govt.nz/>.

[12] See https://www.consumer.org.nz/.

[13] Fair Trading Act 1986, sections 46H–46M.

[14] Fair Trading Act 1986, sections 12A–12D.

- extended warranty contracts.[15]

2.4 Other Sources Relevant to Consumer Protection

Section 11 of the Arbitration Act 1996 states that an arbitration agreement is enforceable against a consumer only if the consumer, by separate written agreement, certifies that, having read and understood the arbitration agreement, the consumer agrees to be bound by it.

The Commerce Act 1986 contains a variety of provisions which promote competition in the market generally. The Commerce Commission was established under the Commerce Act 1986 and enforces the Act.

Basic Contract and Tort law principles in New Zealand are based on the United Kingdom's common law rules. These principles are found mainly in case law, though there are some statutory provisions which apply to contracts, for example:

- Contractual Remedies Act 1979
- Contractual Mistakes Act 1977
- Contracts (Privity) Act 1982
- Illegal Contracts Act 1970

New Zealand operates a unique "no fault" accident compensation system for personal injuries caused by accident.[16] New Zealand's accident compensation scheme came into operation on 1 April 1974 and is based on the philosophy that the community as a whole should be responsible for injuries caused by accident. The government run scheme provides compensation for all, including consumers, regardless of fault or cause of injury. No claim can be brought, based on negligence or breach of statutory provision, where a personal injury is caused by "accident". This scheme has an impact on consumers who may be injured personally by defective products—they cannot sue for damages but must apply for compensation under the Accident Compensation scheme.

2.5 History of National Tradition of Consumer Protection

Though not designed as a consumer protection statute, the first protection for consumers was introduced with the passing of the Sale of Goods Act in 1908. The Act was a direct copy of the corresponding British statute.[17] New Zealand was a British colony in 1908 and was required to enact copies of all British statutes. While the purpose of this statute was to codify the rules that applied to merchants operating

[15]Fair Trading Act 1986, sections 36T–36W.

[16]Accident Compensation Act 2001.

[17]Sale of Goods Act 1893 (UK).

in the market place it also provided benefits to consumers. The definition of "buyer" in the Act covered any buyer of goods including consumers who purchased goods for personal use. The Sale of Goods Act implied conditions, regarding quality and fitness for purpose, into contracts for the sale of goods and set out circumstances when the buyer could reject goods or claim damages from the seller. A major limitation with the Sale of Goods Act 1908 for consumers was that it allowed contracting out by the parties. Consumers' rights in respect of quality and fitness for purpose of goods are now found in the Consumer Guarantees Act 1993.

1981 saw the passing of the first credit protection statute in New Zealand—the Credit Contracts Act 1981. Consumer protection in relation to credit transactions is now included in the Credit Contracts and Consumer Finance Act 2003, which requires disclosure, imposes cooling off periods and allows the Court to grant relief in situations involving oppression. Major advances in consumer protection were made in 1986 with the passing of the Fair Trading Act 1986 and the establishment of the Commerce Commission under the Commerce Act 1986.

The Consumer Guarantees Act was passed in 1993 and replaced and strengthened many consumer rights provisions which were previously contained in the Sale of Goods Act 1908. Significantly the Consumer Guarantees Act extended consumer protection, by statute, to services as well as goods, has very limited contracting out provisions and enables consumers to pursue manufacturers for remedies.

2.6 Influences Which Have Affected the Development of the National Regime of Consumer Protection in New Zealand

As is noted above, New Zealand law originally followed British law as New Zealand was a colony of Great Britain and did not again full independence until 1947.[18]

New Zealand then looked to Australia for guidance. The Closer Economic Relations ("CER") trade agreement signed in 1983[19] was designed to strengthen the relationship between New Zealand and Australia and encourages the development of similar laws—for example, the New Zealand Fair Trading Act 1986 copied much of the Australian Trade Practices Act 1974 (Australia—now repealed).

New Zealand consumer law has also been influenced by Canada. Much of the Consumer Guarantees Act 1993 (New Zealand) is taken from the equivalent Canadian statute—The Consumer Products Warranties Act 1978 (Saskatchewan).

[18]Statute of Westminster 1931 adopted by New Zealand parliament in 1947 see: Statute of Westminster Adoption Act 1947.

[19]The agreement is available at <http://mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Australia/index.php>.

2.7 Current Focus of Consumer Policy in New Zealand

Consumer law reform in New Zealand in 2013 saw increased regulation in some areas—for example: unfair terms; unsubstantiated representations; extended warranties; and wider enforcement powers for the Commerce Commission.[20] Some of the new provisions are limited. For example, only the Commerce Commission can challenge a term in a "consumer contract" as being unfair and terms which relate to the charging of fees cannot be challenged as unfair.[21]

3 Enforcement Mechanisms for Consumers in New Zealand

There are a variety of enforcement methods available for consumers in New Zealand but most of them are not practical or effective for low value disputes.[22] Each of the methods available are discussed below.

3.1 The Disputes Tribunal

The Disputes Tribunal is the most appropriate forum for resolving low value consumer disputes in New Zealand. The Tribunal is presided over by referees appointed by the Ministry of Justice. The referees generally have a legal qualification but they are not judges.

The Tribunal has a maximum jurisdiction level of $15,000(NZ) or up to $20,000 (NZ) if all the parties agree to extend the Tribunal's jurisdiction.[23] A claim may be lodged online via the Tribunal website at costs ranging from $45(NZ) to $180(NZ) depending on the level of the amount claimed.[24] A hearing date is appointed, the other party is notified of the hearing date and the claimant then appears in person to present the claim to the Tribunal referee. Legal representation in the Tribunal is not permitted.

While the claim may be lodged online, the claimant still needs to attend a hearing and may need to take time off work or arrange child care to do so. Tribunal decisions may be appealed to the District Court, but only on narrow grounds. Appeal is only possible on the grounds that the referee conducted the proceedings (or a tribunal investigator carried out an inquiry) in a way that was unfair and prejudiced the result

[20]The Commerce Commission now has power to issue "infringement notices" in relation to certain breaches of the Fair Trading Act 1986—see: Fair Trading Act 1986, section 40D.

[21]Sims (2014b), p. 739.

[22]O'Sullivan (2016), p. 22; Sims (2010), p. 145; Palmer (2014), ch 11.

[23]Disputes Tribunal Act 1988, sections 10 and 13.

[24]Disputes Tribunal Rules 1989, Rule 5 proscribes the following fees: $45 for claims under $2000; $90 for claims $2000 or more but less than $5000; and $180 for claims which are $5000 or more.

of the proceedings, at a cost of $200(NZ).[25] Tribunal decisions and agreed terms of settlement are deemed to be orders of the District Court and may be enforced using District Court procedures.[26]

3.2 Motor Vehicle Disputes Tribunal

The Motor Vehicle Disputes Tribunal is administered by the Department of Justice.[27] The Tribunal is established by the Motor Vehicle Sales Act 2003 and resolves disputes between consumers and motor vehicle traders. The Tribunal deals with disputes relating to amounts up to $100,000(NZ) or more if both parties consent in writing. The claim must relate to a breach of one or more of the following Acts:

- Consumer Guarantees Act 1993
- Fair Trading Act 1986
- Sale of Goods Act 1908
- Contractual Remedies Act 1979

The fee for lodging a claim with the Motor Vehicle Disputes Tribunal is $50(NZ). The Motor Vehicle Disputes Tribunal operates in a similar manner to the Disputes Tribunal, holding informal hearings at which the parties may not be represented by a lawyer. However, Motor Vehicle Disputes Tribunal decisions are not deemed to be orders of the District Court and there are no methods of enforcement established by the Act which creates the Tribunal.

3.3 District Court

Consumers may also seek to resolve disputes by commencing actions in the District Court for any claim up to $200,000(NZ)[28] but will generally need legal representation and need to pay a fee of $200(NZ)[29] to commence the proceeding. Claimants in the District Court are subject to cost orders if they are not successful. Consumers are unlikely to bring claims in the District Court in relation to low value disputes due to the expense of litigation and the risk of cost orders if they are unsuccessful.

[25] Disputes Tribunal Act 1988, section 50.

[26] Disputes Tribunal Act 1988, sections 45–47.

[27] See <http://www.justice.govt.nz/tribunals/motor-vehicle-disputes-tribunal>.

[28] District Courts Act 1947, section 29.

[29] District Courts Fees Regulations 2009—as at 1 July 2014.

3.4 High Court

Claims for sums in excess of $200,000(NZ) must be brought in the High Court.

3.5 Industry Specific Dispute Resolution Schemes

New Zealand has a plethora of industry specific dispute resolution schemes.[30] There is no central platform for directing consumers to the appropriate industry scheme and many schemes overlap in the services provided. The majority of these schemes relate to service industries (for example, the banking and insurance ombudsman schemes) and essentially provide industry funded, self-regulating complaints procedures for customers. Participants in a particular industry may join a relevant scheme for resolution of their customers' complaints. Schemes can generally impose membership sanctions on participants who fail to comply with scheme decisions. These schemes do not follow uniform procedures and consumer awareness of their existence is limited.[31]

3.6 Class Action

Another potential option, for a group of consumers who are affected by the same issue with a particular product or supplier, is to bring a class action. Class actions are generally driven by lawyers acting on a "success fee" basis which is not a common practice in New Zealand. Sims and Tokeley point out that the ability to bring class

[30]See: Sims (2014a), p. 241. For example: The Electricity & Gas Complaints Commissioner see: <www.egcomplaints.co.nz>, Telecommunications Dispute Resolution see: <www.tdr.org.nz>, Privacy Commissioner see: <www.privacy.org.nz>, Accident Compensation complaints see: <http://www.acc.co.nz/making-a-claim/what-if-i-have-problems-with-a-claim/ECI0046>, Motor Vehicle Disputes Tribunal see: <www.justice.govt.nz/tribunals/motor-vehicle-disputes-tribunal>, Health and Disability Commissioner see: <www.hdc.org.nz>, Retirement Commissioner see: <www.cflri.org.nz, Insurance and Savings Ombudsman> see: <www.iombudsman.org.nz>, Financial Services Complaints Ltd see: <www.fscl.org.nz>, Financial Dispute Resolution see: <www.fdr.og.nz>, The Banking Ombudsman see: <www.bankomb.org.nz>, Real Estate Agents Authority see: <www.reaa.govt.nz>, Tenancy Tribunal see: <www.dbh.govt.nz/tenancy-tribunal and www.justice.govt.nz/tribunals/tenancy-tribunal>, Plumbers, Gasfitters, and Drainlayer's Board see: <www.pgdb.co.nz/complaints.html>, Electrical Workers Registration Board see: <ewrb.govt.nz>, Building Practitioners Board see: <www.lbp.govt.nz>, Weathertight Homes Tribunal see: <www.justice.govt.nz/tribunals/wht>, New Zealand Institute of Chartered Accountants see: <www.nzica.com> and Accountants and Tax Agents Institute of New Zealand see: <www.atainz.co.nz>, and New Zealand Law Society see: <www.lawsociety.org.nz/for-the-community/lawyers-complaints-service> all accessed 16 June 2015.

[31]Sims (2014a), pp. 241, 284.

actions is limited by the requirements of the High Court Rules.[32] Rule 4.24 requires all persons with the same interest to consent to the proceeding and provides that the class action may only proceed on the direction of the court.[33] Allowing an "opt out" class action would improve the usefulness of the class action for New Zealand consumers.[34] In practice class actions are rarely taken by consumers in New Zealand.[35]

3.7 Consumer Rights Television Shows

Another route for obtaining resolution of consumer disputes is to contact television shows like "Fair Go"[36] and "Target"[37] in New Zealand which promote the protection of consumer rights. These shows do good work and often a threat of contacting a television show may encourage the trader or supplier to act responsibly and provide an appropriate remedy. However shows like these can only deal with a small number of disputes and many consumers cannot spare the time required to resolve a dispute in this manner or are not interested in appearing on television.

3.8 Government Agencies

Government agencies such as Consumer Protection (formerly known as Consumer Affairs)[38] and the Commerce Commission[39] can also assist consumers in resolving some disputes but they have limited jurisdiction and are subject to funding constraints. The Commerce Commission is able to prosecute offences under the Fair Trading Act 1986 for the benefit of consumers but has no jurisdiction to bring claims on behalf of consumers under the Consumer Guarantees Act 1993. Increasing the Commerce Commission's jurisdiction to include the Consumer Guarantees Act 1993 would benefit consumers greatly.[40]

[32]Sims (2010), pp. 145, 168 and Tokeley (2007), pp. 297, 306–313.

[33]See: Sims (2010), pp. 145, 168 and Tokeley (2007), pp. 297, 306–313.

[34]Palmer (2014), p. 520.

[35]Palmer (2014), p. 515.

[36]See <http://tvnz.co.nz/fair-go>.

[37]Target is a television show produced in New Zealand which ran for 11 seasons but has been off air since 2013.

[38]See <http://www.consumerprotection.govt.nz/> accessed 23 March 2016.

[39]See <www.comcom.govt.nz> accessed 1 August 2015.

[40]See Sims (2010), p. 145 and Palmer (2014), p. 523.

3.9 Self-Help

Various self-help options are available to consumers such as, using credit card charge back facilities or posting negative feedback on social media in relation to particular traders but there is no consistent or guaranteed response when using these methods.

3.10 Need for Reform: Advancement Online Dispute Resolution

Overall access to justice for New Zealand consumers needs improvement, particularly in relation to small value disputes.[41] Calls have been made for access to online dispute resolution methods for consumers in New Zealand—particularly for those consumers who shop online. Currently there are no moves to establish an ODR platform similar to that recently created in the European Union.[42]

4 Volume of Consumer Complaints and Disputes in New Zealand

It is difficult to measure the volume of consumer complaints and disputes in New Zealand. There are no public statistics relating to specifically to consumer disputes. It is possible to review the volume of claims processed by some enforcement tribunals.

4.1 Disputes Tribunal

In the 12 month period ending 31 March 2014 the Disputes Tribunal dealt with 15,511 disputes and the average cost for dealing with each dispute was $600–650 per claim.[43] These disputes may relate to any subject matter—not just consumer disputes. A small selection of "decisions of interest" for the years 2009–2014 are posted on the Disputes Tribunal website.[44] However, these published "decisions of interest"

[41] See generally, Sims (2010), p. 145 and O'Sullivan (2016), p. 22.

[42] O'Sullivan (2016), p. 22.

[43] Letter dated 29 April 2015 from the Ministry of Justice in response to an official information request from the author.

[44] See <http://www.justice.govt.nz/tribunals/disputes-tribunal/decisions-of-note> accessed 16 June 2015.

only represent a small proportion of the total number of disputes dealt with by the Tribunal.[45]

4.2 Motor Vehicle Disputes Tribunal

All the decisions of the Motor Vehicle Disputes Tribunal are published online and are available through the nzlii.org website.[46] A review of the published decisions by date order reveals 179 decisions in 2015 and 144 decisions in 2014.

5 Courts and the Enforcement of Consumer Law

5.1 Court Hierarchy

The basic court hierarchy in New Zealand is:

- Supreme Court
- Court of Appeal
- High Court
- District Court (jurisdiction level for civil claims—up to $200,000(NZ) as discussed above).

The Disputes Tribunal, discussed above, is a division of the District Court (section 4 Disputes Tribunals Act 1988).

5.2 Legal Aid

There are no special procedural rules for consumer disputes. There is no free legal representation and no waiver of court or tribunal fees in relation to consumer disputes.

The maximum level of disposable capital for the purposes of determining an applicant's eligibility for legal aid in respect of a civil matter is $3500(NZ).[47] Legal

[45]The author contacted the Disputes Tribunal in November 2014 to ascertain whether the Tribunal has statistics which record the numbers of different types of disputes dealt with by the Tribunal but was advised that such statistics are not available.

[46]See http://www.nzlii.org/cgi-bin/sinosrch.cgi?method=auto;meta=%2Fnz;mask_path=nz%2Fcases%2FNZMVDT;mask_world=;query=MVD;results=20;submit=Search;rank=on;callback=off;legisopt=;view=date;max=;offset=0.

[47]Legal Services Regulations 2011, section 6.

aid is not available for Disputes Tribunal claims as no legal representation is allowed in the Tribunal.

The only cost effective avenue for resolving a small consumer dispute in New Zealand is to use the Disputes Tribunal, the Motor Vehicle Disputes Tribunal (if the dispute relates to a motor vehicle) or an industry funded scheme.

6 Specialised Agencies and the Enforcement of Consumer Law

As is mentioned above, there are two government funded agencies, Consumer Protection and the Commerce Commission, which can assist in enforcing consumer law.

6.1 Consumer Protection

Consumer Protection (formerly known as Consumer Affairs) is a division of the government Ministry of Business, Innovation and Employment.[48] Consumer protection is responsible for:

- developing consumer policy including consumer protection
- overseas product safety and weights and measures
- providing education and advice for consumers and businesses on consumer laws and issues
- investigating unsafe consumer products
- providing advice on consumer representation
- administrating a range of consumer legislation
- enforcing the Weights and Measures Act 1987.

Part of the role of Consumer Protection is to provide education and give advice to consumers but it cannot bring court action on behalf of consumers. It does not enforce the consumer law.

6.2 The Commerce Commission

The Commerce Commission is New Zealand's primary competition regulatory agency.

It enforces legislation that promotes competition in New Zealand markets and prohibits misleading and deceptive conduct by traders. The Commission also

[48] See https://www.govt.nz/organisations/consumer-protection/.

enforces a number of pieces of legislation that, through regulation, aim to provide the benefits of competition in markets where effective competition does not exist. This includes in the telecommunications, dairy, electricity, gas pipelines and airport sectors.

The Commission is an independent Crown entity established under section 8 of the Commerce Act 1986. The Commission is not subject to direction from the government in carrying out its enforcement and regulatory control activities. The Commerce Commission's purpose is to achieve the best possible outcomes in competitive and regulated markets for the long-term benefit of New Zealanders.[49]

The primary pieces of legislation enforced by the Commerce Commission are the Commerce Act 1986 (which deals with competition law), the Fair Trading Act 1986 and Credit Contracts and Consumer Finance Act 2003.

A consumer may contact the Commission with a complaint which breaches, for example the Fair Trading Act 1986, but the Commission is not obliged to take on every complaint and has limited funding.

7 The Role of Consumer Organisations in Enforcement of Consumer Law

There is only one dedicated consumer organisation in New Zealand—Consumer NZ[50] but consumers can also get free advice from Community Law Centres and the Citizens Advice Bureau.

Consumer NZ[51] is an independent, non-profit organisation established in 1959 dedicated to getting New Zealanders a fairer deal. The main purposes of Consumer NZ are to:

- Test products and services, and recommend the best;
- Investigate issues consumers need to know more about;
- Conduct surveys and mystery shopping programs designed to keep businesses honest;
- Give advice to consumers about their rights and how to exercise them; and
- Campaign to get laws and regulations changed to benefit consumers.[52]

Consumer NZ belongs to Consumers International[53] and is able to draw on experiences and information from consumer organisations around the world. Consumer NZ is funded by member fees, business programmes and contract work, mostly with government departments.

[49] See http://www.comcom.govt.nz/the-commission/about-us.

[50] See https://www.consumer.org.nz/.

[51] See https://www.consumer.org.nz/.

[52] See https://www.consumer.org.nz/topics/our-work.

[53] See www.consumersinternational.org.

Consumer NZ provides a one on one consumer advisory service and product reviews for paid up members of the organisation. However, the Consumer NZ website provides detailed information about consumer rights which is available to the public at no cost.

8 Private Regulation and Enforcement of Consumer Law

As discussed above, New Zealand has many overlapping industry specific dispute resolution schemes but no central platform for directing consumers to the appropriate industry scheme.[54]

9 Enforcement Through Collective Redress

The possibly of bringing a class action is discussed above but is quite uncommon in New Zealand—partly due to the small population base and the High Court Rules' restrictions on bringing class actions.[55]

10 Sanctions for Breach of Consumer Law

The variety of statutes which provide consumer protection regulation contain consumer remedies and penalty provisions.

10.1 Consumer Guarantees Act 1993

The Consumer Guarantees Act 1993 provides self-help styled remedies for consumers when the guarantees in relation to the supply of goods[56] and services[57] are breached. The remedies include: repair; replacement; refund; and compensation when goods or services fail to meet the guarantees contained in the Act.[58] The Act contains no criminal sanctions or penalties for breach. Misleading a consumer about

[54]See Sect. 3.5 above.

[55]See Sect. 3.6 above.

[56]Consumer Guarantees Act 1993, sections 5–13.

[57]Consumer Guarantees Act 1993, sections 28–31.

[58]Consumer Guarantees Act 1993, sections 18–27 (goods' remedies) and sections 32–38 (services' remedies).

the remedies available under the Consumer Guarantees Act may amount to a breach of the Fair Trading Act which does provide criminal penalties.[59]

10.2 Fair Trading Act 1986

The Fair Trading Act 1986 prohibits misleading and deceptive conduct[60] and the making of unsubstantiated or false representations in trade.[61] Certain unfair practices such as bait advertising and referral selling are also prohibited.[62] Consumers may bring civil claims for breach of these provisions in the Act.[63]

The Fair Trading Act 1986 also controls: unfair terms; layby sales; uninvited direct sales; extended warranties and auctions. The Commerce Commission is empowered to bring criminal prosecutions for breach of these provisions, excluding the unfair terms provisions.[64] The unfair terms provisions are limited in that only the Commerce Commission may seek a court declaration that a particular term is unfair.[65] A consumer may not challenge an unfair term but must seek assistance from the Commerce Commission. The Act contains significant criminal penalties for breach—up to $200,000(NZ) per offence for individuals and up to $600,000(NZ) for companies.[66] The court may also order payment of the equivalent revenue or 'commercial gain' earned from any offending.[67]

The Fair Trading Act 1986 allows the Commerce Commission to issue infringement notices, for breach of some parts of the Act.[68] Infringement notices impose instant fines of up to $2000(NZ).[69]

The Commerce Commission frequently brings criminal proceedings against traders for breaches of the criminal provisions in the Fair Trading Act and the Courts have imposed heavy penalties when the offences are established.[70]

[59]Fair Trading Act 1986, section 13(i).
[60]Fair Trading Act 1986, sections 9–12.
[61]Fair Trading Act 1986, sections 12A–14.
[62]Fair Trading Act 1986, sections 17–26.
[63]Fair Trading Act 1986, sections 41 and 43.
[64]Fair Trading Act 1986, section 40.
[65]Fair Trading Act 1986, s 46H and see: Sims (2014b), p. 739.
[66]Fair Trading Act 1986, section 40.
[67]Fair Trading Act 1986, section 40A.
[68]Fair Trading Act 1986, section 40D.
[69]Fair Trading Act 1986, section 40B.
[70]See http://www.comcom.govt.nz/fair-trading/fair-trading-media-releases/show/2016/.

10.3 Credit Contracts and Consumer Finance Act 2003

A person who commits an offence under the Credit Contracts and Consumer Finance Act 2003 may liable on conviction, in the case of an individual, to a fine not exceeding $200,000(NZ) and in the case of a body corporate, to a fine not exceeding $600,000(NZ) for breach of particular sections.[71]

11 Alternative Mechanisms for the Resolution of Consumer Disputes

Private alternate dispute resolution ("ADR") is available but there is very little government funded use of ADR to resolve consumer disputes. The Disputes Tribunal and the Motor Vehicle Disputes Tribunal both hold hearings in which adjudicators impose decisions.

12 External Relations and Cooperation of the State, Enforcers and Consumer Organisations

12.1 Regional or International Organisations

New Zealand is a member of the following organisations:

- Organisation for Economic Co-operation and Development (OECD);
- United Nations (UN);
- World trade Organisation (WTO); and
- Asia-Pacific Economic Cooperation (APEC).

New Zealand is also a "dialogue partner" with the Association of Southeast Asian Nations (ASEAN).

As a member of the OECD, New Zealand adopts OECD guidelines as codes from time to time. These codes do not have legislative force. For example, New Zealand adopted the Model Code for Consumer Protection in Electronic Commerce in October 2000 which is based on the OEDC Guidelines (1999)[72] and requires businesses to set up internal complaint handling procedures to deal with consumer complaints relating to electronic commerce.[73] The guidelines in the code provide a

[71]Credit Contracts and Consumer Finance Act 2003, section 103.

[72]See <http://www.oecd.org/sti/consumer/34023811.pdf> accessed 1 August 2015.

[73]Clause 36 of the Model Code requires businesses to establish fair and effective internal procedures to address and respond to consumer complaints within a reasonable time, in a reasonable manner, free of charge to the consumer and without prejudicing the rights of the consumer to seek

useful reference point for online traders but these guidelines have no legislative force.

12.2 Cross Border Enforcement

The Trans-Tasman Proceedings Act 2010 streamlines the process for resolving civil proceedings with a Trans-Tasman (New Zealand/Australian) connection and minimise impediments to enforcing certain Australian judgments and regulatory sanctions in New Zealand. The Act implements the Trans-Tasman Agreement signed in 2008 into New Zealand law.

13 Conclusion

The enforcement of consumer law in New Zealand needs improvement to make it effective. More needs to be done to give consumers access to justice. The system is not cost effective for small consumer disputes and there is no access to publically funded ADR mechanisms. Work has been done with regard to improving consumers' rights, in the consumer law reform 2013, but more cost effective and efficient methods for enforcing consumer law are required.

There are no special procedural rules for consumer disputes, no free legal representation and no waiver of court fees. New Zealand should consider: increasing the jurisdiction of the Commerce Commission to cover the Consumer Guarantees Act 1993; providing free legal advice to consumers; cutting court fees for consumers and should give more attention to educating consumers about their rights. New Zealand also needs to look at introducing ADR and online dispute resolution systems for consumer disputes.[74]

legal redress. Clause 38 requires businesses to provide consumers, who are unsatisfied with the resolution provided by any internal complaint handling mechanism, with information regarding any external dispute resolution body to which the business subscribes or any relevant government body. Clause 39 requires businesses to provide clear and easily accessible information to consumers on any independent customer dispute resolution mechanism to which the business subscribes that is capable of dealing with consumer complaints. Clause 42 requires any business based in New Zealand that enters into a contract with a consumer whom the business reasonably believes is resident in New Zealand (e.g. because of address details supplied by the consumer) to specify that the governing law of that contract is the law of New Zealand and that disputes arising under the contract shall be determined by courts or tribunals in New Zealand.

[74]See O'Sullivan (2016), p. 22.

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Enforcement and Effectiveness of Consumer Law in Poland

Monika Namysłowska and Agnieszka Jabłonowska

1 Introduction

Due to political and economic factors Polish tradition of consumer protection is relatively short. Although some non-governmental organisations were already advocating consumer rights in the early 1980s, it was only after the political transformation in 1989 that the need for effective consumer protection became universally recognised.[1] An important milestone in this respect was the adoption of the Constitution of 1997,[2] which explicitly recognised the protection of consumers from activities threatening their health, privacy and safety and from dishonest market practices as a task of public authorities. Since then, a constant development in the area of consumer protection is observed. While first measures were mainly aimed at aligning national framework with international standards, major reforms are currently also developed by the Polish legislator himself.

Consumer law in Poland has largely been influenced by the legislation of the European Union. Implementation of a considerable body of existing EU directives in this domain was a condition for the country's accession to the EU in 2004. Since then, Poland has been directly involved in the European law- and policy-making.

Consumer protection is formally recognised as a public policy objective. Poland has a national consumer policy developed by its main consumer protection authority, the President of the Office of Competition and Consumer Protection (*Urząd Ochrony*

[1] See generally Łętowska (2002), pp. 2–10.

[2] Constitution of the Republic of Poland (*Konstytucja Rzeczypospolitej Polskiej*) of 2 April 1997, Dz.U. 1997 nr 78 poz. 483.

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Konkurencji i Konsumentów, UOKiK).[3] The policy aims to ensure a high level of consumer protection and strengthen the position of consumers in the market. This should be achieved by creating safe and consumer-friendly environment, promoting social dialogue in the area of consumer protection and fostering consumer rights to information, education and association. A noticeable evolution at this level is an increased emphasis on effective dispute resolution, in particular through alternative dispute resolution mechanisms.[4] Greater importance is also being attached to international cooperation.

The awareness of Polish consumers of their rights is growing, thanks to a number of initiatives undertaken by public authorities and non-governmental organisations. Municipal and district councils appoint consumer ombudsmen whose main role is to advise and assist consumers in dispute resolution. Consumer NGOs provide consumers with free legal advice and organise information campaigns addressed to all consumer groups, including children, elderly people and other vulnerable parties.[5] Many awareness-raising programmes are also organised by the UOKiK.[6] A marked increase in the number of these activities was observed at the beginning of 2015, following the adoption of the Act on consumer rights.[7] In order to reach a wider audience, traditional advertisements (TV, radio, billboards) go hand in hand with increasing use of online media. Of particular practical value are numerous thematic brochures and reports published by the UOKiK as well as hotlines co-financed by the agency, which allow consumers to obtain first-hand information from qualified consultants.

Despite an upward trend, consumer awareness in Poland is not yet a cause for satisfaction. In a study conducted in 2009 for the Office of Competition and Consumer Protection 75% of respondents agreed with the statement that Poles, in general, do not know their consumer rights.[8] In 2015, 55% of respondents admitted to have heard about the recent amendments to consumer law, but only 40% knew where they could seek legal assistance.[9] Interestingly, Polish consumers performed relatively well in the recent Consumer Conditions Scoreboard and appeared to be

[3]UOKiK, *Polityka konsumencka na lata 2014–2018* (Warsaw, 2014). See: www.uokik.gov.pl/download.php?plik=14692.

[4]Increased focus on alternative dispute resolution has clearly been influenced by the recent EU developments, in particular the adoption of Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on Consumer ADR) [2013] OJ L165/63. The Directive was implemented in Poland by the Act of 23 September 2016 on extrajudicial resolution of consumer disputes (*Ustawa o pozasądowym rozwiązywaniu sporów konsumenckich*), Dz.U. 2016 poz. 1823.

[5]See, e.g.: www.federacja-konsumentow.org.pl/59,kampanie.html; www.zanimkupisz.saferinternet.pl; www.konsumenci.org/pomoc-konsumencka,dla-seniorow,2,26.html.

[6]See, e.g.: www.uokik.gov.pl/education_campaigns.php; www.prawakonsumenta.uokik.gov.pl; www.finanse.uokik.gov.pl.

[7]Act of 30 May 2014 on consumer rights (*Ustawa o prawach konsumenta*), Dz.U. 2014 poz. 827. See also: UOKiK, *Sprawozdanie z działalności UOKiK za 2015 r.*, www.uokik.gov.pl/download.php?plik=18516; Stowarzyszenie Konsumentów Polskich, *Sprawozdanie zarządu z działalności w roku 2015*, www.konsumenci.org/o-nas,sprawozdania-z-dzialalnosci,3,13.html.

[8]UOKiK, *Znajomość praw konsumenckich oraz analiza barier utrudniających konsumentom bezpieczne i satysfakcjonujące uczestnictwo w rynku - raport z badań* (Warsaw, 2009).

[9]www.pssb.pl/pssb/news/details,1,169,konsument-coraz-bardziej-swiadomy-swoich-praw.html.

more aware of their rights than retailers were of their obligations.[10] Awareness of consumer protection legislation among all market participants certainly has an impact on the effectiveness of consumer law.

2 Substantive Provisions in the Field of Consumer Law

Polish consumer protection framework consists of several legal acts. Some of them form the consumer *acquis* in the strict sense of the word, whereas other provisions on consumer protection are set in a wider context. Notwithstanding the differences between particular sources in which consumer rules are enshrined, most of them share a common origin in the EU law.

Consumer provisions have to some extent been integrated into the Polish Civil Code.[11] Article 22^1 of the Civil Code defines consumer as a natural person who performs a legal act with a trader for purposes not directly related to his business or professional activity—a wording that is slightly different from the standard definition laid down in EU directives.[12] Product liability rules, which implemented Directive 85/374/EEC,[13] are included in the chapter on obligations. The Civil Code also lays down general principles for business-to-consumer (B2C) contracts, including rules on unlawful standard contract terms transposing Directive 93/13/EEC.[14] Finally, it determines the position of both parties in particular types of contracts, for example in the section on the sale of consumer goods, which was modelled on Directive 1999/44/EC.[15]

A number of consumer rules are also set out in separate legal acts. One of the most recent pieces of legislation is the Act on consumer rights implementing

[10]European Commission, *Consumer Conditions Scoreboard*, 11th edn, pp. 17–20. See: www.ec.europa.eu/consumers/consumer_evidence/consumer_scoreboards/11_edition/docs/ccs2015scoreboard_en.pdf.

[11]Act of 23 April 1964—Civil Code (*Kodeks cywilny*), Dz.U. 2016 poz. 380 (codified version).

[12]See, e.g. Article 2.1 of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 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] OJ L304/64; Article 3 (a) of Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC [2008] OJ L133/66; Article 2(f) of Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts [2009] OJ L33/10.

[13]Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products [1985] OJ L210/29.

[14]Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29.

[15]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 [1999] OJ L171/12.

Directive 2011/83/EU into the Polish legal system. Other EU-influenced acts deal with particular types of contracts, such as timeshare or consumer credit,[16] or with sector-specific issues.[17] Finally, two acts of a horizontal nature deserve a mention: the Act on countering unfair market practices,[18] which implemented Directive 2005/29/EC,[19] and the Act on combating unfair competition,[20] which incorporates a number of provisions transposing Directive 2006/114/EC.[21] The former deals with business-to-consumer unfairness and closely reflects its European counterpart. The act is based on a general clause prohibiting unfair market practices that are contrary to the principle of good practice (*dobre obyczaje*) and which materially distort or are likely to materially distort the economic behaviour of an average consumer with regard to the product.[22] The general clause is followed by specific provisions on misleading and aggressive practices along with two distinct lists of practices which are considered unfair in all circumstances. By contrast, the Act on combating unfair competition displays a number of national particularities. Similarly to Directive 2006/114/EC, the act constitutes a legal basis for disputes between businesses (B2B), but its subject matter goes beyond the issues of misleading and comparative advertising. In line with the pre-existing tradition of Polish unfair competition law, it includes a general clause prohibiting all acts contrary to the law or the principle of good practice, which impair or infringe the interests of other traders or the clients.[23] Specific acts of unfair competition, such as false or misleading designation of an undertaking or its products, disclosure of trade secrets, hindering market access or unfair advertising, are defined subsequently. Following the adoption of the Act on combating unfair market practices, discussed above, the Act on combating unfair competition no longer provides consumer protection authorities and organisations with a legal standing.[24] Interestingly, however, the act allows traders and trader organisations to bring legal

[16]See, e.g.: Act of 16 September 2011 on timeshare (*Ustawa o timeshare*), Dz.U. 2011 nr 230 poz. 1370; Act of 12 May 2011 on consumer credit (*Ustawa o kredycie konsumenckim*), Dz.U. 2016 poz. 1528 (codified version).

[17]See Sect. 3.2. below on sectoral agencies.

[18]Act of 23 August 2007 on countering unfair market practices (*Ustawa o przeciwdziałaniu nieuczciwym praktykom rynkowym*), Dz.U. 2016 poz. 3 (codified version).

[19]Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 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 (Unfair Commercial Practices Directive) [2005] OJ L149/22.

[20]Act of 16 April 1993 on combating unfair competition (*Ustawa o zwalczaniu nieuczciwej konkurencji*), Dz.U. 2003 nr 153 poz. 1503 (codified version).

[21]Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising [2006] OJ L376/21.

[22]Articles 3 and 4(1) of the Act on countering unfair market practices.

[23]Article 4 of the Act on combating unfair competition.

[24]Szwaja and Kubiak-Cyrul (2016), p. 54.

action against competitors engaging in both B2B and B2C practices, thus indirectly protecting the interests of consumers.[25]

Finally, attention should be drawn the Act on competition and consumer protection, which is crucial from the point of view of enforcement.[26] The Act not only establishes the framework for the protection of competition and traders, but also sets out principles and actions to be undertaken, in the public interest, in order to protect the collective interests of consumers. In particular, it defines the actors responsible for competition and consumer protection, most prominently the President of UOKiK. The following sections describe the design of the Polish enforcement mechanism in more detail.

3 Administrative Agencies

3.1 President of the Office of Competition and Consumer Protection

3.1.1 Status and Organisation

The main authority in charge of enforcement of consumer law in Poland is the President of the Office of Competition and Consumer Protection. The agency is established by the Act on competition and consumer protection, which lays down its tasks and competences.[27] The President of UOKiK is a central government organ appointed by the Prime Minister and answering directly to the latter.[28] The Act on competition and consumer protection does not specify the duration of the President's mandate or reasons for his revocation, which clearly affects his independence.[29] Besides his role in the field of consumer protection, the President of UOKiK is also a competition authority described in Article 35 of the Council Regulation No 1/2003 on the implementation of the rules on competition.[30]

The President of UOKiK acts through the Office of Competition and Consumer Protection, which he manages with the help of vice-presidents, directors general, directors of organisational units and directors of delegations (branch offices). Apart from its executive arm, the agency is composed of nine departments, three of which

[25]Tischner (2014), pp. 103–104.

[26]Act of 16 February 2007 on competition and consumer protection (*Ustawa o ochronie konkurencji i konsumentów*), Dz.U. 2015 poz. 184 (codified version).

[27]Article 31 of the Act on competition and consumer protection.

[28]Article 29 of the Act on competition and consumer protection.

[29]Jaroszyński (2014), p. 845.

[30]Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

are most directly relevant to the present topic.[31] The Department of Consumer Protection develops the national consumer policy, initiates preparatory legislative works in the field of consumer protection and conducts administrative proceedings concerning practices infringing collective consumer interests or consisting in the use of unlawful terms in the standard conditions of business. It works in close cooperation with the Department of Legal Affairs, which drafts opinions concerning legislative acts and represents the President of UOKiK in the court proceedings. Last but not least, the Department of Trade Inspection occupies a particular position, which is elaborated on further below.

The Office consists of the head office located in Warsaw and nine branch offices located in major Polish cities.[32] The branch offices monitor compliance of market participants with relevant legislation and conduct enforcement proceedings within their territorial jurisdiction. If the investigated practice affects the whole or a large part of the national market, the proceedings are carried out by the head office.[33]

3.1.2 Tasks and Competences

As already pointed out, the President of UOKiK has the power to carry out proceedings concerning practices infringing collective consumer interests or consisting in the use of unlawful terms in the standard conditions of business and adopt administrative decisions. Proceedings carried out by the President of UOKiK are a specific type of administrative proceedings set out in the Act on competition and consumer protection and only in exceptional situations governed by the Code of Administrative Procedure[34] and the Code of Civil Procedure.[35] What is more, appeals from decisions of the President of UOKiK are heard by a special district court in Warsaw—Court of Competition and Consumer Protection (*Sąd ochrony konkurencji i konsumentów*, SOKiK). Proceedings before the President of UOKiK are generally instituted *ex officio*, but anyone who suspects a consumer law breach may submit a non-binding notification and request the agency to take action.[36]

[31]The departments include: Legal Affairs, Competition Protection, Market Analyses, Trade Inspection, Concentration Control, State Aid Monitoring, Consumer Protection, Market Surveillance and, finally, Budget and Administration.

[32]Article 33(1) of the Act on competition and consumer protection.

[33]§ 5(2) of the Regulation of the Prime Minister of 1 July 2009 concerning the territorial and subject-matter jurisdiction of branch offices of the Office of Competition and Consumer Protection (*Rozporządzenie Prezesa Rady Ministrów w sprawie właściwości miejscowej i rzeczowej delegatur Urzędu Ochrony Konkurencji i Konsumentów*), Dz.U. 2009 nr 107 poz. 887.

[34]Act of 14 June 1960—Code of Administrative Procedure (*Kodeks postępowania administracyjnego*), Dz.U. 2016 poz. 23 (codified version).

[35]Act of 17 November 1964—Code of Civil Procedure (*Kodeks postępowania cywilnego*), Dz.U. 2016 poz. 1822 (codified version).

[36]Articles 99a and 100 of the Act on competition and consumer protection.

Practices infringing collective consumer interests are defined in Article 24 of the Act on competition and consumer protection as any unlawful activity by a trader prejudicial to these interests, in particular a breach of the duty to provide consumers with reliable, truthful and complete information, unfair market practices, acts of unfair competition and misselling of financial products. Violations of substantive rules on consumer protection, such as the ones enshrined in the Act on combating unfair market practices or the Act on combating unfair competition, are thus an important, but not the only way in which collective consumer interests can be infringed. The sum of individual consumer interests is not considered as a collective consumer interest.[37]

Following recent amendments to the Act on competition and consumer protection, abstract control of unlawful terms in standard conditions of business is also conducted by the President of UOKiK. In the previous system, abstract control was primarily carried out by SOKiK, whose rulings were published in a dedicated register. Inclusion of an unfair clause in the register could give rise to administrative proceedings instituted by the President of UOKiK against other traders, which sought to establish whether standard contract terms used by investigated traders were identical or similar to the clauses contained in the register. The system was subject to criticism,[38] although the Court of Justice recently established that it did not violate EU law.[39] As of 17 April 2016 abstract review is, first and foremost, conducted by the President of UOKiK who may declare a standard contract term to be unlawful, prohibit its further use, oblige the trader to exercise commitments or impose a fine. Decisions of the consumer authority can be appealed to SOKiK, which analyses the case on the merits.[40]

According to Article 104 of the Act on competition and consumer protection, the proceedings concerning infringement of collective consumer interests should be completed within 4 months and in particularly complex cases should not exceed 5 months. In practice, resolution of a dispute may take up to 3 years. Pursuant to Article 106 of the Act on competition and consumer protection, the President of UOKiK may impose a fine of up to 10% of the trader's turnover in the preceding year on a trader who includes unlawful terms in the standard conditions of business or infringes collective consumer interests. If a trader fails to conform to the decision, the President of the Office may impose a fine of up to the equivalence of EUR 10,000 per each day of the delay. Until recently, the usual amounts of fines imposed lied well below the maximum statutory threshold. The total amount of fines imposed in

[37] See generally: Miąsik (2014), pp. 746–780.

[38] Justification of the governmental draft of the Act amending the Act on competition and consumer protection and other legal acts (*Uzasadnienie rządowego projektu ustawy o zmianie ustawy o ochronie konkurencji i konsumentów oraz niektórych innych ustaw*), No. 3662, 8.

[39] Case C-119/15 *Biuro podróży Partner* ECLI:EU:C:2016:987.

[40] Article 81(1) of the Act on competition and consumer protection.

2015, in cases concerning infringement of collective consumer interests, was approx. PLN 18.9 million.[41] The President of UOKiK may also impose, in addition to a fine or when issuing a commitment decision instead of a fine, a specific type of remedy referred to as public compensation (*rekompensata publiczna*), i.e. set out requirements that the company must follow to remedy the consequences of infringement to consumers. The use of public compensation, including in the form of direct payments, has seen a steady rise in the recent months.[42]

In 2015 the President of the Office of Competition and Consumer Protection instituted 473 preliminary proceedings concerning infringement of collective consumer interests and 106 main proceedings. In the same period he adopted 144 decisions concerning infringements of this type. Marked decrease in the number of decisions compared to the previous years was explained by the intensification of soft measures, such as indication of best practices and calling on the traders to change their behaviour.[43] It remains to be seen whether the new President of UOKiK, Marek Niechciał, who took office in May 2016, will maintain this policy stance. Recent decisions, which show a substantial increase in the level of sanctions applied, could be a sign of a more stringent enforcement policy.[44] Questions, which arise as to the compliance of such sanctions with the principle of proportionality, will have to be addressed by the reviewing courts.

Counteracting infringements of collective consumer interests and the use of unlawful terms in the standard conditions of business is an important, but not the only enforcement activity of the President of UOKiK. The agency also carries out proceedings concerning general product safety, which may lead to a decision ordering the trader to withdraw a dangerous product from the market and to pay a fine of up to PLN 100,000. The President of the Office is also responsible for the market surveillance system, which ensures that only products that meet the requirements set forth in the so-called New Approach Directives are available on the market.[45]

3.1.3 External Relations

The President of UOKiK is involved in international cooperation with institutions and organisations responsible for consumer protection. The agency participates in the Consumer Policy Network and coordinates its enforcement efforts with its European counterparts within the framework of Consumer Protection Cooperation. The President of the Office is also involved in activities of the Committee on

[41]UOKiK, *Sprawozdanie z działalności UOKiK za 2015 r.*, p. 15. See also: www.uokik.gov.pl/news.php?news_id=12592.

[42]UOKiK, *Sprawozdanie z działalności UOKiK za 2015 r.*, p. 15.

[43]Ibid., 15–17. See also: www.uokik.gov.pl/news.php?news_id=12159.

[44]See, e.g.: Decision of the President of UOKiK of 20 December 2016 in case RPZ 10/2016 *Telefonia Polska Razem*.

[45]Act of 12 December 2003 on general product safety (*Ustawa o ogólnym bezpieczeństwie produktów*), Dz.U. 2016 poz. 2047.

Consumer Policy established by the Organisation for Economic Co-operation and Development (OECD), International Consumer Protection and Enforcement Network (ICPEN) as well as cooperation in the field of product safety and market surveillance, including as a member of Product Safety Enforcement Forum of Europe (PROSAFE) and through bilateral arrangements.[46]

3.1.4 Public Perception

Poles are generally aware of the consumer authority's existence. They can easily become acquainted with information about their rights and steps to be taken in order to effectively enforce them. Annual reports published by the UOKiK show an impressive number of awareness-raising campaigns and other communication activities. In 2015 the Office published 213 press releases, 109 of which concerned consumer protection. Cooperation with local and national media outlets results in significant media coverage, illustrated by 12,072 press articles, 60,167 Internet publications, 5416 radio and TV materials in 2015, with a strong upward trend throughout successive years.[47] However, up-to-date and comparable data concerning the assessment of the agency's activity are missing. In a survey carried out in 2005, most traders rated the activity of the President of UOKiK highly. What is interesting, particularly positive responses came from large enterprises (73%).[48] Assessment of the general public is less straightforward and seems to reflect the overall consumer awareness. In 2012, almost 50% of respondents were unable to assess the activities of UOKiK. Among those who provided a response, favourable opinions prevailed (37% compared to 15%).[49]

3.2 Sectoral Administrative Agencies

While the President of the Office of Competition and Consumer Protection has a general competence as regards consumer protection, a number of specialised agencies are holding authority in sector-specific matters. The President of Energy Regulatory Office (*Urząd Regulacji Energetyki*) is responsible for regulation in energy sector as well as promotion of competition.[50] In doing so, the agency aims to achieve a balance between the interests of energy suppliers and their customers. The

[46]UOKiK, *Sprawozdanie z działalności UOKiK za 2015 r.*, pp. 58–61. See also: www.uokik.gov.pl/consumer_protection32.php.

[47]UOKiK, *Sprawozdanie z działalności UOKiK za 2015 r.*, 54–55; UOKiK, *Sprawozdanie z działalności UOKiK za 2014 r.*, pp. 55–56. See: www.uokik.gov.pl/download.php?plik=16982.

[48]See www.uokik.gov.pl/historia_urzedu.php.

[49]CBOS (2012), p. 14. See: www.cbos.pl/SPISKOM.POL/2012/K_128_12.PDF.

[50]Act of 10 April 1997—Energy law (*Prawo energetyczne*), Dz.U. 2012 poz. 1059 (codified version). See also: www.ure.gov.pl.

President of the Office of Electronic Communications (*Urząd Komunikacji Elektronicznej*) is responsible for ensuring quality, transparency and safety of electronic services, raising consumer awareness and developing information technology skills.[51] The President of the Office of Rail Transport (*Urząd Transportu Kolejowego*) is in charge of protecting passenger rights, monitoring market developments in the rail transport sector and raising railway safety standards.[52] The President of Civil Aviation Authority (*Urząd Lotnictwa Cywilnego*) is a supervision authority responsible, among others, for the protection of passenger rights in the civil aviation sector.[53] Last but not least, the Main Pharmaceutical Inspector (*Główny Inspektor Farmaceutyczny*) ensures the safety of patients by supervising and controlling the production and distribution of pharmaceuticals, including their labelling and advertising.[54]

4 Courts

4.1 Main Characteristics of the Judicial System

Pursuant to Article 175(1) of the Constitution, the administration of justice in Poland lies with the Supreme Court, common courts, administrative courts and military courts. Proceedings before Polish courts are carried out in at least two instances.

Common courts are divided into three categories. The first refers to regional courts (*sądy rejonowe*), which act as courts of the first instance and handle all cases except for those specifically reserved for other courts. District courts (*sądy okręgowe*) may act as both first and second instance courts, depending on the type of claim. Courts of appeal (*sądy apelacyjne*) are second instance courts, which rule on appeals from the judgments of district courts.

Common courts are divided into divisions according to the type of cases they handle. Disputes between private parties, such as consumers and traders, are typically resolved by common courts pursuant to general rules of civil procedure. Proceedings of this kind may include, *inter alia*, individual control of unfair terms or cases concerning unfair commercial practices employed by traders against consumers. Provisions of the Code of Civil Procedure, which specify the role of consumer ombudsmen and non-governmental organisations in the proceedings, are described in more detail further below.

[51] Act of 16 July 2004—Telecommunication law (*Prawo telekomunikacyjne*), Dz.U. 2016 poz. 1489 (codified version). See also: www.uke.gov.pl.

[52] Act of 28 March 2003 on rail transport (*Ustawa o transporcie kolejowym*), Dz.U. 2016 poz. 1727 (codified version). See also: www.utk.gov.pl.

[53] Act of 3 July 2002—Aviation law (*Prawo lotnicze*), Dz.U. 2016 poz. 605 (codified version). See also: www.ulc.gov.pl.

[54] Act of 6 September 2001—Pharmaceutical law (*Prawo farmaceutyczne*), Dz.U. 2016 poz. 2142 (codified version). See also: www.gif.gov.pl.

Individual control of unfair contract terms is carried out in judicial proceedings by common courts, whose judgments are only binding for the parties involved. If a consumer suspects that a standard term, which forms part of the agreement that he concluded with a trader, is unfair, he may bring an action for a declaratory judgment. This type of review is based on Article 385^1 of the Civil Code, transposing Directive 93/13/EEC, which states that provisions of B2C contracts which have not been agreed individually are not binding on the consumer if his rights and obligations are set forth in a way that is contrary to good practice, thereby grossly violating his interests. This principle does not apply to provisions setting forth main performances of the parties, including price or remuneration, if they are worded clearly. Individual review mechanism has not been affected by the recent amendments to the Polish law.[55]

Civil law remedies that can be sought in cases of unfair B2C practices are specified in the Act on combating unfair market practices. Consumers whose interests have been jeopardised or violated by an unfair market practice, may request that (1) such a practice is discontinued; (2) the effects of the practice are removed; (3) a single or multiple statement of appropriate content and appropriate form is made; (4) the damage is redressed and, in particular, the contract is invalidated, the benefits are mutually returned and the costs associated with the purchase of the product are reimbursed by the trader; (5) an adequate amount of money is adjudicated for a specific social cause related to supporting the Polish culture, national heritage or consumer protection. Claims referred to in points (1), (3) and (5) above may also be brought by the Commissioner for Human Rights (*Rzecznik Praw Obywatelskich*), the Financial Ombudsman (*Rzecznik Finansowy*), a national or regional organisation whose statutory objective is to protect consumer interests and by a district or municipal consumer ombudsman. Similar remedies may be pursued by businesses based on Article 18 of the Act on combating unfair competition.

Common courts also have jurisdiction in disputes between traders and the President of UOKiK arising from the violation of the Act on competition and consumer protection. These disputes are, however, resolved in a specific procedure laid down in Articles 479^{28}—479^{35} of the Code of Civil Procedure. Pursuant to its Article 479^{28} appeals from and complaints against the decisions of the President of UOKiK are adjudicated by SOKiK. Therefore, despite the fact that provisions of the Act on competition and consumer protection are enforced in public law proceedings by the President of the UOKiK, appeals against his decisions lie with the Court of Competition and Consumer Protection and are formally qualified as civil matters.[56]

Costs of legal proceedings in consumer disputes are regulated in the Act on judicial costs in civil cases.[57] The Act sets out detailed rules and procedures for

[55]See, e.g.: Bednarek (2013), pp. 792–795; Olejniczak (2014), pp. 253–263.

[56]See, e.g.: Turno (2012), pp. 33–47; Bernatt (2013), pp. 89–99.

[57]Act of 28 July 2005 on judicial costs in civil cases (*Ustawa o kosztach sądowych w sprawach cywilnych*), Dz.U. 2016 poz. 623 (codified version).

charging court costs, their reimbursement as well as granting waivers. A party filing a pleading is, in general, required to pay a fee. An appeal from the decision of the President of UOKiK is subject to a fee of PLN 1000, while a complaint against his decision is subject to a fee of PLN 500.[58] Logically, these fees are borne by traders.

Consumer ombudsmen are generally exempted from judicial costs in cases relating to the protection of individual consumer interests; so are persons seeking to declare particular contract terms to be unlawful.[59] The same does not apply to consumer organisations as only those qualified as public benefit organisations (*organizacje pożytku publicznego*) are generally exempted from court fees. The court may also grant a waiver to other organisations based on the circumstances of particular case.[60] Individual consumers are not covered by any special tariffs or exemptions by virtue of their legal status—the amount of fee, which they are required to pay depends, in principle, on the value of the claim. Nevertheless, the court may exempt them from incurring costs at their request and having considered their financial situation.[61] A party who cannot afford legal representation may also submit a request to the court to appoint an attorney-at-law, according to general rules laid down in the Code of Civil Procedure. The court grants the application if it considers the participation of a qualified lawyer necessary.[62]

4.2 Collective Redress

The procedure for settling collective claims is regulated in the Act on collective redress.[63] The act has a limited scope of application and covers only consumer protection, tort and product liability claims, with the exclusion of claims for the protection of personal interests. The Polish collective redress procedure allows a collective action to be brought by a group member or by a consumer ombudsman.[64] Action must be brought to the district court in the name of at least ten people, with claims of the same kind and the same or similar factual basis. Accession to the group occurs upon explicit request submitted within the time limit set by the court (opt-in model).[65] The act provides for a mandatory legal representation by an attorney-at-law, whose remuneration can be contractually agreed to cover the maximum of 20% of the amount of compensation awarded by the court.[66] The procedure allows

[58] Articles 32(1) and (2) of the Act on the judicial costs in civil cases.

[59] Articles 96(1)3 and 7 of the Act on the judicial costs in civil cases.

[60] Article 104 of the Act on the judicial costs in civil cases.

[61] Articles 101 and 102 of the Act on the judicial costs in civil cases.

[62] Article 117 of the Code of Civil Procedure.

[63] Act of 17 December 2009 on collective redress (*Ustawa o dochodzeniu roszczeń w postępowaniu grupowym*), Dz.U. 2010 nr 7 poz. 44.

[64] Article 4(2) of the Act on collective redress.

[65] Articles 11, 12 and 13 of the Act on collective redress.

[66] Articles 4(4) and 5 of the Act on collective redress.

claimants to seek both monetary and non-monetary relief. However, if a suit concerns a monetary claim, collective action is only admissible if the amount claimed by each group member has been made equal with the others.[67] Claimants may also limit their claim to a mere declaratory relief and seek individual redress in subsequent lawsuits. To the extent not covered by the Act on collective redress, general rules set out in the Code of Civil Procedure apply. A final judgment concluding the collective redress procedure is binding on all group members.[68]

Since the Act on collective redress only came into force in 2010, it is impossible to evaluate its long-term effectiveness. A number of collective actions have attracted public attention in the last years, including lawsuits filed against banks offering loans denominated in Swiss francs[69] and the most recent lawsuit filed against Volkswagen following the emissions scandal.[70] Overall, 195 cases of collective redress in civil and commercial matters have been recorded since the procedure was introduced, out of which 33 were recorded in 2015 alone.[71]

5 Consumer Ombudsmen and Consumer Organisations

5.1 Consumer Ombudsmen

Municipal and district consumer ombudsmen implement consumer policy at the regional, self-government level.[72] Currently, there are 370 such offices in Poland.[73] Consumer ombudsmen are not subordinated to the President of the Office of Competition and Consumer Protection. Nevertheless, both entities cooperate closely: ombudsmen submit yearly reports on their activities to respective branch offices of UOKiK, report problems relating to consumer protection and notify the Office of suspected infringements of collective consumer interests. While activity of the President of UOKiK is aimed at safeguarding the public interest, consumer ombudsmen assist consumers in individual cases. They do not have power to reach authoritative decisions, but influence the enforcement of consumer law by

[67] Article 2 of the Act on collective redress.

[68] See generally: Sieradzka (2015).

[69] See, e.g.: www.polskatimes.pl/artykul/9085344,frankowicze-zlozyli-pozew-zbiorowy-przeciwko-raiffeisen-polbank,id,t.html.

[70] See, in particular: www.stopvw.pl.

[71] Wydział Statystycznej Informacji Zarządczej, *Pozwy zbiorowe w latach 2010-I p. 2016*, https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/download,2853,30.html.

[72] Article 39 of the Act on competition and consumer protection.

[73] UOKiK, *Sprawozdanie z działalności powiatowych (miejskich) rzeczników konsumentów w roku 2014* (Warsaw, 2016) 3. See: www.uokik.gov.pl/download.php?id=1393.

providing free consumer advice, mediation services and assistance in the court proceedings. They may, in particular, file lawsuits on behalf of consumers, and, with their consent, join pending proceedings in consumer protection cases.[74]

Consumer ombudsmen cooperate with other organisations and authorities involved in consumer protection, such as Bank Ombudsman (*Arbiter Bankowy*), Trade Inspection (*Inspekcja Handlowa*), Energy Regulatory Office, Office of Electronic Communications, Financial Ombudsman, Financial Supervision Authority (*Komisja Nadzoru Finansowego*), police, prosecutors and consumer organisations.

In 2014 consumer ombudsmen in Poland provided advice to consumers in 493,639 cases (compared to 416,323 in 2010).[75] They contacted traders in 65,319 cases and provided them with clarifications, requested information about particular cases, called to terminate practices which violate consumers' rights and interests or submitted requests, on behalf of consumers, to settle the matter amicably.[76] In the same period consumer ombudsmen initiated proceedings on behalf of consumers or drafted documents necessary to file a lawsuit in 4070 cases (compared to 3683 in 2010, and—interestingly—4407 in 2012 and 4317 in 2013).[77] They also referred 611 cases to consumer arbitration courts (compared to 631 in 2010, 750 in 2012, 573 in 2013), most of which were solved to the benefit of the consumer. In 246 cases consumer ombudsmen joined the on-going proceedings before such courts.[78]

5.2 Consumer Organisations

The Act on competition and consumer protection defines consumer organisations as social organisations, independent from traders and their associations, whose statutory aim is to protect consumers' interests.[79] Consumer organisations may conduct business activity, provided that the income there from is devoted to their statutory goals. Legal and organisational forms of consumer organisations are not laid down in more detail. Consequently, every organisation, which pursues the aim of protecting consumers' interests, can be qualified as a consumer organisation. Legal status of a given entity is dependent on the assessment of the case at hand, in particular the organisation's statute and other bylaws, which is carried out by the court. Broad scope of this definition makes it difficult to assess the total number of consumer organisations in Poland. Overall, however, the consumer organisation movement in Poland cannot be described as strong. Two most important consumer

[74] Article 42 of the Act on competition and consumer protection.

[75] UOKiK, *Sprawozdanie z działalności powiatowych (miejskich) rzeczników konsumentów w roku 2014*, p. 5.

[76] Ibid., pp. 12–13.

[77] Ibid., pp. 15–16.

[78] Ibid., p. 17.

[79] Article 4.13 of the Act on competition and consumer protection.

NGOs are Consumer Federation (*Federacja Konsumentów*) and Association of Polish Consumers (*Stowarzyszenie Konsumentów Polskich*), both of which co-financed by the state budget.

Consumer Federation is the biggest consumer organisation in Poland, established in 1981. Its main office is located in Warsaw, but the organisation also operates locally. It provides free legal advice (130,000 consultations per year) in more than 30 local offices. The organisation contributes to the legislative process by promoting laws, which ensure a high level of consumer protection and establish balanced relations between consumers and traders. Consumer Federation is also involved in cooperation at both national and international level, most notably as a member of Consumers International and Bureau Européen des Unions de Consommateurs (BEUC).[80] Association of Polish Consumers, established in 1995, carries out similar tasks, but has a more centralised structure. It is mainly focused on providing free legal advice, promoting consumer education, conducting research and commenting on legislative proposals, which affect consumer interests. In fulfilling these objectives, Association of Polish Consumers often cooperates with Consumer Federation.[81]

Another organisation, which is worth mentioning in this context, is the European Consumer Centre. ECC in Poland was founded in 2005 as a response to new challenges that emerged following Poland's accession to the EU. It was established by virtue of the Grant Agreement between the Health and Consumer Protection Directorate-General of the European Commission and the Office of Competition and Consumer Protection in Poland. The organisation seeks to empower consumers in cross-border disputes—through awareness-raising campaigns, providing free legal advice and facilitating resolution of individual disputes. ECC in Warsaw is a member of European Consumer Centres Network (ECC-Net).[82]

The role of consumer organisations in the enforcement of consumer law, and more generally in the protection of consumer interests, is set out in the following legal acts. Pursuant to Article 45 of the Act on competition and consumer protection, consumer organisations represent consumers' interests towards public authorities and participate in the implementation of the government's consumer policy. They may, in particular: (1) express their opinion about legislative proposals and other documents relating to consumers' rights and interests; (2) develop and promote consumer educational programmes; (3) test products and services and publish their respective findings; (4) publish journals, studies, brochures and leaflets; (5) provide legal advice and assist consumers in the enforcement of their rights—free of charge, unless otherwise provided by the statute of the organisation; (6) participate in standardisation processes; (7) carry out public tasks in the field of consumer protection, to the extent commissioned by the public authorities, and apply for public subsidies for this purpose. Consumer organisations may also directly participate in

[80] See www.federacja-konsumentow.org.pl.

[81] See www.konsumenci.org.

[82] See www.konsument.gov.pl.

the enforcement of consumer rights, carried out in both administrative and civil proceedings.

Pursuant to Article 61 of the Code of Civil Procedure, consumer organisations may initiate civil proceedings on behalf of a natural person or join the on-going proceedings in cases concerning consumer protection, with consent of the person concerned. The person on whose behalf the case was brought may subsequently join the proceedings as a second plaintiff. The position of a consumer organisation in such proceedings is analogous to the position of the prosecutor. Organisations, which do not formally participate in the proceedings, may present their views on the case.[83]

The formal standing of consumer organisations in the proceedings carried out by the President of UOKiK is weaker not only compared to the civil procedure, but also to the general administrative procedure. To illustrate this variation: according to the Code of Administrative Procedure, social organisations may request initiation of administrative proceedings concerning another person, if this is justified by their statutory aims and remains in line with the public interest. Should their request be denied, they are entitled to file a complaint to the authority of a higher instance. Social organisations admitted to participate in the proceedings enjoy the same rights as parties to the dispute. Administrative bodies may also inform social organisations about initiated proceedings of their own motion. Organisations, which do not formally participate in the proceedings, may present their position in the case, subject to the agreement of the competent administrative body. The same, however, does not apply to the proceedings carried out by the President of UOKiK. In cases concerning the use of unfair contract terms in standard agreements, consumer organisations may inform the President of the Office about potential infringements, but the latter has a full discretion to decide whether the proceedings should be initiated and whether the organisation's participation should be admitted.[84] The agency is only obliged to inform the organisation about its decision and provide justification. If admitted, consumer organisations do not enjoy the rights of a party, but act as "interested third parties". As such, they may submit documents, provide explanations and access the files of the case. They are informed about the outcome of the case, but are not entitled to appeal the decision.[85] The role of consumer organisations in the proceedings concerning practices that infringe collective consumer interests is even weaker as they are only entitled to inform the President of the Office of Competition and Consumer Protection about potential infringements and obtain a justified response to their notification.[86]

[83] See, e.g.: Grzegorczyk (2016), pp. 383–393; Gajda-Roszczynialska (2011), pp. 216–287.

[84] Article 99a of the Act on competition and consumer protection.

[85] Article 99c of the Act on competition and consumer protection.

[86] Article 100 of the Act on competition and consumer protection.

6 Private Regulation and Alternative Dispute Resolution

6.1 Private Regulation

The most prominent example of private regulation in the field of consumer protection is the self-government system designed to ensure high ethical standards in advertising. The main role in this system is played by the Union of Associations Advertising Council (*Związek Stowarzyszeń Rada Reklamy*)[87] founded in 2006 (though the system itself dates back as far as 1997). Through its complaint handling mechanism the Council counteracts advertisements, which are misleading, violate the core social values or distort fair competition. Over the years, the organisation has expanded its activities to include copy advice and monitoring.

Advertising Council handles complaints from both consumers and competitors pursuant to Complaint Handling Rules.[88] Complaints lodged by consumers and by members of the organisation are free of charge. Consumer complaints can be submitted through an on-line form or by a standard mail or fax. In 2015, 691 complaints were submitted and 201 cases were resolved.[89] Most controversial advertisements attract numerous complaints. On receiving a complaint the Council asks the advertiser concerned for a formal response within 10 days. After this period the case is referred to the Adjudication Panel of the Advertising Ethics Committee, which analyses the case at hand and verifies its compliance with the Code of Ethics in Advertising.[90] The Committee may consult external experts if the case requires it. The average time for the investigation of a complaint is 30 days. The parties may appeal against the resolution of the Adjudication Panel within 10 days from receipt of the resolution and justification.

6.2 Alternative Mechanisms for the Resolution of Consumer Disputes

As for now, ADR mechanisms are not the most popular way of solving consumer disputes in Poland. According to the 2015 Consumer Conditions Scoreboard, 33.4% of Polish retailers were not aware of the existence of ADR and 21% stated they were aware of ADR bodies but were not willing to use them. Recent Act on extrajudicial resolution of consumer disputes (hereinafter: Act on consumer ADR), which implemented Directive 2013/11/EU on consumer ADR and only came into force

[87] See www.radareklamy.pl/english.

[88] Advertising Council (2014a). See: https://www.radareklamy.pl/images/Dokumenty/COMPLAINTS_HANDLING_RULES.pdf.

[89] See www.radareklamy.pl/images/Dokumenty/Informacja_prasowa_statystyki_2015.pdf.

[90] Advertising Council (2014b). See: www.radareklamy.pl/images/Dokumenty/CODE_OF_ETHICS_IN_ADVERTISING_10.03.2014.pdf.

on 10 January 2017, is aimed to change this state of affairs. The Act on consumer ADR lays down obligations of qualified ADR entities, rules on the ADR entities register, obligations of traders, alternative dispute resolution procedure as well as tasks of the President of UOKiK in this respect. According to the Act, qualified ADR entities resolve both national and cross-border disputes, including disputes concerning contractual obligations stemming from online sales or service contracts between a consumer resident in the EU and a trader established in the EU, which are handled by means of Online Dispute Resolution platform.[91]

Consumer disputes in sector-specific matters can be resolved by specialised public bodies, most of which were set up or entrusted with this task by the Act on consumer ADR. Financial Ombudsman facilitates dispute resolution in financial services matters[92] and Arbitration Court, established at the Financial Supervision Authority, settles disputes between financial institutions and financial services recipients, if both parties agree to its jurisdiction. In the energy sector, ADR is provided by the Negotiations Coordinator appointed at the Energy Regulatory Office,[93] in the telecommunications sector—by the President of the Office of Electronic Communications,[94] and in the rail transport sector—by the Passenger Rights Ombudsman appointed at the Office of Rail Transport.[95]

A special place in the ADR framework is occupied by the Trade Inspection—a public inspection body, whose tasks are carried out at two levels: at the central government level, by the President of UOKiK (with assistance of the Department of Trade Inspection) and at the regional level, by the government-appointed voivodes (with assistance of Voivodship Inspectorates of the Trade Inspection). Before the Act on consumer ADR came into force, Trade Inspection had primarily been responsible for controlling whether products and services available on the market fulfil regulatory requirements, although Voivodship Inspectorates had already been involved in extrajudicial dispute resolution. The Act on consumer ADR largely builds upon this practice, expanding the competences of the Voivodship Inspectorates and elevating the Trade Inspection to a horizontal public ADR entity. This means that, as of 2017, the Trade Inspection has competence to resolve consumer disputes arising in all fields, in which no specialised ADR bodies are present.[96]

[91] Article 2(1) of the Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR) [2013] OJ L165/1.

[92] Act of 5 August 2015 on handling complaints by financial sector bodies and on Financial Ombudsman (*Ustawa o rozpatrywaniu reklamacji przez podmioty rynku finansowego i o Rzeczniku Finansowym*), Dz.U. 2016 poz. 892 (codified version). See also: www.knf.gov.pl/regulacje/Sad_Polubowny.

[93] Article 31a of Energy law.

[94] Article 109 of Telecommunication law.

[95] Article 16a of the Act on rail transport.

[96] Article 3(3) of the Act of 15 December 2000 on Trade Inspection (*Ustawa o Inspekcji Handlowej*), Dz.U. 2016 poz. 1059 (codified version).

As before, Voivodship Inspectorates may carry out mediation either of their own motion—if a complaint received does not indicate an infringement of a public law nature—or at the consumer's request. The Act on consumer ADR also clarified that, with respect to ADR, Voivodship Inspectorates are independent from the President of UOKiK.[97] In 2014 Trade Inspection received 13,485 requests for mediation, which amounted to 69% of all consumer complaints. Mediation resulted in the conclusion of an agreement in 9084 cases (67.3%), compared to 8631 cases in 2013 (66%). Disputes remained unresolved in 4401 cases (32.6%), compared to 4419 in 2013 (33.9%).[98]

The second type of ADR facilitated by the Trade Inspection, namely arbitration, has essentially been maintained in its existing form. As before, the system is based on permanent arbitration courts, which can be established by virtue of agreements between Voivodship Inspectorates and non-governmental organisations or other interested parties.[99] The courts resolve disputes concerning monetary claims arising from contracts concluded between consumers and traders.[100] There are currently 16 consumer arbitration courts as well as 15 local branches.[101] In 2014 the courts received 2515 requests for arbitration (compared to 2597 in 2013). In 1084 cases traders refused to accept jurisdiction of these courts, which amounted to 43% of all requests (compared to 990 cases and 38% in 2013). Average value of claim was approx. PLN 1500 (compared to approx. PLN 850 in 2013). In the same period consumer arbitration courts delivered 185 judgments (compared to 180 in 2013), of which 85 were favourable to consumers and 100 rejected their claims. Moreover, in 840 cases the parties entered into settlements, 756 of which were already reached at the preliminary stage of the proceedings.[102]

Non-public bodies that wish to engage in alternative resolution of consumer disputes are required to apply for registration in a dedicated register.[103] Application may be submitted to the President of UOKiK as of 10 January 2017. One of the existing non-public ADR bodies, which already has an established position on the Polish market, is the Bank Ombudsman (Arbitrator). The entity was created in 2002 with a view to facilitating resolution of disputes between consumers and banks. The proceeding before the Bank Ombudsman is instituted upon consumer's request, which may relate to the dispute with a bank that is a member to the Polish Banks Association (*Związek Banków Polskich*) or with a bank that accepted Bank Ombudsman's competence. The dispute has to refer to monetary claims on account of non-performance or improper performance of banking acts or other acts carried out by a bank on behalf of the consumer, where the value of claim does not exceed

[97]Article 10(1a) of the Act on Trade Inspection.

[98]UOKiK, *Sprawozdanie z działalności Inspekcji Handlowej w 2014 r.* (Warsaw, 2015) 55–57. See: www.uokik.gov.pl/download.php?plik=17364.

[99]Article 37 of the Act on Trade Inspection.

[100]Disputes related to energy supply are now handled by the Negotiations Coordinator.

[101]UOKiK, *Sprawozdanie z działalności Inspekcji Handlowej w 2014 r.*, p. 58.

[102]Ibid., p. 57–59.

[103]Article 7 of the Act on extrajudicial resolution of consumer disputes.

PLN 12,000 (PLN 20,000 for mortgage credit) and the matter had not been resolved in the bank's complaint-handling procedure.[104] The Bank Ombudsman encourages the parties to reach an agreement at each stage of the proceedings. If these attempts fail, it issues a judgement, which is binding on the bank. If the consumer is not satisfied with the ruling, he may refer the case to be examined in judicial proceedings.

In 2015 the Bank Ombudsman handed down 1643 rulings, of which 422 were favourable to consumers. As in the previous years, the majority of cases dealt with credit agreements (711) followed by bank accounts and bank deposits (312).[105] The Bank Ombudsman is a member of FIN-NET, a network of national financial dispute resolution schemes launched by the European Commission in 2001.[106]

7 Overall Assessment

Consumer protection system in Poland does not have a long tradition and remains strongly influenced by the EU law. Over last two decades, the Polish legislator managed to develop a comprehensive and multi-faceted legal framework, covering various aspects of consumer protection. Detailed substantive provisions, along with the co-existence of both civil and administrative enforcement procedures, provide necessary formal tools for exercising consumer rights. The overall assessment is, nevertheless, ambivalent.

Specialised agencies are a central element of the consumer protection system. In particular, the President of the Office of Competition and Consumer Protection is regarded as an institution, which increases consumers' security and trust in the market. Because of the agency's extensive enforcement powers, administrative proceedings carried out by the President of UOKiK play an important role in both preventive and repressive law enforcement. Activities of other public bodies in their respective areas are often less visible, but should not be underestimated. For instance, the Main Pharmaceutical Inspector can order a trader to withdraw or modify an advertisement of pharmaceuticals while other sectoral agencies have recently been entrusted with alternative resolution of consumer disputes.

Unlike administrative proceedings, judicial and extrajudicial enforcement mechanisms are not limited to infringements affecting the public interest, but are open to claims brought by individual consumers. Judicial system in Poland is universally accessible, allows consumers to enforce their rights in a fair and unbiased process and obtain a binding ruling which can subsequently be enforced by state authorities.

[104] Until recently the maximum value of the claim was set at PLN 8000. For the currently applicable set of rules, adopted on 20 April 2017, see https://zbp.pl/public/repozytorium/dla_konsumentow/arbiter_bankowy/regulamin/BAK_Regulamin.pdf.

[105] See www.zbp.pl/dla-konsumentow/arbiter-bankowy/sprawozdania.

[106] See www.ec.europa.eu/finance/fin-net/index_en.htm.

In this regard, support given to consumers as the weaker party to the dispute is of paramount importance. Consumer ombudsmen and NGOs are located all over the country and provide consumers with free legal advice and assist them in formal enforcement. They also increase the level of consumer awareness by carrying out information campaigns, which have become more and more widespread and diverse.

Unfortunately, the overall system of consumer protection in Poland suffers from insufficient financing, the consequences of which are particularly evident in the case of consumer ombudsmen and organisations. Also the enforcement of consumer laws by specialised agencies shows several weaknesses such as limited role of consumers and consumer NGOs in the proceedings. By way of illustration, even if an individual concerned submits a notification to the consumer protection authority about suspected infringement, formal proceedings are instituted *ex officio* by the President of the Office at his sole discretion and the notifying person does not enjoy the status of a party. Public authorities, including sectoral bodies, have also been criticised for failing to take action in several major scandals.[107] Their more active stance could further be desired as regards the challenges posed to consumers by the processes of digitalisation. Excessive duration of both administrative and judicial proceedings may also significantly impede the exercise of consumer rights. Indeed, average time needed to resolve appeals relating to decisions of the Polish consumer protection authority is one of the longest in Europe.[108] On the positive side, SOKiK's case overload was one of the reasons for the recent reform of abstract control mechanism, which offers a prospect of improvement.[109] The observed developments in the field of self-regulation and alternative dispute resolution clearly correspond with the current European trend, but are still at an early stage.

Enforcement mechanisms in Poland are being regularly modernised, as exemplified by the recent reform of the Act on competition and consumer protection, which came into force in April 2016.[110] The amended Act introduced fundamental changes to the abstract control of standard contract terms, giving priority to administrative proceedings and strengthening the role of the President of UOKiK. It also introduced amendments of a substantive nature, in particular established an entirely new type of practice infringing collective consumer interests—the so-called misselling of financial products.[111] It is worth pointing out that these changes were not prompted by

[107]Most recently in the so-called Amber Gold scandal, see: resolution of the Sejm of 19 July 2016 setting up the committee of inquiry to examine the legitimacy and legality of the actions of public authorities and institutions against entities belonging to the Amber Gold group (*uchwała Sejmu Rzeczypospolitej Polskiej w sprawie powołania komisji śledczej do zbadania prawidłowości i legalności działań organów i instytucji publicznych wobec podmiotów wchodzących w skład grupy Amber Gold*), M.P. 2016, poz. 721.

[108]European Commission, *The 2016 EU Justice Scoreboard*, p. 6. See: http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2016_en.pdf.

[109]Justification of the governmental draft of the Act amending the Act on competition and consumer protection and other legal acts, 5.

[110]See generally: Piszcz and Namysłowska (2016).

[111]Article 24(2)4 of the Act on competition and consumer protection. See also: Sroczyński (2016), pp. 26–31.

European legislation, but were aimed to remedy the observed deficiencies of the system and provide consumers with more effective tools of protection (speed up the proceedings, abolish the complex register of unfair clauses). The on-going developments in the EU of course remain of great importance. In 2016 the ODR platform was launched, following the adoption of the Regulation No 2006/2004, and the Polish ADR entities have gradually joined the platform. At the same time, proactive efforts are being made to improve the coherence of consumer protection system, while ensuring its predictability and stability. This is best illustrated by the consumer legislation passed in 2014—the Act on consumer rights not only implemented Directive 2011/83/EU, but was also used as an opportunity to improve the implementation of Directive 1999/44/WE.

8 Conclusion

Polish institutional capacities in the field of consumer protection can be regarded as more than satisfactory. Comprehensive and diverse enforcement system seems to be driven by the logic of consumer empowerment. Indeed, consumers can turn to many actors and exercise their rights. They may pursue their claims in civil proceedings or notify the President of UOKiK about suspected infringements. They may enforce their rights individually—with the assistance of consumer ombudsmen and NGOs—or bring collective actions.

For the same reason, however, the system may be regarded as complex, and discourage consumers from taking any action. One cannot fail to notice that, according to 2015 Consumer Conditions Scoreboard, satisfaction of Polish consumers with redress mechanisms remains low. The main problem seems to lie in the low level of trust and awareness, the length of legal proceedings and continuing asymmetry of resources. Historical and socio-demographic factors could also be of relevance. A recent study showed that consumers from Member States that joined the EU in 2004 or later are generally more negative in their market assessments and display less trust in suppliers' compliance with consumer law compared to earlier members.[112] In the sixth largest EU country in terms of population necessary adaptations take time.

On the whole, the Polish enforcement system can be described as comprehensive, diverse and comparably modern. It contains many positive elements and is constantly improved. Its shortcomings are not related to legal framework as such, but rather to its practical application, which is largely undermined by insufficient funding. There is also a considerable room for improvement in terms of raising

[112]European Commission, *Consumer Markets Scoreboard*, 12th edn, p. 9; http://ec.europa.eu/consumers/consumer_evidence/consumer_scoreboards/12_edition/docs/consumer_markets_scoreboard_2016_en.pdf.

awareness of consumer rights as well as trust that their enforcement is worth the effort.

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Enforcement and Effectiveness of Consumer Law in Portugal: Filling the Gap Between the Law on the Books and the Law in Action

António Pinto Monteiro, Sandra Passinhas, and Maria Raquel Guimarães

1 Introduction: The Portuguese Legal Framework for Consumer Protection

Portugal, being a small European country, with a population of less than 10,500,000 habitants,[1] and a member of the European Union (EU) since 1986, has been profoundly influenced by the European movement of consumer protection.

However, the national concern with consumer protection began years before Portugal joined the EU, then EEC. The first *Constitution* of the democratic era, that started with the 25 April 1974 Revolution (the *Carnation Revolution*), was approved in 1976[2] and already listed the consumer protection as one of the State priority tasks.[3]

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[1] 10374822, year 2014, *INE*—Instituto Nacional de Estatística (Statistics Portugal), in <http://www.ine.pt> (12.05.2016).

[2] *Decreto* of 10/04/1976.

[3] See Article 81(m) Incumbências prioritárias do Estado/State priority tasks, Constitution of the Portuguese Republic (CRP), Decreto of 10/04/1976. The Article stated in its original version that

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With the first Constitutional revision,[4] consumer rights were displayed in a separate provision (Article 110), under the *Economical Constitution* Title. Article 110/1 specifically mentioned consumer rights to education and information, protection of health and safety, protection of economic interests, and the right to claim for damages,[5] clearly influenced by the European Council Resolution on a preliminary programme of the European Economic Community for a consumer protection and information policy.[6] Afterwards, as a result of the second Constitutional revision that took place in 1989,[7] consumer rights were erected as *Fundamental rights* by Article 60, undoubtedly as a result of the increasing importance of consumer protection both nationally and in the EU.[8] Today, the Constitution of the Portuguese Republic recognizes consumer's rights as constitutional or fundamental rights and states:

> Article 60
>
> (Consumer rights)
>
> 1. Consumers have the right to the good quality of the goods and services consumed, to training and information, to the protection of health, safety and their economic interests, and to reparation for damages.
>
> 2. Advertising shall be disciplined by law and all forms of concealed, indirect or fraudulent advertising are prohibited.
>
> 3. Consumers' associations and consumer cooperatives have the right, as laid down by law, to receive support from the state and to be consulted in relation to consumer-protection issues, and are accorded legitimatio ad causam in defence of their members or of collective or general interests.[9]

The first national initiative for consumer protection has been Law 29/81, of 22 August.[10] The protection of the consumer was assumed as a national assignment, and the Instituto Nacional de Defesa do Consumidor (National Institute for the Consumer Protection) was created. This law was repealed by Law 24/96, of 31 July, still the actual Portuguese Consumer Protection Act in force, despite several alterations and amendments suffered during the years.

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consumer protection should be achieved namely through the support to the creation of consumer associations and cooperatives.

[4]Constitutional Law 1/82, of 30 September.

[5]Article 110/2 prohibited deceptive and false advertising and No. 3 established the State support to consumer associations and cooperatives and recognised their right to be consulted in consumer issues.

[6]OJ C 92, 25 April 1975.

[7]Constitutional Law 1/89, of 8 July.

[8]Gomes Canotilho and Moreira (2007), p. 780, consider this an "evident promotion" of consumer rights, that emerge as "third generation rights".

[9]See the English version of the Portuguese Constitution in <http://www.en.parlamento.pt/Legislation/CRP/Constitution7th.pdf> (26.05.2016).

[10]A few days before the 25 April 1974 there was a proposal for a new law on consumer protection that was discharged in the revolutionary process. For further developments on consumer protection before 1974, see Ferreira de Almeida (1982), pp. 39–43.

The Portuguese Consumer Protection Act opens with a definition of "consumer" as *any person* to whom a service or a good is provided for non-professional purposes.[11] This means that the notion of "consumer" adopted in Portuguese law is *wider* than the common core that can be found in EU legislation. A "consumer" is a "non-professional", including—according to some legal writers—*legal persons*, if they are either acquiring goods or services for private use. Despite not being a clear unanimous doctrinal position, the fact is that the letter of the law allows this interpretation. This and other disparities prompts the national legislator to define "consumer" separately in each transposing act, in areas covered by full harmonisation, in order to comply with EU directives. That means that in addition to the definition of "consumer" included on Article 2 of the Portuguese Consumer Protection Act, there are several other different definitions, resulting of the numerous single acts originated by EU directives, leaving the wider notion of consumer empty of content.[12]

In short, the Portuguese legal framework for consumer protection is today grounded on the Portuguese Consumer Protection Act of 1996, that develops the consumer constitutional rights, and particularly on *the single acts that*, during the years, *have implemented European directives* into national legislation and have reduced significantly the scope and the object of the first.

Consequently, the national legislation on consumer protection is more the result of the government *reaction* to the European initiatives than the outcome of a planned *action* or of a strategic plan designed for consumer protection. Still, in specific areas, like the one of standard form contracts or adhesion contracts, Portugal has acted ahead the European initiative, approving Decree-Law 446/85, of 25 October [Abusive Terms Act], several years before the Council Directive 93/13/EEC of 5 April 1993. This 1985 act, though, is not exclusively consumer oriented, ruling all the contractual terms which have not been individually negotiated either in consumer contracts or contracts between professionals.

On the 15 March 2006 a new project for a Consumer Code was presented, after 10 years of intensive work of an academics and experts commission led by Pinto Monteiro.[13] This project had as major goals not only to compile in one single and independent legal act most of consumer oriented laws, but mainly to create a *Code*, meaning a systematically and rationally organized group of rules. The project for a Consumer Code proposed to repeal implementation of several European Directives from the 1980s, 1990s and early 2000s and intended to harmonise and consolidate

[11]See Article 2/1, Law 24/96.

[12]For a definition of "consumer" in the Portuguese law see Ferreira de Almeida (1982), pp. 217–223, and more recently Pinto Monteiro (2014), pp. 376–379, and Morais Carvalho (2016), pp. 17–23.

[13]For more details about the work of this commission and its members, see Comissão do Código do Consumidor (2006), pp. 7–11, and Pinto Monteiro (2006), pp. 190–196. The project can be accessed on-line in <http://www.oa.pt/upl/{074a0e26-88f3-4958-b06b-a07ecb04a19d}.pdf> (23.05.2016).

their regulation. The project for a Consumer Code was dropped after a political turnover and the work was neither resumed, modified nor implemented.

Without a consolidated legal framework, the Portuguese consumer protection rules can be found in several independent *leis* (laws) or *decretos-lei* (decree-laws), approved to the rhythm of the European directives.

Nevertheless, consumer protection has always deserved the attention of Portuguese governments through the years. Lately, Law 7-B/2016, of 31 March, approved the Major Planning Options for 2016–2019, defined by the Portuguese Parliament, and outlined the promotion of the quality of consumer protection as one of the main government' goals. It reads as follows:

> The Government will focus its activities in order to ensure a high level of consumer protection in all areas subject to public policy, in particular by reviewing and strengthening the legislative framework and other initiatives likely to ensure effective and adequate protection of consumers, considering in particular the most vulnerable, such as children, young people and senior.[14]

To pursue this objective, three main areas of activity were appointed:

(a) Strengthening of the available information to consumers;
(b) Strengthening the protection of the consumer in the Portuguese legal system, namely by reviewing and strengthening the existing legal framework;
(c) Cooperation and networking.[15]

2 Number and Characteristics of Consumer Complaints and Disputes

In Portugal, there is data about consumer complaints and disputes, and through several means, consumers can get information about their rights. There is even an organized website maintained by the Portuguese government (Portal do Consumidor, 'Consumer Portal', supervised by the 'General-Direction of Consumer').[16] According to the European Commission (2013), knowledge of consumer rights appears to make consumers more likely to identify problems with products they buy.[17]

According to a 2012 survey whose results were published in a Flash Eurobarometer (No. 358, published in 2013 by the European Commission), 20% of Portuguese respondents said that they have had legitimate cause for complain in the last 12 months. Among those people who identified problems, 87% did take actions to solve it. Actions consisted in: (1) complaints to the retailer/provider (73% in Portugal, very similar to the European Union, 72%); (2) complaints to the

[14]Diário da República, Series I, No. 63, 31 March 2016, p. 40.
[15]Ibid.
[16]See http://www.consumidor.pt.
[17]European Commission (2013).

manufacturer (12% in the EU); (3) complaints to a public authority (4%); (4) submissions to Alternative Dispute Resolution (4% in the EU); (5) submissions to court (2% in the EU). At the European Union level, a relative majority of those who complained to a public authority were satisfied with the achieved solution.[18]

Since 2005, Portuguese dissatisfied consumers can formally submit a complaint using a document (Livro de Reclamações, 'complaints book'). Then, complaints are collected and managed by several (23) legally competent entities.

According to annual official reports,[19] in 2015 consumers submitted 303,548 complaints, 21.25% more than previous year (2014: 250,356 complaints). In fact, numbers have been increasing each year: 148,784 in 2011; 206,146 in 2012; and 222,434 in 2013. Therefore, in the last 3 years, in Portugal an amount of 776,338 complaints were submitted, using the formal document that is available in all services and goods suppliers. Complaints have been concentrated in a few number of entities (and economic sectors): in 2015, 92% of the complaints were related to five entities—ASAE (common goods and services sector, including restaurants): 155,612 (51.26%); ERS (health sector): 52,215 (17.2%); ANACOM (communications and Internet suppliers): 49,764 (16.31%); ERSE (electricity and other energies): 13,644 (4.49%); and BdP (banking sector): 8752 (2.88%).[20] The relative importance of those entities has not varied in the last years.

There is no clear and significant evidence that justifies this strong increase in the number of complaints. However, it could be a signal of a more informed population about consumer rights that react more when reasons exist to complain and/or when an higher likelihood of success of pursuing a complaint is perceived. The increase recently recorded in the number of complaints could also be the natural evolution of a country that in 2009 showed one of the lowest percentage of consumers who had already made any kind of formal complaint.[21]

Portuguese consumers can also apply to the European Consumer Centres (ECCs) that were established by the European Commission in coordination with national governments of the European Union (EU). In these ECCs, the most represented subjects of the Portuguese complaints have been the following: (1) transports (52%); (2) recreation and culture (19%); (3) restaurants, hotels and accommodation (7%); (4) communication services (4%); and (5) furnishings, household equipment and routine household maintenance (4%).[22] At the European level, surveys conducted in

[18]Ibid.

[19]Portuguese Government, *Livro de Reclamações - Dados Estatísticos*, Portuguese Economy Ministry, 2011, 2012, 2013, 2014, 2015, 2016.

[20]ASAE: Autoridade de Segurança Alimentar e Económica; ERS: Entidade Reguladora da Saúde; ANACOM: Autoridade Nacional de Comunicações; ERSE: Entidade Reguladora dos Serviços Energéticos; BdP: Banco de Portugal.

[21]European Commission (2009).

[22]European Commission (2015).

2006 revealed that telephone and Internet services were among those that had the highest levels of complaints.[23]

Several complaints result in consumer disputes. According to the Direcção-Geral do Consumidor, in 2015, 6322 consumer disputes have been initiated and in the same year 4860 disputes have been solved. In the last 2 years, 9499 consumer disputes were resolved and 12,445 new disputes were initiated. In the last 8 years, new consumer disputes summed a total of 37,749 cases. A consumer dispute typically takes an average of 60 days to be solved in Portugal.[24]

Consumer disputes solutions are achieved in the Court system or using the alternative dispute resolution (ADR) means available.

3 The Enforcement of Consumer Law: The Judicial Mechanisms

3.1 Judicial Resolution Mechanisms

According to Article 9 CPR and Article 29 of the Judiciary Organization Act (JOA),[25] in Portuguese law there are the following categories of courts: the Constitutional Court, courts, administrative and tax courts, the court of auditors, and there might be arbitration courts and justices of the peace. Thus, we need to consider the category of courts, which have a residual power within the domestic legal system,[26] being divided into three bodies. The courts of first instance include extended territorial jurisdiction courts[27] and the district courts.[28]

On the other hand, district courts have general jurisdiction and expertise, unfolding in central instances (that integrate expertise sections) and local authorities

[23]Ibid.

[24]The report available at: <http://ec.europa.eu/consumers/eu_consumer_policy/consumer_consultative_group/national_consumer_organisations/index_en.htm> gives evidence that conflicts are solved in a shorter period.

[25]Law 62/2013, of 26 August.

[26]Within these courts the competence is divided according to material, value, hierarchy and territory criteria. The Courts of First Instance and the Courts of Appeal have a purview, value that is used to limit the possibility of appeal.

[27]The courts of extended territorial jurisdictions are courts of first instance with jurisdiction to more than one district or on particular areas mentioned in the law. They are courts of expertise and try certain matters, whatever the form of procedure applicable.

[28]The districts are territorial divisions that are used for the allocation of jurisdiction of the courts of first instance. The country is divided into 23 districts. In each of the districts there is a court of first instance, appointed by the district name where it is installed. As a rule, the courts of first instance are the district courts and are designated by the name of the district in which they are installed. These courts are competent to prepare and try cases related to claims not within the jurisdiction of other courts.

(which are part of general jurisdiction sections[29] and proximity sections)[30] In the central instances the following sections of expertise can be created: civil, criminal, criminal investigation, family and juvenile, labour, trade and enforcement.[31]

There is no judicial tribunal with expertise in consumer disputes. Thus, without prejudice to other distribution of competence criteria, jurisdiction for the trial of such disputes belong, as appropriate, to the general jurisdiction sections of the local authority or the civil expertise of the central instance.

On the other hand, (singular) declaratory action does not provide for special rules in the case of a consumer dispute,[32] or special rules regarding the possibility of a consumer to turn to a court of law.[33] If the consumer is in a situation of economic need the rules to be applied are those that result in general of Law 34/2004, of 29 July (Access to Law and the Courts Act).[34] Under Article 8 of this law, those who are in economic failure situation, having no objective conditions (given their income, wealth and on-going expense of the household), can benefit from legal aid to punctually bear the costs of proceedings.[35]

However, one should mention the existence of two collective actions that can be important on consumer disputes: the popular action (regulated by Law 83/95, of 31 August, the Collective Redress Act) and the inhibitory action (Articles 10 and

[29]These sections (general jurisdiction sections of local instances) can still unfold in civil sections, in criminal sections and small crime sections where the volume or complexity of the service justifies it (Article 81(3) JOA). General jurisdiction sections of the local instances have, as the name implies, a residual jurisdiction.

[30]The latter (the proximity sections) are not sections competent to deal with disputes, but rather sections of support. Their functions are described in Article 130(4) of JOA).

[31]In the central sections and where the procedural volume justifies it, instances of mixed expertise can be created (Article 81(4) JOA).

It should be noted that the civil expertise sections have jurisdiction, among other things, to carry out the preparation and trial of civil declaratory actions of common process of over € 50,000.

[32]Article 14(3) of the Portuguese Consumer Protection Act provides for a cost-free for consumer author, whenever he wants protection of interests or rights, conviction for breach of the supplier or service provider, or repair of loss and damage arising from unlawful acts or set strict liability under the law, provided that the share price does not exceed the sphere of the judicial court of 1st instance (this sphere corresponds under Article 44(1) JOA, to € 5000). However, this standard will have been repealed by Article 25(1) of Decree-Law 34/2008 of 26 February (this diploma approves the Regulation of Procedural Costs (Exemptions of fees are repealed provided for in any law, regulation or ordinance and granted to any public or private entities, which are not provided for in this decree-law), since the Regulation does not foresee a similar exemption (see Article 4 of the Regulation).

[33]There are no special requirements for the use of the courts. It should only be noted that obtaining a credit decision is dependent upon verification of respective procedural constraints.

[34]It should be noted that this scheme is extended to processes that take place in Justices of the Peace.

[35]The Portuguese Supreme Court (in 18.01.2000, Case 99A1015, Judge Aragão Seia, <http://www.dgsi.pt>) clarified that legal aid does not apply to the jurisdiction of arbitral tribunals. "Arbitration is contractual in its origin, private in nature, and because the State broke the monopoly of the exercise of the judicial function to recognize their public, judicial use in their public service and in its outcome".

11 of the Portuguese Consumer Protection Act, and Articles 25 et seq. of the Portuguese Abusive Terms Act).

3.2 *The* Popular Action *and the Inhibitory Action*

In what concerns the first (*actio popularis*)—which, among other things, is aimed at the defence of diffuse, collective or homogeneous individual interests of collective entities—Article 1(2) of the Portuguese Collective Redress Act provides that, among others, it is an interest protected by this law to protect the consumption of goods and services. It is an action for which every citizen has active legitimacy in the enjoyment of civil and political rights (beyond the defenders associations and foundations of their interests and other entities),[36] and expenses exemption is provided in (Article 4(1)(b) of the Litigation Cost Regulation). On the other hand, and in relation to the inhibitory action provided for in Article 10 of the Consumer Protection Act, the right to inhibitory action to prevent, correct or stop harmful practices of consumer rights is guaranteed, enshrined in the respective law, which (inter alia) threatens the health and physical safety of the consumer, to be reflected in the use of standard contractual clauses, or consisting of trade practices expressly prohibited by law. The possibility of a judgment in this type of action to be accompanied by penalty provided for in Article 829-A Portuguese Civil Code (regardless of the compensation that would take place) is also foreseen.

3.3 *Alternative Dispute Resolution (ADR) in Consumer Disputes*

In addition to judicial courts, the resolution of a civil dispute may, in general, take place before an arbitration court or a Justice of the Peace. The justices of the peace (regulated by Law 78/2001, of 13 July [Justices of the Peace Act]) are alternative means of dispute resolution, with jurisdiction for declaratory action in proceedings not exceeding € 15,000 and within a set of matters listed in Article 9 of that law (in particular: contractual liability actions, and actions that respect the breach of contract). These courts are characterized by being a part of the public mediation service, supporting proceedings that occur in two moments: the pre-mediation and the mediation (always voluntary),[37] and a judicial phase—which takes place in case the parties (or some of them) rule out the possibility of mediation, or the latter is

[36] Articles 2 and 3 of Portuguese Collective Redress Act.

[37] The law provides for the existence of a pre-mediation stage (designed to explain to parties what mediation is and ascertain their willingness to reach an agreement there), and a mediation phase. In accordance, however, to Article 49 of *Justices of the Peace Act*, pre-mediation only takes place if

unsuccessful. The decision of the justice of the peace has court order value.[38] In the justices of the peace there is place to payment of costs, and that table is approved by order of the Government member responsible for the area of justice (Article 5), and the general rules on legal aid (Article 40) are applied. The mediation phase is performed by a professional with specific training, and must respect the principles and rules laid down in Law 29/2013 of 19 April (Mediation Act).

Article 14(1) of the Portuguese Consumer Protection Act made responsible the agencies and departments of the Public Administration to promote the creation and support arbitration centres in order to settle consumer disputes (institutionalized arbitration centres). However, Law 144/2015, of 8 September, which transposed into Portuguese law the Directive 2013/11/EU of the European Parliament and of the Council, of 21 May 2013, regularized court settlement procedures of national and international disputes promoted by an alternative dispute resolution (ADR)[39] entity regarding consumer disputes. By "ADR procedures" one means mediation, conciliation and arbitration (Article 3(i)). ADR entities have a set of obligations laid down in Article 6 of Law 144/2015, while the Direcção-Geral do Consumidor organizes the registration and disclosure of ADR entities list, and evaluates compliance with the obligations set out in that Article. In turn, Article 12(1) provides a set of guarantees of ADR procedures (equality, adversarial, duty to state reasons, etc.), resulting from paragraph 2 of that Article the possibility that the parties can give up at any time the procedure and the requirement for them to be informed (before they accept, refuse or adopt the proposed solution) that participation in the ADR procedure does not prevent recourse to the competent court to resolve the dispute, and that the solution proposed by the ADR entity may be different from a solution obtained by court applying the provisions in force.[40]

It should be emphasized that in accordance with Article 13(1), agreements made between consumers and suppliers of goods or service providers in order to resort to an ADR entity, entered into before the dispute has arisen and through in writing, cannot deprive consumers of their right to refer the dispute to the appreciation and decision of a court of law (justices of the peace should be included here).[41]

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either or both of the parties have not previously removed that possibility. This meets up the principle of voluntariness, provided for in Article 4 of the *Mediation Act*.

[38] According to Article 62 of Justices of the Peace Act, decisions in cases whose value exceeds half of the value of the purview of the 1st instance court may be challenged by way of appeal to bring to the relevant section of the district court where the Justices of the Peace is based.

[39] An ADR entity is an entity that is based in Portugal and that, regardless of classification, allows the resolution of disputes covered by the relevant law, through one of the ADR procedures, and is registered in the ADR entities list.

[40] Conversely, Article 11 of Law 144/2015 provides that ADR entities may maintain or adopt procedural rules which enable them to refuse treatment of a dispute in certain cases, being one of these cases the fact that the dispute is pending or it has already been decided by another ADR entity or a court of law.

[41] In this sense, Carvalho and Carvalho (2016), p. 7. The authors bring attention to the fact that jeopardising consumer access to demand a professional in a state court would be contrary to Article 10(1) of Directive 2013/11/EU, according to which "Member States shall ensure that agreements

3.4 Arbitration in Essential Public Services

Article 15(1) of Law 23/96 (as amended by Law 6/2011) provides that "consumer disputes in the context of essential public services[42] are subject to compulsory arbitration when, by express option from individual users, are submitted to the appreciation of arbitral tribunal of the legally authorized consumer disputes arbitration centres". These centres are necessarily ADR entities.[43] We are not dealing here with a mandatory arbitration case (imposed by law), but only with a case where the law replaces the company' statement.[44] The consumer statement is always necessary (consumer's right to resort to arbitration, or compulsory arbitration only for the company).[45] In case of the latter to take the initiative to bring a lawsuit for debt collection, from a court of law (or a Justice of the Peace) several authors defend that the consumer should be allowed to commence arbitration, provided that he expresses this will before his first intervention in the process.[46]

3.5 Advantages for Consumer to Use an ADR Procedure

Article 10 of Law 144/2015 establishes a set of rules to ensure the effectiveness and accessibility of alternative dispute resolution procedures for consumer disputes. Under paragraph 1, ADR entities shall ensure that ADR procedures are effective, available and easily accessible, both online as by conventional means, for both parties, regardless of where they are. Furthermore, ADR entities should also ensure that the parties do not have to resort to a lawyer and may be accompanied or represented by third parties at any stage of the procedure (paragraph 2).[47]

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between consumers and traders in order to pursue an ADR entity are not binding on the consumer if they have been concluded before the occurrence of the dispute and have the effect of depriving consumers of their right to bring an action in court for resolution of the dispute".

[42]Article 1(2) of Law 23/96 lists (exhaustively—in that sense, Carvalho and Carvalho (2016), p. 12) what is meant by essential public service. So (say the authors), the arbitration provided for in Article 15(1) shall apply to the provision of water services, the supply of electricity services, the supply of natural gas and petroleum liquefied gas services, electronic communications services (internet, television, telephone, etc.), postal services, the collection and wastewater treatment services and solid waste management services.

[43]Carvalho and Carvalho (2016), p. 12.

[44]Ibid., p. 12.

[45]Ibid., pp. 13–14. Without prejudice to cases where the law provides that the ADR entity refuses to accept the dispute (Article 11 of Law 144/2015).

[46]Ibid., p. 16.

[47]Carvalho and Carvalho (2016), pp. 16 et seq. draw attention to the fact that the provisions of Law 144/2015 have a mandatory content, overriding even the agreement of the parties. Article 10 (2) provides that, contrary to what happens in state courts, representation by a lawyer cannot be imposed, regardless of the share value. A clause imposing compulsory representation by a lawyer

The rule in Article 10(3) is very important, according to which ADR entities shall ensure that ADR procedures are free or available for consumers against paying a low rate.

It should be noted that, in accordance with paragraph 5 of Article 10, ADR procedures must be decided within 90 days from the date on which the ADR entity has received the full complaint process (and this period can, in accordance with paragraph 6 of that Article, be extended at most twice for equal periods, by the ADR entity if the dispute reveals particular complexity).

Finally, it should be commented that in Portuguese law there are no courts especially designed for the resolution of consumer disputes, nor the existence of procedural rules in civil declaratory action aimed at consumer protection. However, the legislator has set up alternative dispute resolution bodies of consumer disputes, which should be easily accessible to consumers, and should provide a potentially free and speedy resolution of the dispute. Contrary to what results from Voluntary Arbitration Act, where the normal period for decision making by the tribunal is 12 months starting from the last arbitrator acceptance, it is envisaged in Law 144/2015 a (normal) period resolution of 90 days.

The disadvantages associated with this form of dispute resolution are those that result from inherent lessening of the jurisdiction (subject to the procedural guarantees provided by law). Perhaps being aware of it, the legislator intended that the consumer would not be bound by the resource agreement to an ADR mechanism, concluded before the occurrence of a dispute, keeping unchanged the possibility of recourse to a court of law.

4 Specialised Agencies and the Enforcement of Consumer Law

4.1 The Administrative Mechanisms: The Direcção-Geral do Consumidor

The Portuguese Consumer Protection Act of 96 has created two new bodies: the Instituto do Consumidor and the Conselho Nacional do Consumo.[48] With Decree-Law n 126-C/2011, 29 December,[49] the Instituto do Consumidor was replaced in its competences—which were, mainly, to promote consumer rights, information and

inserted in a centre arbitration rules (according to the authors) would be invalid (for being contrary to the law) and could not be applied.

[48] See Articles 21 and 22 of the first version of Law 24/96.

[49] Article 13. See also the last revision of the Portuguese Consumer Act, by Law 47/2014, of 28 July, namely, on Articles 21 and 22.

education and to support consumer organization—for Direcção-Geral do Consumidor, an administrative service with reinforced capabilities.[50]

The Direcção-Geral do Consumidor is an *administrative authority*, part of the Ministry of Economy,[51] and has as special aims to take part on the national and European legislative process, to promote the security of goods and services, to educate and inform the consumers, to enforce mechanisms of consumer protection and to supervise commercial and institutional advertising, specially on the internet. In this last field, this authority has special powers to apply fines and other sanctions.[52]

As a central body of direct public administration, the Direcção-Geral do Consumidor's internal structure is established by law and comprises three directions: the Direction for Consumer Law (12 workers), the Direction for Consumer Communication (13 workers), the Direction for International Affairs (8 workers); one division: the Division for Advertising (8 workers), and a support core: the Direction' Support Group (8 workers).

The Direcção-Geral do Consumidor has been designated as the Portuguese authority and the liaison office responsible for the application of Regulation (EC) No. 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws. This Direcção-Geral is also in charge of the Portuguese ECC—European Consumer Center, part of the European Consumer Center Network[53] co-financed by the European Commission and national governments.[54]

The Conselho Nacional do Consumo (National Consumer Council) is an independent consultative council that aims to have a pedagogical approach and take a preventive action in all matters consumer related. No less than 50% of its members are consumers.[55] This Council is supported technically and administratively by Direcção-Geral do Consumidor.

4.2 *The Direcção-Geral do Consumidor (DGC) and the Portuguese Consumer Protection System*

Since Direcção-Geral do Consumidor (DGC) is in charge of endorsing the Portuguese Consumer Protection System and of the co-ordination of the activities

[50]See Article 21, in its current version, and Decree-Law 11/2014, of 22 January.

[51]Articles 4 and 12, Decree-Law 11/2014, of 22 January. See *Decreto Regulamentar* 38/2012, of 10 April.

[52]See Article 12(2)(f) of Decree-Law 11/2014, of 22 January.

[53]"ECC-Net" is a network of 30 offices in the 28 EU Member States, Norway and Iceland, which main aim is to provide free help and advice to consumers on cross-border contracts.

[54]See <http://cec.consumidor.pt>.

[55]See Article 22 *Portuguese Consumer Protection Act.*

developed by public and private entities integrated in this system, it is in charge of monitoring the activity of consumer associations, arbitration centers and other non-judicial mechanisms for the resolution of consumer disputes and also of municipal information centers (CIAC).[56]

Direcção-Geral do Consumidor has been working very closely with arbitration centers, especially in the last 5 years, providing them with technical and economical support through a Consumer Fund.

Local authorities are also privileged partners of this body, having their own competences in what concerns consumer information and counselling.[57] These local authorities usually perform their duties through municipal information centers (CIAC), currently more than 70 around the country.[58]

The Regulators are also part of the Portuguese Consumer Protection System since they have special duties in defending the interests of consumers in the respective economical area, providing information to consumers and receiving, analyzing and responding to consumer complaints. They also play an important role in the promotion of alternative resolution of disputes. There are several institutionalized regulators in Portugal, covering different areas of the economy: communications, competition, health, banking and financial services, media, data protection, construction, transportation, energy, aviation, tourism, insurance, etc.[59]

There are also monitoring bodies responsible for exercising control over particular areas of activity relevant to consumers as Food and Economic Safety Authority (ASAE).[60] Generally, these authorities have their own consumer support services, providing information and receiving complaints.

In some cases, they have special powers, being competent to investigate and instruct criminal processes, particularly in the context of protecting public health, as is the case of ASAE.

5 The Role of Consumer Organizations in Enforcement of Consumer Law

According to Article 17 of the Portuguese Consumer Protection Act, consumer associations are non-profit organizations, aiming at protecting the rights and interests of consumers in general and of their members, in particular. They may be national, regional or local, depending on their area of activity, and on the number of their members (3000, 500 or 100, respectively). As regards their scope, consumer organizations may be specific (if they aim at protecting consumers of specific goods

[56]See Article 2(2)(c) *Decreto Regulamentar* 38/2012 of 10 April.

[57]See Article 7(1)(b) *Portuguese Consumer Protection Act.*

[58]See all the existing CIACs in <http://www.consumidor.pt/>.

[59]See all the existing Regulators in <http://www.consumidor.pt/>.

[60]Article 13, Decree-Law 11/2014, of 22 January.

and/or services) or generic (if they have the purpose of protecting rights of consumers concerning the acquisition of goods and services in general). In both cases, consumer associations are real associations[61]; consequently, their bodies are freely elected by universal and secret vote of their members.

DECO, the Portuguese Association for Consumer Protection, is the largest consumer association in Portugal. It is present through a nationwide network comprising six regional offices. DECO is an independent non-profit consumer association, and holds a public utility status. It closely works with similar organizations in Spain, Italy, Belgium and Brazil. It is also a member of BEUC (Bureau Européen des Unions de Consommateurs), CI (Consumers International), and ICRT (International Consumer Research & Testing).

It should be underlined that, since enter into force of the above mentioned Directive 2013/11/EU[62] on alternative dispute resolution for consumer disputes (Directive on consumer ADR), Member States shall encourage relevant consumer organisations and business associations to make publicly available on their websites, and by any other means they consider appropriate, the list of Alternative Dispute Resolution entities. The Commission and Member States shall also ensure appropriate dissemination of information on how consumers can access ADR procedures for resolving disputes covered by the Directive, and shall take accompanying measures to encourage consumer organisations and professional organisations, at Union and at national level, to raise awareness of ADR entities and their procedures and to promote ADR take-up by traders and consumers. Those bodies shall also be encouraged to provide consumers with information about competent ADR entities when they receive complaints from consumers. In Portugal, these provisions were implemented by Article 19(2) of Law 144/2015, of 8 September (the Portuguese Consumer ADR Act).

6 Private Regulation and Enforcement of Consumer Law

In 1991, advertisers, agencies and media created the Civil Institute for Self-Regulation of Commercial Communication, ICAP (Instituto Civil de Autodisciplina da Publicidade), a non-profit entity, responsible for implementing a self-regulation system promoting legal, honest, truthful and decent advertising. ICAP has a Code of

[61] Article 17, number 4, of the Portuguese Consumer Protection Act, also refers to consumer cooperatives; they are subject to the same legal regime as consumer associations.

[62] Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR).

Conduct; revised in 2010 and incorporating the provisions of the Consolidated ICC Code of 2006.[63]

As respects dispute resolution, ICAP provides an adjudicative body and a mediation service. The Jury (Júri de Ética) is the complaints adjudicative body. It is divided into two Sections and an Appeal Commitee. ICAP also provides a mediation service, i.e., a forum for the parties to meet and reach agreement about a contested advertisement.

7 Enforcement Through Collective Redress

According to Article 52(3) of the CRP,

> Everyone is granted the right of actio popularis, including the right to apply for the applicable compensation for an aggrieved party or parties, in the cases and under the terms provided for by law, either personally or via associations that purport to defend the interests in question. The said right may particularly be exercised in order to: (a) Promote the prevention, cessation or judicial prosecution of offences against public health, consumer rights, the quality of life or the preservation of the environment and the cultural heritage; (b) Safeguard the property of the state, the autonomous regions and local authorities.

In Portugal, the general regulation for collective redress mechanisms is provided by Law 83/95, of 31 August, as mentioned in paragraph 3. Therein several types of popular action can be found: preventive popular action, popular action to contest administrative decisions, and popular action for compensation of damages, including collective redress.

According to Article 18, No. 1, (l), and Article 13, (a) (b) and (c) of the Portuguese Consumer Protection Act, consumers and consumer organizations have standing rights, regardless of whether they have a direct interest in the claim. Standing is also granted to the Public Prosecutor (Ministério Público) and to the DGC.

Popular action may follow any of the procedures established by the Civil Procedure Code, and it is an opt-out system for collective redress. Therefore, judicial decisions have general effectiveness, except for individuals who have opted-out.

When *actio popularis* is used for collective redress, the remedies are, mainly, civil liability for the compensation of damages. This liability may be based on fault, but also can be effective regardless of fault, when provided by Law. According to Article 22 of Law 83/95, subjects are entitled to receive compensation under the general liability rules within 3 years after the judgment.[64]

[63]The latest code revision included a Portuguese translation of the ICC Code, an exhaustive consultation process with external stakeholders and a working group which adapted the Code to the Portuguese situation.

[64]The unclaimed amounts will be allocated to the Ministry of Justice.

8 Sanctions for Breach of Consumer Law

There are no specific general rules on sanctions for breach of Consumer Law. Article 12 of the Portuguese Consumer Protection Act provides that the consumer has the right to receive compensation for patrimonial damage or non-patrimonial damage caused by defective products or services.

Most of the provisions granting consumer rights are mandatory; therefore, any agreement against those rules is void. Similarly, any preliminary statement by the consumer waving rights and guarantees is not enforceable.

It should also be emphasized that failure to comply with legislation on consumer protection might be considered an administrative infraction, punishable with a fine and other accessory sanctions, as prohibitions of professions or activities, confiscation of property, suspension of administrative licences or authorisations for no more than 2 years, according to Article 21 of Decree-Law 433/82, of 27 October. Publicity may be given to the above-mentioned sanctions.

9 Alternative Mechanisms for the Resolution of Consumer Disputes

There are a number of different structures in Portugal to settle consumer disputes outside the courts. As mentioned above, in Portugal, the out-of-court settlement of disputes can be undertaken through mediation, conciliation and arbitration, applying to the resolution of consumer disputes between consumers and suppliers who are both located in Portugal as well as consumers and suppliers located in different Member States. All disputes resulting from a legal relationship which the parties can terminate through negotiation, even renouncing the rights arising from their agreement, and which are not reserved by law to the judicial courts, can be settled by Alternative Dispute Resolution mechanisms.

Although of a judiciary nature, *conciliation* is an alternative to Court adjudication. Under this process, the judge or the arbitrator[65] invites parties to discuss the matter on which they disagree and helps them to reach a voluntary agreement.[66] In comparison with a mediator, the conciliator takes a more active stance, steering negotiations and putting forward solutions and platforms of mutual agreement that may bring about an agreement between parties. Since the conciliator has the power to adjudicate the dispute, the dynamic of conciliation is quite different from the one of mediation, under Portuguese law.

If the parties reach an agreement in the conciliation phase, it is recorded in the minutes and endorsed by the judge or the arbitrator.

[65]Conciliation is also provided by arbitration centers, it is generally used as a preliminary stage of the proceedings.

[66]Articles 591-A, 594 and 604 CCP.

Mediation is an alternative means of resolving disputes which is confidential and voluntary in nature.[67] The responsibility for coming up with the decisions to be taken resides with the parties involved. In general, mediation is informal in nature. In this type of resolution process, the parties in dispute, helped by an impartial and neutral third party, try to reach an agreement settling their dispute—the empowerment of the parties is what distinguishes mediation. Unlike a judge or an arbitrator, the mediator does not make any decision regarding the result of the argument. Instead, the mediator guides the parties, establishing contacts between them and enabling the dialogue in such a way that the parties themselves can come up with the basis for an agreement ending the dispute.[68]

In what respects consumer ADR, mediation is regulated in general by the Portuguese Mediation, but it is also specifically envisaged in the above mentioned the Portuguese Consumer ADR Act. In Portugal, entities providing mediation are consumer associations; consumer information centers (CIAC) of various municipalities; regulators (ERS—Health Regulator; and CMVM—Securities Market Commission); and arbitration centers.

The agreement reached by mediation is made in writing and may be ratified by the judge or the arbitrator.[69] The enforcement of a mediation agreement is a matter for the Court of First Instance, under the conditions laid down in the Code of Civil Procedure.[70]

Arbitration is also a regular means of settling disputes and is regulated, in Portugal, by Voluntary Arbitration Act (Law 63/2011, of 14 December). Voluntary arbitration is a private method of settling disputes in which the parties, on their own initiative, choose people known to be arbitrators, who come up with a decision which is binding on the parties in settling their differences. Therefore, arbitration is the process bearing most similarities to judicial proceedings, and the arbitrator is

[67]The European Commission recommendation 2001/301/EC of 4 April already set the following principles of mediation: impartiality, transparency, effectiveness and equality.

[68]In ADR procedures which aim at resolving the dispute by proposing a solution, according to Article 12, 2, of the *Portuguese Consumer ADR Act* (implementing Directive on consumer ADR), the parties have the possibility of withdrawing from the procedure at any stage if they are dissatisfied with the performance or the operation of the procedure. They shall be informed of that right before the procedure commences. Where national rules provide for mandatory participation by the trader in ADR procedures, this point shall apply only to the consumer. The parties, before agreeing or following a proposed solution, are informed that: they have the choice as to whether or not to agree to or follow the proposed solution; participation in the procedure does not preclude the possibility of seeking redress through court proceedings; the proposed solution may be different from an outcome determined by a court applying legal rules. They are also informed of the legal effect of agreeing to or following such a proposed solution, and, before expressing their consent to a proposed solution or amicable agreement, should be allowed a reasonable period of time to reflect.

[69]Article 273 CCP and Article 14 of Mediation Act.

[70]Article 9 of Mediation Act.

responsible for making a decision regarding the dispute.[71] The process ends with an arbitration decision which may consist in the ratification of the agreement reached during a conciliation phase. This decision carries the weight of a court judgment and is enforceable in the same way as a decision by a Court of First Instance. However, only if parties have agreed on their right of appeal and did not have authorized the arbitrator to reach a judgment grounded on equity, can an appeal be made against arbitration decisions to the Court of Appeal.[72]

The possibility of settling disputes through institutionalised arbitration was legally recognised in 1986,[73] and the settling of arbitration centres to solve consumer disputes has been ongoing ever since. A set of principles and obligations to be complied with by entities intending to commence proceedings for the out-of-court settlement of disputes in this field were first established in 1999. "Institutionalized arbitration" is the term given to voluntary arbitration carried out by arbitration centres (Centros de Arbitragem). The arbitration centres aimed at setting consumer disputes are set up by non for profit private associations (except in Madeira Autonomous Region, where the centre was set up by the regional government) representing consumers and professionals. The establishment of a consumer center requires the prior approval of the Ministry of Justice and of DGC. These Centres can have general competence or might be specialized in certain areas. Sector-specific arbitration centres are CASA (Motor Vehicle Sector Arbitration Centre) and CIMPAS—Motor Vehicle Sector Information, Mediation and Arbitration Centre. Most Centres have regional jurisdiction and are only involved in disputes occurring in a certain geographical area. One center—CNIACC—, located in Braga, covers the remaining territory and can deal with disputes from all over Portugal.[74]

As a principle, the recourse to out-of-court means to settle disputes is voluntary, and such intervention in a dispute requires the consent of both the consumer and the supplier/provider of the service. Therefore, also in arbitration, the professional has to accept recourse to this process. The acceptance, however, can be provided on a case by case basis—only granted in relation to a specific dispute—or it can be full, the professional agrees to recourse to arbitration in all disputes, by adhesion to one or several arbitration centres.

[71]The European Commission Recommendation 98/257/EC, of 30 March, set forth the following principles of arbitration: independence, transparency, adversarial, effectiveness, legality, liberty and representation.

[72]Article 39(4) *V*oluntary Arbitration Act.

[73]Decree-Law 425/86, of 27 December.

[74]In order to ensure full sectorial and geographical coverage by and access to ADR, Member States should have the possibility to provide for the creation of a residual ADR entity that deals with disputes for the resolution of which no specific ADR entity is competent. Residual ADR entities are intended to be a safeguard for consumers and traders by ensuring that there are no gaps in access to an ADR entity. See Article 5(3) of Directive on Consumer ADR.

Furthermore, in ADR procedures which aim at resolving the dispute by imposing a solution, the solution imposed should be binding on the parties only if they were informed of its binding nature in advance and specifically accepted this.[75]

Arbitration entails simple, informal and swift procedures. According to Article 11 of the Portuguese Consumer ADR Act, ADR entities may refuse to deal with a given dispute on the grounds that: the consumer did not attempt to contact the trader concerned in order to discuss his complaint and seek, as a first step, to resolve the matter directly with the trader; the dispute is frivolous or vexatious; the dispute is being or has previously been considered by another ADR entity or by a court; the value of the claim falls below or above a pre-specified monetary threshold; the consumer has not submitted the complaint to the ADR entity within a pre-specified time limit, which shall not be set at less than 1 year from the date upon which the consumer submitted the complaint to the trader; dealing with such a type of dispute would otherwise seriously impair the effective operation of the ADR entity. ADR procedures should be fair so that the parties to a dispute are fully informed about their rights and the consequences of the choices they make in the context of an ADR procedure. ADR entities should inform consumers of their rights before they agree to or follow a proposed solution. Both parties should also be able to submit their information and evidence without being physically present.

Article 12 of the Portuguese Consumer ADR Act grants the parties the possibility, within a reasonable period of time, of expressing their point of view, of being provided by the ADR entity with the arguments, evidence, documents and facts put forward by the other party, any statements made and opinions given by experts, and of being able to comment on them; the parties are informed that they are not obliged to retain a lawyer or a legal advisor, but they may seek independent advice or be represented or assisted by a third party at any stage of the procedure; the parties are notified of the outcome of the ADR procedure in writing or on a durable medium, and are given a statement of the grounds on which the outcome is based.

Finally, Regulation (EU) 524/2013, Regulation on consumer ODR, should be mentioned.[76] It applies to the out-of-court resolution of disputes initiated by consumers resident in the Union against traders established in the Union which are covered by Directive on consumer ADR.

This Regulation aimed to create an ODR platform at Union level, an interactive website offering a single point of entry to consumers and traders seeking to resolve disputes out-of-court which have arisen from online transactions. The ODR platform

[75]Specific acceptance by the trader should not be required if national rules provide that such solutions are binding on traders. See Sect. 3.4.

[76]Regulation (EU) 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR). See also Commission Implementing Regulation (EU) 2015/1051 of 1 July 2015 on the modalities for the exercise of the functions of the online dispute resolution platform, on the modalities of the electronic complaint form and on the modalities of the cooperation between contact points provided for in Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes.

provides general information regarding the out-of-court resolution of contractual disputes between traders and consumers arising from online sales and service contracts. In Portugal, the platform is properly functioning.

10 External Relations and Cooperation of the State, Enforcers and Consumers Organisations

Portugal is part of the European Union, and most of its Consumer Law is based on European Law, as mentioned above.

In what respects enforcement of Consumer Law, European influence is also strong.

Since implementation of Directive 2013/11/EU, Portugal shall ensure that ADR entities cooperate in the resolution of cross-border disputes and conduct regular exchanges of best practices as regards the settlement of both cross-border and domestic disputes.[77]

Where a network of ADR entities facilitating the resolution of cross-border disputes exists in a sector-specific area within the Union, Member States shall encourage ADR entities that deal with disputes in that area to become a member of that network. Networks of ADR entities, such as the financial dispute resolution network 'FIN-NET' in the area of financial services, should be strengthened within the Union.

The European Consumer Center (Centro Europeu do Consumidor) is the Portuguese contact point in charge of providing support to the resolution of disputes relating to complaints submitted through the ODR platform, according to Article 7 of Regulation 524/2013. It informs the consumer on issues related to the internal market; provides legal information and assistance in submitting claims; facilitates access to justice alternative, providing a clear access to the European ADR; provides information on EU and national legislation; performs comparative studies on prices, legislation and other matters related to the consumption. It is a member of the European Consumer Center Network "ECC-Net".

11 Conclusion

In our opinion, the Portuguese system of consumer protection is adequate and effective. Most of its provisions are implementation of European Law and even when the European regulation was oriented by a minimum harmonization policy, often the Portuguese legislator has established a more favorable regime in order to reinforce the protection granted to consumers.

[77] Article 21 of Portuguese Consumer ADR Act.

The main shortcoming of the Portuguese system is the lack of awareness of the consumers about their rights and guarantees. There is still a work to do in consumers' information and education.

The enforcement mechanisms in Portugal have undergone a recent reform through the above mentioned Portuguese consumer ADR Act, implementing European Directive on consumer ADR. The main advantages of Portuguese system of enforcement of consumer law is that it provides a qualified, cheap and fast solution for the dispute. However, arbitration centres are not always accessible (the national centre follows an online procedure and has a very limited telephonic assistance). The main shortcomings of the enforcement of consumer law are, in our view, lack of institutional capacities, and, again, lack of information to consumers about ADR mechanisms.

To conclude, in our opinion, more arbitration centres should be made accessible and more information about ADR is necessary. A closer dialogue between ADR entities should also be promoted in order to coordinate criteria and proceedings. Most of these shortcomings, however, are expected to be overcome in the near future, as a result of the new Portuguese Consumer ADR Act.

Accordingly, taking into consideration the good quality and adequacy of Portuguese Consumer Law, nonetheless the deficit in its enforcement, we would assign it 7 out of 10.

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L'application et l'effectivité du droit québécois de la consommation

Marc Lacoursière et Stéphanie Poulin

1 Encadrement national de la protection du consommateur

1.1 Pays et population

L'institut de la statistique du Québec estime que la population québécoise est de 8 240 500 personnes au 1er janvier 2015.[1]

1.2 Politique nationale de protection du consommateur

Les gouvernements canadien et provinciaux ont tous élaboré des législations et des normes pour encadrer les relations entre les consommateurs et les commerçants, principalement depuis les années 1970. Ces politiques visent, par exemple, à informer le consommateur, à encadrer des termes contractuels, à assurer la bonne conduite des entreprises sur les marchés et la mise en œuvre d'intervention légale.

Les opinions exprimées dans ce texte, ainsi que les erreurs, n'engagent que les auteurs et non l'OPC.

[1]Le bilan démographique du Québec Édition 2015, faits saillants, p. 9.

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1.3 Éducation des consommateurs

L'éducation des consommateurs pose un éternel problème et malgré les initiatives, des déficiences majeures persistent.

Dans cette optique, le gouvernement québécois propose d'introduire un nouveau cours d'éducation financière destiné aux élèves du 5e secondaire dès l'automne 2017. Par aiIleurs, il existe de nombreuses initiatives publiques et privées qui visent à informer les consommateurs de leurs droits. Par exemple, l'OPC offre des ateliers à différents groupes et finance des initiatives des associations de consommateurs par l'intermédiaire de son programme de contribution.[2] Enfin, les médias contribuent à la diffusion d'information en droit de la consommation.

1.4 Encadrement juridique de protection des consommateurs au Québec, la structure de l'entité et ses principales caractéristiques

Au Québec, la principale loi québécoise qui encadre les relations entre les consommateurs et les commerçants est la *Loi sur la protection du consommateur*.[3] Celle-ci énonce des règles générales, encadre certains contrats spécifiques (contrat de démarchage, de crédit, de télécommunication ou contrats conclus à distance) et les pratiques déloyales de commerce. S'ajoutent des règles qui imposent à certains commerçants l'obligation d'obtenir un permis, et la mise en place de mesures de protection économique (cautionnement, compte en fidéicommis, etc.). Comme dans les provinces anglophones, il n'existe aucun code de la consommation qui contient l'ensemble des dispositions pertinentes. Les lois coexistent selon des thèmes spécifiques, relativement épars et peu coordonnés entre eux : *Loi sur la protection des renseignements personnels dans le secteur privé*,[4] *Loi sur les agents de voyages*,[5] *Loi sur le recouvrement de certaines créances*,[6] *Loi sur les arrangements préalables de services funéraires et de sépulture*.[7] Au fédéral, il faut noter : *Loi canadienne sur la sécurité des produits de consommation*,[8] la *Loi sur l'emballage et*

[2]Pour plus d'informations, voir *infra* Section 2.

[3]RLRQ, c. P-40.1 [Lpc].

[4]RLRQ, c. P-39.1. Au fédéral, mentionnons : *Loi sur la protection des renseignements personnels et les documents électroniques*, L.C. 2000, c. 5.

[5]RLRQ, c. A-10.

[6]RLRQ, c. R-2.2.

[7]RLRQ, c. A-23.001.

[8]LC 2010, ch 21.

l'étiquetage des produits de consommation,[9] *Loi sur l'étiquetage des textiles*[10] et *Loi sur la concurrence*.[11]

Le *Code civil du Québec* prévoit quelques dispositions qui s'appliquent au contrat de consommation qui est défini comme un contrat entre un consommateur et une entreprise,[12] soit notamment les clauses externes, incompréhensibles, abusives[13] ou les protections relatives aux sûretés ou au droit international privé.[14]

1.5 Plan stratégique du Québec pour la protection du consommateur

L'OPC élabore des plans stratégiques afin de prioriser ses actions. Dans le dernier plan adopté,[15] l'OPC a, notamment ciblé les points suivants:

(a) Poursuivre le renforcement de son mandat de surveillance;
(b) Travailler à la modernisation des lois sous sa responsabilité en faisant des recommandations au ministre de la Justice;
(c) Chercher de nouveaux moyens pour aider les consommateurs à faire valoir leurs droits, devant les tribunaux ou par d'autres méthodes non judiciaires.

1.6 Début de la protection du consommateur au Québec

Le Service de la protection du consommateur fut créé en 1969, suivi par l'adoption de la *Loi de la protection du consommateur* de 1971,[16] qui institua l'Office de la protection des consommateurs [OPC][17] afin d'administrer cette loi. Cette loi a été remplacée en 1978 par la loi actuelle,[18] modifiée à plusieurs reprises depuis lors.

[9]LRC (1985), c C-38.
[10]LRC (1985), c. T-10.
[11]LRC (1985), c C-34.
[12]Art 1384 CcQ.
[13]Art 1435-1437 CcQ.
[14]Art 1746, 1749, 1751, 2683, 2758, 3117, 3149 CcQ. Il faut également noter que l'encadrement du bail de location résidentiel : art. 1892-2000 CcQ.
[15]OPC, *Plan stratégique 2014-2018*, 2015, en ligne : <http://www.opc.gouv.qc.ca/fileadmin/media/documents/a-propos/publication/Planification2014-2018.pdf>.
[16]*Loi de la protection du consommateur*, L.Q. 1971, c. 74.
[17]*Ibid*, art. 76. LQ 2005, c. 24, art. 48.
[18]Ci-dessus n 1.

1.7 Modèle d'encadrement pour l'élaboration du régime national de protection

Le modèle québécois puise ses idées à plusieurs sources : le droit canadien-anglais, américain, européen et, particulièrement, le droit français. La multitude de lois québécoises visant la protection du consommateur crée un étalement des sources de protection dans lequel il est parfois difficile de se retrouver.

Au demeurant, les grands principes proposés par les organismes internationaux sont également présents en droit québécois et canadien. Ceux-ci sont à la base des politiques élaborées au fil des ans par les divers organismes qui ont pour mission, principalement ou partiellement, la protection des consommateurs.

2 Conception du mécanisme d'application des lois

2.1 Autorité d'application des lois

L'OPC a principalement pour mandat de surveiller l'application des quatre lois suivantes et de leur règlement d'application :

- *Loi sur la protection du consommateur*[19] ;
- *Loi sur les agents de voyages*[20];
- *Loi sur les arrangements préalables de services funéraires et de sépulture*[21];
- *Loi sur le recouvrement de certaines créances*.[22]

L'OPC a aussi pour fonction de recevoir les plaintes des consommateurs, d'éduquer et de renseigner les citoyens, de faire des études et de promouvoir les intérêts des consommateurs par divers moyens.[23]

L'OPC constitue un organisme de gestion dont les activités sont de nature administrative. Il relève de la responsabilité du ministre de la Justice.[24] Il jouit d'une certaine autonomie et il est dirigé par des personnes nommées pour exercer ses fonctions.[25] Il jouit de pouvoirs discrétionnaires pour l'exécution de ses fonctions.

L'OPC se compose d'un conseil d'administration formé d'au plus dix membres, dont le président et le vice-président, tous nommés par le gouvernement.[26] Il ne

[19] *Ibid* n 3.
[20] Ci-dessus n 5.
[21] Ci-dessus n 7.
[22] Ci-dessus n 6.
[23] Art 292 Lpc.
[24] Art 1(i) et 352 Lpc.
[25] Art 294 Lpc.
[26] Art 294 Lpc.

s'agit pas d'un organisme paritaire comprenant en parts égales des représentants du monde des affaires et des représentants des consommateurs.

Par ailleurs, l'OPC a créé trois comités consultatifs : comité consultatif des agents de voyages, le conseil consultatif des consommateurs et le comité consultatif sur le commerce de détail.

2.2 Principales caractéristiques et compétences de cette autorité

2.2.1 Pouvoirs dévolus à l'OPC

Il faut distinguer le pouvoir de surveiller l'application de la Loi, d'informer le consommateur et de défendre ses intérêts.

2.2.1.1 Application de la Loi

L'OPC est chargé de surveiller l'application de la Loi et de toute autre loi dont l'administration lui est confiée.[27] Il constitue un organisme de vigilance qui doit surveiller la conduite des commerçants. Le président est notamment investi du pouvoir d'enquêter, qui n'appartient pas à l'OPC comme tel.

L'OPC ne dispose d'aucun pouvoir pour édicter des règlements relativement à l'application de la Loi. Ces pouvoirs appartiennent au gouvernement.[28] Il peut toutefois faire des études concernant la protection du consommateur et, s'il y a lieu, transmettre ses recommandations au ministre.[29] Il ne dispose d'aucun pouvoir judiciaire et ne peut intenter de poursuites devant les tribunaux.

Sa principale fonction consiste à recevoir les plaintes des consommateurs.[30]

2.2.1.2 Information du consommateur

Dans ses plus récents plans stratégiques, l'OPC reconnait la nécessité de bien informer le consommateur par des mesures d'information individuelle, collective ou ciblée. L'organisation reconnaît aussi que les consommateurs ont de la difficulté à faire respecter leurs droits en raison de leur méconnaissance.[31]

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[27] Art 292(a) Lpc. ; ci-dessus n 19-22 et le texte correspondant.

[28] Art 350 Lpc.

[29] Art 292(d) Lpc.

[30] Art 292(b) Lpc.

[31] OPC, *Plan stratégique 2014-2018*, ci-dessus n 15, p. 23 et s.

L'OPC est chargé d'éduquer et de renseigner la population concernant la protection du consommateur, notamment via sa vitrine Internet. Il a développé des activités éducatives destinées aux élèves du primaire ou du secondaire et leurs professeurs. Le site permet aussi d'obtenir des renseignements sur un commerçant, c.-à-d. de savoir s'il est titulaire d'un permis, s'il a fait l'objet de plaintes ou s'il a été condamné en vertu des lois sous la responsabilité de l'OPC.

Enfin, l'OPC a mis sur pied un programme de soutien financier aux projets d'éducation, d'information et de partenariat.

2.2.1.3 Défense des intérêts du consommateur

L'OPC n'est pas l'avocat du consommateur. Cependant, il est, dans un sens large, le défenseur des intérêts du consommateur en tant que groupe social distinct ayant des intérêts particuliers à faire valoir. Il a également pour fonction de promouvoir et de subventionner la création et le développement d'organismes destinés à la protection du consommateur et de coopérer avec ces services.[32]

2.2.2 Président de l'office de la protection du consommateur

Le président est responsable de l'administration de l'OPC, dont il assume la direction et préside les assemblées du conseil d'administration.

En plus de la direction de l'OPC, il exerce des pouvoirs dont il est personnellement titulaire puisqu'ils lui sont attribués par la Loi. Il est titulaire du pouvoir de surveiller l'application des lois dont l'administration est confiée à l'OPC, d'administrer une sanction administrative, de délivrer les permis et d'intervenir dans toute instance.

2.2.3 Sanctions administratives

Le président dispose de moyens administratifs préventifs pour faire respecter les lois sous sa responsabilité. Cependant, le législateur ne lui accorde aucun pouvoir judiciaire. Il doit s'adresser au tribunal chaque fois que le remède recherché comporte la condamnation d'une pratique.

Ainsi, le président peut, à sa discrétion, transmettre le dossier au procureur général pour que soient intentées des poursuites pénales,[33] s'adresser au tribunal pour obtenir une ordonnance d'injonction ou de correction[34] ou négocier avec le commerçant un engagement volontaire de respecter la Loi.[35]

[32] Art 292(e) Lpc.
[33] Art 277 Lpc.
[34] Art 316-317 Lpc.
[35] Art 314-315 Lpc.

Lorsqu'un commerçant transgresse les dispositions de la Loi ou du règlement, le président peut accepter un engagement volontaire consigné par écrit par un commerçant ayant pour objet de régir les relations entre celui-ci (ou un groupe de commerçants) et les consommateurs.[36]

Le président doit s'adresser au tribunal pour obtenir contre le commerçant une injonction ordonnant de cesser la commission d'une pratique déterminée[37] ou s'adresser au tribunal pour obtenir une ordonnance rectificatrice.[38]

2.2.4 Permis et certificat

Le président est investi du pouvoir d'accorder les permis au commerçant dont les activités sont soumises à cette exigence par l'article 321 de la *Loi sur la protection du consommateur* ou par une autre loi dont l'OPC a l'administration.[39]

Le président peut suspendre ou annuler le permis d'un titulaire qui, au cours de la durée du permis, cesse de satisfaire aux exigences prescrites par la Loi ou le règlement pour la délivrance du permis.[40]

2.2.4.1 Audition

Le président doit, avant de rendre sa décision, donner au demandeur ou au titulaire l'occasion de se faire entendre.[41]

Ce dernier a droit de recevoir un avis d'audition comportant un délai suffisant. À cette audition, il a le droit d'être représenté par avocat, de faire valoir son point de vue, de produire une preuve favorable et de s'attendre à être traité d'une façon équitable par le président.

La décision du président doit être impartiale. La Loi exige qu'elle soit donnée par écrit et qu'elle énonce les motifs sur lesquels elle se fonde. La décision ainsi que ses motifs doivent être signifiés par écrit à la personne concernée.[42]

[36] Art 314 Lpc.

[37] Art 316 Lpc.

[38] Art 317 Lpc.

[39] *Loi sur les agents de voyages*, ci-dessus n 5, art 4; *Loi sur le recouvrement de certaines créances*, ci-dessus n 6, art 7.

[40] Art 328-329 Lp.c. ; *ibid.*

[41] Art 333 Lpc. ; *ibid.*

[42] Art 334 Lpc. ; *ibid.*

2.2.4.2 Appel

Le commerçant dont la demande de permis a été rejetée ou dont le permis est annulé ou suspendu peut contester la décision du président devant le Tribunal administratif du Québec dans les 30 jours de sa notification.[43] La contestation ne suspend pas l'exécution de la décision du président.

2.2.5 Intervention dans toute instance

Le président peut, de plein droit, intervenir dans toute instance relative à ces lois et règlements.[44] Dans son plan stratégique 2014-2018, l'OPC a indiqué qu'il y aurait davantage d'interventions devant les tribunaux « dans des causes importantes qui opposent des consommateurs et des commerçants, et où les dispositions des lois qu'il doit faire appliquer sont invoquées ».[45]

2.3 Notoriété de cet organisme

Un sondage effectué en 2008 auprès de 400 Québécois révèle que 16 % des adultes sondés nomment spontanément l'OPC comme source d'information privilégiée sur les droits et les recours des consommateurs ou comme l'organisation vers laquelle ils se tourneraient pour résoudre un problème avec un commerçant.

À ce nombre s'ajoutent 23 % des répondants qui identifient l'organisation, mais sans être capables de donner son nom de façon exacte. Enfin, 2 % additionnel des répondants s'adresserait au gouvernement du Québec.[46]

Lorsqu'on leur demande d'identifier les activités de l'OPC, 43 % des gens qui disent connaître l'OPC ne sont pas en mesure. Par ailleurs, moins de 10 % nomment spontanément ses activités : son mandat d'éducation collective (9 %), de traitement des plaintes (9 %), de protection des consommateurs en général (9 %) et de surveillance de l'application des lois (7 %) et de réponse aux demandes d'information.

En additionnant les gens qui ne peuvent nommer une des activités de l'OPC (43 %) à ceux qui se trompent relativement à son mandat et à ceux qui mentionnent la protection des consommateurs en général sans préciser davantage, ce sont 69 %

[43] Art 339 Lpc. ; *ibid.*

[44] Art 318 Lpc.

[45] OPC, *Plan stratégique 2014-2018*, *supra* note 15.

[46] SOM, *Sondage sur la notoriété et les perceptions des citoyens québécois à l'égard de l'Office de la protection du consommateur*, Sondage effectué pour le compte de l'Office, avril 2008, p. 9, en ligne : <http://www.opc.gouv.qc.ca/fileadmin/media/documents/a-propos/publication/rapport-final-som-opc-2008.pdf>.

des gens qui disent connaître l'OPC qui sont incapables d'identifier précisément une de ses activités.[47]

2.4 Autorités et mécanismes sectoriels

La mise en œuvre de l'encadrement peut être contraignante ou non, selon les divers secteurs. Au Canada, le domaine de la concurrence est caractérisé par un tribunal spécialisé, appelé le Tribunal de la concurrence, dont les décisions sont contraignantes et même sujettes à appel à la Cour fédérale.

Le secteur des télécommunications est particulièrement intéressant. Le Code de services sans fil, qui s'adresse aux fournisseurs de services vocaux et de données de services sans fil (de détail), est entré en vigueur en décembre 2013. Il est sous la direction du Conseil de la radiodiffusion et des télécommunications canadiennes. Le Code est obligatoire à l'égard de ces fournisseurs.

Le secteur de l'automobile permet à un consommateur de se prévaloir du Programme d'arbitrage pour les véhicules automobiles du Canada (PAVAC), en cas de problème de vice ou de garantie.[48] Un arbitre rendra une décision qui sera obligatoire pour les parties.

Le secteur des services financiers offre des recours aux consommateurs qui ont des différends contre leurs institutions financières.[49] Aucun tribunal spécialisé n'existe pour les consommateurs, mais il est possible pour ces derniers de porter plainte à des organismes qui tenteront de résoudre le litige à l'amiable. Au Québec: Autorité des marchés financiers; au fédéral: Ombudsman des services bancaires et d'investissement (OSBI)[50]; ADR Chambers Banking Ombuds Office.[51] Les recommandations ne sont pas contraignantes, mais elles sont généralement suivies.

Enfin, le prix de l'électricité est fixé par un tribunal administratif, la Régie de l'énergie. Si Hydro-Québec désire obtenir une augmentation de tarif ou modifier les conditions de fourniture, elle doit en faire la demande auprès de la Régie de l'énergie. Ce tribunal fixe les conditions après audition où différents groupes (environnementaux ou de consommateurs, etc.) ont fait leurs représentations.

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[47] *Ibid*, p. 11.

[48] Nous excluons dans cette discussion les recours contre les représentants et les courtiers. Pour le *Code de services sans fil*, voir : CRTC, *Politique réglementaire de télécom CRTC 2013-271*, en ligne : <http://www.crtc.gc.ca/fra/archive/2013/2013-271.htm>.

[49] Voir le site du PAVAC : <http://www.camvap.ca/fr>.

[50] Voir le site de l'OSBI : <https://www.obsi.ca/fr/home>.

[51] Voir le site d'ADR Chambers Banking Ombuds Office : <https://bankingombuds.ca/fr/a-propos>.

3 Nombre et caractéristiques des plaintes et des litiges

3.1 Statistiques officielles relativement aux nombres de plaintes

L'OPC publie dans son rapport annuel, des statistiques relativement aux demandes de renseignement traitées[52] par l'organisation ainsi que les sujets de ces demandes. À partir du 23 septembre 2013, l'OPC a mis en place une nouvelle façon de consigner les renseignements liés aux demandes des citoyens. Les statistiques publiées distinguent alors les demandes de renseignements, des « plaintes » reçues par l'organisation à proprement dites. L'OPC qualifie de plainte les demandes reçues portant sur un litige entre un consommateur et un commerçant.

3.2 Statistiques relativement au nombre de litiges

Comme indiqué précédemment, depuis le 23 septembre 2013, l'OPC compile de façon distincte les « plaintes » reçues c.-à-d. les cas où un consommateur a un litige avec un commerçant.

Cependant, sauf exception, la proportion des consommateurs (qui ont contacté l'organisation) qui se sont vu référer à la Cour des petites créances (ou à un avocat) ne peut être déterminée. De plus, on ne dispose pas de statistique qui précise la proportion des consommateurs qui ont suivi la recommandation reçue et, s'il y a lieu, ont effectivement saisi un tribunal.

3.3 Nombre de litiges de consommation initiés en 2015

Entre le 1er avril 2014 et le 30 mars 2015, l'OPC a reçu 31 872 plaintes pour une valeur estimée des litiges de 57 371 134 $ (Table 1).[53]

3.4 Nombre de litiges résolus en 2015

Nous ne disposons pas de données relatives au nombre de litiges résolus en 2015.

[52]Par téléphone, par la poste, par télécopieur, en personne et par courriel.

[53]Les statistiques énoncées ici sont regroupées par grande catégorie.

Table 1 Nombre de plaintes reçues en 2015

Catégorie	Nombre de plaintes reçues	% Des plaintes reçues
Biens de consommation	20 380	63,9 %
Services généraux aux consommateurs	4 212	13,2 %
Santé	141	0,4 %
Services financiers	1 935	6,1 %
Service de communication	2 130	6,7 %
Services de transport	288	0,9 %
Services de loisirs	1 716	5,4 %
Énergie et eau	207	0,6 %
Enseignement	490	1,5 %
Autres	373	1,2 %
Total	**31 872**	**100 %**

3.5 Nombre de litiges de consommation initiés au cours des trois dernières années

L'OPC a changé la méthodologie utilisée pour compiler les demandes reçues des consommateurs à partir du 22 septembre 2013. Les statistiques sont donc scindées en deux tableaux compilant chacun une période de 1,5 an. Entre le 23 septembre 2013 et le 31 mars 2015, l'OPC a reçu un total de 47 427 plaintes réparties comme suit (Table 2).[54]

Entre le 1 avril 2012 et le 22 septembre 2013, l'OPC a reçu un total de 225 588 demandes de renseignements (incluant les dénonciations et les plaintes) et a transmis un total de 13 056 formulaires de plaintes répartis comme suit (Table 3).[55]

3.6 Nombre de litiges résolus au cours des trois dernières années

Nous ne disposons pas de données cumulatives permettant de répondre à cette question.

[54]Données provenant des rapports annuels suivants : OPC, *Rapport annuel de gestion 2014-2015*, en ligne : <https://www.opc.gouv.qc.ca/fileadmin/media/documents/a-propos/publication/OPC_WEB_RAG_2014_2015.pdf> ; OPC, *Rapport annuel de gestion 2013-2014*, 2014, en ligne : <http://www.opc.gouv.qc.ca/fileadmin/media/documents/a-propos/publication/RapportAnnel2013-2014.pdf>.

[55]Données provenant des rapports annuels suivants : OPC, *Rapport annuel de gestion 2014-2015*, *ibid.* ; OPC, *Rapport annuel de gestion 2013-2014*, *ibid.* ; OPC, *Rapport annuel de gestion 2012-2013*, 2013, en ligne : <http://www.opc.gouv.qc.ca/fileadmin/media/documents/a-propos/publication/Rapport_annuel_2012_2013.pdf>.

Table 2 Demandes de renseignements (23 septembre 2013 – 31 mars 2015)

Catégorie	Plaintes	% Des plaintes
Biens de consommation	29 924	63,1
Services généraux aux consommateurs	6 192	13,1
Santé	207	0,4
Services financiers	1 935	6,4
Service de communication	2 130	6,8
Services de transport	288	0,9
Services de loisirs	2 720	5,7
Énergie et eau	330	0,7
Enseignement	808	1,7
Autres	557	1,2
Total	**47 427**	**100 %**

Table 3 Demandes de renseignements (1 avril 2012 – 22 septembre 2013)

Catégorie	Demandes	*% Des demandes*	Formulaires transmis	*% Des formulaires*
Automobile	35 689	*15,8 %*	2 865	*21,9 %*
Habitation	28 948	*12,8 %*	1 753	*13,4 %*
Mobilier	30 651	*13,6 %*	950	*7,3 %*
Services financiers	20 456	*9,1 %*	2 018	*15,5 %*
Services personnels	18 737	*8,3 %*	1 775	*13,6 %*
Organismes et entreprises	15 782	*7 %*	30	*0,2 %*
Biens personnels	47 754	*21,2 %*	2 786	*21,3 %*
Indication des prix	4 389	*1,9 %*	432	*3,3 %*
Autres sujets	23 182	*10,3 %*	447	*3,4 %*
Total	**225 588**	***100 %***	**13 056**	***100 %***

Cependant, nous disposons d'outils qui ont mesurés à des périodes données, la proportion de consommateurs qui ont réussi à régler leur problème avec un commerçant.

Divers sondages de satisfaction effectués pour l'OPC en 2014, ont permis d'évaluer dans quelle proportion certaines clientèles de consommateurs ont résolu leur problème avec un commerçant.[56] Voici quelques faits saillants :

[56]SOM, *Étude de la satisfaction auprès des usagers des services des usagers de l'OPC, Rapport de sondages présenté à l'OPC*, Étude de satisfaction réalisée en 2014 pour le compte de l'OPC, juillet 2014, en ligne : <http://www.opc.gouv.qc.ca/fileadmin/media/documents/a-propos/publication/Rapport_final_SOM_OQM_2014.pdf>.

Usagers du centre d'appel[57] **:**
Le sondage a été effectué auprès de 1002 répondants en avril et mai 2014

- La majorité des répondants a appelé au sujet d'un problème avec un commerçant (85 %). Dans la moitié des cas (50 %), cette situation était totalement ou partiellement réglée au moment du sondage.

Consommateurs ayant reçu une trousse d'information[58] **:**
Le sondage a été effectué auprès de 846 répondants en avril et mai 2014.

- Parmi les consommateurs interrogés, 36 % ont été destinataires de la trousse «Durée raisonnable d'un bien », 33 % de la trousse « Délai de livraison, conformité du bien ou service, garantie », et 31 % de toute autre trousse.
- Les consommateurs ont effectué les démarches suivantes pour résoudre leur problème
  - 84 % des répondants ont pris contact avec le commerçant;
  - 42 % des répondants ont envoyé au moins une mise en demeure, en utilisant le modèle fourni dans la trousse (36 %), ou en utilisant un autre modèle (15 %);
  - 11 % ont pris contact avec l'un des organismes de soutien juridique proposés par l'OPC;
  - 6% ont déposé une demande à la Cour des petites créances.
- La majorité des répondants (53 %) déclarent que leur problème s'est réglé à la suite de leurs démarches auprès de l'OPC.
  - Plus particulièrement, ils déclarent que le problème qu'ils avaient s'est totalement (41 %) ou partiellement (12 %) réglé à la suite de leurs démarches auprès de l'OPC. 14 % des répondants indiquent que le problème est toujours en discussion, tandis que 20 % précisent qu'il n'est pas du tout résolu. 13 % des répondants ne se prononcent pas à ce sujet.
- En moyenne, les répondants ont obtenu 813 $ (± 228 $); la médiane étant de 300 $.

L'OPC rapporte avoir transmis les trousses suivantes aux consommateurs (Table 4).[59]

Dans l'étude des crédits budgétaires de 2015-2016, l'OPC précise le nombre de plaintes traitées entre le 1er avril et le 20 septembre 2013, qui ont fait l'objet d'une référence (à la Cour des petites créances ou un avocat lorsque le litige était de plus de 7000$), la nature des plaintes et la proportion des plaintes qui ont été réglées.[60] Sur les 1948 plaintes répertoriées, 41 % (801/1948) ont été réglées (Table 5).

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[57] *Ibid.*, p. 10.

[58] *Ibid.*, pp. 15 et 72.

[59] OPC, *Rapport annuel de gestion 2014-2015*, ci-dessus n 54 ; OPC, *Rapport annuel de gestion 2013-2014*, ci-dessus n 54; OPC, *Rapport annuel de gestion 2012-2013*, *supra* note 55.

[60] OPC, *Étude des crédits budgétaires 2015-2016 – Réponses aux demandes de renseignements particuliers (PQ)*, déposées le 5 mai 2015, en ligne : <http://www.opc.gouv.qc.ca/fileadmin/media/documents/a-propos/publication/Credits2015-2016-PQ.pdf>.

Table 4 Nombre de trousses transmises aux consommateurs (2012–2015)

Année financière	Trousses transmises
2014-2015	28 986
2013-2014	29 282
2012-2013	20 000[a]
Total	**78268**[b]

[a]Le rapport annuel de gestion 2012-2013, indique qu'il y a eu plus de 20 000 trousses transmises : OPC, *Rapport annuel de gestion 2012-2013*, *ibid*, p 26

[b]Dans la mesure où plus de 50 % des répondants ayant reçu une trousse ont résolu leur problème, nous pouvons estimer que 39 134 consommateurs (soit 50% de 78 268) ont réglé leur problème avec un commerçant

3.7 Nombre de litiges de consommation initiés au cours des dix dernières années

Entre le 1er avril 2003 et le 30 mars 2013, l'OPC a reçu un total de 1 955 895 demandes de renseignements (incluant les dénonciations et les plaintes) et a transmis un total de 137 931 formulaires de plaintes[61] (Table 6):

3.8 Nombre de litiges résolus au cours des dix dernières années

Nous ne disposons pas de données cumulatives permettant de répondre à cette question.

Cependant, l'OPC a fait effectuer en 2012, un autre sondage de satisfaction qui a permis d'évaluer dans quelle proportion certaines clientèles de consommateurs ont résolu leur problème avec un commerçant.[62] Voici quelques faits saillants :

Le sondage a été effectué du 9 mars au 2 avril 2012, auprès de 400 consommateurs ayant parlé à un agent, qui leur a fait parvenir une ou des trousses de recours civils : la trousse relative à la garantie et la durée raisonnable d'un bien ou la trousse concernant le contrat, sur les délais de livraison et la conformité

- 51 % des répondants ont réussi à régler leur problème avec le commerçant.

[61]OPC, *Rapport annuel de gestion 2012-2013*, *supra* note 55 ; OPC, *Rapport annuel de gestion 2011-2012*, en ligne : <http://www.opc.gouv.qc.ca/fileadmin/media/documents/a-propos/publication/rapport-annuel-2011-2012.pdf> ; Voir les rapports annuels de 2003 à 2012 : OPC, en ligne : <http://www.opc.gouv.qc.ca/a-propos/publication/rapport-plan-strategique>.

[62]Ad hoc recherche, *Étude de la satisfaction auprès des usagers des services de l'Office de la protection du consommateur*, Étude de satisfaction réalisée en 2012 pour le compte de l'OPC, 2012, p. 5, 12, en ligne : <http://www.opc.gouv.qc.ca/fileadmin/media/documents/a-propos/publication/final-gq36-rapport-23-mai.pdf>.

Table 5 Nombre de plaintes traitées (1eravril et le 20 septembre 2013)

Nature des plaintes	Référence			Aucune référence	Nombre de plaintes traitées	% de plaintes traitées	Résultat			Nombre total de plaintes traitées	% de plaintes réglées
	Cour des petites créances	Avocat	Autre				Plainte réglée	Plainte non réglée	Résultat inconnu		
Qualité du bien et/ou service	74	5	3	41	123	67	33	80	10	123	27
Problème relié à la garantie	22	0	2	23	47	51	19	22	6	47	40
Travaux incomplets	9	1	2	12	24	50	9	13	2	24	38
Pratique commerciale	210	15	20	331	578	43	207	269	100	576	36
Annulation/ Résiliation	145	6	12	284	447	36	252	163	32	447	56
Délais de livraison/Bien ou service	14	3	0	24	41	41	20	19	2	41	49
Menaces/ Harcèlement	20	3	12	94	129	27	95	24	10	129	74
Tout autre domaine	99	6	5	283	393	28	158	124	111	393	40
Nature non codifiée	5	3	1	159	168	5	8	16	144	168	5
Total	**598**	**42**	**57**	**1251**	**1948**	**36**	**801**	**730**	**417**	**1948**	**41**

Table 6 Nombre de demandes de renseignements et nombre de formulaires de plaintes transmis (1er avril 2003 et le 30 mars 2013)

Catégorie	Demandes	% Des demandes	Formulaires transmis	% Des formulaires
Automobile	335 598	17,2 %	23 929	18 %
Habitation	259 506	13,3 %	21 944	16,3 %
Mobilier	235 524	12 %	24 759	18,2 %
Services financiers	205 970	10,5 %	17 385	13,1 %
Services personnels	157 260	8 %	11 885	9 %
Organismes et entreprises	253 250	12,9 %	458	0,3 %
Biens personnels	350 743	17,9 %	27 344	20,4 %
Indication des prix	35 703	1,8 %	3 765	2,8 %
Autres sujets	122 341	6,3 %	2 471	1,9 %
Total	**1 955 895**	**100 %**	**137 931**	**100 %**

- La quasi-totalité des consommateurs a entrepris une action à la suite de réception de la trousse :
  - plus de huit consommateurs sur dix ont pris contact avec le commerçant.
  - près de quatre usagers du centre d'appel sur dix (39 %) ont envoyé le formulaire de mise en demeure;

    le recours à la Cour des petites créances est mineur (7 %).

Dans la table 7 l'OPC rapporte avoir transmis les trousses suivantes aux consommateurs[63] :

3.9 Principales causes/types de plaintes formulées par les consommateurs (ou litiges) auprès de l'OPC

Nous ne disposons pas de données cumulatives permettant de répondre à cette question.

Cependant, voici les principales règles bafouées entre le 1er janvier et le 25 novembre 2015[64] (Table 8).

[63]OPC, *Rapport annuel de gestion 2014-2015*, ci-dessus n 54 ; OPC, *Rapport annuel de gestion 2013-2014*, *supra* note 54 ; OPC, *Rapport annuel de gestion 2012-2013*, ci-dessus n 55.

[64]Données basées sur les plaintes déposées à l'OPC par des consommateurs qui ont eu une mésentente avec le commerçant : Stéphanie Grammond, « Mon "top 10" des pépins de consommation, 10 décembre 2015 en ligne : <http://affaires.lapresse.ca/opinions/chroniques/stephanie-grammond/201512/10/01-4929737-mon-top-10-des-pepins-de-consommation.php>.

Table 7 Nombre de trousses transmises aux consommateurs (2011–2015)

Année financière	Trousses transmises
2014-2015	28986
2013-2014	29282
2012-2013	20000[a]
2011-2012	20000[b]
Total	**98268**

[a]Le rapport annuel de gestion 2012-2013, indique qu'il y a eu plus de 20 000 trousses transmises : OPC, *Rapport annuel de gestion 2012-2013*, *ibid*, p 26
[b]*Ibid*

Table 8 Principales régles bafouées entre le 1er janvier et le 25 novembre 2015

Les règles les plus souvent bafouées	Plaintes reçues	% Des plaintes
Livraison et conformité d'un produit ou service	10 001	28 %
Garantie légale	7232	20 %
Fausse représentation ou omission d'un fait important	3599	10 %
Pratiques interdites sur le prix	1943	5 %
Contrat conclu à distance	1848	5 %
Recouvrement de créances	1489	4 %
Commerce itinérant	1197	3 %
Contrat de service d'enseignement	1126	3 %
Réparation de véhicules	819	2 %
Indication des prix (politique d'exactitude)	754	2 %

3.10 Temps nécessaire pour résoudre un litige de consommation

Nous ne disposons pas de données à cet égard.

4 Tribunaux

4.1 Structure du système judiciaire et ses caractéristiques

Brièvement, au Québec, il existe des tribunaux civils, administratifs et pénaux. Parmi les tribunaux civils – pertinente en l'espèce –, il existe deux cours de première instance, soit la Cour supérieure pour les litiges supérieurs à 70 000 $, ainsi que quelques cas spécifiques (injonction, action collective, matière familiale), et la Cour de Québec, pour les autres litiges. Dans les deux cas, il y a possibilité d'appel à la Cour d'appel, et ensuite, à la Cour suprême. Il existe plusieurs divisions à la Cour du Québec, dont la chambre civile (division générale) et la Cour des petites créances, laquelle entend les litiges de moins de 15 000 $.

4.2 Tribunaux pour les litiges de consommation

Au Québec, comme au Canada, il n'existe aucun tribunal civil général spécialisé en droit de la consommation. Les litiges de consommation sont donc intentés devant les tribunaux civils. À la Cour des petites créances, de nombreux litiges concernent des problèmes liés à la consommation (environ 40 %).

Voici les principales caractéristiques de la Cour des petites créances :

- Seules les personnes physiques peuvent être demandeurs, ainsi que les personnes morales, les sociétés ou les associations ou autres groupements sans personnalité juridique qui possédaient au plus dix employés au cours des douze derniers mois.[65]
- Aucune représentation par un avocat devant le tribunal.[66]
- Simplification de l'étape de la procédure écrite ;
- Rôle inquisitoire du juge ;
- Jugement est final et sans appel.[67]

4.3 Aide juridique

Au Québec, l'aide juridique est un système mixte, puisqu'il comprend à la fois un système d'assistance judiciaire pour le recours à des avocats qui travaillent en pratique privée et un système qui fait appel à des avocats salariés de l'État. Dans ces deux cas, les barèmes d'admissibilité à l'aide juridique demeurent très bas et, en pratique, peu de gens y ont accès.

L'aide juridique québécoise s'intéresse aux domaines criminel et civil. En ce qui concerne la matière civile, la *Loi sur l'aide juridique et sur la prestation de certains autres services juridiques* prévoit que l'aide sera accordée notamment pour une affaire en matière familiale (traitant pas ex. la survie de l'obligation alimentaire, la tutelle au mineur, un mandat donné en prévision d'inaptitude ou un changement de nom), pour la protection de la jeunesse, pour des demandes de prestation en matière d'assurance automobile, d'assurance emploi, d'accident du travail ou de soutien du revenu ou pour une tout autre affaire, mais dans ce cas seulement si la sécurité physique ou psychologique d'une personne est en jeu. En revanche, l'aide juridique n'est pas accordée pour certaines demandes, comme les recours en diffamation, ou elle peut également être refusée lorsque la vraisemblance d'un droit ne peut être établie, que le recours a manifestement très peu de chances de succès, que le coût serait déraisonnable par rapport aux gains, que le jugement ne serait pas susceptible d'exécution ou qu'une proposition de règlement a été refusée sans motif valable.

[65] Art. 536 Cpc.
[66] Art. 542, al 3 Cpc.
[67] Art. 563 Cpc.

Surtout, l'aide juridique n'est pas accordée pour les réclamations d'argent, ce qui concerne de nombreux recours de consommateurs.

En fait, le Québec a adopté une approche où l'admissibilité est très restrictive par rapport aux provinces canadiennes-anglaises, mais où la couverture des services est plus large que celle qui est proposée par ces dernières, car elle englobe non seulement les services essentiels, mais d'autres types de services. Considérant les seuils très faibles d'admissibilité à l'aide juridique, et considérant que plusieurs litiges relèvent de la juridiction de la Cour des petites créances, où la présence d'un avocat est interdite, la possibilité pour un consommateur de recourir à l'aide juridique pourrait n'être que théorique.

4.4 Pourcentage de satisfaction des consommateurs

Nous ne disposons pas d'information à cet égard.

4.5 Pourcentage de satisfaction des commerçants

Nous ne disposons pas d'information à cet égard.

4.6 Avantages et inconvénients de l'application des droits des consommateurs

Pour les litiges inférieurs à 15 000 $, il peut être intéressant pour les consommateurs de procéder par un recours en justice, vu les faibles coûts et l'absence d'avocat. Cependant, si le montant réclamé est faible, ou si la cause est suffisamment complexe pour demander conseil à un avocat (qui ne pourra pas plaider, cependant), ces avantages peuvent s'estomper.

Néanmoins, les longs délais avant d'obtenir une audition devant le tribunal, conjugué au processus judiciaire qui demeure subjectivement difficile pour les justiciables qui manquent de connaissances juridiques et au fait qu'il n'est pas rare que le consommateur doive s'opposer à un commerçant ayant une expérience devant les tribunaux, posent de sérieux problèmes.

Depuis un certain temps, le justiciable doit lui-même contacter l'huissier de justice pour accomplir cette tâche, en plus d'assurer les frais judiciaires (qui pourront éventuellement être remboursés par le débiteur).

5 Organisme d'application des lois de protection du consommateur

5.1 Principale autorité d'application des lois de protection du consommateur

Voir réponse à la section 2.1.

5.2 Base légale de cette autorité

Voir réponse à la section 2.1.

5.3 Organisation de cette agence

Voir réponse à la section 2.1.

5.4 Structure de cette autorité

L'OPC a des bureaux dans onze villes du Québec.[68] Cependant, la majorité des employés travaillent aux bureaux de Montréal et Québec.

5.5 Mise en œuvre des lois de protection du consommateur

L'OPC a le mandat de surveillance relativement à quatre lois.[69]

5.6 Durée d'un litige devant l'agence spécialisée

Nous ne disposons pas d'information à cet égard.

[68]Gaspé, Gatineau, Montréal, Québec, Rimouski, Rouyn-Noranda, Saguenay, St-Jérôme, Sept-Îles, Sherbrooke et Trois-Rivières.

[69]Ci-dessus Section 2.

5.7 Pourcentage de satisfaction des consommateurs

Le sondage de satisfaction effectuée par l'OPC en 2014, a mesuré le degré de satisfaction de certains groupes cibles tels que les usagers du centre d'appel et les consommateurs ayant reçu une trousse d'information.[70]

Usagers du centre d'appel[71] :
Le sondage a été effectué auprès de 1002 répondants en avril et mai 2014

- Le niveau de satisfaction à l'égard du centre d'appels est très bon (note moyenne de 8,6 sur 10, comparativement à 8,8 en 2012).
- Les répondants qui ont utilisé le centre d'appels évaluent très favorablement la qualité du centre d'appels (index de qualité) et l'utilité de l'information (avec des notes moyennes respectives de 9,0 et 8,5).
- La grande majorité des répondants a appelé au sujet d'un problème avec un commerçant (85 % des répondants). Dans la moitié des cas (50 %), cette situation était totalement ou partiellement réglée au moment du sondage.
- Près des trois quarts (72 %) des répondants dont le problème avec un commerçant a été réglé sont en accord (note de 8 à 10 sur 10) pour dire qu'ils ont réglé le problème à l'aide de l'OPC, pour une note moyenne de 8,0.

Consommateurs ayant reçu une trousse d'information[72] :
Le sondage a été effectué auprès de 846 répondants en avril et mai 2014.

- Le niveau de satisfaction à l'égard de la trousse d'information est très bon (note moyenne de 8,5 sur 10).
- Parmi les consommateurs interrogés, 36 % ont été destinataires de la trousse «Durée raisonnable d'un bien », 33 % de la trousse « Délai de livraison, conformité du bien ou service, garantie », et 31 % de toute autre trousse.
- La majorité des répondants (53 %) déclarent que le problème qu'ils avaient avec un commerçant s'est réglé à la suite de leurs démarches auprès de l'OPC.
  - Plus particulièrement, ils déclarent que le problème qu'ils avaient avec un commerçant s'est totalement (41 %) ou partiellement (12 %) réglé à la suite de leurs démarches auprès de l'OPC. Alors que pour plus d'un répondant sur dix (14 %), le problème est toujours en discussion, tandis que pour un répondant sur cinq (20 %), il n'est pas du tout résolu. Plus d'un répondant sur dix (13 %) ne se prononce pas à ce sujet.
- Près des deux tiers (65 %) des répondants dont le problème avec un commerçant a été réglé sont en accord (note de 8 à 10 sur 10) pour dire qu'ils ont réglé le problème à l'aide de l'OPC, pour une note moyenne de 7,8.

[70] SOM, ci-dessus n 56.
[71] *Ibid*, p. 10.
[72] *Ibid*, pp. 15 et 72.

- La résolution du problème permet généralement de récupérer plusieurs centaines de dollars.

5.8 Satisfaction des commerçants

Nous ne disposons pas d'information à cet égard.

5.9 Principaux avantages et inconvénients

Le consommateur qui fait affaire avec une agence spécialisée comme l'OPC obtient de l'information gratuitement relativement à ses droits, incluant des outils (trousse contenant un modèle de mise en demeure). Une telle démarche suffit dans plus de 50 % du temps à apporter une réponse totalement ou partiellement satisfaisante au litige.

Cependant, les informations et outils ne permettent pas de résoudre tous les problèmes. Parfois, le consommateur n'a pas d'autres choix que de saisir le tribunal compétent.

En 2010, l'OPC a effectué un suivi auprès de 117 consommateurs a qui les agents de l'OPC ont recommandé d'aller à la Cour des petites créances. Seule une faible proportion l'a fait. Plus de la moitié des consommateurs contactés n'ont pas présenté de demandes devant cette Cour. Et lorsque le montant en litige était inférieur à 200 $, c'est près de 93 % des consommateurs qui n'avaient entrepris aucune démarche.

6 Rôle des organisations

6.1 Nombre d'associations

Nous avons répertorié 41 associations de consommateurs.

6.2 Lieu

Ces organisations ont leur siège dans toutes les régions du Québec. Cependant, les organismes regroupant certaines de ces associations (Coalition des associations de consommateur du Québec, Union des consommateurs) sont situés à Montréal.

6.3 Conditions légales d'encadrement des associations

Il n'y a aucune règle qui encadre spécifiquement l'établissement et l'opération d'associations de consommateurs au Québec.

6.4 Compétences des organisations

Ces organisations ont l'obligation de réaliser les missions prévues dans leurs chartes constitutives. Celles-ci prévoient généralement qu'elles ont pour principale mission de défendre et de promouvoir les droits et les intérêts des consommateurs. Elles ont aussi pour mission d'aider, d'informer, d'éduquer les consommateurs en général avec une attention particulière pour les clientèles vulnérables ou économiquement défavorisées.

La majorité porte le nom d'ACEF (Association coopérative d'économie familiale). Ces coopératives sont créées en vertu de la *Loi sur les coopératives*.[73] Les autres associations sont des organisations sans but lucratif créées en vertu de la partie III de la *Loi sur les compagnies*.[74]

Plusieurs d'entre elles ont un statut d'organisme de charité reconnu par le gouvernement fédéral.

Un certain nombre d'entre elles sont regroupés soit au sein d'une coalition (Coalition des associations de consommateur du Québec) ou au sein d'une fédération (Union des consommateurs). Cependant un certain nombre préfère demeurer indépendant.

Seulement deux associations[75] sont membres de l'organisation Comsumer's International des consommateurs.

6.5 Rôle des associations

Les associations de consommateurs jouent le rôle de chien garde. Elles dénoncent à l'OPC des problèmes qu'elles ont observés sur le marché. Plusieurs mènent des dizaines d'actions collectives invoquant des règles du droit de la consommation et du droit de la concurrence[76] et concernant des domaines tels que le crédit, la sécurité des produits, les pratiques commerciales, les cartels, etc.

[73] RLRQ, c C-67.2.

[74] RLRQ, c C-38.

[75] Option consommateurs et de l'Union des consommateurs.

[76] Les plus actives dans ce domaine sont : l'Association pour la protection des automobilistes, Option consommateur et l'Union des consommateurs.

Depuis 2010, la *Loi sur la protection du consommateur* accorde à un organisme destiné à protéger le consommateur (qui est constitué en personne morale depuis au moins un an) le droit de saisir un tribunal afin d'obtenir une injonction afin de cesser une pratique de commerce interdite, ou ordonner à un commerçant de cesser d'insérer dans ses contrats une stipulation interdite.[77]

Un grand nombre d'organismes offre un service de médiation/conciliation destiné aux consommateurs ayant une dette auprès de fournisseurs d'énergie tel qu'Hydro-Québec.

6.6 Autres organisations sans but lucratif

Plusieurs organisations (ou universités) offrent des consultations juridiques gratuites qui peuvent porter sur les lois de protection du consommateur. Certains organismes offrent des consultations, mais proposent aux clients de payer un tarif réduit.

7 Régulation privée

L'exemple canadien par excellence est le *Code de pratique canadien des services de cartes de débit*, préparé par l'industrie, les consommateurs, le gouvernement et, surtout, les institutions financières. Ce code est volontaire et non contraignant. Cependant, au fil des ans, les contrats bancaires ont intégré les principales clauses de ce code.

Dans le secteur des télécommunications, l'Association canadienne des télécommunications sans fil a publié un code de conduite où elle indique que les membres adhèrent à ce code.[78]

8 Application de la loi par l'action collective

8.1 Action collective

Au Québec, le *Code de procédure civile* a été amendé en 1978 pour permettre au justiciable d'intenter un « recours collectif », maintenant appelé « action collective » sous le nouveau *Code de procédure civile* [n.C.p.c.], entré en vigueur le 1er janvier 2016.

[77] Art 316 Lpc.

[78] Association canadienne des télécommunications sans fil, *Code de conduite*, 13 août 2009, en ligne : <http://www.cwta.ca/fr/for-consumers/code-of-conduct>.

L'action collective est particulièrement utile dans le domaine de la consommation, qui accapare plus de 40 % de tous les recours intentés, que ce soit dans le domaine du crédit, du respect des garanties, de la responsabilité du fabricant, de fraude ou de coalition anticoncurrentielle, ou de services de voyage. Il est également très avantageux pour les consommateurs qui ne se seraient pas prévalus des tribunaux pour exercer leurs droits.

8.2 Caractéristiques de l'action collective

Le fonctionnement de l'action collective présente certaines particularités par rapport à un recours civil classique. Nous discutons brièvement ci-dessous de ces éléments.

8.2.1 Représentant

La première question à résoudre a trait au choix du représentant. Il peut s'agir, par exemple, d'une personne physique ou d'une association consumériste.

8.2.2 Demande d'autorisation

La première étape consiste à demander à un juge de la Cour supérieure l'autorisation d'exercer l'action collective.[79]

8.2.3 Déroulement du processus

La demande principale doit être introduite dans les trois mois du jugement qui accueille la requête en autorisation, sous peine d'être déclarée caduque.[80]

Le juge possède un rôle accru dans un recours collectif : il est revêtu d'une plus large discrétion pour protéger les intérêts des membres du groupe. Il est désigné pour assurer la gestion particulière de la procédure concernant cette action, à toutes les étapes.[81]

[79] Art 574 Cpc.
[80] Art 583, al. 1, Cpc.
[81] Art 572, al 1, Cpc.

8.2.4 Jugement

Le jugement final décrit le groupe et a pour effet de lier le membre qui ne s'en est pas exclu.[82] Le tribunal peut subdiviser le groupe pour déterminer les dommages lorsque l'intensité du préjudice n'est pas la même pour tous les membres.[83] Le jugement doit être publié dès qu'il a acquis l'autorité de la chose jugée.[84]

8.2.5 Mesures d'exécution

Si la preuve le permet, le montant d'un recouvrement collectif est « établi sans égard à l'identité de chacun des membres ou au montant exact de la réclamation de chacun ». Le juge peut prévoir la liquidation individuelle des réclamations des membres ou la distribution d'un montant à chacun d'eux.[85]

8.3 Nombre de litiges enregistrés en 2015, au cours des trois et des dix dernières années

Nous ne disposons pas d'information à cet égard.

9 Sanctions

9.1 Sanctions

Les sanctions pour le non-respect du droit de la consommation se répartissent selon les recours civils ou pénaux (dans de rares cas, il y a des sanctions criminelles) ou administratifs.

9.1.1 Sanctions civiles

Les manquements aux règles de la formation d'un contrat de consommation sont sévèrement sanctionnés, tant en ce qui concerne les conditions de forme[86] que celles qui régissent le fond.[87]

[82] Art 591, al 1, Cpc.
[83] *Ciment du Saint-Laurent inc.* c *Barrette*, 2008 CSC 64, [2008] 3 RCS 392, par 108.
[84] Art 591, al 2, Cpc.
[85] Art 596, al 1, Cpc.
[86] Art 271 Lpc.
[87] Art 272 Lpc.

Tous les contrats pour lesquels un écrit est requis[88] sont soumis à des règles strictes de formation et à des exigences de forme. Le consommateur a le fardeau de démontrer que les règles prescrites n'ont pas été observées. L'absence d'un contrat écrit lorsque la *Loi sur la protection du consommateur* le requiert constitue une nullité *ab initio* que le juge constate. Lorsqu'un manquement à l'une des exigences de forme prescrites rend le contrat défectueux, sa validité est compromise. Le consommateur peut en demander la nullité.[89] La rigueur de la sanction tient au caractère impératif de la Loi.[90] Enfin, 271 al. 2 de la *Loi sur la protection du consommateur* permet la suppression des frais de crédit en cas de non-conformité portant sur une modalité du paiement, du calcul ou de l'indication des frais de crédit ou du taux de crédit.

L'article 272 énonce les sanctions en cas de manquement aux conditions de fond. La Loi impose au commerçant ou au fabricant certaines obligations telles la garantie légale de qualité,[91] de conformité,[92] de sécurité,[93] de bon fonctionnement pour les automobiles d'occasion,[94] l'évaluation écrite pour les réparations.[95] Le consommateur qui subit un préjudice à la suite d'un manquement à l'une de ces obligations n'a qu'un faible pouvoir de négociation face au contrevenant pour le forcer à exécuter son obligation. La Loi prévoit plusieurs recours pour forcer le commerçant et le fabricant à exécuter leurs obligations, pour permettre au consommateur d'être dédommagé du préjudice subi et pour décourager ceux qui ignorent leurs obligations légales. En plus de ces remèdes, le consommateur peut exiger des dommages-intérêts compensatoires et des dommages punitifs et même joindre les trois recours.[96] Les sanctions de l'article 272 sont disponibles s'il y a eu manquement à une obligation que la Loi ou le règlement imposent et si aucun autre recours n'est prévu. Ainsi, si le commerçant commet une pratique interdite,[97] omet de respecter un engagement volontaire,[98] il est susceptible d'être sanctionné en vertu de cette disposition.

Les dommages réclamés peuvent être compensatoires et punitifs.

La *Loi sur la concurrence* prévoit également des sanctions administratives similaires lorsqu'une personne a commis des pratiques déloyales de commerce[99] telles que des indications trompeuses sur un point important (garantie, prix

[88] Art 23, 54.6 Lpc.
[89] Art 271 Lpc.
[90] Art 261-262 Lpc.
[91] Art 37-38 Lpc.
[92] Art 40-42 Lpc.
[93] Art 53 Lpc.
[94] Art 159 Lpc.
[95] Art 168, 183 Lpc.
[96] Art 272 Lpc.
[97] *Richard* c *Time Inc.*, 2012 CSC 8.
[98] Art 314, 315.1 LPC.
[99] Art 74.01 à 74.1 *Loi sur la concurrence*, ci-dessus n 11.

habituel),[100] ou sur une épreuve de rendement, d'efficacité ou de durée utile d'un produit, la vente au prix d'appel[101] ou la vente au-dessus du prix annoncé.[102] Le Tribunal de la concurrence peut ordonner la cessation du comportement, une ordonnance rectificatrice ou une sanction administrative pécuniaire (sanction civile).[103]

9.1.2 Sanctions pénales et criminelles

L'article 277 de la *Loi sur la protection du consommateur* prévoit les infractions de nature pénale en cas de contravention à certaines dispositions de la Loi ou d'un règlement. Par exemple, constitue une infraction le fait de donner une fausse information aux personnes chargées de l'application de la Loi, d'entraver l'application de la Loi ou d'un règlement, de violer un engagement volontaire,[104] de ne pas se conformer à une ordonnance rectificative rendue par le tribunal[105]ou de ne pas obtempérer à une décision du président. La poursuite doit être intentée dans les deux ans de la date de la perpétration de l'infraction.[106] Les sanctions pénales comprennent une peine d'amende,[107] une ordonnance rectificative[108] et une ordonnance d'injonction.[109]

La *Loi sur la concurrence* prévoit des sanctions de nature criminelle lorsqu'une infraction a été commise en fournissant sciemment une information fausse ou trompeuse sur un point important quant à un produit,[110] pour des infractions liées au télémarketing[111] ou pour la mise sur pied, d'exploiter, de promouvoir un système de vente pyramidale,[112] par exemple.

Enfin, le Code criminel (fédéral) prévoit des sanctions criminelles pour la vente pyramidale,[113] le prêt usuraire (taux d'intérêt annuel effectif dépasse 60 %)[114] et différentes atteintes à la vie privée.[115]

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[100] *Ibid* 11, art 74.01.
[101] *Ibid*, art 74.04.
[102] *Ibid*, art 74.05.
[103] *Ibid.*, art 74.1.
[104] Art 314, 315.1 Lpc.
[105] Art. 288 Lpc.
[106] Art 290.1 Lpc.
[107] Art 278-280 Lpc.
[108] Art 288 Lpc.
[109] Art 290 Lpc.
[110] *Loi sur la concurrence*, ci-dessus n 11, art 52.
[111] *Ibid*, art 52.1.
[112] *Ibid*, art 55.
[113] Art 206 Ccr.
[114] Art 347 Ccr.
[115] Art 183 et s Ccr.

9.1.3 Sanctions administratives

Le président est investi du pouvoir d'enquêter, qui n'appartient pas à l'OPC comme tel.[116]

Il a la discrétion pour choisir le moyen approprié à chaque cas pour mettre fin à une pratique trompeuse, obtenir la réparation des dommages subis par le consommateur et assurer le rétablissement de la vérité. Il peut, à sa discrétion, transmettre le dossier au procureur général pour que soient intentées des poursuites pénales,[117] s'adresser au tribunal pour obtenir une ordonnance d'injonction ou de correction,[118] négocier avec le commerçant un engagement volontaire de respecter la Loi[119] ou transmettre un préavis au commerçant l'avisant de son intention de ne pas renouveler son permis.[120]

9.2 Forme la plus commune de sanction en pratique

Nous ne disposons pas d'information précise, mais tout porte à croire que les recours de nature civils selon les articles 271 et 272 de la *Loi sur la protection du consommateur* sont les plus courants.

9.3 Satisfaction de l'application des sanctions en pratique

Nous ne disposons pas d'information à cet égard.

10 Mesures alternatives de résolution des conflits

10.1 Méthodes alternatives de résolution des conflits

En apparence, les mécanismes alternatifs de résolution des conflits, siéent bien au consommateur, lui évitant frais, longs délais et le stress d'un procès. Ils brillent toutefois par la difficulté d'obtenir la coercition. Ces mécanismes apparaissent sous la forme de méthodes favorisant le rapprochement entre un consommateur et une entreprise, soit en proposant un arbitre dont la sentence est obligatoire ou soit en

[116] Pour plus d'information, veuillez consulter la Section II.
[117] Art 277 Lpc.
[118] Art 316, 317 Lpc.
[119] Art 314-315 Lpc.
[120] Art 333 Lpc.

suggérant des solutions de type conciliation ou médiation aux parties, qui demeurent libres de les accepter ou de les rejeter.

10.1.1 Arbitrage

L'arbitrage des différends permet au consommateur d'obtenir une décision exécutoire contre une entreprise fautive lorsqu'elle est homologuée.

L'article 11.1 de la *Loi sur la protection du consommateur* interdit aux commerçants d'inclure ce type de clauses dans les contrats de consommation. Néanmoins, le consommateur peut soumettre son litige à l'arbitrage après la conclusion du contrat. Cette solution proposée par le législateur accorde au consommateur le choix de recourir à l'arbitrage ou de porter sa cause devant une instance judiciaire (dont la possibilité de participer à une action collective).

10.1.2 Médiation et conciliation

Dans une instance devant la Cour des petites créances, le greffier doit inviter les parties à soumettre leur litige à la médiation, lesquelles demeurent libres d'accepter ou de refuser.[121] En cas d'acceptation, le médiateur doit se conformer au *Règlement sur la médiation des demandes relatives à des petites créances*.[122]

Outre ces options légales de soumettre un litige de consommation à la médiation, il existe plusieurs autres forums, habituellement très spécialisés, qui ont vu le jour.

Par exemple, les consommateurs québécois peuvent effectuer leur plainte devant un organisme fédéral nommé le Commissaire aux plaintes relatives aux services de télécommunications.

Le Programme d'arbitrage pour les véhicules d'automobiles du Canada (PAVAC) administré sous l'égide de l'Association canadienne des constructeurs d'automobiles[123] constitue une excellente illustration de l'arbitrage de consommation. Les consommateurs peuvent y soumettre un problème relié à la qualité d'un véhicule ou à l'interprétation ou à l'application de la garantie du fabricant sur un véhicule neuf.

Le consommateur peut aussi s'adresser à l'Ombudsman des services bancaires et de l'investissement.[124] Cet organisme effectue des enquêtes sur les plaintes déposées par les consommateurs et les petites entreprises. Les plaintes peuvent concerner les fraudes par carte de débit et de crédit, les pénalités relatives à un remboursement

[121] Art 556 Cpc.

[122] RLRQ, c C-25.01, r 06.

[123] Pour plus d'informations, voir le site Internet : <http://www.camvap.ca/fre/consumers_guide.htm>. Au sujet de l'homologation de sentences du PAVAC, voir : *Racine* c *Mercedes-Benz Canada inc*., [2008] JQ no 3987, 2008 QCCS 1897.

[124] Voir le site Internet de l'OSBI : <http://www.obsi.ca>.

hypothécaire anticipé, les conseils de placement et leur pertinence et les différends liés à des transactions. La décision de l'Ombudsman est finale et sans appel. Toutefois, si le consommateur n'est pas satisfait de la solution proposée, il conserve son droit de recourir aux tribunaux civils. Il existe aussi l'ADR Chambers Banking Ombuds Office,[125] dont le fonctionnement est similaire à l'OSBI. L'Autorité des marchés financiers (AMF) est toute désignée pour recevoir une plainte relative à une institution financière québécoise comme le Mouvement Desjardins.[126] L'AMF n'offre aucune compensation monétaire, mais pourra suggérer de choisir un médiateur si les deux parties y consentent.

Les clients faisant affaire avec un fournisseur canadien de services de télécommunications peuvent, s'ils n'obtiennent pas satisfaction à la suite d'une plainte, s'adresser au Commissaire aux plaintes relatives aux services de télécommunications (CPRST) (si le fournisseur est membre du CPRST)[127]. Sinon auprès du Conseil de la radiodiffusion et des télécommunications canadiennes (CRTC).[128] Le processus est similaire à celui du secteur des services financiers.

10.2 Pourcentage de consommateurs et de commerçants satisfaits

Nous ne disposons pas d'information à cet égard.

10.3 Promotion par l'État

Si la résolution extrajudiciaire des conflits prend de plus en plus d'importance, l'avènement de nouveau *Code de procédure civile* est venu confirmer l'intérêt de l'État envers de processus. D'ailleurs, le deuxième alinéa du préambule souligne que: « [l]e Code vise à permettre, dans l'intérêt public, la prévention et le règlement des différends et des litiges, par des procédés adéquats, efficients, empreints d'esprit de justice et favorisant la participation des personnes. [. . .] ». Concrètement, le septième livre du Code est consacré à la médiation et à l'arbitrage.

Ajoutons également qu'en vertu de l'article 556 du *Code de procédure civile*, le greffier de la Cour des petites créances doit proposer aux parties de soumettre leur litige à la médiation, bien que ces derniers aient le choix de refuser.

[125] Voir le site Web : <https://bankingombuds.ca/fr/a-propos>.

[126] Voir le site de l'Autorité : <http://www.lautorite.qc.ca>.

[127] Voir le site du CPRST : <http://www.ccts-cprst.ca/fr>.

[128] Voir le site du CRTC : <http://www.crtc.gc.ca/fra/question.htm#internet_choix>.

11 Relations extérieures et coopération

11.1 Participation du Québec à une organisation composée d'États ayant une politique commune de protection du consommateur

Le Québec est signataire de l'Accord sur le commerce intérieur.[129] Il est membre du Comité des ministres chargés des mesures et normes en matière de consommation et du Comité des mesures et des normes en matière de consommation (CMC)[130] créés en vertu de chapitre 8 de l'ACI.

11.2 Politique et législation communes

Le chapitre 8 de l'ACI s'applique aux mesures et aux normes en matière de consommation. Aucune partie n'est tenue de réduire le niveau de protection des consommateurs existant à la date de l'entrée en vigueur de l'ACI. En vertu des articles 200 et 803 de l'ACI, la protection du consommateur peut être considérée comme étant un objectif légitime et à ce titre, une mesure incompatible avec les objectifs de l'ACI peut, à certaines conditions, être permise.

Depuis 1998, le CMC a permis l'établissement d'accords d'harmonisation formels dans les dossiers suivants[131] :

- Liste harmonisée des pratiques de recouvrement interdites.
- Modèle d'harmonisation des règles régissant les contrats de vente par Internet.
- Accord relatif à l'harmonisation des lois sur la divulgation du coût du crédit au Canada.
- Harmonisation des lois sur la vente directe. Ce modèle offre aux consommateurs une période de réflexion uniforme de dix jours et assure une divulgation claire du contrat.

[129]L'Accord sur le commerce intérieur (ACI) est un accord multilatéral dont les parties sont les gouvernements du Canada, des provinces (dont le Québec) et des territoires canadiens.

[130]Voir le site du CMC : <https://www.ic.gc.ca/eic/site/cmc-cmc.nsf/fra/accueil>.

[131]CMC, Accords formels », 2016, <https://www.ic.gc.ca/eic/site/cmc-cmc.nsf/fra/h_fe00157.html>.

11.3 Membership

Le CMC a élaboré un *Accord de coopération en matière d'application des lois relatives à la consommation*.[132] Cet accord prévoit un mécanisme d'administration uniforme pour demander et fournir des renseignements et de l'aide aux autres Parties.

11.4 Effets de la participation à ce réseau

La participation à ce réseau peut faciliter l'administration et la mise en œuvre des textes législatifs, l'exécution d'un jugement, apporter un soutien dans le cadre d'enquête et permettre l'obtention de renseignements relativement à un commerçant, etc.

11.5 Entente bilatérale/multilatérale

Outre l'*Accord de coopération en matière d'application des lois relatives à la consommation*, le Québec ne fait pas partie d'une entente bilatérale/multilatérale avec d'autres pays (ou états) portant spécifiquement sur l'application des lois de protection du consommateur.

11.6 Contexte transfrontalier

Le *Code civil* prévoit des dispositions spécifiques pour les contrats de consommation qui présentent un élément d'extranéité. L'article 3117 prévoit que le choix de loi ne doit pas priver le consommateur québécois des dispositions impératives de la loi où il réside « si la conclusion du contrat a été précédée, dans ce lieu, d'une offre spéciale ou d'une publicité et que les actes nécessaires à sa conclusion y ont été accomplis par le consommateur, ou encore, si la commande de ce dernier y a été reçue » ou lorsque le consommateur « a été incité par son cocontractant à se rendre dans un État étranger afin d'y conclure le contrat ». Enfin, la loi où réside le consommateur a préséance en l'absence de désignation. Par ailleurs, c'est le tribunal québécois qui a compétence relativement au contrat de consommation qui doit être exécuté au Québec et auquel est parti un consommateur domicilié au Québec.[133]

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[132]CMC, *Accord de coopération en matière d'application des lois relatives à la consommation*, en ligne : <https://www.ic.gc.ca/eic/site/cmc-cmc.nsf/vwapj/Coop_enforcement.pdf/$FILE/Coop_enforcement.pdf>.

[133]Art 3149 CcQ. Voir : Guillemard (2006), p. 130. Voir également : *Chatigny-Bitton* c *Margo Movers International Inc.*, JE 95-1662, EYB 1995-28860 (C.S.), conf par [1996] RDJ 14 (CA).

11.7 Organisations de consommateurs membres d'un réseau régional (ou international)

Oui. Deux associations de consommateurs québécoises sont membres de l'organisation Consumer's International.[134]

12 Conclusion et questions finales

L'encadrement des droits des consommateurs est toujours perfectible. Bien qu'il faille poursuivre la quête d'une meilleure justice en faveur du consommateur, par l'amélioration de l'encadrement, il faut reconnaître que, d'une part, la législation actuelle protège relativement bien le consommateur et, d'autre part, l'interprétation libérale des tribunaux y contribue grandement. Il ne faut point se leurrer, les nouvelles pratiques commerciales et les développements technologiques, notamment, doivent inciter le législateur à réviser constamment le corpus législatif québécois et canadien. Une comparaison avec l'Union européenne démontre une telle nécessité dans de nombreux secteurs. Outre la question de la mise à jour de la législation, une meilleure structure du corpus législatif, destinée à simplifier la compréhension, serait bénéfique aux consommateurs.

Au demeurant, plusieurs éléments sont encourageants. Au fil des dernières années, le législateur québécois a modernisé les lois et la réglementation à plusieurs reprises, notamment pour encadrer le commerce électronique (contrat à distance) et les contrats de télécommunication (ainsi que les autres contrats à exécution successive de services fournis à distance). Si d'autres avancées demeurent souhaitables, dont l'encadrement du crédit à la consommation ou de la location en temps partagé (*time sharing*), il faut saluer ces initiatives.

Reference

Guillemard S (2006) Le droit international privé face au contrat de vente cyberspatial. Éditions Yvon Blais, Cowansville, p 130

[134] Option consommateurs et de l'Union des consommateurs.

Enforcement and Effectiveness of Consumer Law in Romania

Camelia Toader

1 Introduction

In Romania, the consumer protection field has passed through gradual transformations since 1990. Today, consumers in Romania can rely upon similar protections of law afforded to consumers in any EU country. Romanians can rightfully expect that the competent authorities will sanction merchants who fail to respect the rules set forth in the nation's consumer protection legislation. In the field of consumer protection, Romania has reached a fair legislative balance between the rights of consumers and the needs of the marketplace.

2 National Legal Framework for Consumer Protection

Legislation in Romania shows that a considerable effort has been made to promote consumer rights. The main fields of Romania's consumer legislation cover prices, packaging, labeling, advertising, selling methods and unfair competition, the quality and safety of consumer products and services and consumer credit, liability for products and services, access to justice, control over unfair terms and consumer education.

Prior to December 1989, although Romania had a centralized economy and the control of products was made inside the production line, there were several legal acts

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that regulated the field of consumer protection, such as the Law no. 3/1972 *on the activity of domestic trade* and the Law no.7/1977 *on the quality of products and services.*

Nowadays, there is a relatively complex regulatory framework which provides adequate consumer protection. The Consumer Code, issued through the law no. 296/2004, is the main framework for consumer protection, governing the legal relationship between economic operators and consumers in respect with the acquisition of products and services, including financial services. It provides the legislative framework underpinning to the access to products and services, to the correct and complete information of the consumers regarding the essential characteristics of the products. This law also ensures the protection of the consumer's rights and their legitimate interests against abusive practices. According to the provisions of Consumer Code, the Romanian Government should develop and maintain a strong consumer protection policy, taking into account the guidelines set out below and the relevant international agreements (meaning especially the EU law).[1]

However, there are several other laws which regulate consumer protection in Romania, most of them transposing the EU Legislation, such as: Government Ordinance no. 21/1992 *regarding the protection of consumers*[2]; Law no.193/2000 *on unfair terms in consumer contracts*[3]; Law no. 148/2000 on advertising; Law no.504/2002 *on the field of audio visual media*; Law no.240/2004 on producers' liability for damages *caused by defective products;* Law no.*245/2004 on general product safety;* Law no.*363/2007 on unfair business-to-consumer commercial practices;* Law no.*365/2002 on e-commerce;* Law no.*449/2003 on certain aspects of the sale of consumer goods and associated guarantees;* Law no.*608/2001 on the assessment of the conformity of the products;* Government Ordinance no. 106/1999 *regarding the contracts concluded outside the commercial spaces;* Government Ordinance no. 130/2000 *regarding the protection of consumers in respect of distance contracts,* Government Ordinance no. 85/2004 *regarding the distance contract for financial services*, Government Ordinance no. 107/1999 *regarding the selling of tourist packages*, Law no. 457/2004 *on publicity of tobacco products*, Law 190/1999 *on mortgage credit*, Law no. 289/2004 *on consumer credit*. On the institutional level, we can mention Government Decision's no. 747/2007 *regarding the organization and functioning of the National Authority for Consumer Protection*.

Lastly, legal provisions regarding consumer protection can be found in the New Civil Code (Article 1177)[4] and the Civil Procedure Code (hereinafter, the "CPC") (Articles 121 and 125).

[1] Article 3 of the Consumer Code.

[2] This Ordinance was not repealed in conjunction with the adoption of Consumer Code in 2004.

[3] See also: Toader and Popescu (2001), p. 74.

[4] Law no. 287/2009, republished in the Official Gazette of Romania, Part I, no. 505/2011, in force since the 1st October 2011.

The concept of "unfair contract clauses" normally used in contracts between consumers and professionals has been also extended to the relations between professionals. The Law no.72/2013 *on measures to combat the delay in execution of obligations to pay the sums of money arising from contracts between professionals and between them and contracting authorities*[5] introduces the legal regime of unfair contract clauses and practices in the relationships between professionals. According to Article 12 of Law no.72/2013, if the term of payment or the interest or damages, shall be determined manifestly unfair in relation to the professional, then the practice or clause is considered abusive. Such an abusive clause is null and void (Article 15 paragraph 1), and can give rise, under the Civil Code, and damages (Article 15 paragraph 2).

In order to determine the unfairness of a contractual term or practice, the court seized "will consider", as shown in Article 13 of Law no.72/2013, all the circumstances of the case, but in particular: (1) gross deviation from practices established between the parties or from usages conform to public order or morality; (2) breach of the principle of good faith and the principles of diligence in the execution of obligations; (3) the nature of the goods or services; (4) non-provision of objective exemption from the payment terms or interest rates; (5) the dominance of contractual partner in relation to a small or medium enterprise.

The current focus of consumer policy in our country is based on financial services and in particular consumer credit and residential real estate property credit. Recently, the Romanian Parliament adopted Law no.77/2016 on the commissioning of real estate property payment on redemption of obligations through loans *(Legea dării în plată)*. The law that applies to relations between consumers and credit institutions, and assigns claims by consumers it has determined that, notwithstanding the provisions of the Civil Code, the consumer has the right to have the debts arising from credit agreements with all accessories, at no additional cost, by opening payment of the mortgaged property in favour of the creditor, if the term is the one prescribed by law and if the parties to the credit agreement do not reach another agreement.[6] According to this new law, very controversial, especially for the credit institution, the law allows to settle debts resulting from a credit and its accessories under some conditions, such as: (a) the amount borrowed at the time of granting should not exceed 250,000 RON (about 55,000 EUR); (b) the loan was contracted by the consumer to purchase, build, expand, modernize, equip, and rehabilitate a building for housing purposes, and (c) the consumer has not been convicted by final judgement for offenses related to the credit. The law introduces several steps to ensure that banks do not rush to declare early maturity too quickly. Thus, even if they have not been paid three consecutive installments, banks must submit proposals to decrease the impact of restructuring clients' monthly rate, without additional cost and without requiring new guarantees.

[5]Law no. 72/2013, published in the Official Gazette of Romania, Part I, no. 182/2013.

[6]Article 3 of the Law no.77/2016.

This law was challenged before the Constitutional Court by several banks in Romania who argued that it had only a limited temporal scope and therefore should not have been applied to them. In greater detail, according to Article 11 of Law no.77/2016: "in order to balance the risks emerging from the credit agreement and the devaluation of real estate, this law applies both to credit contracts in progress at the time of its enforcement, and to contracts concluded after that date". The crux of the matter before the Constitutional Court was the reconciliation of that provision with the broader idea of legal certainty, specifically the principle expressed in the latin phrase pacta sunt servanda, or agreements must be upheld (paragraph 94). Indeed, the binding force of contracts has been eroded by empowering a judge to interfere in the bargain reached by the parties to the contract, under the guise of re-establishing the economic balance between them, where the uncertain condition of the "unforeseeability" (imprevision) is satisfied. According to the explanatory statement, the adoption of the law was justified by reasons of equity and contractual risk-sharing (paragraph 102) in such situations of economic "unforeseeability". Proceeding to analyse what this condition entailed, the Constitutional Court noted that this condition of "unforeseeability", required, amongst other things, good-faith (paragraph 99). Similarly, the Constitutional Court stated that this law is an application of the "unforeseeability" criterion in the context of a credit agreement and its provisions are not retroactive. Thus, the Constitutional Court observed that the legislator's policy choice was to subject the binding effect of credit agreements to a condition of "unforeseeability". As such, that law applies to all existing contracts, without taking into account the situation of the debtors, or differentiating between the good-faith or the bad-faith debtors or between the ones that can no longer afford to pay or the ones who do no longer want to pay (paragraph 116).

3 Enforcement by Administrative Authorities

Right after the transition to the market economy, the Office for the Protection of Consumers (hereinafter called "OPC") was created.[7] Over the years, OPC acquired an additional responsibility in the public consciousness, besides the role of consumer's rights defender, namely that of a permanent source of advice in the purchase of foods, non-foods and services. Later, a new operating context is set by the Government Emergency Ordinance no. 2/2001, which regulates the establishment of the National Authority for Consumer Protection as a specialized entity of central public administration and as a legal entity, subordinated to the Government. Also, in

[7]The Emergency Government Ordinance no.18/2012. This act represented an entirely new regulation which highlighted the social values of the modern society. Under this act, the basic principle was the protection of the consumer. It must be also said that before 1989, there was a similar authority which had a few of the competences of the Office for the Protection of Consumers: the General Inspectorate for the Quality of Products (IGSCCP) which was responsible for the quality of products.

all normative acts in force, the name "Office for Consumer Protection" has been replaced with the National Authority for Consumer Protection (hereinafter, the "NACP"). The NACP coordinates and carries out the strategy and policy of the Romanian government with regard to the enforcement of consumer protection in Romania, preventing and combating the practices that jeopardize consumers' life, health, safety or economic interests.

3.1 Structure of the NACP

The structure of the NACP is provided by Government's Decision 700/2012 regarding the organization and functioning of the National Authority for Consumer Protection. The employees of the NACP are public servants and are appointed through the procedures established by the Law no. 188/1999 on the legal status of the public servants.

According to this legal act, the NACP is led by a president assisted by two vice presidents. Currently the NACP has the following structure: a president, the president's cabinet-an internal audit compartment- two vice presidents-a general secretary, and four departments: (1) Control and Market Surveillance, (2) European Harmonization. Strategies, Associations and Legal Department, (3) Budget, Administration and Human Resources; (4) Precious Metal and Stones and Kimberly process. The authority has also in subordination eight regional offices for consumer protection and the National Centre of Test Expertize Larex Products in Bucharest.

Apart from the NACP, there are specific agencies charged with the oversight of regulation of particular markets of relevance to consumer protection.

In the energy sector, the National Authority for Energy (ANRE) is the independent body which regulates controls and monitors the electricity and gas markets in Romania. It has been established by the Government Decision no. 1428/2009 with the purpose to protect the interests of users and consumers, promote competition and ensure efficient, cost-effective and profitable nationwide services with satisfactory quality levels. The Authority mission includes defining and maintaining a reliable and transparent tariff system, reconciling the economic goals of operators with general social objectives, and promoting environmental protection and the efficient use of energy. It provides an advisory and reporting service to the government and parliament, and drafts observations and recommendations concerning issues in the regulated sectors of electricity and gas. The Authority maintains bilateral relations with all the European regulators and in particular with those belonging to countries sharing a border with Romania. Furthermore, it cooperates with many non-UE Regulators to exchange best practices and share experiences. As regards Order no. 16/2015 of the National Authority for Energy's, consumers have the possibility to make complaints about the electric services. The complaints may concern billing, difficulty contacting the company, dissatisfaction with the service or other issues.

In the telecommunication sector, the National Authority for Management and Regulation in Communications (ANCOM) is the body that protects the interests of

the communications users in Romania, by promoting competition in the communications market, ensuring the management of scarce resources and encouraging innovation and efficient investments in infrastructure. The authority was set up by Government Ordinance no. 22/2009. The main characteristic of the authority is to protect the interests of the communications users in Romania, by promoting competition in the communications market.

The authority receives complaints from electronic communications in respect with mobile telephony services and internet. The authority received and settled more than 2000 complaints from the electronic communications users in Romania, by 19% more than in 2014.[8] Almost half of the complaints referred to mobile telephony services, registering a slight growth compared to the previous year (+5%), as revealed by the most recent ANCOM statistics which show that, by mid-2015, the Romanians used 22.7 million active SIM cards (prepaid and subscription-based).

3.2 Enforcement Powers

The NACP has a very wide range of competences (Article 3 of Government's Decision 700/2012 *regarding the organization and functioning of the National Authority for Consumer Protection*). Firstly, the authority contributes to the development of new legislation: proposes consumer protection draft laws to the Government and notifies the European Commission about the legislative measures adopted in the areas affected by transposed directives. Secondly, the NACP solves individual consumer complaints and offers counseling to traders. Thirdly, it carries out controls on producers and vendors and applies sanctions or imposes measures against merchants found to have violated consumer law in order to raise consumer awareness. Lastly, the NACP supports consumer associations to achieve the objectives prescribed by law and also consumer associations in establishing and operating consumer advice, information and education centers.

In order to limit consumer harm, the NACP uses several dissuasive measures, the authority being also in charge with the investigation by permanently stopping the marketing of, and withdrawing certain products from human consumption, or temporarily stopping service delivery, import, manufacturing, marketing or use of products or services, in order to correct deficiencies or even the destruction of dangerous products from the market.

The NACP has also powers to sanction consumer law breaches. The main source of law that governs the sanctions for breaching consumer law is Government Ordinance no. 21/1992. The Consumer Code does not include any provisions in this regard. Contraventions (any breach) of Government Ordinance no. 21/1992 (Chapter IX) will trigger fines and/or complementary sanctions such as: temporary

[8]See http://www.ancom.org.ro/en/ available on 10 June 2016.

closing of the company for 6–12 month, the definitive closing of the company and the suspension or withdrawal of the operating license.

The Criminal Code also provides sanctions for breaching consumer law.[9] Generally, criminal sanctions include imprisonment and fines (Article 357[10] and 358[11]). The most common sanction applied is the fine, but imprisonment shall not be excluded. However, the sanctions imposed depend upon a set of various aspects, such as the facts of each case, the circumstances, the person committing the offence, etc. The procedure before the NACP presents the characteristic of a contradictory procedure, as the accused parties have the right to defend themselves by any means, to present evidence and also to present written observation. The decision of the NACP may be challenged before court.

Even though the NACP is the only administrative authority which can enforce consumer law, there are regularly press releases which reflect that its activity is productive and very efficient.[12] It should be also mentioned that in respect of the unfair terms regarding the credit contracts in Swiss Franc, the authority not only has had extensive negotiations[13] with the banks which granted these type of credits, but also initiated a lot of successful class action suits.

[9]According to Government Ordinance 21/1992, its provisions shall be completed by the provisions of the Criminal Code and the Criminal Procedure Code.

[10]Article 357 of the Criminal Code on Forgery or substitution of foodstuffs or other products: "Preparation, offer or exposure for sale of food, drink or other falsified or substituted products, if they are harmful to health, is punished with imprisonment from 3 months to 3 years or a fine and deprivation of certain rights. Preparation, offering or exposing for sale or substituted counterfeit drugs which are injurious to health shall be punished with imprisonment from 6 months to 5 years and deprivation of certain rights."

[11]Article 358 of the Criminal Code on marketing of altered products: "The sale of food, beverages and other products knowing that are altered or exceeded the shelf life if they are harmful to health, is punished with imprisonment from 6 months to 3 years or a fine and deprivation of certain rights. The same punishment is applied for release, for consumption purposes, of meat or meat products, cuts from animals' stolen veterinary control, if they are harmful to health. The sale of drugs, knowing that they are counterfeited, altered or that the period of validity expired, if harmful to health or have lost all or part of the therapeutic efficiency, shall be punished with imprisonment of one to five years and deprivation of some rights".

[12]For instance, according to a press release of 28 November 2016, the NACP conducted a verification check of observance of legal provisions on consumer protection in car repair shops in the period 10.24.2016 – 04.11.2016, when 514 operators were checked, finding violations in 251 of them (48.83%). Also, according to a press release of 5 December 2016, during 07-18.11.2016, the NACP developed a verification of compliance with legal provisions on toy safety, including online commerce and there were applied 560 sanctions, including fines amounting to 303,973,200 lei and 257 warnings for violating the rights of consumers.

[13]According to the information available on the NACP's website (communication of 18 March 2015), it invited banks to negotiations to find significant long-term solutions. The authority also announced that 240 complaints were registered from consumers with mortgages and personal loans, which borrowed in CHF. Of these, 176 were analysed by ANPC, noting the possibility of abusive clauses related to: (1) Adjust interest to the bank, "in event of a significant change in the money market"; (2) Amendment margin fixed interest, banks taking advantage of the ignorance of consumers or restrictive situation in financial terms; (3) penalty fee (4) management fee, a percentage of the entire loan amount.

4 Enforcement by Courts

4.1 Independence of Justice

In Romania, the independence of justice is openly affirmed by courts and judges. Organized by the Law no. 304/2004 on judicial organization, the judicial system in Romania is structured as a pyramid, led by the High Court of Cassation and Justice. The court system comprises also 15 courts of appeal, 41 tribunals, 4 specialized tribunals and 177 courts of first instance. Guarantees of the independence of judges are provided both by the Constitution and the laws on judiciary on following matters. Judges are appointed through a public contest and all career decisions are rendered by an independent body, the Superior Council of Magistracy. The judges are independent and obey only to the law and decide on their own competence to solve the cases. Only superior courts may review the court decisions.

4.2 Jurisdiction

Unfortunately, in Romania, there is no specialized tribunal in charge of consumer disputes, the cases are normally attributed to civil chambers of the respective courts. If the case concerns a sanction imposed by the NACP, it shall be attributed to the administrative chamber of the respective competent court. As the number of cases increased substantially in the last years, mostly due to the financial crises, it is conceivable that specialized courts or chambers to be created.

In respect with consumer disputes, the cases can be referred to the courts of first instance (*judecătorie*) or to the tribunal, depending of the amount of the value of the dispute (if the amount is below of 200,000 lei or 45,000 €, the court of first instance is competent; if the amount is superior to 200,000 lei or 45,000 €, the tribunal is competent). A decision rendered at the level of courts of first instance may be challenged in appeal at the next court level.

Regarding to the territorial jurisdiction, according to the Article 121 of the CPC, the requests made by professionals can be brought only before the jurisdiction where the consumer has his habitual residence. However, in accordance with the Article 126 CPC, the consumer and the professional can agree upon the choosing of the competent jurisdiction only after compensation can be requested. As for the consumer, according to the Article 107 CPC, he or she has the choice to sue the professional before the jurisdiction where he has the habitual residence or before the jurisdiction where the professional has its habitual residence (alternative jurisdiction).

4.3 Parties to a Judicial Procedure

The NACP or other public authorities can sue professionals if they find that the contracts concluded with consumers contain unfair terms (Article 12(1) of the Law 193/2000). They also have the possibility to introduce class actions (Article 12 (3) of the Law 193/2000).

4.4 Collective Redress

Since 2000, the CPC provides the possibility to group together similar claims arising from a single or from closely related wrongful act(s) or from unfair business practices in a single proceeding to enable more efficient resolution and compensation for the victims (Article 59). According to Article 100 CPC, the fields of application of collective redress action are not expressly issued, but one can deduce that this type of action can be used in various fields. Of course, the applicants shall prove the interest to judge all the actions together. The main characteristic of the form of collective redress is that such a procedure can be used by consumers who suffered the same damage caused by the same producer, importer, business person or retailer, and has derived from the same infringement. Such an action can be initiated by a consumer association, consumer association can be explicitly granted by consumers with a power-of-attorney for bringing such a claim. In these types of procedure, damages can be granted to the consumer associations (plaintiff) which have to be spent only for consumer protection purposes. Also, compensations for damage suffered by consumers can be granted. The court judgment has a binding force (*res judicata*) for the infringer, the plaintiffs, and for all persons who suffered damage from the same infringement and have not declared that they will bring individual claim for damages. Recently, this procedure was very used by the NACP to initiate cases against banks in respect with the unfair terms in the loan contracts.

4.5 Procedure

A consumer who wants to address a claim to the court shall comply with all the general conditions required to initiate court proceedings, there is no particular procedure applying to cases involving consumer protection. The law doesn't impose a mandatory legal representation. Furthermore, the consumer does not have to follow an administrative procedure prior to the action in court which simplifies the procedure before the court and exempts consumer for extra-formalities. However, we believe that a special procedure should be drafted for consumer litigations in order to facilitate an effective access and a more reasonable delay for the consumers facing a particular problem (i.e. enforcement of a possession order). As the current procedure

might be quite long mostly due to the regularization period (the period when the judges proceed to a formal exam of a case in order to check if the procedural requirements of an action are fulfilled), the consumer may suffer significant prejudice during this time. In addition, in event of cancellation of an unfair term in a credit contract, the legislation doesn't provide what happens with this contract, how this judgment may be enforced when they have effects in more cases.

As for the burden of proof, in accordance with Article 4(3) of Law no. 193/2000 *on the unfair terms*, if a seller claims that a standard pre-phrased clause was negotiated directly with the consumer, it is his duty to present evidence in this regard. Likewise, Government Decision no.85/2004 *concerning the distance marketing of consumer financial services* provides that any contract term or condition providing that the burden of proof of the respect by the supplier of all or part of the obligations incumbent on him should lie with the consumer shall be an unfair term within the meaning of the Law no. 193/2000 on unfair terms.

4.6 Costs

The claims brought in reference of consumer protection are exempt from any tax, whereas the applicant is a natural person or consumer protection associations (Article 29(1)(f) of the Government Ordinance no. 80/2013 *regarding the judiciary fees)*. This facility for consumers and for consumer protection associations is meant to encourage litigation and also to make them rely on the rights that are granted through consumer protection legislation. Although the claims are exempted from any fee, the consumer can still ask for a financial aid under the Government Ordinance no. 51/2008 in order to get reimbursed for the legal assistance fee, expert fee or bailiff fee.

4.7 Case Law

The jurisprudence of Romanian courts in this field is rich, a series of terms having been declared unfair: conditioning the contract termination of full payment of amounts due to the subscriber[14]; penalties for delay that can exceed the amount on which they are calculated[15]; compensation payable by the consumer in the situation of cancellation of contracts before the minimum contract period[16]; calculation of the damage caused from the amount of 150 euro and the payment of a compensation if the customer wants the transition from extra Internet Mobile Roaming 1GB to

[14]Civil decision no. 24 598 of 18.12.2013 of the Bucharest District 1 Court.

[15]Civil decision no. 28 of 01.08.2015 of the Constance Court.

[16]Civil decision no. 3519 of 03.26.2015 of the Court of Constanta.

Internet Mobile Roaming 500MB value in euro lower, before the expiry of the minimum duration of the contract, the customer will pay as compensation.[17]

5 Enforcement by Alternative Mechanism for Resolution of Consumer Disputes

The ADR mechanism in Romania provides arbitration and mediation. While arbitration procedure is very similar to the common judicial procedure due to provisions that regulate notifications, summoning, compatibilities and binding effect, mediation is far more different due to the fact that the mediator's activity involves mostly counseling and the mediation agreement is essentially non-binding. One cannot affirm whether the ADR mechanism is promoted by the State as the most effective mean of enforcement of consumer law, but one can say that ADR is highly encouraged in general as it constitutes a way of solving a legal conflict in less time than before a court and as a manner to decrease the number of pending cases. However, ADR suppose a financial contribution that it's supported by both parties, meaning also the consumer. The State lays the choice regarding the procedure to follow-court or ADR to the consumer.

More recently, the Alternative Dispute Resolution Centre of Banking (CSALB) was created under the Government Ordinance no. 38/2015 *on the Alternative Dispute Resolution between consumers and retailers nationwide*, transposing Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC. CSALB's mission is to organize, manage and monitor settlement through ADR procedures, disputes between consumers and traders whose activity is regulated, authorized and monitored by National Bank of Romania, as well as subsidiaries of traders carrying out activities on the Romanian territory banking.

A site has been set up by the European Commission to help unsatisfied customers for each Member State (http://www.eccromania.ro/EN). One can use it to make a complaint about a good or service you bought over the internet and find a neutral third party ("dispute resolution body") to handle the dispute. In some countries, traders are allowed to submit complaints about consumers.

5.1 Arbitration

The CPC (The Fourth Book) provides the possibility for Parties to settle their disputes outside the courts of law when the rights and obligations in question can

[17]Civil sentence no. 8254 of 11.20.2015 of the Bucharest Court.

be subject to an extra judiciary settlement. Arbitration[18] is excluded in the maters which the parties cannot apply to rights and obligations on which the parties are not free to decide themselves (Article 542). The general arbitration procedure imposes that claims can be submitted to arbitration only if Parties agree by means of arbitration clauses ("compromise clause") included in the agreement which is the source of the dispute or by a separate arbitration agreement ("compromise convention") in which parties recognize the jurisdiction of the arbitration tribunal. It is compulsory for parties to agree upon arbitration only in written form, other forms of consent will not be considered as a valid arbitration agreement. Further trial will be submitted to the relevant provisions of the CPC, the internal rules of the institution which provide the arbitration procedures, but mainly, the Parties' agreement will govern the rules of the arbitration agreement. Thus, the agreement will indicate the law applicable to the trial, the number of arbitrators (less complex disputes are usually settled by one or two arbitrators), the name of the arbitrators or the arbitrators' appointment procedure.

When agreed by Parties, arbitration clauses bind the disputes arising from the contract to the exclusive jurisdiction of the arbitration tribunal and further claims from the contract submitted to courts of law will be considered inadmissible and repelled in consequence.

Every arbitrator, whether nominated by a party or appointed independently, must carry out his duty on behalf of both parties and this should "manifestly and undoubtedly" be seen to be the case. An arbitrator must not only act impartially but he must also be understood to be completely free of any relationship which may call into doubt his independence, other than as disclosed by the arbitrator and accepted by the parties as not having a bearing on the proceedings. According to the rules of the Chamber of Commerce and Industry of Romania, one can become associate member by filling up the application form and approved by the Management Board of the Chamber of Commerce and Industry of Romania, after analysis and documentation on file.[19]

In conclusion, it should be added that, since the arbitration clause is listed in Appendix, point 1 of the Law no. 193/2000 *on unfair terms in consumer contracts* among the unfair terms, in the matter of consumer disputes arbitration is not often used.

5.2 Mediation

The law of mediation[20] has a distinct and unitary statute since 2006, enacted by Law no. 192/2006 *on mediation and organizing the mediator profession*. As a general

[18]See Leaua and Baias (2016).

[19]More information can be found on: http://ccir.ro/members/how-to-become-a-member-of-ccir/.

[20]See Lefter and Ignat (2016).

principle, mediation is not mandatory for the parties, being considered by the Romanian judicial system as a voluntary, impartial, neutral and confidential procedure meant to settle the dispute both without a court action but also in any stage of a trial. There is an obligation for the authorities with jurisdictional competences to inform the parties on the possibilities and advantages of using mediation procedure in respect also with consumer law. The general rule provided by the CPC calls for an active role of the judge in trying to reconcile the parties on an amiable base, at any stage of a trial. The judge will invite the parties in a meeting to present the advantages of the mediation procedure (this meeting is free of charge for the parties). The law also provides civil fine if the parties fail to participate in an agreed meeting. The judge will dismiss the case if the parties reach a transaction, by mutually reaching a convenient, efficient and sustainable solution. Mediation relies on the cooperation among parties and on the use, by a mediator, of certain specific methods and techniques, based on communication and negotiation. In exercising its competences, the mediator shall not have decision power in terms of the contents of the agreement the parties may reach, but can provide guiding as for the Parties to verify the lawfulness of their agreement. The mediator shall ask for external opinions from specialists if difficult or controversial aspects occur in the case, but still the mediator has to keep its independence and impartiality.[21] In a recent decision, the Constitutional Court held that the essence of mediation is the confidence that parties grant to the mediator, as being a person qualified to facilitate the negotiation between them and to support them for the resolution of the dispute, by obtaining a convenient solution for both parties.[22]

6 Consumer Organizations and Enforcement of Consumer Law

Government Ordinance no. 21/1992 *on consumer protection*, republished, indicates that consumer associations are considered NGOs as legal entities under the law, and that, without seeking to achieve profits for their members, have the sole purpose of defending rights and legitimate interests of their members or consumers in general. Consumer associations are entitled to be social partners in the consultative councils dealing with consumer issues. Consumer associations defending the rights and interests of consumers in general are rightfully social partners in the advisory councils provided in the Ordinance, if: (a) they have at national level at least 3000 members and branches in at least 10 counties; (b) at local and county have been in activity for a period of at least 3 years.

[21] Păncescu (2008), pp. 114–119.

[22] Constitutional Court's decision no. 397 of 15 July 2016, published in the Official Gazette no. 532/2016, first part of 15 July 2017, paragraph 29.

Consumer associations that protect only the interests of their members can become social partners entitled to representation in consultative bodies involved in consumer protection if they have at least 800 members. The senior management and specialized employees in bodies of public administration and the decentralized public services of ministries and other specialized bodies of the central government, charged with the consumers protection issues do not have the right to hold positions in the governing bodies of consumers associations.

The competences of consumer organizations are very wide (Article 60 of Government Ordinance no. 21/1992 *on consumer protection*).[23] These organizations can require from the competent authorities to take measures to stop production or to withdraw products or services that do not provide the documents prescribed by law or that endanger life, health or safety of consumers.

The role of the consumer organizations is very important since they are normally consulted during the elaboration of normative documents, standards or specifications that define the technical characteristics and quality of products and services for consumers. According to the law, they have the right to initiate legal actions regarding a matter of consumer law.

The Association for Consumer Protection in Romania plays an important role in the enforcement of consumer law. It focuses on the representation of interests at the level of making decisions of interest to consumers, consumer access to justice, consumer information and education, consulting in the field of consumer protection, strengthening cooperation with other consumer organizations in Romania, representation in national and international advisory bodies, participation in European and international networks. In respect with the free legal aid, the action is already exempted by law from any fee. Thus, the main role in respect with the enforcement of consumer law is the possibility to organize class actions.

7 Private Regulation

Private regulation is part of a broader and highly significant shift toward global private governance. In some sectors companies created associations in order to better protect their interests. In Romania, we find such regulation in the meat sector (the Romanian Association of pork producers), cosmetics (the Romanian Union of Manufacturers of cosmetics and detergents), steel (the Union of steel producers in

[23]For instance, the consumer organization can: (1) require operators making products and services for special conditions to meet the needs of consumers with disabilities or elderly; (2) request and obtain information on price and quality characteristics of products or services likely to help consumers in their decision on their purchase; (3) initiate its own actions to identify where operators do not respect consumer rights provided by law, and cases of non-compliance of the products or services, and to refer, in an emergency procedure; (4) inform public opinion through the media, about the deficiencies of quality for products and services, and the harmful consequences for their consumers; (5) initiate legal proceedings to defend the rights and legitimate interests of consumers.

Romania) and medicines (Romanian Association of International Medicines Manufacturers) etc.

In addition, the organizations created by the companies acting in a particular sector normally adopt guidelines to be pursued. For instance, in order to encourage ethical competence and correct promotion of pharmaceutical products, the Romanian Association of International Medicines adopted in 2006 the "Code of Ethics in the promotion of drugs". The Code of Ethics contains provisions regarding the marketing authorization, the information to be made available, the promotion of drugs etc. The content of the Code of Ethics is available on ARPIM's site.[24]

Sector regulation plays a key role because it designs regulatory framework. These unions normally don't initiate proceedings; they just ensure that the sets of conducts are respected, which is regrettable.

8 External Relations

8.1 European Union

Consumer protection is probably the most central issue of European economic integration for it brings into very sharp relief the dialectics for open borders, protectionism and *bona fide* intervention of the Member State to protect legitimate values and goals even if at the expense of interrupting the free flow of goods on which the idea of a common marketplace is postulated.[25]

Romania is a member of the European Union since 1st of January 2007. In a decade of membership, Romania has done considerable efforts to apply the common policy of the European Union.[26] As a consequence of the EU membership, The NACP is member of BEUC (European Consumer Organization). The NACP has recently initiated the transposition of Directive 2014/17/EU[27] on credit agreements for consumers related to residential real estate property through the adoption of the law wishing to introduce a series of new measures to protect borrowers with mortgages.

In respect with the enforcement mechanism, even though Regulation (EU) 2015/1051 of 1 July 2015 entered into force currently, Online Dispute Resolution platform (SOL) states currently express that Romania has not yet ADR entities (those which

[24]See http://arpim.ro/codul-de-etica/.

[25]Wetherill (1997), p. 1.

[26]See also: ECJ C-110/14, Costea, ECLI:EU:C:2015:538; C- 92/14, Tudoran, ECLI:EU:C:2014:2051; C-74/15, Tarcău, ECLI:EU:C:2015:772; C-143/13, Matei, ECLI:EU:C:2015:127; C-348/14, Bucura, ECLI:EU:C:2015:447, which prove that Romanian legislation grants a proper protection to the consumers.

[27]Directive 2014/17/EU European Parliament and of the Council of 4 February 2014 on credit agreements for consumers related to residential real estate property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010, OJ 2014, L 60/34.

will help solve disputes between traders and consumers outside the courts). Therefore, even if a Romanian merchant would like to apply ADR procedures currently in its commercial relationships with consumers, it will have to wait a while, until at least the ADR entity will exist in Romania. It can therefore be considered as NACP currently cannot yet impose fines in respect of infringements of these new legal obligations incumbent Romanian traders.

The Ordinance no. 38/2015 on the Alternative Dispute Resolution between consumers and retailers[28] is not currently implemented properly; there are delays in settling platforms in respect with the establishment of Alternative Dispute Resolution Centers/Platforms. The NACP has not yet created such a platform; the only Alternative Dispute Resolution Center is in the field of Banking (CSALB).

8.2 Other Organizations

Romania's accession to the Organization for Economic Co-operation and Development is a strategic objective of the Romanian foreign policy, being included in the 2013–2016 government programs. Romania reaffirmed in 2012 its intention to become a member of the organization.[29]

9 Conclusion

The current Romanian system of consumer protection is aligned to the standards set by the European Union: the national legislation existing prior to the EU accession was modified in accordance with the European legislation. At the administrative level, there is only one authority in charge of the enforcement of consumer legislation. Thus, there is a lack of other specialized agencies and the duty of the NACP to ensure at the national level the respect of all the legal acts in respect with the consumer protection, by both controlling and sanctioning at the same time, it's very big. As a consequence, the enforcement mechanisms are weak, partially due to lack of resources, institutional capacity, and limited enforcement powers of regulators. Public servants claim that their salaries are too low.

It may also be noted that the legislation doesn't provide legal provisions in reference of the coordination between collective actions concerning unfair terms

[28]This Ordinance transposed Regulation (EU) no 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR), 2013 OJ, L 165/1.

[29]According to the information available on the website of the Ministry of Foreign Affairs, https://www.mae.ro/en/node/18543.

which succeeded and the individual cases where the consumer lost the case in respect with the same contractual provisions.

However, the current national system of enforcement of consumer law has many advantages. There is no fee to pay in order to sue a company which sells goods or provides services; the system is very accessible for consumers. As for the procedures, administrative or judiciary, they are not complicated; there is no mandatory procedure before submitting an action to the court.

I strongly believe that the level of the current system of consumer protection is mainly due to European integration, since the EU accession of Romania stimulated competition and induced producers to achieve maximum efficiency in order to protect, and *a fortiori* to expand, their market share. Even the ECJ underlined that in respect with some transpositions of the directives in the field, the Romanian legislation chose a high standard of protection for the consumer.[30]

Although considerable effort has been made by the judiciary system and by the NACP, the Government should set up a coherent policy in terms of consumer protection. Empowering consumers means providing a robust framework of principles and tools that may enable them to drive a smart, sustainable and integrated economy. Empowered consumers who can rely on a robust framework ensuring their safety, information, education, rights, means of redress and enforcement, can actively participate in the market by exercising their power of choice and by having their rights properly enforced.

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Wetherill S (1997) EC consumer law and policy. European law series. Longman, London, p 1

[30]For instance, in the Case C-143/13, Matei, ECLI:EU:C:2015:12, the Court held that "Article 4 (4) of Law No 193/2000 which is intended to transpose Article 3(3) of Directive 93/13 and the annex referred to by that directive, by means of a mechanism consisting in drawing up a 'black list' of terms to be regarded as being unfair. Moreover, such a mechanism is one of the more stringent measures that Member States may adopt or retain in the area covered by Directive 93/13 to ensure a maximum degree of protection for the consumer which is compatible with the EU law".

Singapore Consumer Law

Gary Low

1 Overview of the Consumer Market

Singapore has a highly developed free market economy, with a large manufacturing base, but also increasingly important high-tech as well as services sectors. It has a population of over five million, and a GDP per capita of over USD 52,000 as at 2015,[1] being second in Asia behind only Japan. About half its population is affluent, and thus, taken as a whole, has considerable spending power.[2] The country capitalises on its historic geographical position as a port of transhipment and is a major facilitator of entrepot trade in the region. It is one of the freest economies in the world, and has concluded FTAs with the US, the EU, and China, just to name a few.[3] The upshot of all this is an increasingly affluent Singapore consumer with an ever-expanding range of products and services to consume from. Singapore's approach regarding consumer law and policy can be characterised as light-touched: empowering consumers with remedies to seek their own redress, and eschewing rigorous enforcement in favour of consumer education. Although consumer rights as well as the enforcement framework have strengthened in recent years, it is important to realise that Singapore's small hinterland and dependence on imported goods

[1]World Bank: Doing Business in Singapore (data.worldbank.org/country/singapore).

[2]DP Credit Bureau news release: New Insight Reveals the Nine Faces of Singapore Credit Consumer Behaviour (www.dpgroup.com.sg/Attachments/98_DP%20Mosaic%20Release%20FNL.pdf).

[3]Although the legality of EUSFTA is currently in issue before the Court of Justice of the European Union (CJEU).

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means it is very much a rule-taker, and policy makers are keen to avoid raising consumer standards so high as to become barriers to entry to Singapore's market.

Household internet penetration rate is about 88% and growing.[4] Nine in every ten households owns a mobile device.[5] An estimated 49% shop online at least once a month. Major international online retailers have in recent years established a local presence as a result of growth potential here and regionally.[6] The government has been actively encouraging local and foreign businesses to do so through a variety of initiatives and subsidies, seeing e-commerce as contributing to economic growth and job creation.[7] E-commerce in Singapore is developing apace, with cross-border online shopping set to balloon,[8] with predictions that the value of online spending will outstrip offline shopping by 2020.[9]

That having been said, the present paints a different picture. A 2015 government survey notes that online purchases account for a mere 4% of overall consumer spending.[10] 56% of Singaporeans are estimated to shop offline as their main mode of purchase, with between a third and a quarter expected to increase the proportion of offline spending within the next 2 years, with this being especially true for those in the 18–34 age group. The persistence of offline spending can be attributed to Singapore consumers exhibiting a 'mall culture',[11] and malls responding to the threat posed by e-commerce by sharpening their competitive edge through a 'retailtainment' strategy, hoping to turn what would otherwise be a mundane visit to a mall into an entertaining experience.[12] Another factor affecting the size of the domestic e-commerce pie is that consumers tend to prefer shopping offline for more expensive products than offline, and vice versa.[13] This behaviour appears quite rational, since inter alia the risk (of defect) is mitigated when inspection prior to purchase is possible. For many businesses, though, these different modes of selling are seen to be complementary. Indeed, an increasing number of traditionally brick-and-mortar retainers are adopting an omnichannel market strategy, thus enabling shoppers the opportunity of a look-and-feel before deciding whether to buy a product

[4]According to 2014 statistics by the Infocomm Development Authority (IDA) of Singapore (www.ida.gov.sg/Tech-Scene-News/Facts-and-Figures/Infocomm-Usage-Hrewqouseholds-and-Individuals).

[5]CBRE APAC Consumer Survey 2014: Singapore, (www.cbre.com/research-and-reports/apac-consumer-survey-2014-singapore) at p. 4.

[6]Regionally, Singapore's share of the e-commerce pie is larger than that of its immediate neighbours Malaysia and Indonesia: Kearney (2015).

[7]See for instance, Spring Singapore's Innovation and Capability Voucher scheme and their Capability Development Grant, IDA's iSPRINT grant, and tax allowances and credits under IRAS's PIC grant; and Tan (2015).

[8]'Singapore leads in APAC online buying: report' (14 January 2016, Channel News Asia).

[9]'More Singaporeans Turn to Virtual Stores for Shopping' (22 September 2014, Business Times).

[10]Lim (2015b).

[11]Paterson (2014).

[12]Footnote 6 at pp. 6–7.

[13]Ibid.

(online).[14] The suggestion is that while electronic commerce is gaining traction and indeed importance for consumer law and policy, concerns with traditional means of consumption cannot be so quickly neglected.

2 Consumer Law & Policy

Singapore, at present, has a slew of legislative instruments that collectively are aimed at protecting consumers specifically. This is a relatively recent development. Given Singapore's English common law heritage—having achieved independence from the UK only since 1963 and Malaysia in 1965, and with a legal autochthony movement which only gained traction in the 1990s—it is only natural that it inherited and preserved the English approach for much of its post-independence legal history.

At a general level, a key plank in protecting consumers in the marketplace remains the Sale of Goods Act (SOGA),[15] which for all intents and purposes mirrors the UK's Sale of Goods Act 1979 from which it is derived. Applicable to all, and not only consumer contracts, that Act protects consumers as purchasers of goods chiefly in that it has provisions obliging sellers to take into account the description, quality, purpose and title of the goods so sold.[16]

Another important part of its English heritage is the Unfair Contract Terms Act (UCTA),[17] which is derived from the UK's own version.[18] The English lawyer will therefore be unsurprised in that Singapore consumer contracts may not exclude or restrict liability for death or personal injury, whereas other contractual terms limiting or exempting liability on the part of the seller are subject to a judicial control of reasonableness.

The prototypical consumer protection legislation in Singapore is its Consumer Protection (Trade Descriptions and Safety Requirements) Act of 1975,[19] and one might find parallels in its counterparts in the UK[20] and Malaysia,[21] from which it drew inspiration. This Act, as the name suggests, was primarily concerned with ensuring accurate labelling on consumer products, as well as catering for the recognition and establishment of safety related standards.

[14] Ibid.

[15] The Sale of Goods Act, Cap 393, 1999 Rev Ed (originally enacted from the UK Sale of Goods Act 1979 c 54) See also the Supply of Goods and Services Act, Cap 394, 1999 Rev Ed, taken also from the UK Supply of Goods and Services Act 1982, c 29.

[16] Sections 13–14.

[17] Cap 396, Rev Ed 1994.

[18] The UK Unfair Contract Terms Act 1977, c 50.

[19] Cap 393, Act 10 of 1975.

[20] Trade Descriptions Act 1968, Cap 29.

[21] Trade Descriptions Act 1972.

From a legislative perspective, status quo ante persisted for decades: that is, until the passage in late 2003 of the Consumer Protection (Fair Trading) Act (CPFTA),[22] through the successful lobbying of the non-governmental Consumers Association of Singapore (CASE).[23] What undergirded CASE in its lobbying for a consumer-specific—and, indeed, centric—piece of legislation, was their noticing a growing trend of sharp business practices, including aggressive and unethical sales tactics, across different market segments, but also across different modes of sale. The occasion for the CPFTA was a root-and-branch overview commencing in 2001 by the Ministry of Trade and Industry (MTI) of the legislative framework for consumer protection and which precipitated negotiation for and the signing of a Free Trade Agreement with the US in 2003 (and which also led to the introduction of Singapore's first antitrust regime).[24]

The CPFTA provides a list of 20 specific practices deemed unfair and many of which find counterparts in the UTCCR, such as the concealment of onerous or material terms in small print, and the warranting to consumers that a particular good has a quality or grade that is known not to have. The CPFTA provided, for the first time, civil remedies like damages for consumers aggrieved or injured by unfair business practices.[25]

Growing confidence and influence from the legal autochthony movement probably resulted in a move away from traditional English legislative influence, and the CPFTA was the product of other commonwealth jurisdictions, most notably Sasketchewan in Canada and New South Wales in Australia.[26] The latter, in particular, attracted keen interest due to the desire to empower consumers and limit the direct role of the government insofar as this segment of the market is concerned. A further update was done in 2008 in order to introduce a greater range of remedies and raise the standard of consumer protection loosely comparable that of the EU[27]; and, most recently in late 2016, to strengthen governmental oversight and relevant enforcement powers especially as regards unfair commercial practices.

Since 2008, available remedies include a general right to cure or price reduction, as well as a right of withdrawal for certain types of contracts, like those concluded via colportage, and also time-share contracts, both of which attracted scrutiny for the

[22]Consumer Protection (Fair Trading) Act 52A, Rev Ed 2009 (Informal Consolidation 2016).

[23]The association was set up in 1971 as a formal arrangement between academia and trade unions who sought, as was then the trend globally, to organize the consumer movement in Singapore.

[24]The Act itself was the product of a joint taskforce led by CASE and MTI and comprising private and business organisations, to study the need for fair trading legislation in Singapore, and if so, what form such legislation ought to take. The suggestion to collaborate was announced by then Senior Minister of State for Trade and Industry, Mr Peter Chen, in Parliament on 8 March 2001. A delegation of CASE, MTI, AGC and industry interests visited Melbourne and Sydney to study their respective consumer protection regimes.

[25]See Loo et al. (2007), p. 66.

[26]Chandran (2004), p. 6.

[27]Singapore Parliamentary Debates, vol 88 (9 March 2012) (Mr Teo Ser Luck, Mr Lim Biow Chuan).

use of pressure tactics to close deals. Furthermore, there is a presumption of non-conformity of goods at the time of sale or delivery where defects are uncovered within 6 months of sale or delivery.[28]

Certain types of contracts remain outside the ambit of the CPFTA. These include the sale of immoveable goods as well as employment contracts, indicating that the main purpose of the CPFTA, like the Sale of Goods Act, is to regulate the everyday exchange of goods in the marketplace.[29] Contracts involving financial instruments or services were initially excluded from the application of the CPFTA, since these were regulated by way of specific legislation. Since the recent global financial crisis gave rise to many complaints regarding the behaviour of financial institutions in the marketing of such products and the rendering of advice, the government felt the need to safeguard the interests of retail investors. This resulted—speedily, one might add—in an important amendment in 2008 to the CPFTA to extend it to financial products and services insofar as financial institutions committed unfair practices, specifically including the application of undue influence or unconscionable conduct.[30]

Merely looking at the legislative framework provides an incomplete picture of the remedial and enforcement mechanisms in Singapore, however. A pantheon of governmental and quasi-governmental agencies regulates market entry of consumer goods and services either by actual inspection or the formulation of standards, as well as conducting post-entry surveillance. An equally large number of specific pieces of legislation target particular sectors or types of goods, like electronic or electrical goods[31] or cosmetics or goods with medicinal qualities[32] or fisheries and food.[33] Likewise, as mentioned previously, CASE complements these tasks by themselves encouraging sectoral self-regulation, providing standard setting through accreditation, and conducting their own post-market surveillance.

A final observation regarding market regulation must be made. Legislative initiative and policy-making in the realm of consumer protection falls on the shoulders of the Ministry of Trade and Industry. The fundamental government approach to consumer policy remains that of caveat emptor, with specific exceptions carved out by the various aforementioned pieces of legislation. What this means is that the onus remains on the consumer to be reasonably well informed regarding the transaction he wishes to enter into, and to assess his risks accordingly. Where in the context of consumer contracts the seller has acted unfairly or performed his obligations imperfectly, likewise, the onus is on the consumer to rectify the problem via a

[28]Section 12B(3) CPFTA.

[29]Section 2 CPFTA.

[30]Consumer Protection (Fair Trading) Amendment Act 2008, section 2.

[31]The Standards Productivity and Innovation Board of Singapore, an agency of the Ministry of Trade and Industry.

[32]The Health Sciences Authority, a statutory board of the Ministry of Health.

[33]The Agri-Food and Veterinary Authority of Singapore, an agency of the Ministry of National Development.

specified set of self-help remedies or to seek recourse through the courts. Enforcement costs are therefore largely borne by consumers themselves.

There are several theoretical and practical reasons explaining the apparent laissez-faire attitude of Singapore's erstwhile consumer policy and its legal framework. Given that consumer policy is within the remit of MTI, it is subservient to the prevailing philosophical attitude towards the management of the wider economy: neo-liberalism. There appears to be a firm belief in the efficiency of the market; that given the rationality of actors, Adam Smith's invisible hand will eventually correct any deficiencies that may occasionally plague marketplace transactions.

This explains why, for instance, the primary regulator for financial products consistently insists that '[c]onsumers bear the primary responsibility for protecting their interests. They should exercise due care in their selection of . . . products and service providers'.[34] It also explains the preference for rules improving market competition *rather than* protecting consumers per se: '[t]he emphasis in Singapore has been on encouraging competitive processes and raising consumer awareness . . . as active competition policy is seen as a more efficient way to deliver benefits . . . to end-user consumers . . . [and] business consumers'.[35] This explains why, under the Singapore regime, mandatory information disclosure regarding description and quality of goods are regulated under the Sale of Goods Act as well as the CPFTA (for misleading or false statements), and under pointilistic subsidiary legislation for rights of withdrawal. Disclosure of information is seen as a paramount policy objective since it enables consumers to make informed decisions in a competitive market as to which product best enhances their welfare.

3 Enforcement of Consumer Law

Caveat emptor remains the backbone of the consumer protection and enforcement framework in Singapore. Consumers are expected to take personal responsibility not only for deciding whether to enter into a transaction, but also in seeking redress should problems arise. The majority of remedies listed in the main consumer protection legislation—the Consumer Protection (Fair Trading) Act (CPFTA)[36]—are therefore private in nature, whether addressed through self-help or with

[34]Monetary Authority of Singapore, Objectives and Principles of Financial Supervision in Singapore (April 2004, revised April 2013) at p. 9.

[35]The Competition Commission of Singapore, 'The Interface between Competition and Consumer Policies – Contribution from Singapore' (Organisation for Economic Co-operation and Development, Directorate for Financial and Enterprise Affairs, 21 February 2008) DAF/COMP/GF/WD (2008)(3) at p. 3. This is underscored by the fact that there is an independent state regulator—the Competition Commission of Singapore (CCS)—with dedicated resources to ensure a competitive market, but none specifically for the furtherance of consumers' interests.

[36]Consumer Protection (Fair Trading) Act, Cap 52A 2009 Rev Ed.

assistance from the courts. There are no provisions under Singapore law for collective redress.

As the sums involved tend to be modest, virtually all consumer disputes fall within the monetary jurisdiction of the State Courts[37] (formerly the Subordinate Courts of Singapore) rather than that of the Supreme Court (which deals with disputes of a value of at least S$250,000).[38] 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).[39]

Unlike for criminal legal matters, there is no legal aid scheme for civil matters. Bear in mind, though, that a concerted effort has been made, over the last three decades, to streamline the judicial process and to attempt to ensure costs are not inhibitive. The result is a fast-tracked and relatively cheap procedure, at least insofar as the SCT is concerned. Thus consumer disputes within the value of S$5000 require only a lodgement fee of S$10, and S$20 for between that and S$10,000. Information on how to commence claims and to enforce judgments is readily available in electronic and hardcopy format. Most if not all are adjudicated without legal representation, thus keeping costs down.

A key approach to domestic dispute resolution in Singapore, perhaps in a nod to Confucian influences, is to encourage mediation rather than litigation.[40] As such, once a claim is lodged, and it is one that does not involve personal injury (as the run-of-the-mill consumer disputes tend not to be), action is stayed in favour of state-supported mediation. Mediation typically occurs within 14 days of a claim being lodged, and if it is not resolved before the State-appointed mediator, is thereafter fixed for a hearing within 10 days of the failed mediation session.

As tourism is a major contributor to the Singapore economy, an even faster-track is put in place for tourist disputes. Mediation and/or a hearing may be fixed within 24 h of a claim being lodged. Hearings before the SCT are largely documentary affairs, and although formally a court procedure, the SCT Referee usually conducts matters as informally as possible; and as a matter of judicial policy, encourages parties to settle their dispute amicably, and steps in to adjudicate only as a last resort. Decisions of the SCT are enforceable as court orders, and claimants may avail themselves of general enforcement mechanisms like writs of seizure and sale, garnishee orders or examination of judgment debtors. Problems related to debt enforcement appear a growing concern in Singapore. Like any other country, sometimes the costs of enforcement vis-à-vis the value of the debt dissuade (would-be) creditors from going down this route: this is especially true of many consumer disputes since the values tend to be small.

[37]Section 2, Small Claims Tribunal Act, Cap 208, 1998 Rev Ed.

[38]Section 2, State Courts Act, Cap 3212007 Rev Ed.

[39]This sum can, by consent of parties to the dispute, be increased to a maximum of S$20,000: fn 38 section 5(4).

[40]See for instance Lee and Teh (2009), pp. 54 and 55; S. Menon, 'Building Sustainable Mediation Programmes: A Singapore Perspective' (14 February 2015, New Delhi), keynote address at the Asia-Pacific International Mediation Summit.

Insofar as the financial sector is concerned, Singapore's de facto Central Bank—the Monetary Authority of Singapore (MAS)—worked together with stakeholder banks and other financial institutions to set up the Financial Industries Dispute Resolution Centre (FIDReC).[41] FIDReC, in operation since 2003, offers a fast-track arbitration process to deal with complaints between consumers (often retail investors) and financial institutions. FIDReC's attractiveness lay in the fact that it offered something for everyone—defendants got the confidentiality they wanted, and both parties could avail of a speedy process. Its case-load ballooned in the wake of the 2008 global financial crisis, especially since a sizeable number of consumers purchased instruments linked to the now-defunct Lehman Brothers.

A recent development in another sector is worth mentioning—telecommunications. The sector is regulated by the Media Development Authority (MDA) and the Infocomm Development Authority (IDA), under the purview of the Ministry of Communication and Information (MCI). In terms of access to justice, 2016 saw amendments to the IMDA Act[42] and the Telecommunications Act[43] to allow for the telco regulator to set up a telecom specific ADR regime. The reasons for the amendment stem from the government's recognition of a growing reliance by consumers and businesses on telecommunication services, and a concomitant need to ensure reliable and quality telecommunication services; and also the fact that many consumer disputes in this area are increasingly individualised or contractual in nature. In the past, the telco regulator have stepped in to facilitate or mediate such disputes, but had no power under existing laws to mandate solutions. MCI specifically mentions the UK, Hong Kong and Australia as examples to follow in setting up a telco-specific ADR scheme to resolve consumer disputes better and more effectively: telco operators are obliged to buy-in to the scheme, while consumers had the option of opting for the scheme or choosing the traditional court-based route. It would appear that sectors not regulated via MTI are developing their own specialised dispute resolution mechanisms.

An important *facilitator* of the private enforcement of consumer rights is CASE. The organisation is many-tentacled. It conducts post market regulation[44] and surveillance,[45] is heavily involved in consumer outreach and education,[46] and runs an

[41] See www.fidrec.com.sg/website/background.html.

[42] Cap 172.

[43] Cap 323.

[44] Notably through the CASETrust accreditation initiative, which encourages voluntary industry-wide best practices and audits participating firms in a wide range of sectors.

[45] Through the Consumer Standards and Products Testing committee, whose members are experts in their respective fields of testing, and of which this author chairs. The committee is involved in advising product standards and best practices in e.g. supply chains, though its main activity is to ensure consumer products operate as claimed, and against health and safety standards.

[46] It has a publication and media arm, as well as a separate committee which runs regular talks at schools as well as suburban residential estates.

independent legal advisory and mediation service.[47] CASE cannot represent consumers in private actions against firms, but can and often uses its clout to attempt to reach an amicable agreement. Like many of its counterparts across the developed world, CASE is non-governmental and membership-based. Akin, for example, to the UK's Which? and the Dutch *consumentenbond* its articles of association restrict its capacity to act in consumer disputes to those on its membership. Due in part to buy-in from the national labour movement, it must be said, it does represent a large swathe and cross-section of the domestic consumer population. Furthermore, to get around this formality, membership fees for individuals are kept deliberately affordable: non-members who approach CASE regarding their disputes may enrol for a pittance to take advantage of CASE's professional expertise and leverage with the trading community, or otherwise, pay a fraction of that for CASE to assist in drafting preliminary correspondence with the trader in question to commence negotiations over redress.

With more participants in the market and an increase in the value and number of transactions, there is bound to be a concomitant growth in the number of consumer-related problems. There are no publically available statistics regarding the number of consumer disputes that occur in Singapore, nor the numbers for specific sectors or issues, nor the rate of resolution. Singapore's highly regarded judicial system does collate and publish statistics, but none specifically on consumer disputes.

That having been said, CASE periodically releases media statements on problematic sectors or consumer related issues, based on regularly collected and collated data from consumer complaints registered with the organisation.[48] In Table 1 below, one finds the number of complaints that were brought to CASE's attention in the last 5 years[49]:

On average, a complaint handled by CASE takes about 3 months to close. There is obviously much variance in the timeline of any given complaint, with some taking longer than half-a-year to come to an end. Much depends on the cooperation of the parties to the dispute, the complexity of the matter, the ability of the CASE officer to facilitate negotiation, and a willingness of parties to accommodate and compromise.

One notices a year-on-year spike in the number of complaints registered with CASE in 2012, explainable by the coming into force in that year of Singapore's 'Lemon Law'. The increase therefore is attributable to complaints regarding goods found to be defective within 6 months' of purchase. Recent and sudden closures in

[47]CASE employs staff officers to deal with the day-to-day advisory operations, but also enjoys support from a body of legally-qualified volunteers who administer its mediation scheme.

[48]Bi-monthly statistics from July 2015 to December 2016 are kept on file with the author. For CASE's statistics on complaints for the year 2015, see www.case.org.sg/consumer_guides_statistics.aspx

[49]The author expresses his appreciation to CASE for collating and disclosing the following statistics in their possession.

Table 1 Consumers Association of Singapore

Year	Total complaints[a]	Complaints handled[b]	Resolved[c]	Unresolved[d]	Resolution rate
2011	22,240	1396	1365	962	70.53%
2012	25,773	1765	1238	402	75.48%
2013	29,254	1452	1163	337	77.53%
2014	24,721	1381	1109	118	85.51%
2015	22,319	2006	1484	455	76.53%
2016	19,102	1763	1451	444	76.57%

[a]This figure represents the total number of complaints received by CASE via email, telephone, fax, walk-in, or referral from STB or foreign consumer organisations with MOUs with CASE in any given year

[b]This figure represents the total number of complaints that CASE officers handled on behalf of consumers in any given year

[c]This represents the total number of handled complaints that were resolved (or remained unresolved) in any given year. Complaints registered in previous year(s) but which are resolved or remain unresolved in the given year would be captured in the number. This explains why the number in the 'complaints handled' column does not necessarily tally with that under the 'resolved' and 'unresolved' columns

[d]This represents the number of handled complaints in which the CASE officer is unable to achieve a satisfactory resolution and no longer plays an active part in its handling. The aggrieved consumer may simply walk away from the dispute or seek resolution via the State court system

the wellness,[50] travel,[51] bridal[52] and fitness[53] sectors, leaving hundreds of customers in a lurch, have also contributed to one-off increases in the number of complaints registered with the NGO. Other than that, sectors which register the highest number of complaints are usually those regarding beauty and wellness (including spas and slimming centres), motor cars (including second-hand car dealerships), electrical and electronics, furniture, contractors and telecommunications.[54]

With regard to contracts for the sale of goods, the largest proportion of complaints relate to defective goods. Many of the claims related to second-hand cars, as can be expected due to the nature of the good, arise from complaints of *latent* defects.[55] As regards both beauty and travel, many complaints were with regard to sub-standard or

[50]Lim (2015a), and also Quek (2009).

[51]Over 500 complaints on sudden closure of travel agencies since 2012: CASE (31 July, 2015, Todayonline) see www.todayonline.com/singapore/over-500-complaints-sudden-closure-travel-agencies-2012-case.

[52]Wei and Tai (2015).

[53]Ng (2016a, b). See www.todayonline.com/singapore/mps-lawyers-call-more-safeguards-consumers-buying-prepaid-deals and www.todayonline.com/singapore/hope-some-california-fitness-members-who-want-money-back.

[54]Based loosely on monthly statistics captured by CASE.

[55]The persistently high number of complaints regarding the second-hand car market have galvanized that sector's self-regulatory association to cooperate with CASE to improve inspection standards and educate both consumers and dealers regarding expectations on the sale of second-hand cars.

total failure in provision of the agreed services.[56] Across both goods and services, other significant issues relate to false or misleading claims, as well as pressure selling leading to duress or undue influence. In the recent past, complaints related to timeshare contracts featured prominently, but legislation allowing for withdrawal rights for such contracts as well as the outlawing of pressure selling appear to have nipped the problem in the bud. These days, the major culprit appears to be from vendors of electrical and electronic goods. Indeed, whilst this has probably been the trend for some time, it is only recently—due largely to increasing ease and reliance on social media—that these problems which consumers otherwise perennially face have attracted the attention of society at large as well as the relevant authorities.

Up until December 2016, the CPFTA named CASE, together with the Singapore Tourism Board, as 'specified bodies' to advance the interests of consumers and tourists to the country.[57] As specified bodies' under the Act, CASE and STB are empowered to negotiate with firms who are or appear to be engaging in unfair trading practices with a view to changing their behaviour. If an agreement is reached, it can be concretised in a Voluntary Compliance Agreement (VCA), and which amongst others may contain a commitment from the firm to compensate consumers who have already suffered a loss as a result of the firm's behaviour. If the firm is unwilling to enter into a VCA or breaches it, the specified body may, on approval from the Injunctions Proposals Review Panel (as appointed by the Minster for Trade and Industry), make an application before the courts for an injunction on pain of contempt of court to restrain the firm in question from persisting in its behaviour.[58]

Whilst the right to commence injunction proceedings have been used on occasion, the specified bodies have not seen fit to use it frequently for the following reasons. First, the costs incurred are inevitably not recovered—either because the law rarely allows recovery on a complete indemnity basis, or because of impecuniosity of the defendant firm—and therefore the decisions on whether to proceed with injunction invariably involve questions of where the scarce resources of a not-for-profit organisation ought best to be employed. Second, the facilitative efficiency of Singapore's company laws means that a firm that is or is about to be injuncted can simply wind-up, and the errant trader can swiftly set up a new company in order to circumvent the order. Most disputes are therefore resolved through the signing of VCAs, direct legal action by consumers, or invoking extra-legal reputational sanctions like naming-and-shaming on (social) media.

[56]At this juncture, the reader would do well to be aware of the possible reason why: that the number of complaints in these sectors spiked due to the recent and unexpected closure of a small number of large spas or salons or travel agencies, leaving customers who have pre-paid in the undesirable position of being unsecured creditors, and with one of their remedial measures being an immediate registering of a complaint with the police as well as with CASE. Through self and co-regulatory measures in place in these sectors, as well as the presence of the current legislative framework, risk exposure to a majority of consumers is well mitigated.

[57]Section 8(10) CPFTA.

[58]Section 10 CPFTA.

As mentioned, the CPFTA was amended in 2016 to remove CASE's and STB's powers to seek injunction of errant traders before the courts. The apparent reason for this legislative initiative is the recent spate of negative publicity due to errant behaviour by a handful of traders, causing the government to intervene directly.[59] The right to initiate injunction proceedings is now allocated to a new department within SPRING Singapore, a statutory board under the purview of MTI and which is the standard setter and regulator for weights and measures. In addition, SPRING now has powers of entry and arrest in order to investigate possible breaches of the CPFTA.[60]

On the one hand, this is to be commended since in the present context, powers of entry and arrest could only be exercised by the police, and which would only be invoked on suspicion of breaches of the Penal Code, e.g. incidences of intimidation or cheating.[61] SPRING is the right choice for empowerment since it already has both experience and expertise in investigating and prosecuting breaches of the Weights and Measures Act. Understandably, given their infancy, SPRING has yet to exercise its powers of initiation.

Taking away CASE's right to apply for injunction, or where SPRING exercises its investigative and injunctive powers without seeking CASE's views, may undercut CASE's ability to negotiate with errant traders as regards undertaking VCAs. This may mitigated by establishing a cooperation protocol between CASE and SPRING on information sharing and consultation. Neither the proposed bill nor its accompanying explanatory notes indicate that such a protocol will be explored or encouraged, but some form of cooperation can be expected. Officers of SPRING are regularly appointed to CASE's central committee and its sub-committee on Product Standards and Testing, allowing, informally, for professional relationships between the two entities to be nurtured. The concern is as regards turnover of key personnel in either organisation, leading to a possible loss of relationship and knowledge unless these processes are institutionalised. The two entities would do well to take note of the like situation in the Netherlands, where the *consumentenbond* (Dutch consumer association) and the *Autoriteit Consument en Markt* (Dutch Competition and Consumer Authority) inked a *samenwerkingsprotocol* (legally-binding memorandum of cooperation) obliging information sharing and consultation.[62]

[59]See also Minister of State Teo Ser Luck's reply to Parliamentary Questions on Errant Retailers (19 January 2016) www.mti.gov.sg/NewsRoom/Pages/Minister-of-State-Teo-Ser-Lucks-reply-to-Parliament-Question-on-errant-retailers.aspx.

[60]The wording is *in pari materia* with the like sections of the Competition Act.

[61]Sections 417, 420, and 506 of the Penal Code, Cap 224, 1985 Rev Ed.

[62]*Samenwerkingsprotocol tussen Autoriteit Consument en Markt en de Consumentenbond* (10 December 2015, Staatscourant Jaargang 2015 no 44660). See zoek.officielebekendmakingen.nl/stcrt-2015-44660.html.

4 External Influences or Inspirations

Enough has been said about Singapore's historical common law links, which explains the vast majority of its initial consumer legal framework. The autochthony movement played a part in encouraging lawyers and policy makers to look beyond the UK for legal inspiration. The CPFTA of 2003 is a prime example of this: a product of study trips to Australia and comparative studies with Canadian legislation. When the CPFTA was amended in 2008 to include 'lemon law' provisions, the model taken was that of Victoria, Australia, when empowers consumers to seek their own recourse, rather than emphasising a reliance on the government.

Of note is the ASEAN Cosmetics Directive 2003, which was implemented in Singapore in 2008. The directive is very similar to the EU's own Cosmetics Directive, and, in fact, the vast majority of the technical standards and tolerances apply the European Union's standards. Indeed, when Singapore sought to rein in complaints related to the timeshare industry via the Consumer Protection (Fair Trading) (Cancellation of Contracts) Regulations 2009, it studied the EU's approach closely.

Insofar as FTAs are concerned, the most noticeable (albeit indirect) impact on Singapore law is the EU-Singapore FTA (EUSFTA) which, pending determination before the CJEU, has yet to come into force. Pursuant to the relevant provisions of the EUSFTA,[63] MTI is committed to reviewing certification requirements regarding the import/export of electronics and telecommunications equipment. At present, EU-manufactured products must comply with the Low Voltage Directive and the Electromagnetic Compatibility Directive; whereas in Singapore, only controlled goods (e.g. microwaves, gas hobs, washing machines) need to comply with specific international standards[64] under the Consumer Protection (Safety Requirements) Registration Scheme (CPS). The scheme is currently under review to comply with the EUSFTA, in light of Singapore's and the EU's commitment to base regulatory requirements on international standards set by the International Organisation for Standards (ISO), the International Electrotechnical Commission (IEC), and the International Telecommunication Union (ITU), many of which are in any event already in use in Singapore. There is no evidence of impact of substantive EU consumer law on Singapore's consumer law regime via the EUSFTA beyond what has been mentioned.

There is no evidence of formal dialogue between Singapore's regulators and those of other countries. Singapore is not subject to developmental aid and as such is not the recipient of technical assistance or influence via that channel.

[63] Article 2.9, Section C, Chapter 2, EUSFTA on Non-Tariff Measures.

[64] See the Singapore Consumer Protection (Safety Requirements) Registration Scheme: Controlled Goods and their Applicable Safety Standards: www.spring.gov.sg/Building-Trust/Raising-Confidence/Consumer-Product-Safety/CPS-Scheme/Documents/List_of_controlled_goods.pdf.

5 Concerns and Trends

Insofar as Singapore's attitude towards consumer protection is concerned, one could reasonably say it is laissez faire and reactive. 'Laissez faire' because of the enduring belief in free market fundamentals, translating into legal rules targeted at consumer (and therefore, private) empowerment and addressing informational asymmetries. It is 'reactive' in the sense that developments in the area of consumer protection appear to be due to external factors, whether in light of FTA negotiations or negative publicity on errant trading.

To be fair, much of the regulatory oversight focuses of pre- and post-market surveillance. Put differently, prevention rather than cure. Thus the Consumer Protection (Safety Requirements) Regulation (CSRR) gazettes 45 categories of household electrical, electronic and gas products as 'controlled goods', and requires suppliers of such goods (whether manufacturers or importers) to register with the relevant government regulator SPRING prior to sale. and the Consumer Protection (Consumer Goods Safety Requirements) Regulations 2011 (CGSR). Suppliers of controlled goods are required to register with SPRING and provide certification that their goods comply with the relevant safety standards. As for non-controlled goods, there is no such requirement. Where no international standards exist, SPRING does facilitate self-regulation and encourage industry best practices amongst local manufacturers. What this does mean is that there could be import into Singapore of potentially unsafe non-controlled goods. SPRING conducts pre- and post-market surveillance of such products, in conjunction with CASE,[65] coupled with publicity and educational campaigns to raise consumer awareness on safety issues. A major issue remains policing cross-border e-commerce. This is especially since it is difficult and resource intensive to check each and every package that comes into the country. CASE has been working to establish feedback loops with the major e-commerce websites to ensure that their retailers comply with the relevant statutory requirements regarding the sale of their goods.

Enforcement of consumer rights remains a concern. For many aggrieved consumers, very little can be done when the retailer they bought from or service provider has shallow pockets or has gone bust. While CASE has been lobbying for the introduction of mandatory manufacturer's warranty similar to that available in the EU and its member states, and also for pre-payment protection (perhaps similar to that under s 75 of the UK Consumer Credit Act) to pre-empt possible problems, there appears little regulatory attention or political will to bring these proposals to fruition.

The picture is not altogether bleak, however. As can be seen, there has been in recent years an explosion of ADR mechanisms—whether generally or sector-specific mechanisms. Some are put in place to fill gaps, while others to ensure disputes are resolved speedily and satisfactorily and to relieve the burden on court systems. The schemes are cheap, and easily accessible, and mostly resolved within a

[65]The author chairs CASE's Products Standards and Testing Committee, which includes a member from SPRING.

span of a couple of months, if not weeks. The three-decade long investment and expansion of such mechanisms has resulted, regrettably, in the stunted development of consumer case law.

Recent changes to empower SPRING do provide this author with a cautious dose of optimism. If SPRING exercises its investigative and injunctive powers timely and prudently, the public's confidence in the competitiveness and fairness of the market—not infrequently tarnished—ought to be restored; and a regulator's deep pockets ought to be similarly appreciated if it translates into reinvigorating court-based adjudication and enriching local consumer protection jurisprudence.

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Enforcement and Effectiveness of Consumer Law in Slovenia

Verica Trstenjak and Petra Weingerl

1 Introduction

The purpose of this chapter is to provide a general picture of the enforcement of consumer law and the effectiveness of regulatory regime of consumer protection in Slovenia. Slovenia is an EU Member State since 2004 and a member of the the Organisation for Economic Co-operation and Development (OECD) since 2010, thus, its national consumer policy embraces all objectives set by the EU consumer policy and the OECD policies. However, the effective framework does not suffice. Although our overall assessment of the legal framework for consumer protection in Slovenia is positive, some improvements are needed to enhance the level of the effective enforcement of consumer law in practice. Lengthy proceedings are the main obstacle on a consumer's path to redress. Hence, non-judicial mechanisms of dispute resolution are gaining in importance. Moreover, there is a lack of adequate consumer awareness of their rights. The government has focused on consumer information and education as a means to ensure a high level of consumer protection in the existing national consumer policy. It has committed to enhancement of consumer rights awareness, in particular in the fields of consumer credit and the liability for defects. The government's efforts to boost consumer awareness through education and information are welcome developments in this regard. Another striking obstacle to the effective enforcement of consumer law is an apparent systemic unfamiliarity with consumer law and the Court of Justice of the EU

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(CJEU)'s case law among legal practitioners. Thus, to achieve the effective enforcement of consumer law in practice both consumers and practitioners, also judges, need to become better acquainted with consumer protection law.

2 National Legal Framework for Consumer Protection in Slovenia

2.1 The Slovene National Consumer Policy

Slovenia is a tiny country in Central Europe and has a population of two million people. It gained its independence from Yugoslavia in 1991. Since 2004, it is an EU Member State, and, since 2010, it is a member of the OECD. Accordingly, the Slovenian national consumer policy embraces all objectives set by the EU consumer policy and the OECD policies.

The national consumer policy's origins are found in the National Program of Consumer Protection 2001–2005.[1] It represented the first policy document in the field of consumer protection in Slovenia.[2] Its main goal was to harmonise Slovene legislation with the EU *acquis* in the pre-accession period. This process led to significant enhancement of the level of consumer protection in Slovenia.[3] At present, the national consumer policy and the legal design of the regulatory system of consumer protection are provided by the Resolution on the National Program of Consumer Protection 2012–2017.[4] The latter encourages further development and strengthening of consumer protection policies, taking into account the economic and social conditions and peculiarities of Slovene market. The basic goals are enhancing consumer rights and the strengthening of the consumer's position in the market to enable him or her to make independent, free and rational choices in the market and to enhance his or her awareness of the existing rights.[5]

Studies show that consumers in Slovenia are not sufficiently aware of the existence of consumer rights. According to the 'Consumer attitudes towards cross-border trade and consumer protection' barometer, only 47% respondents in Slovenia agreed that they know where to get information and advice about cross-border

[1]Nacionalni program varstva potrošnikov 2001–2005, Official Gazette of the RS (OG RS) No. 61/00.

[2]Resolucija o Nacionalnem programu varstva potrošnikov 2012–2017, OG RS No. 47/12, point 2.1.

[3]Ibid.

[4]Ibid.

[5]Ibid., point 2.2.

shopping in the EU.[6] The level of awareness of the consumer right to return defective products is also 47%.[7]

The Slovenian Consumer Protection Association (SCPA; Zveza potrošnikov Slovenije) conducted its own research on consumer rights awareness in March 2015.[8] The results showed that consumers are very familiar with certain rights (e.g. the right to withdrawal, the right to change mobile operator without any costs). However, they are not well informed about some other rights, as for example the package travel rights and rights related to guarantees.

The government is trying to enhance the level of awareness of consumer rights. It shows a particular concern for consumer education and information as a means to ensure a high level of consumer protection, especially in the field of financial services, which partly derives from the obligations undertaken during the pre-accession to the OECD period. The main undertaken obligation was the adoption of a special program for financial education. Accordingly, Slovenia adopted the National Financial Education Programme in 2010.[9] In February 2016, two public tenders were published; one to award concession for carrying out public service dealing with consumer information and education, and another for public service carrying out comparative assessments of goods and services.[10] Concession for carrying out public service dealing with consumer information and education has been awarded to the SCPA.[11] The latter has announced to carry out this public service in two areas—consumer credit and procedural aspects pertaining to the liability for defects, respectively.[12] The SCPA has launched a special website dedicated to this public service aiming at enhancing the level of consumer rights awareness (www.vemvec.si).

[6]European Commission, Flash Eurobarometer 358. 2013. Consumer attitudes towards cross-border trade and consumer protection. http://ec.europa.eu/public_opinion/flash/fl_358_en.pdf. Accessed 1 December 2016.

[7]Ibid., p. 59.

[8]Slovene Consumer Protection Association. 2015. Potrošniki določene pravice odlično poznajo, druge malo manj. https://www.zps.si/index.php/o-nas-mainmenu-361/aktualno/7440-potrosniki-dolocene-pravice-odlicno-poznajo-druge-malo-manj. Accessed 1 December 2016.

[9]Ministry of Finance. 2010. Nacionalni program finančnega izobraževanja. http://www.mf.gov.si/fileadmin/mf.gov.si/pageuploads/sporocila/oecd/NPFI.pdf. Accessed 1 December 2016.

[10]Ministry of Economic Development and Technology. 2016. http://www.mgrt.gov.si/si/medijsko_sredisce/novica/article/26/10713/bd0f3e21899c481e0858a7ad33735937/. Accessed 1 December 2016.

[11]Slovene Consumer Protection Association. 2016. Koncesija za opravljanje javne službe obveščanja in izobraževanja potrošnikov. https://www.zps.si/index.php/mediji/izjave-za-javmost-2016/8187-koncesija-za-opravljanje-javne-sluzbe-obvescanja-in-izobrazevanja-potrosnikov. Accessed 1 December 2016.

[12]Ibid.

2.2 The Legal Framework for Consumer Protection in Slovenia

The Slovene national regime of consumer protection has been mainly influenced by EU consumer law and policy. The main legal act in the field of consumer protection is a separate and independent legal act, the Consumer Protection Act (CPA).[13] Since the enactment of the CPA in 1998, Slovenian consumer protection legislation is governed dualistically—rules governing consumer protection are primarily found in the special consumer *acquis*, whilst the provisions of the general law of obligations found in the Code of Obligations are applicable to B2C relations as *lex generalis*.[14] Although Slovenia was not yet the Member State of the EU in the time of the CPA adoption, some of the provisions were modelled according to the EU directives, whilst in 2002, as part of the accession procedure, the CPA was amended to implement the whole EU consumer protection *acquis*.[15]

Although Slovenia adopted special consumer protection legislation only in 1998, its law of obligations had been consumer-friendly at least to a certain extent already prior to that. To illustrate, some legal concepts and institutes in the Yugoslav Code of Obligations from 1978 possessed 'consumer protection functions', e.g. product liability, standard contract terms and guarantee/warranty.[16] These provisions were transposed into the new Slovene Code of Obligations of 2001.[17]

The CPA mainly transposes the EU consumer *acquis*. Its content is divided into the following subsections: general provisions, product liability, advertising of goods and services, guarantee/warranty, unfair contract terms, sale of goods and provision of services, consumer protection organisations, national strategy for consumer protection, inspection and administrative measures, civil liability, penalty provisions. There are also other laws that have a certain impact on consumer law in general, and on consumer contract law in particular. Examples of such laws are the aforementioned Code of Obligations, the Consumer Protection against Unfair Commercial Practices Act,[18] the Collective Actions Act,[19] the Consumer Credit Act,[20]

[13]Zakon o varstvu potrošnikov—ZVPot, OG RS No. 98/04 et seq.

[14]Obligacijski zakonik—OZ, OG RS No. 83/01 et seq.

[15]Weingerl (2015), pp. 259–268. For the account of the development of private law in Slovenia see for example Možina (2008), pp. 173–180; Trstenjak (2000), pp. 77–89.

[16]Možina (2015), p. 15.

[17]Ibid. Slovenia gained independence in 1991, but adopted the new Code of Obligations only in 2001 (it entered into force in 2002). It is to a large extent based on the Yugoslav Code of Obligations.

[18]Zakon o varstvu potrošnikov pred nepoštenimi poslovnimi praksami—ZVPNPP, OG RS No. 53/07.

[19]Zakon o kolektivnih tožbah—ZKolT, OG RS No. 55/17.

[20]Zakon o potrošniških kreditih—ZPotK-1, OG RS No. 59/00 et seq.

the Civil Procedure Act,[21] the Electronic Commerce and Electronic Signature Act,[22] and the Patient Rights Act.[23] The content of majority of these Acts is to a large extent based on the EU legislation.

3 The General Design of the Enforcement Mechanism in Slovenia

The enforcement of consumer law in Slovenia is divided into private and public enforcement, with private enforcement referring to individually initiated litigation and public enforcement referring to proceedings initiated by public authorities. Private enforcement embodies actions before the courts and the out-of-court alternative dispute resolution (ADR) mechanisms.[24] Public enforcement, on the other hand, mainly concerns the administrative enforcement through public agencies.

Private enforcement is considered to be the traditional approach to the enforcement of consumer law. The main authority in charge of the enforcement of consumer law in Slovenia is a court. Courts are competent to adjudicate disputes and adopt preliminary measures. Their jurisdiction is established by the Civil Procedure Act. There are no specialised tribunals, thus, ordinary courts are competent to hear claims in consumer disputes. In our opinion, consumers are aware that they can pursue their claims in the court. It seems that they are less aware of the available ADR mechanisms. Enforcement by courts and ADR mechanisms are briefly sketched in Sects. 5 and 11 of this chapter, respectively.

Apart from private enforcement, public agencies and other public authorities are of major importance for the consumer rights enforcement, especially for the oversight of the consumer protection legislation. The main public body is the Market Inspectorate under the auspices of the Ministry of Economic Development and Technology. It is responsible for surveillance of execution of Slovenian legislation in areas of consumer protection, product safety, trade, catering, crafts, services, pricing, tourism, competition protection and copyrights. It monitors the application of the legislation, as well as helps to resolve the consumer disputes and acts as the minor offence authority. There are also other public agencies that play an important role in the consumer rights enforcement, in particular they have supervisory powers to monitor the implementation of the consumer legislation (see below Sect. 6 of this chapter).

The non-governmental sector for consumer protection also plays an important role in the enforcement of consumer law. It has origins in the early 1990s, way before

[21] Zakon o pravdnem postopku—ZPP, OG RS No. 73/07 et seq.

[22] Zakon o elektronskem poslovanju in elektronskem podpisu—ZEPEP, OG RS No. 98/04 et seq.

[23] Zakon o pacientovih pravicah—Zpac, OG RS No. 15/08.

[24] See also the general report written by Hans-W. Micklitz and Geneviève Saumier in this book.

consumer protection became institutionalised in the public sector.[25] The SCPA was established already in 1990, and the International Consumer Research Institute was established in 1993. Slovenia has acknowledged the particular importance of the non-governmental consumer organizations in its first national consumer protection program and in the CPA of 1998. The latter defined the concept of non-governmental consumer organizations and clearly distinguished them from other non-governmental and non-profit organizations. The main difference is that consumer organisations need to be independent from suppliers of goods and services.[26] They are entitled to receive public funds, however, they are not entitled to receive funds by suppliers of goods and services, as well as by political parties.[27]

The SCPA is a non-governmental consumer organisation active at the national level. It is a membership organisation, active on the behalf of its members and does not carry out official tasks, unless it carries out a public service awarded by the government. It is further described in the Sect. 7 of this chapter.

There is no special public body designed specifically to carry out alternative dispute mechanism resolutions for consumer disputes. In contrast, there are some bodies in private sector, either established on the basis of the Out-of-Court Resolution of Consumer Disputes Act,[28] or established by private regulators and designed for resolution of narrowly defined consumer disputes (see below Sects. 8 and 11 of this chapter).

4 Number and Characteristics of Consumer Complaints and Disputes

The official statistical data on the number of consumer complaints is not available in Slovenia. The European Consumer Centre of Slovenia, dealing with consumer rights in the cross-border context, received 220 consumer inquiries in 2014.[29] They have received 192 complaints in cases where consumers were not successful in enforcing their rights directly with the trader/service provider.[30] In the cross-border context, the main causes/types of consumer complaints and disputes are complaints due to: delayed or cancelled flights, lost baggage claims and the right to withdrawal in the online shopping.[31]

[25]Resolucija o Nacionalnem programu varstva potrošnikov 2012–2017, point 3.3.4.

[26]Ibid.

[27]Ibid.

[28]Zakon o izvensodnem reševanju potrošniških sporov, OG RS No. 81/15.

[29]European Consumer Centre. 2014. Poročilo o delu Evropskega potrošniškega centra Slovenija (The Report of the European Consumer Centre of Slovenia). http://epc.si/media/EPC_letno_porocilo_2014_web_SI.pdf, p. 7. Accessed 1 December 2016.

[30]Ibid., p. 8.

[31]Ibid., pp. 12–13.

Regarding the number of consumer disputes initiated or resolved before the courts, there is no statistical data made according to the type of a dispute—i.e. for consumer disputes. Consumer disputes form part of a total number of civil and commercial cases. The number of incoming civil and commercial cases in 2014: 108,244 (first instance: 91,835, second instance: 14,604, third instance: 1805). Official data for 2015 is not available yet.[32]

The average time typically needed for the resolution of civil and commercial cases in a court in 2014 was 238.2 days for the first instance courts, 82.2 days for the second instance courts, and 167.4 days for the third instance courts.[33]

5 Enforcement by Courts

5.1 The Structure of the Judicial System in Slovenia

In Slovenia, the judicial system has three main levels. At the first instance, there are local (44) and district (11) courts. At the second instance, there are four appellate courts. The Supreme Court of the Republic of Slovenia (RS) assumes the role of the third instance court. There is also the Constitutional Court of the RS, an independent and autonomous body exercising constitutional review. Judges are appointed by the Parliament (*Državni zbor*), after they have been nominated by the Judicial Council (*Sodni svet*), which itself is not part of the judicial branch of the government.

In this judicial architecture, there are no specialised courts in charge of consumer disputes. Thus, general courts are competent for consumer disputes in Slovenia. Court tariffs/taxes are set according to the value of the claim. There are no exemptions for consumer disputes. However, there are some exemptions for consumers who are faced with financial difficulties and fulfil the requirements for a free legal aid (see below).

General rules on time limits for bringing a claim, applicable to consumer contracts, can be found in the Code of Obligations. The court may not take notice of time limits if the debtor makes no reference thereto (Article 335(3) of the Code of Obligations). General time limit for civil law claims is 5 years (Article 346 of the Code of Obligations). Time limit for claims for periodic charges that fall due annually or at specific shorter time intervals (periodic claims) is 3 years after each individual charge falls due, whether they are accessory periodic claims, such as interest claims, or such periodic claims by which a right itself is drawn upon, such as maintenance claims (Article 347(1) of the Code of Obligations). Time limit for compensation claims for damage inflicted is 3 years after the injured party learnt of

[32]We received this statistical data from the Service for Development of Judicial Administration of the Supreme Court of the RS (using mechanisms and methodology for the CEPEJ) via email correspondence.

[33]Ibid.

the damage and of the person that inflicted it (Article 352(1) of the Code of Obligations).

There is a special 1-year time limit for bringing a claim for so-called 'household claims' (Article 355 of the Code of Obligations). Examples of such claims are claims for supplied electricity, thermal energy, gas, and water, for chimney-sweeping services and for municipal cleaning services; radio and television stations' claims for station reception; claims for internet access services, and services connected to access to cable and satellite radio and television stations paid at three-monthly or shorter intervals. In these cases, time limits run from the end of the year in which the claim fell due for payment.

As a general rule, the procedure at first instance is a normal court procedure. Moreover, the Civil Procedure Act governs the small claims procedure (Articles 442 et seq.). It is a special simplified procedure. A small claim dispute shall denote a dispute where the amount of a claim does not exceed 2000 EUR. Small claims procedure is conducted on the basis of acts of procedure executed in writing. It may not be stayed. The applicant files a normal action before the local court, as there is no special application procedure for the small claims procedure.

5.2 Free Legal Aid

Consumers who are faced with financial difficulties can be offered a free legal aid. The latter is regulated by the Legal Aid Act.[34] A person entitled to the free legal aid may claim funds to meet the costs of legal help in full or in part and exemption from the costs of court proceedings. In particular, this encompasses the costs of legal advice, legal representation at general courts, specialised courts and the Slovenian Constitutional Court and before all bodies, institutions and persons in Slovenia which have jurisdiction for out-of-court settlement of disputes, and exemption from paying the cost of court proceedings.

The consumer is entitled to the free legal aid if, in view of his or her financial position and that of his or her family, he or she would not be able to cover the costs of legal proceedings on his or her own without jeopardising his or her financial position and that of his or her family.

5.3 Assessment of Judicial Enforcement of Consumer Rights

The main advantages of the enforcement of consumer rights by courts are the following: legal security and procedural safeguards. However, some of the main, and very serious, shortcomings of the enforcement of consumer rights by courts in

[34]Zakon o brezplačni pravni pomoči—ZBPP, OG RS No. 96/04 et seq.

Slovenia are the length of the proceedings and legal practitioners' unfamiliarity with consumer law and the relevant case law of the Court of Justice of the EU (CJEU) (for example case law regarding the *ex officio* control of the unfair contract terms, e.g. see cases *Pénzügyi Lízing*[35] and *Banco Español de Crédito*[36]). However, the situation seems to be improving. This is reflected, for example, in cases dealing with compensation for the non-material damage caused by loss of enjoyment of the package holidays. Initially, national courts did not follow the CJEU's jurisprudence in this field, however, they are now applying the CJEU's case law (in particular, the case of *Leitner*[37]).[38] Still, this is only a small step, since the Slovene lower courts infrequently cite the CJEU case law and do not refer questions for preliminary ruling procedure to Luxembourg. This allegedly demonstrates judges' unfamiliarity with EU law.[39]

Another striking problem highlighted in legal scholarship is unfamiliarity with the CPA, its role in the legal framework and its content.[40] In one of the cases, the Appellate Court in Maribor worryingly held that the CPA applies only to administrative procedures before the competent inspectorate, but not to judicial proceedings.[41] This could be almost seen as unsurprising in light of the fact that the CPA is not included in the list of sources and literature for the state lawyers' examination (except regarding the framework for judicial protection).[42] Thus, lawyers (including future judges, prosecutors, attorneys and notary public) only need to be familiar with *lex generalis*, i.e. the Code of Obligations, and not also with its *lex specialis*, the CPA. Effectively, lawyers learn the 'wrong' law in the consumer law context.[43] This is reflected in a lower standard of consumer protection in practice, despite generally satisfying legal and policy framework.

It is hard to estimate what percentage of consumers and traders/merchants are satisfied with the outcome and timing of a consumer dispute before the court, but it seems that the judiciary is by and large 'consumer friendly'. As regards the duration of proceedings, Slovenia is known for long delays in adjudicating cases and has been frequently condemned for it by the European Court of Human Rights.

[35]Case C-137/08, *Pénzügyi Lízing*, ECLI:EU:C:2010:659.

[36]Case C-618/10, *Banco Español de Crédito*, ECLI:EU:C:2012:349.

[37]C-168/00, *Leitner*, ECLI:EU:C:2002:163.

[38]See the Supreme Court of the RS decision, II DoR 397/2012, ECLI:SI:VSRS:2013:II.DOR.397.2012.

[39]Možina (2015), p. 17.

[40]Ibid.

[41]Ibid. Decision of the Appellate Court in Maribor, I Cp 1902/2010, 17.3.2011.

[42]Možina (2015), p. 18.

[43]Ibid.

6 Specialised Agencies and the Enforcement of Consumer Law

There are several specialised agencies in charge of the enforcement of consumer law. Most of them assume only supervisory powers, with an exception of the main one, i.e. the Market Inspectorate of the RS.[44] The CPA grants powers of surveillance and enforcement to the Market Inspectorate (and other competent inspectorates) in Article 70.

The Market Inspectorate is a constituent body of the Ministry of Economic Development and Technology. The main legal basis for its establishment is the Market Inspection Act.[45] It functions on the basis of the Constitution of the RS and the relevant legislation (e.g. the CPA and the Consumer Credit Act). It is a public body, responsible for surveillance of execution and enforcement of Slovenian legislation in areas of consumer protection, product safety, trade, catering, crafts, services, pricing, tourism, competition protection and copyrights. It monitors the application of the legislation, as well as helps to resolve the consumer disputes and acts as the minor offence authority. Pursuant to the CPA, the Market Inspectorate has the power to, for example, issue injunctions, decisions to temporarily prohibit unlawful practices or to require the fulfilment of legal obligations. Also, it has the power to impose monetary penalties.

It is important to emphasise that the Market Inspectorate carries out the administrative procedure. Thus, some principles that are applicable to the judicial branch are not applicable to its procedures. In this context, the judicial control of the Market Inspectorate's decision is possible through the administrative dispute (judicial review of administrative acts).

The head of the Market Inspectorate is the Chief Market Inspector. Its headquarter is in the capital Ljubljana, while there are also regional and local offices at 14 different locations all over Slovenia. However, all market inspectors can work and carry out their tasks on the entire territory of Slovenia.

Another special body under the auspices of the Ministry of Economic Development and Technology is the Sector for consumers and competition. It provides information and advice to consumers. It has established a free telephone counselling for consumers.[46]

Another important body, in Slovenia under the auspices of the Ministry of Economic Development and Technology, is the European Consumer Centre, which forms part of the European network and deals with cross-border cases. It is not an independent body as it is the case in other countries. It has come under the

[44] http://www.ti.gov.si/en/. Accessed 1 December 2016.

[45] Zakon o tržni inšpekciji—ZTI, OG RS No. 20/97.

[46] Ministry of Economic Development and Technology. 2016. http://www.mgrt.gov.si/si/delovna_podrocja/notranji_trg/sektor_za_varstvo_potrosnikov_in_konkurence/svetovanje_potrosnikom/. Accessed 1 December 2016.

Ministry's umbrella in 2014, although it was initially established under the auspices of the non-governmental SCPA (in 2006).[47]

There are also other public agencies and public bodies that are part of ministries that play an important role in the consumer rights enforcement, in particular through their supervisory powers to monitor the implementation and the enforcement of the consumer legislation. Apart from the Market Inspectorate, the supervisory powers assume also, for example, the Health Inspectorate of the RS, the Veterinary Administration of the RS, the Inspectorate for Agriculture, Forestry, Food, and Environment, the Transport, Energy and Spatial Planning Inspectorate of the RS, the Chemicals Office of the RS, the Insurance Supervision Agency, the Securities Market Agency, the Bank of Slovenia, the Medical Devices Agency, the Post and Electronic Communications Agency of the RS, and the Energy Agency of the RS.

When enforcing consumer rights via a specialised agency path, consumers only 'report' infringing businesses to a specialised agency or public authority, e.g. the Market Inspectorate, and the latter then carries on the procedure and investigation. Thus, this enforcement mechanism is less time-consuming and tiring for consumers in comparison to the enforcement before the courts. However, it is believed that the main shortcomings of the enforcement of consumer rights before specialised agencies are limited sources and personnel.

7 The Role of Consumer Organisations in Enforcement of Consumer Law

Three consumer organisations, registered by the competent ministry, exist in Slovenia (according to the official data available on the website of the Ministry of Economic Development and Technology)[48]:

1. The Slovenian Consumer Protection Association (SCPA; Zveza potrošnikov Slovenije);
2. The International Institute for Consumer Research (Mednarodni inštitut za potrošniške raziskave);
3. The Consumer Association of the Upper Carniola Kranj (Združenje potrošnikov Gorenjske Kranj).

[47]Delo. 2014. Potrošniški center prevzelo gospodarsko ministrstvo. http://www.delo.si/gospodarstvo/potrosnik/potrosniski-center-prevzelo-gospodarsko-ministrstvo.html. Accessed 1 December 2016.

[48]Ministry of Economic Development and Technology. 2016. Potrošniške organizacije. http://www.mgrt.gov.si/si/delovna_podrocja/notranji_trg/sektor_za_varstvo_potrosnikov_in_konkurence/potrosniske_organizacije/. Accessed 1 December 2016.

The first two consumer organizations have their seat in the capital city Ljubljana, whereas the third one has its seat in Kranj, outside the capital city, and is a regional consumer organisation.

Article 63 of the CPA provides that consumer organisations are registered as societies or institutes, or other organisations that are not involved in profit-making activities, which are founded by consumers in order to protect their rights, and which are entered in the register of consumer organisations kept at the competent ministry. Conditions for entry in the register of consumer organisations shall be the neutrality and independence of the organisation from the interests of suppliers of goods and services, meaning that such an organisation may not receive funds from suppliers of goods and services. For entry in the register of consumer organisations, an organisation must meet certain organisational, spatial and technical conditions. There are special Rules on the procedure and requirements for entry of consumer organizations into the register.[49]

The relevant consumer organisations are competent to request an injunction or compensatory relief (now on the basis of the Collective Actions Act, previously based on Articles 74 and 75 of the CPA) or start legal proceedings due to the invalidity of contract terms.

Among consumer organizations working in the field of consumer protection, the most notable is the SCPA, a non-governmental autonomous organization that provides assistance in the area of the enforcement of consumer rights. It was founded in June 1990. Its institutional structure is legally an association governed by the executive board. Its president is Breda Kutin.

There are also other NGOs (besides consumer organisations) which play a role in the enforcement of consumer law. For example, Zavod PIP provides free legal aid. It is a non-profit organization of private law specialized for providing legal counselling and legal aid, information about the European Union and developing non-governmental organizations.[50] There are also other organisations that provide help and assistance in the enforcement of consumer law, for example Zavod za brezplačno pravno pomoč[51] and Pravno-informacijski center nevladnih organizacij—PIC.[52]

8 Private Regulation and Enforcement of Consumer Law

Private regulation is not relevant for the enforcement of consumer law to a significant extent yet, however, it is gaining in its importance. Hitherto, there are only some instances of private regulation for the enforcement of consumer law, which are

[49]Pravilnik o načinu vpisa in pogojih za vpis potrošniških organizacij v register, OG RS No. 8/12.

[50]Zavod PIP. http://zavodpip.si/en/company-id-card. Accessed 1 December 2016.

[51]Zavod za brezplačno pravno pomoč. http://www.brezplacnapravnapomoc.si/. Accessed 1 December 2016.

[52]Pravno-informacijski center nevladnih organizacij—PIC. www.pic.si. Accessed 1 December 2016.

designed for resolution of narrowly defined consumer disputes and confined to certain sectors only. As an example, there is a special code for resolving disputes with mediation in the insurance sector. Moreover, the Bank Association of Slovenia has a special conciliatory body.[53] Similarly, the Energy Act,[54] the Payment Services and Systems Act,[55] and the Postal Services Act[56] govern special dispute resolution mechanisms. In the telecommunications sector, a special Telecommunication Code on Compensation has been adopted by eight telecommunications providers.[57] Its goal is to enable faster and more efficient complaints resolution procedure. These dispute resolution bodies operate within professional or commercial associations. Thus, there are concerns pertaining to their impartiality and independence.[58]

Apart from the limited role in resolving consumer disputes, which is confined to certain sectors only, private regulatory bodies can initiate administrative proceedings with the Market Inspectorate or inform consumer organisations of their competitor's infringements of consumer law.

9 Enforcement Through Collective Redress

In Slovenia, collective redress is available both for injunctive and for compensatory relief. Collective organisations are able to bring an action for injunctive or compensatory relief pursuant to the Collective Actions Act. It was published in October 2017, and it is effective since 21 April 2018. It governs collective actions and collective settlements, and also a special follow on action for competition law infringements.

Collective redress in Slovenia takes form of a representative action. Qualified consumer organisations and a senior state attorney can pursue collective consumer claims. The choice of the opt-in or opt-out regime is left to the discretion of the judge on a case by case basis (Article 30 of the Collective Actions Act). There are some exceptions to this rule. The opt-in regime is mandatory if at least one of the claims relates to the payment of compensation for non-material damage, or if at least 10% of the group members claim a payment exceeding 2,000 EUR. Before the adoption of the Collective Actions Act, collective organisations and the chamber or business associations of which the defendant enterprise is a member were able to bring actions

[53]Resolucija o Nacionalnem programu varstva potrošnikov 2012–2017, point 6.8.

[54]Energetski zakon—EZ-1, OG RS No. 17/14 et seq.

[55]Zakon o plačilnih storitvah in sistemih—ZPlaSS, OG RS No. 58/09 et seq.

[56]Zakon o poštnih storitvah—ZPSto-2, OG RS No. 51/09 et seq.

[57]The wording of the Code (Telekomunikacijski kodeks o nadomestilih) can be accessed here (in Slovene): https://www.zps.si/images/stories/telekomunikacije/samoregulacijski_kodeks_telekomunikacije.pdf.

[58]For an overview of shortcomings of such system, see Galič (2012), pp. 6–8; Felc and Češnjevar (2007), pp. VII–VIII.

for injunctive relief based on (now repealed) Articles 74 and 75 of the CPA. One of the most well-known cases is the action initiated by the SCPA against the biggest bank in Slovenia, NLB, d.d., due to lower interest rates than promised in the promotional brochure.[59]

Moreover, the Civil Procedure Act governs the possibility that several plaintiffs file a complaint jointly or for a plaintiff (or more) to file a complaint against several defendants. Claims may also be joined by the judge. The Civil Procedure Act governs also test-case procedure. Article 279b provides that if a larger number of actions has been brought in which the claims are based on the same, or similar, factual and the same legal basis, the court shall after receipt of the statements of defence and on the basis of one action conduct test case proceedings, whilst staying the other proceedings. Prior to issue of an order staying the proceedings, the court shall permit the parties to make a statement about the stay of the proceedings for the purpose of conducting test case proceedings and of making it possible for the plaintiff the declare themselves about the statements in the statement of defence. After the judgment issued in the test case proceedings has become final, the stayed proceedings which shall have no particular priority shall be decided taking into account the decision in the test case.

10 Sanctions for Breach of Consumer Law

The envisaged sanctions for the breach of consumer law in Slovenia are pecuniary fines, pecuniary damages, injunctions, invalidity or lack of legal effects, and in certain instances even imprisonment. The applicable sanctions are provided by the CPA and by other sectoral legislation (e.g. the Consumer Credit Act) and by the Criminal Code.[60]

In practice, the most common sanctions are injunctions and pecuniary fines. In limited circumstances, a breach of consumer legislation can lead to criminal liability. The Criminal Code contains a provision dealing with the production and trade of tainted foodstuffs and other products (Article 184 of the Criminal Code). It provides in the first paragraph that 'whoever produces, sells or otherwise supplies foodstuffs dangerous to human health, thus causing danger to human life or health shall be sentenced to imprisonment for not more than three years.' The second paragraph reads: 'Whoever produces, sells or otherwise puts on the market products for personal care, toys or similar products for mass consumption, which are dangerous to human health, shall be punished to the same extent.' If serious or grievous bodily

[59]The Supreme Court of the RS decision, II DoR 187/2010, ECLI:SI:VSRS:2010:II.DOR.187.2010.1. For media coverage, see for example http://www.24ur.com/novice/slovenija/tozba-zaradi-prenizkih-obresti.html; http://siol.net/novice/slovenija/vrhovno-sodisce-glede-modrega-varcevanja-pritrdilo-zps-109614.

[60]Kazenski zakonik—KZ-1, OG RS 50/12 et seq.

harm or a corresponding impairment of health of at least one person have been caused, the sentence can be 5 years of imprisonment.

11 Alternative Mechanisms for the Resolution of Consumer Disputes

Alternative dispute resolution (ADR) mechanisms for consumer disputes are governed by the Out-of-Court Resolution of Consumer Disputes Act, transposing Directive 2013/11 on alternative dispute resolution for consumer disputes (Directive on consumer ADR)[61] and the Regulation 524/2013 on online dispute resolution for consumer disputes (Regulation on consumer ODR).[62] It provides for the voluntary ADR. Consumer ADR under the Out-of-Court Resolution of Consumer Disputes Act is currently run only by a small number of bodies, but the number is steadily growing.[63] Institutions carrying out consumer ADR are approved by the Ministry of Economic Development and Technology. Regarding the requirements for the ADR providers, the Out-of-Court Resolution of Consumer Disputes Act provides that the natural persons in charge of ADR possess the necessary expertise and are independent and impartial. The Ministry has been subject to criticism for granting approvals to institutions that are politically close to the government.

The basic principles and rules on mediation procedure are governed by the Mediation in Civil and Commercial Matters Act,[64] which transposed the Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters.[65]

The elements of mandatory mediation are present in relation to court-annexed mediation, governed by the Act on Alternative Dispute Resolution in Judicial Matters.[66] With the introduction of this Act in 2010, the court-annexed mediation was made obligatory for the first instance courts and for appellate courts. The Civil Procedure Act provides that the court has a duty to draw the parties' attention to the possibilities of interrupting the legal proceedings due to alternative dispute resolution mechanisms or to refer them to such mechanisms whenever this is appropriate.

[61]Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR), OJ L 165, 18.6.2013.

[62]Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR), OJ L 165, 18.6.2013.

[63]Ministry of Economic Development and Technology. 2016. http://www.mgrt.gov.si/si/delovna_podrocja/notranji_trg/sektor_za_varstvo_potrosnikov_in_konkurence/seznam_izvajalcev_irps/. Accessed 1 December 2016.

[64]Zakon o mediaciji v civilnih in gospodarskih zadevah, OG RS No. 56/08.

[65]Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters [2008] OJ L 136/3.

[66]Zakon o alternativnem reševanju sodnih sporov, OG RS No. 97/09 et seq.

The ADR mechanisms are both publicly and privately run. The court-annexed meditation is publicly run. Concerning the out-of-court mediation, there are several non-governmental organisations that are active in the field of mediation, the most important being the Permanent Arbitration Court of the Chamber of Commerce and Industry of Slovenia, the Slovenian Association of Mediators, the Centre for Mediation at the Legal Information Centre, the Slovenian Association of Mediation Organisations—MEDIOS, and the Institute for mediation and arbitration under the auspices of the Bar Association.

The ADR mechanism are implicitly promoted by the State as the most effective means of enforcement of consumer law, as it is highly encouraged and used both in the courts and in the out-of-court proceedings.

12 External Relations

As regards regional or international cooperation in organisations that have a common consumer policy, Slovenia is a member of the EU and the OECD. EU consumer law and policy has shaped almost every aspect of Slovene consumer protection law and policy. Also the OECD policy guidelines have had an impact on Slovene consumer protection law and policy, especially pertaining to consumer education in financial services sector.

Slovenia concluded also some bilateral agreements that concern the enforcement of consumer rights. For example, there are bilateral agreements on legal aid or the enforcement of (general) civil law with the following countries (we do not list the EU Member States here): Algeria, Australia, Bosnia and Herzegovina, Canada, Macedonia, Mongolia, Russia, Serbia, Turkey.[67]

Regarding Slovene consumer organisations' participation in international organisations, the SCPA participates in several regional or international networks, e.g.: the European Consumer Consultative Group (ECCG), the European Consumer Organisation (BEUC), the European Association for the Co-ordination of Consumer Representation in Standardisation (ANEC), the Consumers International (CI), the Trans Atlantic Consumer Dialogue (TACD), the European Food Safety Authority (EFSA), the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA).[68]

[67]Data accessible at http://www.mp.gov.si/si/zakonodaja_in_dokumenti/mednarodne_pogodbe_s_podrocja_pravosodja/bilateralni_sporazumi/. Accessed 1 December 2016.

[68]See the 2014 Annual Report of the Slovenian Consumer Protection Association: https://www.zps.si/index.php/o-nas/zveza-potronikov-slovenije/7406-letno-porocilo-zps-za-leto-2014. Accessed 1 December 2016.

13 Conclusion

In our opinion, the existing system of consumer protection in Slovenia is well designed. However, the effective framework does not suffice. It is a prerequisite of the effective enforcement that consumers are aware of their rights and exercise them in practice. The main shortcomings in the enforcement of consumer law in Slovenia are recognised precisely in the lack of adequate consumer awareness of their rights. The government's efforts to boost consumer awareness through education and information are welcome developments in this regard. However, it would be desirable to expand the scope of these actions from the consumer credit and the liability for defects areas to other areas relevant for consumers too.

One of the main impediments to the effective enforcement of consumer rights in Slovenia are slow and inefficient procedures, both judicial and administrative procedures. In courts, also aforementioned unfamiliarity with consumer law and the CJEU's case law is strikingly problematic.

Although the outlook of the ADR mechanism is more positive, there are only few consumer ADR providers under the Out-of-Court Resolution of Consumer Disputes Act, with most of them having their seat in the capital city Ljubljana or close to it. The situation could be improved with more numerous and dispersed consumer ADR providers, offering wider choice to consumers and also accessibility to consumers in all parts of the country.

When foreign consumers are taken into consideration, it seems especially problematic that the (current version) CPA is not available in English. This makes the enforcement of consumer rights more challenging for those that do not speak Slovene.

Despite certain shortcomings, the overall assessment of enforcement and effectiveness of consumer law in Slovenia leads us to the conclusion that consumers in Slovenia in theory enjoy a high level of consumer protection, mostly as a result of the implementation of EU law and policy. However, to achieve the effective enforcement of consumer law in practice both consumers and practitioners, including or even primarily judges, need to become better acquainted with consumer protection law.

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Enforcement and Effectiveness of Consumer Law in South Africa

Tjakie Naudé and Jacolien Barnard

1 Principal Legal and Policy Framework

1.1 Legislation and Common Law

South Africa does not have one unified law on consumer protection. The broadest legislation is the Consumer Protection Act ('CPA'), which came into force in 2011.[1] This Act recognises 10 consumer rights,[2] which echo those recognised in the UN Guidelines for Consumer Protection and by Consumers International. The lead regulator under the CPA is the National Consumer Commission ('NCC'). The CPA was preceded by the less comprehensive Consumer Affairs (Unfair Business Practices) Act,[3] which did not recognise specific consumer rights, but relied on declaration of a practice as unfair by the Minister of Trade and Industry.

[1] 68 of 2008, available at http://www.gov.za/documents/consumer-protection-act.

[2] Ss 8 to 71. The right of equality in consumer market, right to privacy, right to choose, right to disclosure and information, right to fair and responsible marketing, right to fair and honest dealing, right to fair, just and reasonable terms and conditions, right to fair value, good quality and safety, supplier's accountability to consumers and the right to be heard and obtain redress. The Act provides for consumer education in s 96.

[3] 71 of 1988.

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Another major law is the National Credit Act ('NCA'),[4] which created the National Credit Regulator ('NCR') and the National Consumer Tribunal ('NCT'). This Act revoked old consumer credit legislation.[5]

The enforcement of legislation in the financial services sector, such as the Long-Term Insurance Act[6] and the Financial Advisory and Intermediary Services Act,[7] was overseen by the Financial Services Board, created by the Financial Services Board Act.[8] Suppliers in this sector are not subject to the CPA.[9] Under the Financial Sector Regulation Act,[10] the Financial Services Board was replaced by a new market conduct authority, the Financial Services Conduct Authority ('FSCA'), as from 1 April 2018.

Other sector-specific Acts apply in conjunction with the CPA, such as the Rental Housing Act.[11] Several pieces of legislation provide for food safety standards.[12] The Electronic Communications and Transactions Act[13] protects consumer rights, such as to a cooling-off right.[14] The CPA provides that in case of an inconsistency between itself and other legislation, both provisions apply concurrently, and if that is not possible, the provision which most protects the consumer prevails.[15]

Additional legislation has created sectoral regulators, such as the National Energy Regulator.[16]

National government and the nine provincial governments have concurrent legislative authority regarding consumer protection.[17] Most provinces are in the process of aligning their pre-existing legislation with the CPA.[18]

[4] 34 of 2005, available at http://www.lawsofsouthafrica.up.ac.za/index.php/current-legislation.

[5] E.g. the Usury Act, 1926 and the Hire-Purchase Act, 36 of 1942.

[6] 52 of 1998, available at https://www.fsca.co.za/Customers/HTML%20Pages/legislation.html.

[7] 37 of 2002, available at https://www.fsca.co.za/Customers/HTML%20Pages/legislation.html.

[8] 97 of 1990, available at https://www.fsca.co.za/Customers/HTML%20Pages/legislation.html.

[9] Financial Services Board Act, 97 of 1990, s 28; Financial Sector Regulation Act 9 of 2017, s 10.

[10] 9 of 2017, available at https://www.fsca.co.za/Customers/HTML%20Pages/legislation.html.

[11] 50 of 1999, available at http://www.lawsofsouthafrica.up.ac.za/index.php/current-legislation.

[12] E.g. the Foodstuffs, Cosmetics and Disinfectants Act, 54 of 1972 and Agricultural Products Standards Act, 119 of 1990. The Foodstuffs, Cosmetics and Disinfectants Act and amendment legislation thereto are available at http://www.gov.za/documents/foodstuffs-cosmetics-and-disinfectants-act-2-jun-1972-0000. The consolidated Agricultural Products Standards Act is available on databases for paid subscribers (LexisNexis Online (South Africa) and Jutastat).

[13] 52 of 2002.

[14] Section 44.

[15] Section 2(9).

[16] National Energy Regulator Act, 40 of 2004, available at http://www.nersa.org.za/Admin/Document/Editor/file/Legislation/National%20%20Energy%20Regulation%20Act/NERSA%20ACT.pdf.

[17] Sch 4 of the Constitution of the Republic of South Africa, 1996, available at http://www.lawsofsouthafrica.up.ac.za/index.php/current-legislation.

[18] Woker (2015), pp. 43–45.

The CPA and other consumer legislation are not codifications and the uncodified common law applies as well.[19]

1.2 Consumer Policy and Strategic Plans

There is no published overarching consumer policy covering all sectors. The Department of Trade and Industry, which is responsible for policy and law on consumer protection, aims 'to create a fair regulatory environment that enables investment, trade and enterprise development in an equitable and socially responsible manner'.[20] One of the purposes of the CPA is 'providing for a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions; and providing for an accessible, consistent, harmonised, effective and efficient system of redress for consumers'.[21]

Various enforcement bodies publish strategic plans. An example is the NCC's main strategic objectives, inter alia 'to promote consumer protection and consumer safety', 'to promote reform of consumer policy and consumer protection legislation' and 'to conduct research and develop public awareness on consumer protection matters'.[22] The NCC no longer deals with all individual complaints by consumers, but refers these to the accredited industry ombuds, so that the NCC is free to rather focus on systemic problems in certain industries, proactive investigations and consumer education.[23]

The FSCA states that it aims 'to enhance and support the efficiency and integrity of financial markets and to protect financial customers by promoting their fair treatment by financial institutions, as well as providing financial customers with financial education.[24]

2 General Design of the Enforcement Mechanisms

Under the CPA, a person with locus standi under the Act,

[19] See e.g. section 2(10) CPA.

[20] See www.thedti.gov.za/about_dti.jsp.

[21] Section 3(1)(g) and (h).

[22] NCC, *Strategic Plan (2016/17–2020/21)* (25 January 2016), 20–23.

[23] *Annual Report 2014/2015*; *Consumer protection: input from Department of Trade and Industry (Consumer Corporate Regulation Division), National Consumer Commission, National Credit Regulator and National Consumer Tribunal*, minutes of a meeting of the Parliamentary Portfolio Committee on Trade and Industry of 29 July 2014. All such minutes referred to in this chapter are available at www.pmg.org.za for subscribers.

[24] https://fsca.co.za/Pages/About_us.aspx

may seek to enforce any right in terms of this Act or in terms of a transaction or agreement, or otherwise resolve any dispute with a supplier, by:

(a) referring the matter directly to the National Consumer Tribunal, if such a direct referral is permitted by [the CPA]. . .;
(b) referring the matter to the applicable ombud with jurisdiction. . .;
(c) if the matter does not concern a supplier contemplated in paragraph (b)
(i) referring the matter to the applicable industry ombud, accredited in terms of section 82 (6). . .; or
(ii) applying to the consumer court of the province with jurisdiction over the matter. . .;
(iii) referring the matter to another alternative dispute resolution agent contemplated in section 70; or
(iv) filing a complaint with the National Consumer Commission in accordance with section 71; or
(d) approaching a[n ordinary] court with jurisdiction over the matter, if all other remedies available to that person in terms of national legislation have been exhausted.

Imperial Group (Pty) Ltd. v Dipico[25] held that the consumer has a choice of which of the mechanisms in section 69(c) of the CPA may be approached.[26] In the next part, the NCC will be discussed, whereafter some sector-specific enforcement agencies will be considered, followed by a discussion of provincial consumer protection authorities and the provincial consumer courts. Ombuds and other alternative dispute resolution agents will be discussed in Sect. 4 below. The NCT and ordinary courts will be discussed in Sect. 5 below.

3 Specialised Enforcement Agencies

The main advantages of enforcement by these agencies are proactive investigations and that no legal representation is needed. The main shortcoming of these agencies is that they are situated only in some major cities.

3.1 National Consumer Commission ('NCC')

The NCC is an administrative body established 'under the auspices of the Department of Trade and Industry'.[27] According to the Department's website, the NCC is 'an organ of state within the public administration', but 'an institution outside the public service'.[28] It receives its budget allocation from the same Department and

[25] *Imperial Group (Pty) Ltd. v Dipico* (1260/2015) [2016] ZANCHC 1 (1 April 2016).
[26] Para 32.
[27] See www.thencc.gov.za.
[28] Section 85(1).

reports regularly to it and the Parliamentary Portfolio Committee on Trade and Industry.

The NCC is responsible to enforce the CPA by promoting informal dispute resolution; receiving and dealing with complaints regarding prohibited conduct; monitoring the consumer market and effectiveness of consumer groups; investigating alleged prohibited conduct; issuing and enforcing compliance notices; negotiating and concluding undertakings and consent orders; and referring matters to the Competition Commission, NCT or National Prosecuting Authority.[29] The NCC has broad investigative powers.[30]

The NCC has other functions such as establishing codes of practice,[31] promoting legislative reform[32] and research and consumer education.[33] The NCC deals exclusively with consumer law and franchisor-franchisee relations (and not also with competition law).

There are apparently no statistics on consumer awareness of the NCC. The NCC draws conclusions about the level of awareness of itself amongst different age and race groups from the amount of complaints received.[34] For example, the percentage of black people who lodged complaints is far below the StatsSA black population data (46% of complaints were by black African people, even though 80.4% of the population is black African).[35] By contrast, 41% of complaints were by whites, whereas whites constitute 8.3% of the population.[36] This suggests insufficient awareness of the NCC amongst blacks, and the difficulty of accessing enforcement agencies for low-income consumers.

Eighty percent of the 7204 complaints received were resolved on an average of 14 days in 2014/2015.[37] In earlier years the NCC had a great backlog of complaints, also due to insufficient resources.[38] The faster resolution of complaints as from 2014/2015 could be ascribed to the NCC's decision to refer individual complaints to accredited ombuds.[39]

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[29]Section 99.

[30]Sections 102–105.

[31]Section 93.

[32]Section 94.

[33]Sections 96–98. Section 100(2) obliges the Commission to consult with a regulatory authority before issuing a compliance notice to a regulated entity.

[34]See e.g. NCC, *Annual Report 2015/2016,* 28–29.

[35]NCC, *Annual Report 2015/2016,* 29 figure 4.

[36]Ibid.

[37]NCC, Annual Report 2015/2016, p. 36.

[38]See e.g. E Mohamed, *Presentation to the Parliamentary Portfolio Committee: Trade and Industry: Annual Report 2013–2014, 1st quarter report 2014–2015 National Consumer Commission 16-09-2014*, attachment to the minutes of a meeting of the Parliamentary Portfolio Committee: Trade and Industry of 16 September 2014.

[39]See also NCC, *Annual Report 2015/2016,* 36 in terms of which 96% of complaints received were referred to ombuds etc. or issued with non-referral notices within 14 days (a non-referral notice entitles the complainant to approach the National Consumer Tribunal—see further at n 49 below).

Consumers may still approach the NCC if they are dissatisfied with the outcome of the ombud's process, e.g. if no consensus was reached or the supplier remains recalcitrant.[40] The ombud may also refer matters to the NCC, particularly in cases of threats to consumers' safety and serious contraventions.[41]

The main causes of complaints to the NCC are poor service delivery, defective and unsafe goods, cancellation of contracts, incorrect billing, misrepresentation, unconscionable behaviour and unauthorised deductions[42] and misleading information.[43] The main sectors involved are retail, motor vehicles and the mobile phone industry.[44]

The NCC does not publish statistics on the percentage of parties who are satisfied with the outcome and timing of a dispute. However, in some reports the NCC indicated how much money was refunded to consumers (R26,6 million in 2011/2012).[45]

The NCC has targeted certain sectors over the years (e.g. the cellphone and timeshare industries, safety of paraffin stoves and pyramid schemes in 2015/2016).[46] The NCC focuses especially on vulnerable consumers, including low-income consumers, elderly, young and disabled consumers and first time home or vehicle buyers.[47]

There have been indications of a lack of capacity at the NCC in the first years of its existence. Compliance notices issued by it were often set aside because the CPA was not in force at the time of the relevant conduct, or because the NCC did not comply with the procedural requirements for the issuing of compliance notices, such as an investigation.[48] It is worrying that the NCC often unjustifiably issues notices of non-referral, thereby forcing consumers to approach the National Consumer Tribunal for relief, even though the requirements for a notice of non-referral in the CPA are not met.[49] The NCC needs to take a more active stance toward enforcement.

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[40]See e.g. Consumer Goods and Services Ombud (CGSO), *Annual Report 2014/2015* 8.

[41]CGSO, *Annual Report 2015/2016* 3.

[42]NCC, *Annual Report 2014/2015.*

[43]*National Consumer Commission: further briefing; Co-operatives Amendment Bill: report back by subcommittee,* minutes of a meeting of the Parliamentary Portfolio Committee: Trade and Industry of 06 September 2012.

[44]Ibid.; Ebrahim Mohamed *Briefing to the Parliamentary Portfolio Committee on Trade and Industry on the second quarter report (2015–2016) of the National Consumer Commission*, attachment to the minutes of the meeting of the Parliamentary Portfolio Committee on Trade and Industry of 18 November 2015.

[45]NCC, *Annual Report 2011/2012* at 6.

[46]*NCR 1st Quarter 2015/6 performance*, minutes of a meeting of the Parliamentary Portfolio Committee on Trade and Industry of 13 November 2015; NCC, *Annual Report 2014/2015*.

[47]See e.g. NCC, *Annual Report 2014/2015.*

[48]For examples, see *Vodacom Service Provider Company (Pty) Ltd. and Another v National Consumer Commission* (NCT/2793/2011/101 (1)(P)) [2012] ZANCT 9 (8 June 2012); *Club Leisure Group v National Consumer Commission* (NCT/4900/2012/60(3)&101(1)(P)) [2014] ZANCT 5 (22 January 2014); *Quality Vacation Club v National Consumer Commission* (NCT/5078/2012/60(3)& 101(1)(P)) [2014] ZANCT 6 (22 January 2014). See Magaqa (2015), p. 32.

[49]Section 72.

3.2 National Credit Regulator ('NCR')

The NCR was created by the National Credit Act, 34 of 2005 as a 'Department of Trade and Industry agency'.[50] It also reports to the Parliamentary Portfolio Committee on Trade and Industry. It receives its budget allocation from the Department of Trade and Industry and reports to that Department.

The NCR's mandate is consumer education, research, policy development, registration of industry participants (credit providers, credit bureaux and debt counsellors), investigation of complaints, and enforcement of compliance with the NCA.[51] The NCR must also promote 'a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry.'[52]

The NCR has often been successful in applications for administrative fines against offending suppliers.[53] The NCR also acts proactively in policing non-compliance with the NCA.[54] In addition it sometimes conducts national studies such as on weaknesses in these systems, which may then lead to legislative reform.[55]

There are no statistics on satisfaction by complainants with the NCR's services. The amounts refunded to consumers and adjustment to account balances are indicated (e.g. R4 million in 2015/2016[56]). 4068 consumer disputes were initiated in 2015/2016, and 3571 were resolved, whereas the NCR received many more calls and complaints.[57] In 2012/2013, 90.8% of complaints were resolved within 90 days. The main causes of complaints and disputes related to high interest rates, failure to provide accounting statistics, non-issuance of notification to credit providers by debt counsellors, delayed distribution of funds by payment distribution agents, unprofessional conduct of debt counsellors, overcharging on credit life insurances, reckless lending and illegal advertising.[58]

Some disputes find their way to the Credit Ombud, a dispute resolution scheme set up by the credit industry, discussed below.[59] The NCR is the only body allowed to deal with complaints about debt counsellors.

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[50]Website of the Department of Trade and Industry, www.thedti.gov.za/agencies/ncr.jsp.

[51]Ch 2 of the National Credit Act, 34 of 2005.

[52]Section 13.

[53]A recent example is *National Credit Regulator v Kutuma Financial Services* (NCT/16158/2014/140(1)NCA) [2016] ZANCT 5 (2 February 2016).

[54]See e.g. *Public procurement and localisation & consumer credit regulation: dti briefing; Preferential Procurement Policy Framework: National Treasury briefing; National Credit Regulator on African Bank crisis, with Minister,* minutes of a meeting of the Parliamentary Portfolio Committee on Trade and Industry of 22 August 2014. See also NCR, *Annual Report 2015/2016* 32.

[55]Ibid.

[56]NCR, *Annual Report 2015/2016* 31.

[57]NCR, *Annual Report 2015/2016* 30.

[58]*National Consumer Commission; National Regulator for Compulsory Specifications & National Credit Regulator on their 2014/15 Annual Reports; NCR 1st Quarter 2015/6 performance*, minutes of a meeting of the Parliamentary Portfolio Committee: Trade and Industry of 13 October 2015.

[59]Section 4.

3.3 Financial Services Board and Financial Sector Conduct Authority

The Financial Services Board ('FSB') was an independent regulatory authority created by the Financial Services Board Act[60] to oversee the non-banking financial services sector. This includes retirement funds, short-term and long-term insurance companies, collective investment schemes (like unit trusts), capital markets and financial advisors and brokers. It was funded by levies payable by this industry.[61]

As already noted, the Financial Sector Regulation Act[62] resulted in replacement of the FSB by the Financial Services Conduct Authority as from 1 April 2018. The FSCA will also supervise the conduct of banks and will continue to enforce the FSB's 'Treating Customers Fairly' program. The FSCA will also license financial service providers, like the FSB before it.[63]

Legislation governing licensing and consumer protection in the financial sector, to be named the Conduct of Financial Institutions Act, is currently being drafted.[64] A draft Bill is expected to be published for comment in 2018.

3.4 Independent Communications Authority of South Africa

The Independent Communications Authority of South Africa (ICASA) was created by the Independent Communications Authority of South Africa Act.[65] It regulates broadcasting, electronic communications and postal services, and is responsible for licensing.

ICASA enforces various consumer protection rules, such as in the Postal Services Act.[66] It also focuses on consumer education and advocacy.[67] ICASA publishes reports on its website and other media forums.[68] In 2014/2015, 4297 consumer complaint cases were opened and 3867 were resolved.[69] No such statistics are

[60] 97 of 1990.

[61] www.fsb.co.za/Pages/Home.aspx.

[62] 9 of 2017.

[63] See www.fsb.co.za/TPNL/2/licensing.html.

[64] www.fsb.co.za/TPNL/2/licensing.html.

[65] 13 of 2000, available at http://www.lawsofsouthafrica.up.ac.za/index.php/current-legislation.

[66] 124 of 1998, available, with amendment legislation, at http://www.gov.za/documents/postal-services-act.

[67] See www.icasa.org.za/ConsumerProtection/tabid/66/Default.aspx.

[68] E.g. www.icasa.org.za/ConsumerProtection/PublicAwareness/NationalCampaigns/tabid/532/Default.aspx.

[69] ICASA, *Annual Report 2015* 51.

available for 2015/2016, but 91% of complaints were resolved in this period.[70] The main causes of complaints are quality of service, internal referrals and billing.[71]

3.5 *Brief Overview of Some Other Specialised Enforcement Agencies*

The National Regulator for Compulsory Specifications (NRCS) sets compulsory standards in line with international standards, including on food safety, building regulations, motor vehicles and electro-technical devices. It was created by the National Regulator for Compulsory Specifications Act[72] as 'an entity of the Department of Trade and Industry'.[73]

The National Energy Regulator of South Africa (NERSA) regulates the electricity, piped gas and petroleum pipeline industries.[74] It sets guidelines for tariffs. ESCOM, a state-owned enterprise, has a monopoly on the supply of electricity to consumers, through local authorities such as city councils.

The Health Professions Council of South Africa (HPCSA) was established by the Health Professions Act.[75] The HPCSA co-ordinates with professional boards within the health sector, which require registration for health professionals.[76] The HPCSA determines strategic policy (for example regarding education, registration and ethics).[77] It also arbitrates and mediates disputes.[78] The Legal Department opened 2944 cases in 2015/2016, of which the ombudsman received a total of 676 and resolved 557.[79]

The Council for Medical Schemes ('CMA') was established by the Medical Schemes Act[80]and provides 'regulatory supervision of private health financing through medical schemes.'[81] 5089 new complaints were received and 5794 were resolved in 2015/2016.[82]

[70]ICASA, *Annual Report 2015/2016* 65.

[71]ICASA *Annual Report 2013* 49.

[72]5 of 2008, available at http://www.nrcs.org.za/siteimgs/downloads/NRCS%20ACT%20Act%205%20of%202008.pdf.

[73]See www.nrcs.org.za/content.asp?subID=4.

[74]National Energy Regulator Act, 40 of 2004.

[75]56 of 1974, available at http://www.lawsofsouthafrica.up.ac.za/index.php/current-legislation.

[76]See www.hpcsa.co.za/About.

[77]For the full list see www.hpcsa.co.za/OrgStructure.

[78]Ibid.

[79]HPCSA, *Annual Report 2015/2016* 31.

[80]131 of 1998, available at http://www.lawsofsouthafrica.up.ac.za/index.php/current-legislation.

[81]See www.medicalschemes.com.

[82]CMS, *Annual Report 2015/2016* 43.

The Estate Agency Affairs Board ('EAAB') was created by the Estate Agency Affairs Act.[83] It sets educational standards for estate agents and requires registration. It also has a consumer protection and education function. It administers the Estate Agents Fidelity Fund for claims in the event of disappearance of money from an estate agent's trust fund. 4821 complaints were initiated and 3131 resolved in 2015/2016.[84]

3.6 Provincial Consumer Protection Authorities

The consumer protection authorities of South Africa's nine provinces have typically been set up in terms of the now repealed Consumer Affairs (Unfair Business Practices) Act,[85] as well as provincial legislation.[86] The CPA recognises the jurisdiction of the provincial authorities over suppliers carrying on business exclusively within that province.[87] It provides for cooperation between these authorities and the NCC.[88] Most of the provinces are in the process of aligning their provincial legislation with the CPA.

Typically the provincial legislation provides for various powers to enable investigations into consumer complaints. After the investigation, the authority may issue a notice of non-referral to the consumer, who may then refer the matter to the consumer court. Alternatively, the investigator may negotiate with the supplier that prohibited conduct be stopped. An agreement reached may be confirmed as a consent order by the consumer court or an ordinary court. Otherwise the consumer protection authority may issue a compliance notice.[89] The Consumer Protector may also decide to institute proceedings against the supplier in the provincial consumer court.

Although in Gauteng province, matters have been known to proceed to trial in the provincial consumer court within weeks,[90] this is not currently the experience in all provinces.[91]

[83] 112 of 1976, available at http://www.lawsofsouthafrica.up.ac.za/index.php/current-legislation.

[84] EAAB *2015/2016 Annual Report* 41.

[85] 71 of 1998.

[86] E.g. the Western Cape Consumer Affairs (Unfair Business Practices) Act 10 of 2002 (available at https://www.westerncape.gov.za/Text/2004/8/act10_2002.pdf); North-West Consumer Affairs (Unfair Business Practices) Act 4 of 1996; Northern Cape Consumer Protection Act 1 of 2012; and Gauteng Consumer Affairs (Unfair Business Practices) Act 7 of 1997 (available at http://www.ecodev.gpg.gov.za/ConsumerAffairs/Pages/ConsumerProtectionLegislation.aspx).

[87] Section 84.

[88] Sections 83 and 84.

[89] Section 84 CPA.

[90] Du Plessis (2008), p. 76 on the position in Gauteng.

[91] As confirmed to Tjakie Naude by Elizabeth de Stadler, an attorney who specialises in consumer law in Cape Town, on the basis of letters by the Western Cape Consumer Protector. A possible

The provincial consumer courts are really tribunals, as their orders cannot be enforced and executed as judgements of the ordinary courts.[92] Instead, non-compliance with their orders is typically a criminal offence.[93] Experience in Gauteng has shown that criminal charges do not always result in financial compensation to the consumer by the offending supplier.[94]

Section 140(7) NCA and s 73(6) CPA may create confusion by providing that an order of a consumer court made after hearing a matter referred to it by the NCC or NCR 'has the same force and effect as it if had been made by the Tribunal'. In turn, an order by the Tribunal 'may be serviced, executed and enforced as if it were an order of the High Court'.[95] This still requires a writ of execution issued by the registrar of the High Court.[96] However, the CPA and NCA do not clearly give consumer courts' judgments the same status when a consumer or Consumer Protector approached the consumer court.

One author has therefore called for the provincial consumer protection legislation to provide for enforcement and execution of consumer court orders.[97] Some provinces have recently enacted new legislation or published draft legislation for comment which grants the consumer court judgments the same status as that of the Magistrates' Courts. Whether they are entitled to do so is doubtful given that only national legislation may recognise courts not already listed in the Constitution of the Republic of South Africa, 1996.[98] The Constitution does provide that a provincial legislature may promulgate legislation on consumer protection.[99] On the other hand, section 171 of the Constitution provides that '[a]ll courts function in term of national legislation and their rules and procedures must be provided for in terms of national legislation'. Section 165 of the Constitution states that 'judicial authority of the Republic is vested in the courts', and the courts are '(a) the Constitutional Court; (b) the Supreme Court of Appeal; (c) the High Courts, including any High Court of appeal that may be established by (d) the Magistrates' Courts; and (e) any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates' Courts.'[100] Judicial authority can therefore only be conferred upon a tribunal by national legislation. Such national legislation should clearly set out rules on the enforcement or execution

explanation for some delays is that the Western Cape is currently in the process of aligning its consumer protection legislation with the CPA.

[92]Du Plessis (2010), p. 517.

[93]See e.g. section 30 of the Gauteng Consumer Affairs (Unfair Business Practices) Act 7 of 1996.

[94]Du Plessis (2010), pp. 522–523.

[95]Section 152 NCA.

[96]R 45 of the High Court Rules.

[97]Du Plessis (2010), p. 517.

[98]Sections 165, 166 and 171 of the Constitution of the Republic of South Africa, 1996.

[99]Sch 4.

[100]Section 166.

of judgments. Any writ of execution would probably still have to be issued by the clerk of the Magistrates' Court or registrar of the High Court.[101]

Should the CPA and NCA be amended to give the provincial consumer courts' judgments the same status as that of the Magistrates' Courts? Consumers may be confused by the judgment not being executable. The provincial consumer courts may also be more accessible than ombuds and specialised agencies with offices in one city. If the provincial consumer courts can be trusted to give good judgments after referral by the NCC or NCT, they should also be trusted when approached by consumers directly. Criminal proceedings entail unnecessary costs for the state.[102] The national legislation should also provide for appeals against the orders of the consumer courts to the National Consumer Tribunal.

Provincial authorities run awareness campaigns, with mixed success. One example is the Gauteng Consumer Protection Office, which ran 437 workshops, 46 road shows and 6 imbizos in the 2014/2015 financial year.[103] A survey done in 2014/2015 to assess consumer education and awareness in the Western Cape found that about 77% of respondents knew about the CPA and more than 80% knew of other relevant legislation such as the Western Cape's consumer legislation.[104] However, only 14.2% indicated that they knew about the Office of the Consumer Protector (who represents consumers in the provincial consumer tribunal).[105] Very few indicated that they attended information sessions (4.7%), 'heard about it in on the radio (11.2%), read about them in community newspapers (10.8%) or were given brochures (5%).'[106]

The same survey found that 52.5% of respondents who submitted complaints were dissatisfied with the services experienced.[107] The following reasons were indicated: 'inability to be assisted in a manner satisfactory to consumers', 'lack of communication' and 'unclear conduct between [the office] and companies'.[108] 55.7% of respondents rated the response time as poor although respondents were informed of closure of cases within a maximum of 3 months.[109] Respondents also

[101] Cf the comparable case of *MBS Transport CC v CCMA and others; Bheka Management Services (Pty) Ltd. v Kekana and Others Case No J1706/15,* unreported judgment of the Labour Court of 06 November 2015 in which it was held that the Commission for Conciliation, Mediation and Arbitration could not give itself the power to issue writs of execution, which should be issued by the Labour Court.

[102] Du Plessis (2010), p. 523.

[103] Gauteng Department of Economic Development, *Annual Report 2014/2015* at 24. 'Imbizo' is an isiZulu word for a forum for discussion of policy.

[104] Urban-Econ Development Economists, *Outcomes Evaluation of the Office of the Consumer Protector's Consumer Complaints Programme: 2014–2015* 39 (www.westerncape.gov.za/assets/departments/economic-development-tourism/ocp_eval2.pdf).

[105] Ibid., p. 40.

[106] Ibid., p. 41.

[107] Ibid., p. 50.

[108] Ibid.

[109] Ibid.

complained about technical jargon in explanations on closure of cases.[110] Unrealistic expectations of the powers of the Consumer Protector added to consumers' frustration.[111]

Statistics for complaints handling by the provinces cannot be given here due to space constraints. Provincial consumer protection authorities and other enforcers send statistics to a Compliance Committee, but this data is not published. Instead, the Annual Reports of some provincial authorities contain statistics.[112] For example, the Gauteng Department resolved 2367 complaints within 60 days in 2014/2015.[113]

4 Alternative Dispute Resolution ('ADR')

As noted above, section 69 of the CPA provides that a consumer[114] must first approach the 'applicable ombud with jurisdiction'. If this route is not applicable, the consumer may refer the matter to inter alia 'the applicable industry ombud, accredited in terms of section 82(6)' or another ADR agent.

An ADR agent may terminate the process if there is 'no reasonable probability of the parties resolving their dispute through the process', whereafter a complaint may be filed with the NCC.[115] The ADR agent may refer an agreement between the parties to the National Consumer Tribunal or high court to be made a consent order, which may include an award of damages.[116]

'Ombud with jurisdiction' is defined firstly as an ombud recognised by national legislation, or where a supplier is a 'financial institution', an ombud as determined in accordance with section 13 or 14 of the Financial Services Ombud Schemes Act.[117] This should be contrasted with 'industry ombuds' accredited in terms of section 82 (6). Currently, the accredited industry ombuds are the Consumer Goods and Services Ombud (CGSO) and the Motor Industry Ombudsman (MIOSA). It should be noted that, since 2014, financial institutions subject to regulation by the Financial Services Board and now the FSCA, are no longer subject to the CPA. Thus the accredited industry ombuds will be discussed briefly first, after which the financial services ombuds will be discussed.

[110] Ibid.

[111] Ibid.

[112] The Western Cape Office of the Consumer Protector does not publish statistics on the number of disputes initiated for example.

[113] Gauteng Province Economic Development, *Annual Report 2014/2015* 24.

[114] Or other party with locus standi in terms of s 4(1).

[115] Section 70.

[116] Ibid.

[117] 37 of 2004, available at http://www.lawsofsouthafrica.up.ac.za/index.php/current-legislation.

4.1 Ombuds Accredited Under the CPA

Ombud schemes accredited under the Consumer Protection Act and other industry ombuds do not have the power to make binding determinations, but their rulings are mostly accepted by both parties.[118] The consumer retains the right to approach the NCC if they are not satisfied with the outcome of the process. The ombud may also refer matters to the NCC, which it will do in cases of threats to their safety and serious contraventions.[119] Moves are afoot to accredit more industry codes of conduct with dispute resolution schemes under the CPA.[120]

The CGSO was set up in 2013 as a voluntary scheme.[121] It was accredited under the CPA in 2015 as part of the Consumer Goods and Services Industry Code of Conduct, which became binding on all suppliers in this sector upon accreditation.[122] Suppliers in this industry are now subject to the code and obliged to contribute financially to the dispute resolution scheme, except for businesses with a turnover of less than R1 million.[123]

The ombud applies the law (particularly the CPA and the Code), other applicable industry codes or guidelines as well as fairness. The CGSO appears to be a success story. In 2015/2016, 3495 complaints were initiated[124] and 2192 resolved.[125] It took on average 57 days to resolve disputes in this period. The main causes of consumer complaints related to mobile phones, services, furniture, electrical appliances, computers and accessories, clothing, building material, hardware suppliers, cancellation and refund policies and incorrect prices.[126]

MIOSA was created in 2000 under a voluntary scheme. It was accredited under the CPA in 2015, with similar consequences as accreditation of the CGSO.[127] The MIOSA Annual Reports do not usually list the number of disputes initiated and

[118] See e.g. CGSO, *Annual Report 2014/2015* 8.

[119] CGSO, *Annual Report 2015/2016* at 3.

[120] The Minister published an Industry Code for the Franchise Industry for comment in GN 33 of 2016 in *Government Gazette* 39,631 of 29-01-2016, a Code for the Funeral Industry (GenN 534 in *GG* 40243 of 02-09-2016) and a Code for the Advertising and Marketing Industry (GenN 449 in *GG* 40159 of 26-07-2016). The NCC reported in 2014/2015 that it was working on an industry code for the airlines industry (Ebrahim Mohamed *Briefing to the Parliamentary Portfolio Committee: Trade and Industry on the 1st quarter report (2014–2015) of the National Consumer Commission,* attachment to the minutes of a meeting of the Parliamentary Portfolio Committee on Trade and Industry of 16 September 2014).

[121] CGSO, *Annual Report 2012/2013* 2.

[122] See www.cgso.org.za/members/code_background.htm.

[123] See www.cgso.org.za/members/code_background.htm. See for a different interpretation, Woker (2015), p. 42.

[124] CGSO, *Annual Report 2015/2016* 8.

[125] CGSO, *Annual Report 2015/2016* 9.

[126] CGSO, *Annual Report 2015/2016* 23–25.

[127] See www.miosa.co.za/articles/MIOSA_issue4_vol5.pdf.

resolved. However 175,932 calls were received in 2015.[128] The case of *Imperial Group (Pty) Ltd. t/a Cargo Motor Klerksdorp v Dipico and Another*[129] suggests that this ombud could in the past have done more to timeously and fairly resolve disputes. The consumer referred his complaint to this ombud during November 2012 but was allegedly told that the supplier could not find any fault with the vehicle, there was nothing to repair and the ombud was closing his file.[130] (The consumer had returned the vehicle to the supplier in April 2012). The ombud should rather have used another expert to inspect the vehicle. The NCC then referred the matter to MIOSA again in August 2013, but the dispute remained unresolved and the Ombudsman failed to make a ruling by March 2014.[131] The result was that by the time the review of a decision by a provincial consumer court in an interim application was heard by the High Court in February 2016, the consumer had been trying to resolve this dispute for almost 4 years without any final ruling.

The main advantage of dispute resolution by accredited ombuds is that disputes are typically resolved fast and informally by experts. The main shortcoming is that they are centrally situated and so out of reach of many low-income consumers. It may also frustrate consumers that the ombuds' rulings are not binding.

4.2 Ombuds in the Financial Services Sector

As noted, financial services regulated by the Financial Sector Conduct Authority are not subject to the CPA. Sector-specific legislation in this sector is typically enforced by ombuds recognised under the Financial Services Ombud Schemes Act,[132] which Act will effectively be replaced by Chapter 14 of the Financial Sector Regulation Act[133] from 1 October 2018. These ombuds were recognised before accreditation of ombuds under the CPA. A full discussion of these ombuds is beyond the scope of this chapter.[134] The Office of the Ombud for Financial Services Providers ('FAIS Ombud') was established by the Financial Advisory and Intermediary Services Act.[135] 9003 complaints were initiated and 3110 were resolved in 2014/2015.[136] In 2015/2016 9891 complaints were initiated and 9289 were resolved (including by

[128]MIOSA, *Annual Report 2015* 9.

[129](1260/2015) [2016] ZANCHC 1 (1 April 2016).

[130]Para 4.3.

[131]Para 4.

[132]37 of 2004.

[133]9 of 2017

[134]See e.g. Melville (2010), p. 50.

[135]37 of 2002. See http://www.faisombud.co.za/.

[136]FAIS Ombud, *Annual Report 2014/2015* 29. For more about this ombud, see Millard (2011), p. 232.

referral to other bodies).[137] The Pension Fund Adjudicator was created in 1998 and inter alia enforces the Pension Funds Act.[138] 9667 complaints were initiated and 9970 disposed of in 2015/2016.[139] 3467 final determinations were made, of which 83% in favour of consumers.[140]

Apart from these two statutory ombuds, there are four other ombud schemes recognised under the Financial Services Ombud Schemes Act. The ombud will first attempt conciliation, mediation and recommendation before making a determination.[141] The ombud may apply equitable principles.[142] The supplier but not the consumer is bound by the ombuds' ruling. The Ombudsman for Long-Term Insurance was created in 1985. It enforces the Long-Term Insurance Act[143] and policyholder protection rules. It only binds insurers who subscribe to its dispute resolution scheme, but most insurers do.[144] 5018 complaints were initiated and 3491 resolved in 2015.[145] The Ombudsman for Short-Term Insurance was created in 1989.[146] Its decisions are binding on the insurance companies that are its members, but not on the consumer. It enforces the Short-Term Insurance Act[147] and policyholder protection rules issued under it. 9784 complaints were initiated[148] and 2656 were resolved in 2015.[149] The Ombudsman for Banking Services was established in 1997 and applies the Code of Banking Practice.[150] 5021 complaints were initiated and 4899 resolved in 2015[151] The Credit Ombud was set up by the credit industry (but complaints against banks must be referred to the Ombudsman for Banking Services and complaints about debt counsellors are dealt with by the NCR).[152] 4522 complaints were initiated and 5074 resolved in 2015.[153] Disputes were resolved on average in 47.88 days.[154]

[137] FAIS Ombud, *Annual Report 2015/2016* 34–36.

[138] 24 of 1956, available at https://www.fsca.co.za/Customers/HTML%20Pages/legislation.html.

[139] Pension Fund Adjudicator, *Annual Report 2015/2016* Key figures.

[140] Ibid.

[141] Section 10(1)(e) of the Financial Services Ombud Schemes Act 37 of 2004; definition of 'industry ombud scheme' in section 1 of the Financial Sector Regulation Act 9 of 2017.

[142] Section 10(1)(e) of the Financial Services Ombud Schemes Act 37 of 2004; section 196(3) of the Financial Sector Regulation Act 9 of 2017.

[143] 52 of 1998, available at https://www.fsca.co.za/Customers/HTML%20Pages/legislation.html.

[144] See www.ombud.co.za/complaints/what-we-do.

[145] 'Key figures' in Ombudsman for Long-Term Insurance, *Annual Report 2015.*

[146] http://www.osti.co.za/ombudsman-about.html.

[147] 53 of 1998, available at https://www.fsca.co.za/Customers/HTML%20Pages/legislation.html.

[148] Ombudsman for Short-Term Insurance, *Annual Report 2015* 9.

[149] Ombudsman for Short-Term Insurance, *Annual Report 2015* 10. But note that 9944 cases were closed in this year.

[150] See http://www.obssa.co.za/index.php/about-us.

[151] Ombudsman for Banking Services, *Annual Report 2015* 20.

[152] See http://www.creditombud.org.za/jurisdiction/.

[153] Credit Ombud, *Annual Report 2015* 10.

[154] Ibid.

5 Enforcement by the Courts

Over 380 small claims courts have been established,[155] including in rural areas.[156] They provide fast, accessible dispute resolution. Legal representation is not allowed.[157]

As noted above, s 69 unfortunately provides that a consumer may only approach an ordinary court, including a small claims court, until all other avenues available under national legislation have been exhausted. This is unconstitutional, particularly in relation to the small claims courts, which may be more accessible to low-income consumers in rural areas than national and provincial consumer agencies and ombuds with offices only in major cities.[158]

It has been argued that section 69(d) does not apply where a consumer chooses to rely on a common law right, so that the consumer can immediately approach a court.[159] On the other hand, s 69 applies to attempts to 'enforce any right . . . in terms of a transaction or agreement, or otherwise resolve any dispute with a supplier'. This is broad enough to include disputes about the correct application of the common law.

The other ordinary courts, namely the Magistrates' Court and High Court, are typically out of reach of normal consumers, given that the intricate, formal court procedures necessitates legal representation and there are long waiting periods for trials.

It is also unclear in what instances the courts retain primary jurisdiction with respect to consumer disputes. The National Consumer Tribunal ('NCT') has stated that only the courts have jurisdiction regarding 'contractual disputes.'[160]

The interpretation that the NCT does not have jurisdiction over contractual disputes is not clearly borne out by the CPA. Amendment of this legislation is needed to clarify the position.[161] It is true that, in its initial briefing to Parliament, the Department of Trade and Industry stated that the ordinary courts would have exclusive jurisdiction over contractual consumer disputes in order to allay concerns by the Department of Justice that the courts' jurisdiction would be reduced by the creation of various tribunals.[162] However, the CPA does not plainly confirm this

[155] Small Claims Court Act, 61 of 1984, available at http://www.lawsofsouthafrica.up.ac.za/index.php/current-legislation.

[156] See http://www.justice.gov.za/contact/lowercourts-sheet-scc.pdf.

[157] Small claims are defined as claims for R15,000 or less (€ 991 at 05 November 2016, but the buying power of R15,000 in South Africa is more than € 991 in Europe).

[158] See section 34 of the Constitution of the Republic of South Africa, 1996 on the right of access to courts. The current jurisdiction of the small claims courts are claims under R15,000.

[159] Van Heerden (2017), pp. 69–2 (para 2).

[160] See e.g. *Primi World v NCC* NCT/4740/2012/101(1)(P)CPA para 57; *Global Pact 417(Pty) Ltd. and Others v Mercedes Benz Financial Services (Pty) Ltd.* (NCT/40/2009/149(1)(P), NCT/41/2009/149(1)(P), NCT/42/2009/149(1)(P), NCT/43/2009/149(1)(P), NCT/44/2009/149(1)(P), NCT/49/2009/149(1)(P), NCT/60/2009/149(1)(P)) [2010] ZANCT 42 (20 April 2010).

[161] Naude (2010), pp. 515, 525. See also Mupangavanhu (2012), p. 319.

[162] Naude (2010), p. 525 and authority there cited.

intention.[163] At most, it could be indirectly implied from section 52, which is headed 'Powers of court to ensure fair and just conduct, terms and conditions' and which only grants ordinary courts powers in respect of unfair contract terms, unconscionable conduct and misrepresentations.[164] However, section 73 provides that the NCC may refer prohibited conduct by a supplier to the relevant provincial consumer court or the NCT. Unfair contract terms are prohibited by s 48. One possible interpretation is that the use of an unfair contract term only becomes 'prohibited conduct' upon being declared unfair by a court.[165] This interpretation is not clearly conveyed by the Act.[166]

Section 52 provides for various orders that could be made by a court should it find a transaction in whole or in part unfair or unconscionable, including any order that the court considers just and reasonable and an order that the supplier must cease or alter any practice or document.

In respect of the consumer's fundamental right to equality in the consumer market (regulated in Chapter 2 Part A of the CPA), the equality courts have jurisdiction. Every High Court is an equality court and one or more Magistrates' courts in an administrative region may be so qualified. The equality courts may make a wide range of orders, with the effect of a civil judgment. To date there is no reported equality court decision in relation to an alleged contravention of Chapter 2 Part A of the CPA.

The National Consumer Tribunal ('NCT') is an independent adjudicative entity created by the National Credit Act,[167] but also has jurisdiction in matters arising from the CPA. In 2016, the NCT consisted of ten part-time members, and three full-time members.[168] A decision of the NCT has the same status as a High Court judgment.[169] Various parties can bring cases before the NCT, including the NCR and debt counsellors. Examples of applications or referrals to the NCT are objections to compliance notices, objections to decisions made by the NCR, consent orders, administrative fines and complaints by consumers.

Legal Aid South Africa is an independent statutory body established by the Legal Aid South Africa Act.[170] A means test determines who qualifies for legal aid.[171] Many universities have law clinics partially funded by Legal Aid SA, which provides free legal services to low-income consumers. In addition, legal practitioners must do some pro bono (unpaid) legal work, often in aid of low-income consumers. Some of the bigger law firms have departments dedicated to pro bono work.[172]

[163] Ibid.

[164] Ibid.

[165] Ibid.

[166] Ibid.

[167] 34 of 2005.

[168] NCT, *Annual Report 2015/2016* 20.

[169] Section 27 NCA.

[170] 39 of 2014, available at http://www.lawsofsouthafrica.up.ac.za/index.php/current-legislation.

[171] See www.legal-aid.co.za/?p=16.

[172] E.g. Werksmans Attorneys (www.werksmans.com/legal-services-view/pro-bono/).

As indicated above, enforcement by the courts has shortcomings. The ordinary courts may lack specialised knowledge of consumer law. An example is the patently incorrect judgment in *MFC (a division of Nedbank Ltd) v Botha*.[173] Various high courts have also rendered conflicting judgments on the interpretation of the National Credit Act, which ultimately had to be resolved by the Supreme Court of Appeal or Constitutional Court.[174]

On the other hand (as will discussed below), consumer organisations have occasionally instituted court action to enforce the rights of consumers.[175]

6 Enforcement Through Collective Redress

The CPA provides that 'a person acting as a member of, or in the interest of, a group or class of affected persons' may approach a court, the National Consumer Tribunal or the NCC, alleging that a consumer's rights in terms of the Act have been infringed, or that prohibited conduct has occurred.[176] Section 76 also provides that a court may 'award damages against a supplier for collective injury to all or a class of consumers generally, to be paid on any terms or conditions that the court considers just and equitable and suitable to achieve the purposes of this Act'. There is currently no legislation on the procedure to be followed for class actions. However, the courts have been willing to apply certification requirements.[177] In *Mukkadam v Pioneer Foods (Pty) Ltd.,*[178] the Constitutional Court held that a class action should be certified where this is in the interests of justice. According to this judgment, relevant non-exhaustive factors are the existence of a cause of action raising a triable issue, whether there were common issues of fact or law and whether there was a suitable class representative.[179]

However, no collective redress cases in terms of the Consumer Protection Act have been reported.

[173] See (6981/13) [2013] ZAWCHC 107 (15 August 2013).

[174] See e.g. the Constitutional Court judgment of *Sebola v Standard Bank of South Africa Ltd.* 2012 (5) SA 142 (CC) and the judgments preceding and following upon it, about the manner in which a so-called section 129 notice must be sent to the consumer.

[175] *Premier Foods v Manoim NO* 2016 (1) SA 445 (SCA); *Afriforum v Minister of Trade and Industry and Others* 2013 (4) SA 63 (GNP).

[176] Section 4(1).

[177] See e.g. *Mukaddam v Pioneer Foods (Pty) Ltd.* 2013 (5) SA 89 (CC); *Nkala v Harmony Gold Mining Company Ltd.* [2016] ZAGPJH 97.

[178] *Mukkadam v Pioneer Foods (Pty) Ltd.* 2013 (5) SA 89 (CC).

[179] Ibid.

7 The Role of Consumer Organisations

Consumer organisations are not well-resourced and are not very active in the enforcement of consumer law. There are two relatively well-known consumer organisations solely dedicated to consumer protection, namely the National Consumer Forum and the SA National Consumer Union. In *Gundwana v Steko Development CC and Others*,[180] the National Consumer Forum submitted argument as friend of the court on whether a High Court registrar, in the course of ordering default judgment, may grant an order declaring mortgaged property that is a person's home specially executable, or whether only a court may do so. However, it should be noted that the National Consumer Forum does not have a working website at the moment, thereby raising doubts as to its effectiveness. The SA National Consumer Union was one of the parties who attempted to stop the National Roads Agency from changing certain roads in Gauteng to toll roads in the case of *Opposition to Urban Tolling Alliance and Others v The South African National Roads Agency Ltd. and Others.*[181]

Two general non-governmental organisations also seek to protect consumers' interests. The Black Sash is a highly regarded organisation advocating for social justice and engages in advocacy for effective competition legislation addressing collusion by companies with respect to basic food and services.[182] It also seeks to educate the public about consumer rights.[183] It was involved in a class action which attempted to claim damages against a company involved in bread price fixing.[184]

Afriforum aims to protect the socio-political rights of the 'Afrikaner' minority.[185] It successfully challenged the exclusion of certain low-income municipalities (local government institutions) from the application of the Consumer Protection Act.[186]

8 Private Regulation

There are several associations that enforce voluntary codes of conduct aimed at consumer protection and only a few can be discussed here.

The Advertising Standards Authority of South Africa (ASASA) is an independent body set up and paid for by the marketing communications industry. It enforces the

[180] *Gundwana v Steko Development CC and Others* 2011 (3) SA 608 (CC).

[181] *Opposition to Urban Tolling Alliance and Others v The South African National Roads Agency Ltd. and Others* [2013] 4 All SA 639 (SCA).

[182] See www.blacksash.org.za/index.php/about-the-black-sash/about-the-black-sash.

[183] See www.blacksash.org.za/index.php/your-rights/consumer-protection.

[184] *Premier Foods v Manoim NO* 2016 (1) SA 445 (SCA).

[185] See https://www.afriforum.co.za/about/about-afriforum/.

[186] *Afriforum v Minister of Trade and Industry and Others* 2013 (4) SA 63 (GNP).

Advertising Code of Practice and the Sponsorship Code.[187] It can demand that advertisements that breaches the Codes be withdrawn. ASASA can issue an 'Ad Alert' on its website and to all members that the advertisement should not be published. As all mainstream media are members of ASASA, this is an effective sanction.[188] A court recently held that ASASA may not make a ruling that binds non-members, but may nevertheless 'consider and issue a ruling to its members (which is not binding on non-members) on any advertisement regardless of by whom it is published to determine on behalf of its members, whether its members should accept any advertisement before it is published or should withdraw any advertisement if it has been published.[189]

The Wireless Application Service Providers' Association (WASPA) safeguards consumers of mobile phones by regulating the conduct of suppliers of wireless applications.[190] The major mobile phone companies require such suppliers to be members of WASPA.[191] WASPA enforces its Code by effective sanctions such as to block a member's access to a specific number or a specific category of service.[192] If non-members of WASPA breach the Code of Conduct, WASPA can instruct members to stop assisting the non-member in providing services to consumers.[193]

Other voluntary associations with codes of conduct containing rules on consumer protection include the Direct Marketing Association,[194] the Internet Service Providers' Association,[195] the Wireless Application Providers' Association,[196] the Direct Selling Association of South Africa[197] and the Vacation Ownership Association of Southern Africa.[198]

9 Sanctions for Breach of Consumer Law

The Consumer Protection Act (CPA) provides for administrative fines and criminal sanctions for prohibited conduct as well as for damages and other 'civil law sanctions'. The National Consumer Tribunal may impose an administrative fine for prohibited or required conduct which may not exceed 10% of the supplier's

[187] See www.asasa.org.za.

[188] See www.asasa.org.za/codes/sponsorship-code/sanctions.

[189] *Advertising Standards Authority v Herbex (Pty) Ltd* 2017 (6) SA 354 (SCA).

[190] See waspa.org.za/.

[191] See waspa.org.za/; Woker (2015), p. 32.

[192] Code of Conduct para 24.44 (waspa.org.za/coc/14-3/).

[193] Code of Conduct para 24.53.

[194] See www.dmasa.org/.

[195] See ispa.org.za/code-of-conduct/.

[196] See www.wapa.org.za/code-of-conduct/.

[197] See www.dsasa.co.za/modules_fe/layout1/displayfull.asp?id=7#.VyhfyPl96M8.

[198] See www.voasa.co.za/.

annual turnover during the preceding financial year or R1,000,000, whichever is the greater.[199] The CPA also creates various offences, most important of which is a failure to act in accordance with a compliance notice issued by the NCC in terms of section 100 CPA.[200] However, a person may not also be prosecuted criminally for failure to heed a compliance notice where the NCC has applied for imposition of an administrative fine.

Unfortunately, compliance notices imposed by the NCC has often been set aside by the National Consumer Tribunal for non-compliance with procedural requirements.[201]

Certain sections of the Act provides for a non-derogable claim for damages, for example, section 61 on liability for damage caused by goods. The Act recognises other 'civil law' sanctions like refund, repair or replacement in respect of defective goods.[202] Common law remedies may also be available. The prohibition of unfair contract terms in section 48 CPA may cause exemption clauses (purporting to limit common law remedies) to be ineffective.

The National Credit Act (NCA) has similar provisions on the imposition of administrative fines as well as criminal offences.[203] These sanctions have often been imposed in practice.[204] It also provides for the suspension or cancellation of the credit provider's registration, thereby preventing them from operating lawfully.[205] In addition, the Tribunal may interdict prohibited conduct or require refund to the consumer of excess amounts charged.[206] The Act renders unlawful exemption clauses excluding warranties otherwise implied by law.[207]

The Financial Sector Regulation Act also provides for administrative penalties for contravention of financial sector legislation.[208]

Non-compliance with orders by the provincial consumer courts are typically punishable as an offence.[209]

[199] Section 112(2).

[200] See section 110. Other offences include breaches of confidence (section 107), hindering administration of the Act (section 108), or frustrating action by the NCC or Tribunal in various ways (section 109(2)).

[201] E.g. in *Vodacom Service Provider Company (Pty) Ltd. and Another v National Consumer Commission* NCT/2793/2011/101(1)P.

[202] Sections 55–56.

[203] See section 151 and sections 156–162.

[204] For recent examples, see *National Credit Regulator v Abrahams* (NCT13393/2014/57(1)) [2014] ZANCT 33 (14 August 2014); *National Credit Regulator v Kutuma Financial Services* (NCT/16158/2014/140(1)NCA) [2016] ZANCT 5 (2 February 2016).

[205] Section 150. An example where the National Credit Tribunal ordered this relief is *National Credit Regulator v Louhen Consultants CC* (NCT/6752/2012/57(1)(P)) [2013] ZANCT 21 (4 July 2013).

[206] Section 150.

[207] Section 90(1)(g).

[208] Section 167 of Act 9 of 2017

[209] See e.g. s 30 of the Gauteng Consumer Affairs (Unfair Business Practices) Act, 7 of 1996.

Some sanctions imposed by voluntary trade associations have been discussed in Sect. 8 above.

10 External Relations and Cooperation of the State, Enforcers and Consumer Organisations

South Africa is a member of the Southern African Development Community (SADC), which adopted a Declaration on Cooperation in Competition and Consumer Policies.[210] This requires member states to 'adopt, strengthen and implement' the 'necessary consumer laws'.[211] This Declaration aims to 'foster cooperation and dialogue in the field of consumer policy and facilitate further convergence in this area'.[212]

The UN Guidelines for Consumer Protection played a role in the drafting of the CPA. The preamble of the Act recognises that 'it is necessary to develop and employ innovative means to…give effect to internationally recognised customer rights'.

The consumer rights recognised by Consumers International are also echoed in the Consumer Protection Act.[213] The National Consumer Forum is a member of Consumers International.

The NCC and NCR are members of the African Consumer Protection Dialogue, which facilitates discussion by African regulators, NGOs and the US Federal Trade Commission of issues such as cross-border enforcement and awareness campaigns.

Although no South African authority is listed as a member of ICPEN (the International Consumer Protection and Enforcement Network), the African Consumer Protection Dialogue forms part of ICPEN.

The NCC also has ties with the OECD.[214]

There is also evidence of more informal engagement with foreign consumer protection agencies. For example, the Financial Services Board reported that it 'has developed and maintained a strong, effective presence… internationally, while working closely with its counterparts elsewhere in Africa to establish solid regulatory frameworks.'[215] Its successor, the Financial Services Conduct Authority, also has links with various international and foreign regulators, and is a member of the International Financial Consumer Protection Organisation. Another example is the NCR which works closely with other regulators and the World Bank.[216]

[210] See www.sadc.int/files/4813/5292/8377/SADC_Declaration_on_Competition_and_Consumer_Policies.pdf.

[211] Clause 1(b).

[212] Clause 2(b)(ii).

[213] Chapter 2 of the CPA.

[214] The NCC reported that it attended an OECD conference in its *Annual Report 2014/2015*.

[215] See www.fsb.co.za/Pages/Home.aspx.

[216] https://www.fsca.co.za/Pages/Regulatory-Liason.aspx.

The Trade, Development and Cooperation Agreement between South Africa and the European Union of 1999[217] provided for 'cooperation in the area of consumer policy and consumer health protection' and listed concrete ways in which this should be done. Subsequently the EU concluded an Economic Partnership Agreement with SADC, of which South Africa is a member, in 2014.[218] This only refers to consumers not being misled about the origin of certain goods.

Various other bilateral trade agreements do not contain references to consumer protection, such as the trade agreement with the USA.[219] The final 'Agreement establishing a tripartite free trade area among the Common Market for Eastern and Southern Africa, the East African Community and the Southern African Development Community' does not contain a reference to consumer protection, whereas an earlier draft did.[220]

The CPA provides that its application 'extends to a matter irrespective of whether the supplier resides or has its principal office within or outside the Republic'.[221] The Act itself does not deal with cross-border enforcement in other ways. A South African consumer would have to use a South African judgment as a basis for instituting litigation in the suppliers' country.

11 Critical Evaluation of the Effectiveness of the Enforcement Mechanisms

Enforcement of consumer law in South Africa relies heavily on sectoral ombud schemes. Interestingly, such ombud schemes existed in the financial services industry long before the CPA came into force in 2011, and there was more effective protection in the area of financial services before a fairly effective system of redress was introduced for consumer goods and other services.

Self-regulation through industry codes of conduct has many well-known benefits. Inter alia, the enforcers are usually experts in the sector and the codes may contain more tailor-made rules and sanctions than overarching consumer protection legislation. Industry funding excludes the problem of under-funding by government. On the other hand, industry funding may create distrust in the objectivity of the ombud by consumers.

[217] OJ L 311/3 of 04-12-1999.

[218] See trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153915.pdf.

[219] Agreement Concerning the Development of Trade and Investment between the Government of the Republic of South Africa and the Government of the United States of America.

[220] The final agreement is available at www.tralac.org/images/docs/7646/signed-tfta-agreement-and-declaration-june-2015.pdf. The draft is available at www.tralac.org/wp-content/blogs.dir/12/files/2011/uploads/Draft_Tripartite_FTA_Agreement_Revised_Dec_2010.pdf.

[221] Section 5(8).

Ombud schemes have been strengthened due to backing by legislation, thereby resulting in 'enforced self-regulation'.[222] However, not all ombuds recognised by statute have the power to make binding rulings. Nevertheless, these ombud schemes are probably the most effective forums for consumers to obtain effective redress.

A drawback of the CPA's requirement in section 69(d) that consumers first exhaust all their remedies recognised by national legislation before approaching the courts is that the ombuds and other agencies typically only have offices in big cities, which are less accessible to low-income consumers (the majority of South Africans). Giving consumers a choice of approaching the various enforcement mechanisms, including the accessible small claims courts, is more in line with the constitutional right to access of courts.[223] The objection that this may lead to forum shopping does not outweigh the benefits of access to a choice of avenues of redress. Section 69(d) only applies where a consumer or other person with locus standi in terms of s 4 approaches the court alleging that prohibited conduct has occurred. Thus it does not bar a supplier who wants to sue a consumer from directly approaching a court. The Act should be amended to allow a defendant consumer, who relies on a right in the CPA as a defence to the supplier's claim, to ask for a stay of the court proceedings, in order that the dispute could first be resolved by an ombud, provincial consumer protection authority or NCC. However, the defendant consumer who is content with the matter being heard by an ordinary court should be able to rely on the CPA there.

In addition, more should be done to advertise avenues of redress in media accessible to low-income consumers, particularly radio and television.

Because the NCC no longer deals with all consumer complaints received by it, but refers these to the accredited ombuds, it is able to proactively target industries and suppliers to ensure compliance with the CPA.[224] On the other hand, referral to ombuds may frustrate consumers expecting to be assisted at their first port of call. The NCC should play a more active role in enforcement of the CPA.

As noted above, national legislation may be needed to make the orders of provincial consumer tribunals executable as if they were judgments of the Magistrates' Court.[225]

The inability of the National Consumer Tribunal to award damages in contested cases means that a consumer may have to go through the whole route of redress in terms of section 69 before being able to approach a forum which actually has the power to make a damages award, namely an ordinary court.

[222] See also Woker (2015), p. 34.

[223] Section 34 of the Constitution of the Republic of South Africa, 1996.

[224] As noted above. See also e.g. Ebrahim Mohamed *Briefing to the Parliamentary Portfolio Committee: Trade and Industry on the 1st quarter report (2014–2015) of the National Consumer Commission,* attachment to the minutes of a meeting of the Parliamentary Portfolio Committee on Trade and Industry of 16 September 2014 in which they reported about 4 targeted inspections on 65 retailers.

[225] Section 3.6 above.

At least the NCA and CPA generally provide high levels of consumer protection. For example, the prohibition of unfair contract terms applies to all contracts, even negotiated terms in the business-to-small business contracts covered.[226]

However, the NCA and CPA are not clearly drafted.[227] For example, in some instances the CPA sets out rights for consumers, without any indication of their remedies.[228] This unclarity prevents the legislation from operating effectively out of court. The legislation is also not in plain language. As the CPA and NCA are not codifications of consumer rights,[229] it is difficult for consumers and suppliers to ascertain their rights and obligations. An in depth review of the CPA and NCA is necessary to properly codify consumers' rights, to eliminate bad drafting and to put the legislation into plain language.

To conclude, the enforcement of consumer law is fairly effective in South Africa, but more needs to be done to tailor the system to the needs of especially low-income consumers, the majority of South African consumers.

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[227]See e.g. *Nedbank Ltd. and Others v National Credit Regulator and Another* 2011 (3) SA 581 (SCA) para 2 on the NCA ('Numerous drafting errors, untidy expressions and inconsistencies make its interpretation a particularly trying exercise').

[228]E.g. section 44 which deals with the consumer's right to assume that the supplier is entitled to sell the goods.

[229]E.g. section 2(10) CPA.

An Interdisciplinary View of Enforcement and Effectiveness of Spanish Consumer Law

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Abbreviations

BOE	Boletín Oficial del Estado (Official State Gazette)
CCAA	Comunidades Autónomas (Autonomous Community—Regional Administrations)
IPREM	Indicador Público de Renta de Efectos Múltiples (Public Indicator of Multiple Effect Income)
LEC	Ley de Enjuiciamiento Civil (Code of Civil Procedure)
LECr	Ley de Enjuiciamiento Criminal (Code of Criminal Procedure)
LGDCU1984	Ley 26/1984, de 19 de julio, General para la Defensa de los Consumidores y Usuarios (General Law of consumers and users protection)
LOPD	Ley Orgánica de Protección de Datos (Organic Law of personal data protection)
LOPJ	Ley Orgánica del Poder Judicial (Organic Law of the Judiciary)
OMIC	Oficina Municipal de Información al Consumidor (Municipal Office of Consumer Information)
SAN	Sentencia de la Audiencia Nacional (Judgement of the National High Court)
STS	Sentencia del Tribunal Supremo (Judgement of Supreme Court)

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TRLGDCU Real Decreto Legislativo 1/2007, de 16 de noviembre, por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias (General Law of consumers and users protection)

1 Consumer Protection as a Constitutional Principle

The Spanish Constitution (Article 51) enshrines consumer protection as one of the country's principles of social and economic policy. The objective of such policy, to this respect, is to ensure the protection of safety, health and economic interests of consumers through the adoption of effective measures.[1] It is also established in the Constitution that public authorities shall promote the information and education of consumers, and foster their organisations.

The recognition, respect and protection of these interests shall guide the action of public authorities, whether legislative, administrative or judiciary, pursuant to Article 53(3) of the Spanish Constitution. This commandment places the executive and judiciary branches (due to their respective competences) in the position of assuming a leading role in the enforcement of consumer law—a commitment that does not hinder the participation of consumer associations or individuals.

The inclusion of consumer rights in the Constitution has guided the development of their recognition by legal rules and action plans, and continues ensuring the enforcement of such rights. Hence, the Spanish Constitution is still an inevitable reference for any assessment of consumer law and the bar to measure the standard of consumer protection afforded in Spain.

Taking this as a reference point, this chapter focuses on the design of existing enforcement mechanisms and their practical application in order to determine the effectiveness of consumer law in Spain. The analysis is preceded by a brief explanation of the legal framework as it stands.

2 Legal Framework

2.1 Current Legal Framework

The starting point for the development of consumer law in Spain was a massive intoxication that occurred in 1981, caused by the consumption of rapeseed oil, which affected 20,000 people and killed 350 people. (Decisions of the Spanish Supreme Court: 23 April 1992 ECLI: ES:TS:1992:20999 and 26 September 1997 ECLI:ES: TS:1997:5661).

[1] Busto Lago et al. (2010), p. 433.

The aforementioned event resulted in regulatory development of Article 51 of the Spanish Constitution, which was the only normative reference existing until that moment, providing consumer protection as a principle of social and economic policy. More specifically, the LGDCU 1984 was enacted. It should be noted that this law is previous to the accession of Spain to the European Union in 1986. Since then, the development of consumer protection in Spain has been influenced by EU consumer law and policy. EU Directives were transposed through statutes: Directive 85/374/EEC Liability for defective products (Ley 22/1994), Directive 87/102/CEE Consumer credit (Ley 7/1995), Directive 90/314/CEE Package travel (Ley 21/1995), Directive 94/47/EC, Timeshare (Ley 42/1998), Directive 93/13/CEE, unfair terms (Ley 7/1998 Standard contract terms), Directive 1999/44/CE (Ley 23/2003 Sales and guarantees).

Nowadays, the main legal framework for consumer protection is the following statute: TRLGDCU (Real Decreto Legislativo 1/2007). TRLGDCU regulates aspects of public law and private law. The opening articles of Book I set out the general concepts (consumer, entrepreneur, product ...); thereon aspects of public law are regulated (basic consumer's rights, consumer's associations, infringements and sanctions, and finally extrajudicial proceedings that apply for the protection of consumers, and the consumer arbitration system). Book II regulates consumer contracts (formation of contract, right of withdrawal, standard contract terms and unfair terms, distance contract, guarantees and after-sales services). Book III regulates civil liability for defective good or services. Finally, Book IV regulates package travel.

Certain subjects fall outside of the main legal framework: contracts for financial products and services, as well as consumer credit (Ley 16/2011), financial services at distance (Ley 22/2007) and financial products (Real Decreto-ley 6/2013). The same must be said in regard to timeshare which is regulated by Ley 4/2012.

Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property, still remains to be transposed (OJ L 60, 28 February 2014, pp. 34–85).[2]

2.2 *Private Regulation*

Private self-regulatory initiatives should be distinguished from other ones promoted by the government. Among the purely private initiatives there is a high incidence of self-regulation in insurance and advertising sectors. Besides, public administrations have encouraged the adoption of codes of good practice in the field of electronic commerce and data protection; there is also a code of good practice in the case of non-compliance with mortgage loans for home purchase.

[2] Albiez Dohrman (2016), pp. 3–72; Díaz Alabart (2015).

2.2.1 Self-Regulatory Initiatives: Insurance and Advertising

In the field of insurance, the business association Unespa has favoured self-regulation and there are codes of good practice for different branches of insurance, which are available on its website, alongside the business entities related to each of them. In this sector, Orden ECC/2502/2012 channelled claims for breaches of codes of good practice.

On the other hand, in the advertising sector, private regulation presents a remarkable path through the Autocontrol Association (www.autocontrol.es/) whose goal is precisely the development of ethical codes applicable to the activity of advertising agencies. This association has a dispute resolution body, which is free. Any consumer, consumer groups and even the government are entitled to act before that body. A jury that applies the codes of good practice decides the claims; the members of this jury are independent of the association and are supposed to act transparently. The admission by the courts of any claim against an advertisement, which is the object of a complaint before the Jury of Advertising Autocontrol, will suspend the proceedings before the Jury. If a decision by the Jury of Advertising has been rendered, the courts usually take it into account.

2.2.2 Governmental Boost of Private Regulation

Self-regulation is promoted by public administrations in order to develop consumer protection policies. Sometimes local administrations offer quality labels if companies adhere to codes of good practice (www.madrid.es/consumo). Currently, the government's impulse on self-regulation is mainly in sectors such as housing, data protection and e-commerce.

In the area of housing, a code of good practice has been included in the Royal Decree-Law 6/2012 (BOE No. 60 of 10 March 2012) to which banking entities, providing mortgage loan agreements for housing, can adhere. Different ways (restructuring and debt reduction) are proposed to solve over-indebtedness of families caused by the purchase of a house. The purpose of these measures is to avoid mortgage foreclosure and, if it is inevitable, to extinguish the debt completely.[3] Most banking entities have adhered to this code. Consumers can complain to Banco de España (Spanish Central Bank) when adherent entities breach the code of good practice; such claims are regulated by the Order ECC/2502/2012 cited above.

Regarding the protection of personal data, Article 32, LOPD 15/1999 promotes the development of codes of good practice and their registration in the General Data Protection Register of the National Data Protection Agency—Agencia Española de Protección de Datos—(AEPD, www.agpd.es). Breach by adherent entities allows bringing a complaint before the AEPD.

[3] Alonso Pérez (2015), pp. 31–67.

Finally, as regards to e-commerce, Article 18, Ley 34/2002 (Electronic commerce) (BOE No. 166 of 12 July 2002) urges the government to promote the development of codes of good practice in e-commerce and suggests the participation of consumers in their drafting. In this area, the following codes have been developed: the System for an integral regulation of advertising and electronic commerce (offering a quality label to member companies), the Convention for the self-regulation to prevent unsolicited email and boost trust to internet users, and the Code of practice for disclosure of financial information by internet.

2.3 Current Focus: Housing and Over-Indebtedness

The economic crisis that began in 2008 had in Spain a particular effect on housing.[4] In 2013, in the course of mortgage enforcement proceedings, a national court requested a preliminary ruling before the Court of Justice of the European Union (CJEU), (Aziz vs. Catalunya Caixa), considering that the LEC breached Directive 93/13/EEC of 5th April 1993 on unfair terms in consumer contracts. The CJEU—Judgement of CJEU 14 March 2013 (ECLI:EU:C:2013:164)—held that a system of levying execution, in reliance on notarial documents, on mortgaged or pledged property, in which the possible grounds of objection to enforcement are limited is incompatible with Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts where the consumer cannot obtain effective legal protection. As a consequence of this judgement, the Ley 1/2013—mortgage debtors' protection—amended certain features of the judicial mortgage enforcement.

In this context, the judgment of 9 May 2013 of the Spanish Supreme Court is relevant (ECLI:ES:TS:2013:1916). This judgement declares as abusive the interest rate floor clause in mortgage loans for home purchase, and it contains two statements that have raised serious problems. The first problematic statement is that the floor clause is abusive because it is not transparent. The second controversial statement is that the nullity of the clause has non-retroactive effects, which has caused a wave of requests for a preliminary ruling by several Spanish courts to the CJEU about the *ex tunc* or *ex nunc* effect of the nullity of the unfair clause (C-154/15, C-307/15, C-308/15, C-381/15, C-431/15, C-1/16, C-34/16). The issue has been ultimately ruled on in the judgement of the CJEU of 21 December 2016 (ECLI:EU:C:2016:980), which has effectively confined national courts in relation to the temporal effects of the declaration of nullity of an unfair term: the effectiveness of the nullity of the clause is *ex tunc* (retroactive).

The other problem regarding the lack of transparency arises because Article 4 (2) of Directive 93/13/EEC on unfair terms in consumer contracts is not incorporated into Spanish law. Despite this, it was held that it was not possible to assess if terms related to the price were unfair.[5]

[4] Alonso Pérez (2014), pp. 51–59.

[5] Cámara Lapuente (2016), pp. 163–180. Miquel González (2011), p. 723.

However, in the judgement of 3 June 2010 (C-484/08, Caja Madrid v. Ausbanc; ECLI:EU:C:2010:309), the CJEU stated that Spanish law may authorise judicial review of price clauses,[6] and thereon, the judgement STS 9 May 2013 (ECLI:ES:TS:2013:1916) declared the interest floor clause abusive because it was not transparent.[7] In this way, two pathologies of contract terms, which until then had been differentiated—transparency and unfairness–, have been interconnected on the basis of the understanding that the lack of transparency of clauses related to price implies their unfairness. And this despite the fact that CJEU had not clearly ruled on the issue. Recently, the Spanish Supreme Court, in STS 9 March 2017 (ECLI:ES:TS:2017:788)—following the judgement of the CJEU of 26 January 2017, Banco Primus (C-42/14; ECLI:EU:C:2017:60)—declared the validity of a floor clause because it understood that it was transparent; in this way this judgement helps to redirect the aforementioned discussion.

Consumers' over-indebtedness is currently another major focus in consumer law; this aspect is regulated by the Royal Decree-Law 1/2015 which reforms insolvency law (Article 178 bis) (BOE No. 164 of 10 July 2003).[8]

Finally, another focus is on complex financial products which are causing significant litigation before the Spanish Supreme Court. In this area the application of the rules on pre-contractual information duties has enabled the courts to rescind many complex financial product purchase agreements (ECLI:ES:TS:2016:3847). The cause of nullity is the existence of vices of consent.

3 General Design of the Enforcement Mechanisms

3.1 The Role of the Administration in the Enforcement of Consumer Law

3.1.1 Multiple Administrations and the Complexities of a Decentralised Country

The development of consumer policies is decentralised, whereby the central government and the Regional Administrations (CCAA) develop them. Currently, from an institutional perspective, central government policies on consumers are within the faculties of the Ministerio de Salud, Servicios sociales e Igualdad (Ministry of Health, Social Services and Equality), specifically the Agencia Española de Consumo, Seguridad Alimentaria y Nutrición (Spanish Agency of Consumer

[6]Against: Alfaro Águila Real (2017), p. 3. J Alfaro Águila Real (04.06.2010). http://derechomercantilespana.blogspot.com.es/2010/06/de-locos-el-tribunal-de-justicia-de-la.html.

[7]Pertiñez Vilchez (2004) *passim.*

[8]S Senent Martínez, 'Exoneración del pasivo insatisfecho y concurso de acreedores', http://eprints.ucm.es/28133/. Cuena Casas (2017). Prats Albentosa (2016).

Affairs, Food Security and Nutrition (www.aecosan.msssi.gob.es/). On the other hand, the governments of the CCAA have their own institutional structures to develop consumer protection policy.

Due to the aforementioned decentralised organisation of Spain, it is not possible to speak of only one specialised agency in charge of the enforcement of consumer law, but rather of various specialised agencies. The division is not mainly based on functions, at least not in regard to a majority of the faculties at a national/central or regional level, but it is divided in accordance with the autonomous organisation of the different regions between which the territory is structured. Therefore, apart from having a central agency for the enforcement of consumer law (the aforementioned *Agencia Española de Consumo, Seguridad Alimentaria y Nutrición*), each region has its own consumer agency and, within regions, local councils may also assume some competences. The common characteristic of all of them is that they are not independent entities but, instead, they are autonomous organisations within the structure of the Administration in its different layers (central, regional or local). They normally deal exclusively with consumer issues, although the central agency has been merged in 2014 with the agency that supervises food and nutrition (Royal Decree 19/2014). Articles 40 to 45 of the TRLGDCU regulate a body that serves to coordinate consumer policies of the central state and the regional administration called "Conferencia Sectorial de Consumo"—Consumer Sector Conference—and whose purpose is to ensure that consumer protection is homogeneous throughout the national territory.

The distribution of competences between the central and the regional administrations is one of the most difficult issues of the constitutional organisation of the Spanish "State of Autonomies", and this complexity affects consumer law, as well.[9] It would exceed the purpose of this work to go into them in detail. It is sufficient to mention that most of the enforcement is done, in practice, by the regional administrations due to the legislative competences that they have assumed in this matter. Additionally, it should be taken into consideration that the regional administrations have competence to enact consumer laws. Most of these laws merely regulate aspects of public law: basic consumer rights, infringements and sanctions. The reason why CCAA do not regulate aspects of contract law is that Article 149.1.8 of the Spanish Constitution reserves for the central state the legislative competence over obligations and contracts.

The attributions of the local administrations are easier to grasp. After controversial interpretations, it is now clear that they may assume the powers ceded to them by the regional legislatures (Law 27/2013, Article 25, as interpreted by the Constitutional Court (Plenary) in its Decision of 3 March 2016, BOE No. 85 of 8 April 2016). Most commonly, these competences include information obligations vis-à-vis consumers and reception (but not decision) of complaints. Both tasks are undertaken by a non-independent entity usually known as OMIC (*Oficina Municipal de Información al Consumidor*).

[9]Guillén Caramés (2002), pp. 253–323.

The conflicts of competences have also appeared in respect of the consumer agencies and other sectors of the administrations (intra-region or regional-central or even, region-region), especially when dealing with sanctions. Some examples of these are: sanctions imposed on financial institutions—consumer protection is a competence of regional agencies whereas control of financial entities corresponds to an autonomous institution of the Central Administration (*Banco de España*, Law 10/2014, Article 90); the violation of a provision that rules markets (a competence of the Central Administration) which affects consumers (enforceable by the regional administrations); or, on an intraregional level, sanctions on tour operators for an infraction that also constitutes a violation of consumer law. A confusing provision of the National Consumer Legislation (Article 47(3) TRLGDCU) seems, however, to enlarge the participation of the regional consumer agencies in the aforementioned areas (technically reserved to the Central Administration), in particular, as regards the imposition of sanctions, when an infraction of the regulation of those specific sectors results in a violation of consumer law. In this scenario, it is not surprising that no clear rules may be deducted from case law (compare the decisions of the Supreme Court of Justice of Andalucía 4 February 2016—ECLI:ES:TSJAND:2016:162—and the Contentious-administrative Court num. 1 of Toledo 4June 2002—RJCA 2002, 1006).

Additionally, problems of competence may arise when an infraction of consumer law produces effects in more than one region, a problem to which the National Consumer Legislation offers no clear solution (Article 47(2) TRLGDCU),[10] leaving the risk that more than one regional administration may intervene, jeopardising the principle of *non bis in idem* in the application of penalties.[11]

The complexities in the distribution of competences may cause confusion to an individual consumer whose rights have been affected. If we add that the settlement of a dispute between consumers and businesses (i.e. besides the voluntary ADR mechanisms) by the consumer agencies lacks binding effects, the outcome is that consumers prefer to choose courts in the event of a dispute. Although there are no reliable surveys on the ratio of satisfaction of consumers and traders with the enforcement agencies, most likely it would be low.

However, if we analyse the role of consumer agencies from the perspective of prevention of violation of consumer law, their existence should not be underestimated, as the inspections that they conduct and the sanctions that they impose serve as a deterrence mechanism for businesses which leads to self-enforcement of consumer law.

3.1.2 The Entitlement of the Administration

Most of the attributions granted, by statute, in respect of consumer law as well as the obligations thereof are vested in the Administration. Among its functions, the most

[10]Carrasco Perera (2008), pp. 4–5.

[11]Cordero Lobato (2008), p. 99.

relevant ones for the current analysis are the powers to conduct inspections on businesses and to impose (administrative) sanctions for breach of consumer law (Articles 14(2), 46 and following TRLGDCU). Furthermore, the handling of the voluntary mediation and arbitration procedures are of relevance (Royal Decree 231/2008, Article 5). Finally, the Administration (at the central and regional levels) is entitled to file an injunction in court aimed at ceasing an infraction of consumer law that affects the collective or general interests of consumers (Article 54 TRLGDCU).[12]

The Judiciary only intervenes in conflicts between a consumer and a business (as well as in the revision of decisions taken by the Administration towards a business) for the purpose of finalising disputes. Only courts may decide upon actions and remedies such as annulment of contracts and damages resulting from an infraction of consumer law[13] and, of course, not limited to them but including any other action filed by a consumer. It is understood (according to Article 103 of the Spanish Constitution) that the Administration is meant to serve general interests. Therefore, the latter only rarely intervenes in the protection of private interests.[14]

A main exception to the aforementioned appears in the current National Consumer Legislation (Article 48 TRLGDCU), which grants the aggrieved consumer the possibility to claim for damages suffered within an administrative sanctioning procedure. The application of the norm is unclear, especially in respect of the efficacy of the decision taken by the Administration and its effects in a subsequent proceeding in court.[15] From a procedural point of view, it is doubted if a business willing to challenge the decision should file the complaint in the contentious-administrative jurisdiction (in which recourses against decisions of the Administration are available) or in the ordinary civil courts (which deal with claims between private persons or entities). For the time being and to the best of our knowledge, the commented provision has had no practical application.

Finally, in order to complete the picture of this presentation of administrative enforcement mechanisms in Spain, it is worth noting that apart from the general structure previously described, there are particular enforcement mechanisms specifically designed for certain sectors.

The most significant of them is the non-judicial procedure for the resolution of conflicts in telecommunications (a similar one is in force in the energy sector, Law 3/2013, Eighth Additional Disposition 1.c and 2.d). Its main characteristics are as follows: (1) the client should file a complaint to the Customer Service Office (*Servicio de Atención al Cliente*) of the company that provides the service, within 1 month (Articles 26 CDUSCE and 4(1) Orden ITC 1030/2007); (2) thereon, if after 1 month the customer does not receive an answer from the company or the customer finds it non-satisfactory, the client may decide, within 3 months, either to begin a

[12]Busto Lago (2009), pp. 672–696.

[13]Mendoza Losada (2011), p. 2.

[14]Busto Lago et al. (2010), p. 453.

[15]Carrasco Perera (2008), p. 7.

consumer arbitration (if the company accepts it or has previously adhered to the system of arbitration), or to file a complaint before the organism in the central Administration in charge of the telecommunications sector (*Secretaría de Estado de Telecomunicaciones y para la Sociedad de la Información;* Articles 55(1) LGTel, 27 CDUSCE and 4(3) Orden ITC 1030/2007). If the customer decides to use the latter, the administration will initiate a proceeding to solve the conflict, which is mandatory for the company. In the course of it, among others, the Administration may order the company to annul invoices or to reimburse the customer those charges and payments that are considered not due, but it may not order to pay damages (Article 3(2) Orden ITC 1030/2007). The decision may be challenged in court.

As it can be perceived, an advantage of this special process, from a consumer perspective, is that the consumer may obtain compensation for its harm (with the said exception of damages) in a simple, costless and relatively fast way. The role of the Administration in a B2C dispute is, thus, not restricted to the imposition of sanctions, or to a remedy that may work for the protection of general interests but cannot be satisfactory for an individual consumer.

3.2 Consumer Associations

Consumer associations, which exist at a state or regional level, play an important role in the enforcement of consumer law. The former type must be registered at the State Register of Consumer Associations—Article 33 TRLGDCU—and the latter one in the respective regional registry. Currently, in the State Register there are 20 associations registered (www.aecosan.msssi.gob.es/AECOSAN/web/consumo/seccion/asociacionismo_consumo.htm. Accessed 8 December 2016), but it is difficult to determine how many regional associations exist.

3.2.1 Legal Requirements

Mandatory requirements for consumer associations are set out in the TRLGDCU. Consumer associations are non-profit organisations (Article 23 TRLGDCU) and are required to be independent from market operators and public authorities.

The interpretation of this second requirement has been quite controversial.[16] It is considered that they remain independent even if they receive grants from the government or if they enter into cooperation agreements with some operators in the market (Article 29 and 30 TRLGDCU). In compliance with the duty of independence, consumer associations must not include profit-making legal persons as members; engage in commercial communications in respect of goods and services; authorise the use of their name, image or any other representative sign in commercial

[16]Marín López (2015), pp. 309–489.

advertising; nor receive economic or financial assistance from companies or groups of companies which supply goods or services to consumers or users (Article 27 TRLGDCU). An important consumer association *was expelled from the Register of Associations* because it was financed by commercial advertising in its publications and on its website (SAN 6 October 2010 -ECLI:ES:AN:2010:4765).

A further requirement is transparency. In order to fulfil this requirement, consumer associations' annual accounts must be filed with the National Consumer Institute (Aecosan)—Article 31 TRLGDCU—and cooperation agreements between consumer associations and companies, groups or associations or other market operators must be submitted to the National Consumer Institute—Articles 29 and 30 TRLGDCU. All such information is public.

Finally, internal organisation and functioning of associations must be *democratic* (Article 2(5) Ley Orgánica 1/2002 of 22 March, reguladora del Derecho de Asociación BOE Nr. 73 of 26 March 2002).

3.2.2 The Function of Consumer Associations in the Enforcement of Consumer Law

The agency for representation and consultation of consumer associations is called *Consejo de Consumidores y Usuarios* (www.consumo-ccu.es/index.asp) This Council holds the institutional representation of consumer organisations to the central government and other entities (Article 38 TRLGDCU).

Consejo de Consumidores y Usuarios must be consulted as part of the procedure for drawing up laws of general nature, with nationwide scope, relating to matters that directly affect consumers and users (Articles 38 and 39 TRLGDCU).

Consumer organisations can act before the court on behalf of *their members* (Article 37.c TRLGDCU) and represent the collective interests of consumers—collective redress—(Article 37.c TRLGDCU, Article 11 LEC, Article 7(3) LOPJ). Nowadays, the most important proceedings before the courts in respect of consumer law (financial products, unfair terms on loans for house purchase) have been channelled through consumer associations.

Consumer associations are quite powerful and are a well standing lobby in Spain. However, in April 2016 a judicial enquiry into the directors of a well-known association began: AUSBANC (Association of Bank Users); its directors are suspected of blackmailing some of the major banks in Spain during the last years. They have allegedly obtained high amounts of money; in return they would have given favourable information to the users about the banks that paid them. This news is having a very high social impact and may have an influence hereafter on the reputation of consumer associations.

3.3 Sanctions and Remedies for the Breach of Consumer Law

Penalties for infringing consumer law may be criminal or administrative. In addition, remedies available to consumers in civil law must be taken into account.

3.3.1 Sanctions

The Criminal Code establishes penalties of imprisonment for anyone who commits crimes against public health (Articles 363 and following), who puts in danger the health of consumers, alters products intended for human consumption, or poisons water and other public supplies. In addition, Articles 278 and following of the Criminal Code punish offenses against the market and consumers (forcing an alteration in prices, removing raw materials or products of basic need in order to interrupt supplies, making misleading publicity, modifying automatic measurement of supplies, etc.) with imprisonment and fines.

Administrative penalties are most frequent in consumer law. They are regulated in Articles 49 to 52 TRLGDCU, which list the infringements in matters of consumer protection of a general scope, and further establish some specific offences in distance contracts.[17]

In addition, as complementary penalties, the administration may, if the offense is very serious, declare the closure of an establishment for a period not exceeding 5 years, alongside the publication of the sanctions imposed, the names or the companies, who are responsible when public health is at risk or in the case of repeated offenders. For safety reasons, the public administration may precautionary or definitively remove goods or services from the market, although such measure is not considered to be a sanction.

3.3.2 Remedies Offered by Civil Law

TRLGDCL and the Civil Code regulate the applicable remedies if consumer law is violated. Among the most effective remedies are those for the lack of conformity in the sale, which are hierarchically ordered: repair/replacement of the product and price reduction/contract termination (Article 119 and 121 TRLGDCU).[18]

The right of withdrawal[19] is also a remedy widely used by consumers—Articles 68 and following TRLGDCU—which is specifically regulated for distance contracts—Articles 102 and following TRLGDCU. The breach of the rules on *pre-contractual information or advertising* can lead to the supplementation of the contract (Article 61 TRLGDCU) and even termination if the breach is serious

[17] Velasco Caballero et al. (2015), pp. 581–638.
[18] Fenoy Picón (2013), pp. 717–836.
[19] Larrosa Amante (2016).

(Article 1124 Civil Code). *The nullity of unfair terms* (Article 83 TRLGDCU) has recently raised a problem in relation to mortgage loans for house purchase, as mentioned in the above sections. *Compensation for damage caused by defective products or services* is regulated in Articles 128 and following TRLGDCU: a system of strict liability is established for products and the fault is presumed in case of defective services.

4 The Effectiveness of Consumer Law: Complaints, Disputes and Problems Raised by Their Resolution

4.1 Structure of the Judicial System and Main Characteristics

4.1.1 Competent Court for Consumer Disputes: Specialisation of Courts

Considering that any violation of consumer law may be subject to criminal or civil procedure, any citizen whose rights as a consumer have been violated may denounce an illegal act before the criminal jurisdiction (if a crime has been committed) or before the civil jurisdiction (in case of contracts or torts). However, criminal procedure has preference before any other proceedings (Article 10(1) LOPJ). Hence, if there is a criminal proceeding pending, it is forbidden to initiate civil proceedings until the criminal proceedings have finished.

LECr does not include any reference to consumer protection at all; the procedure before the criminal jurisdiction will follow the common rules regarding jurisdiction and procedure.

As to the regulation of civil procedure, special courts or procedures for claims related to consumer law do not exist. As an exception, and due to the aforementioned CJEDU of 21 December 2016 (ECLI:EU:C:2016:980) the number of civil claims on nullity of the floor clause increased notably in 2017; to afford this situation the creation of new Civil Instance Courts in the main cities was approved, and the General Counsel of the Judiciary established the specialization of about 50 First Instance Courts in all the country to solve the claims on general terms and conditions in mortgage secured loans (Agreement of the General Council of the Judiciary of 28th December 2018). However, the concern of the legislator about consumer protection is shown in some provisions of the LEC which establish specific rules on civil procedure when one of the parties is a consumer. Most of these rules are related to the jurisdiction of civil courts in the case of collective redress.[20]

Article 52(2) of the LEC establishes that in matters such as insurance, contracts and any matter that has been preceded by a public tender, the courts of the place of the domicile of the consumer will have jurisdiction to hear the dispute. Therefore, the general rule of jurisdiction of the courts where the defendant is domiciled (Article

[20]See Sect. 4.3.

50 LEC) does not apply. Obviously, the aim of such jurisdiction rule is to avoid the burden on consumers of moving to the address of the defendant to sue him.[21]

Jurisdiction rules in proceedings against consumers aim to protect them, and this is why the most important rule deals with limitations on the autonomy of the parties over the jurisdiction of the claimant when the defendant is a consumer. Explicit or tacit submission of the parties to a court is allowed in the LEC under certain circumstances. However an explicit submission cannot be included in 'contracts of adherence or contracts with general conditions imposed by one of the parties or that have been entered into with consumers and users' (Article 54 LEC); in such case, the submission shall be null and void.

This kind of explicit submission in consumer contracts—B2C—was very common up to 2001 when the LEC entered into force; the choice of jurisdiction by means of such unfair term was so common that many of the proceedings dealing with consumer law used to take place before the courts of big industrial cities, such as Madrid or Barcelona. Even now, it is not uncommon to find contracts that include this kind of term. Of course, courts do not accept their jurisdiction on the basis of such choice, since it is clearly forbidden by the law (Article 90 TRLGDCU).

4.1.2 Access to Justice: Specialised Court's Tariffs or Taxes for Consumer Disputes. Legal Aid

There is no tariff for the access to the jurisdiction, however Law 53/2002 establishes a system of taxes to be paid before the beginning of any process. Among the tax exemptions, the most important was the one regarding natural persons that are not obliged to pay the tax. An amendment to this Law in 2012 included the obligation to pay the tax for natural persons which was abolished again by means of another amendment in 2015.

There is a system of legal aid for insolvent and especially vulnerable subjects. To declare a person insolvent it is necessary to pass the exam of a commission formed by representatives of the Administration (usually belonging to the government of regional administrations, the Bar, and the Judicial Career).

The system of legal aid is regulated in Law 1/1996. This Law establishes the minimum income to be a beneficiary of the free assistance in a proceeding, which is equal to the double of the IPREM. The IPREM is the income index accounting for multiple indices, which is officially established each year for the entire country (the IPREM for 2018 was 537.80 EUR per month).

Legal aid includes all expenses that may be included in costs of proceedings and some other expenses that the Law 1/1996 establishes in section 6: free expert advice, free legal advice before the process, advertisements required by the regulations of the different procedures, etc.

[21] Suárez Robledano (2000), p. 418.

4.2 Collective Redress

4.2.1 Forms of Collective Redress in Civil Proceedings

In the Spanish LEC (approved in 2000) there are some rules that regulate the intervention of a group of related claims in a civil proceeding; most of these rules are in Article 6 and following, concerning regulation of the parties (their capacity, their representation and standing—as capacity to sue). However, there is no specific procedure foreseen for collective claim cases. Up to the year 2000 there was no regulation of collective redress in Spanish procedural law.

The inclusion of collective redress in civil proceedings was a consequence of a massive intoxication by the selling of adulterate oil; this event and the lawsuit that took place after the intoxication (one of the longer proceedings in Spain) had a very high social impact.[22] In the decision of this proceeding, the Supreme Court recognised damages for consumers that were not represented in the lawsuit, a possibility that was not allowed by the former legislation.

The LEC was approved in 2000 and the decision of the Supreme Court on the case of intoxication by adulterate oil can be considered a precedent of the current regulation, which may also explain the particular awareness of consumers about Spanish legislation, and thus why the protection by means of collective redress is only available to them.[23]

In the other jurisdictional orders (labour, criminal and administrative) the intervention of groups is conditioned on the existence of corporate personality, whereby the possibility of a group of individuals, who act in a proceeding as one single plaintiff, is not considered.

In criminal proceedings the *acción popular* exists, which implies that any person (natural or corporate) can intervene as an accusing party in a criminal proceeding, even if they have not been affected by the crime. Authors consider this possibility sufficient to protect the interests of groups although, once again, the intervention of the group itself is not possible. Natural or corporate persons and the effects of the judgment cannot be extended to third parties.

4.2.2 The Distinction Between Collective and Diffuse Interests

The regulation of collective redress is based in the distinction of two legal concepts (Articles 6 and 11 LEC): collective interest and diffuse interest.

[22] See above Sect. 2.1.

[23] Garnica Martin, 'Comentario al artículo 11' in Fernández-Ballesteros *et al*. (coord.), *Comentarios a la Ley de Enjuiciamiento Civil*, 165; Gutiérrez de Cabiedes e Hidalgo de Caviedes (2011), p. 236; Marín López (2001), p. 4. However, in 2007 an amendment of the LEC (Ley Orgánica 3/2007 for the effective equality between men and women) introduced a new kind of collective litigation, in case of gender discrimination.

An interest is considered to be collective when the persons that have been affected by a civil wrong, that is, the potential plaintiffs are determined or can be easily determined (Article 11(2) LEC). For example, a group of persons that purchases a trip by a travel agency or a group of passengers of a flight that has been delayed would fall within this concept. An interest is diffuse when it is impossible or very difficult to determinate the persons that have been affected by a civil wrong (Article 11(3) LEC). This would be the case for example of misleading publicity, a blackout across a whole city, or the selling of a defective product.[24]

Depending on the existence of one of these two interests, the LEC establishes different possibilities to sue before a court, and different instances of capacity to sue as well.

However, the categorisation of the Spanish regime of consumer protection under the concept of class action is not peaceful among its doctrine. The terminology used to define the different actions is not uniform either; in fact the LEC and the Civil and Commercial law do not use a specific word to refer to these causes of action, and doctrine usually refers to collective actions, general interest actions, etc. Moreover, apart from comparative analysis, the term "class action" is not commonly used and, of course, it does not appear in LEC or case law.[25]

In Spanish civil procedure, in case of collective redress, general rules of the LEC will be applied. This implies as a consequence that the claim in collective redress, depending on the matter or the amount, can follow the procedure of one of the two ordinary proceedings (ordinary procedure or oral procedure) or even a special proceeding (publicity, oral procedure on cease actions, etc.). Regardless of the civil procedure resulting from the application of the rules for the determination of the proceeding, there are some special rules that must be applied; these rules refer to the parties (capacity and capacity to sue), *res iudicata* and enforcement of the judgement.

4.2.3 Parties in Collective Redress

Depending on the existence of a collective or a diffuse interest, the LEC recognises different instances to have the capacity to sue, regulated in Article 11:

(a) Consumers and customers associations have a wide possibility to bring actions before the courts in consumer protection; they have capacity to sue in the name of their members and also in the name of consumers who do not belong to the associations, when the interest is collective.

In case of a diffuse interest, the LEC restricts the capacity to sue only to consumer associations of a certain importance according to the law. To have

[24]Samanes and Gutiérrez (1988), p. 1157.

[25]Ferreres Comella (2005), p. 42 and Marín López (2001), p. 44.

such capacity as a representative, the association must register in the *Registro estatal de asociaciones de consumidores y usuarios* (Article 33 TRLGDCU).

(b) Associations whose objective is the defence of consumers: since the LEC considers this kind of associations to be different from consumer associations, scholars understand that we can include in this category any association whose objective is not directly the defence of consumers but, in some cases, consumers' interests can be included somehow in its objective. This could be the case, for example, of an association of parents of a school, an association of housewives, an association of neighbours of a district, etc. This kind of associations can claim before the courts when the civil wrong injures a collective interest.

(c) Groups of consumers affected by a harmful act: a group of consumers can also be a plaintiff as a single party, subject to some requisites set forth in Article 6 of the LEC: each member of the group must have suffered the consequences of the harmful act and the group must be composed of the majority of the potential claimants. Groups of consumers have their capacity to sue recognised only in the case of a collective interest, whereby the potential claimants must be always identified, even if not all of them take part in the group claim.

The LEC regulates a system to make the claim publicly known among the potentially affected consumers in order to gather the legally required number of members for the group (Article 15). With the same aim, Article 256 LEC establishes a preliminary proceeding to ask the defendant to cooperate in the determination of the potential claimants.

(d) Natural persons: the capacity to sue of natural persons as individuals in collective litigation is not expressly established nor forbidden in the LEC and the wording of Article 11 is confusing. This Article begins with the expression 'without prejudice to the capacity to sue of natural persons affected by the harmful act'; these words caused a controversy, but the most common opinion in legal literature considers that allowing a single person to introduce a lawsuit that can affect a numerous group of consumers is not feasible. However, when in 2007 the second type of collective redress (related to non-discrimination) was introduced in our civil procedure, the regulation of this kind of collective redress clearly established that any natural person affected by a harmful act (even if it was a case of diffuse interest) had the right to file a lawsuit as an individual.[26] In our opinion, this most likely means that the legislator considers that the elimination of the capacity to sue for natural persons in consumers' collective redress is a misinterpretation of the LEC. However, there are no decisions from our courts up to now in one sense or another.

(e) Cease actions: cease actions have a special regime in regard to the capacity to sue. In addition to the entitled subjects already mentioned, we must also add the associations authorised by EU regulation to file a suit in cease matters, and also Spanish public prosecution (called *Ministerio Fiscal*).

[26]Castillejo Manzanares (2008), p. 3.

4.2.4 Res Iudicata in Collective Redress

As we have already mentioned, an outstanding precedent in the regulation of collective redress is the decision of the Supreme Court 26 September 1997 (ECLI:ES:TS:1997:5661). This judgment recognised damages resulting from the toxic syndrome to consumers that were not represented in the process, in contradiction with the applicable law at that time.

In general, the effect of *res iudicata* is only towards the parties. But there are two exceptions in the LEC.

(a) In collective litigation the *res iudicata* may affect persons that were not litigants in the process, as it is regulated in Article 222 LEC, which makes an express allusion to cases on the capacity to sue regulated in Article 11 of the LEC. Nevertheless, Article 222 leaves room to some construction difficulties, since it does not discriminate all kinds of capacity to sue set forth in Article 11, and not all the cases of capacity to sue that this Article regulates are considered collective litigation.

Furthermore, authors find in a wide construction of this section a basis to interpret our LEC as a liberal system, according to which most of the issues regarding capacity to sue regulated in section 11 could be understood to extend the effects of the judgment to persons who did not intervene in the process in the sense of the ruling of STS 26 September 1997 (ECLI:ES:TS:1997:5661).[27]

According to the rule of Article 221 LEC, court decisions can establish the characteristics or requisites that consumers shall meet in order to be a beneficiary of a judgment rendered in their favour, whereby the determination of the specific consumers who are favoured by a decision is determined during execution proceedings.

(b) The second exception is found in Article 221(2) LEC, which establishes that in the case of claims aimed at declaring the illegality of certain behaviour or activity, the court in its decision must determine if the content of the judgment is binding for parties that did not intervene in the proceedings.

4.3 Length of Proceedings

As an epilogue to the assessment of judicial enforcement, objective data as regards the length of judicial proceedings is worth noting. The average length of a court proceeding is 6.2 months at first instance (data corresponding to the year 2014), with a broad variation depending on regions. Although, as mentioned above, there is no discrimination of matters nor parties involved, if we take into account the two most common proceedings for B2C disputes, the average length would be of 6.5 months for *Juicios Verbales* (e.g. used in B2C claims up to 6000 euros) and of 14 months for

[27] Samanes (2000), p. 91.

Procedimientos Ordinarios (e.g. used in the challenge of standard terms),[28] in both cases at first instance.

4.4 ADR and Resolution of Consumer Disputes

The most common ADR in Spain are arbitration and mediation. Arbitration used to be regulated in the LEC up to the Arbitration Law of 1953, followed by the Arbitration Laws of 1988 and the current one of 2003 (Ley 60/2003). The Arbitration Law regulates arbitration for civil and commercial matters which are of free disposal. The arbitral award has the same effects as a judgement. There is a specific regulation for consumer arbitration (Real Decreto 231/2008).

The regulation of the mediation is much more recent: Mediation Law of 2012 (Ley 60/2003) considers mediation as a mean to solve disputes by the parties with the aid of a mediator. Mediation Law regulates mediation in civil and commercial matters (labour and criminal mediation which are quite common have their own regulation).

Although both ADR (arbitration and mediation) are suitable for consumer claims, the first regulation of Consumer Protection, LGDCU 1984, stated that the government should establish a system of arbitration to solve the disputes among consumers and entrepreneurs. As a consequence of this order, the first regulation of consumer arbitration is included in RD 636/1993. These rules were amended later, current TRLGDCU 2007, and the RD 626/1993 was amended in 2008 (RD 231/2008).

Mediation is also allowed for consumer disputes, however arbitration has a more established tradition in the Spanish legal system. The regulation of consumer arbitration requires, as of 2008, mediation prior to the initiation of arbitral proceedings, but until that year consumer mediation was quite uncommon.

Arbitration is entrusted to autonomic and local administrations, which implies that each regional administration and most of the main councils have their own system of consumer arbitration, although the composition of the different arbitration courts and the proceeding do not differ much, since the regulation is at the state level.

The qualification and requirements to be an arbitrator are established in Law 60/2003 on Arbitration. According to Article 13 any person in its full capacity of its civil rights may be an arbitrator regardless of its nationality; however, arbitrations are not to be decided *ex aequo et bono*, and also in the case of three arbitrators, one of them must be an attorney (Article 15).

As to the mediator he also needs to be in full capacity of his civil rights, but it is also required to have any bachelor degree and a specific formation as a mediator (Article 12 Law 5/2012 of 6 July 2012).

[28]See *Consejo General del Poder Judicial*, "Memoria 2015", www.poderjudicial.es/cgpj/es/Poder-Judicial/Consejo-General-del-Poder-Judicial/Actividad-del-CGPJ/Memorias/Memoria-anual-2015--correspondiente-al-ejercicio-2014-.

Independence and impartiality are a requisite for arbitrators (Article 17 Law 60/2003 Arbitration) and mediators (Article 13 Law 5/2012 Mediation); in case of any relationship with the parties or with the dispute, arbitrators or mediators must abstain from resolving the dispute.

5 Conclusions

Spain enjoys a high level of consumer protection which began to be developed prior to the incorporation of the country into the EEC/EU—and is one of the guiding principles for public authorities (legislative, executive and judiciary branches) enshrined in the Spanish Constitution of 1978. However, it is evident that Spanish consumer law has benefited from the European *Acquis Communautaire* since the country became a Member State of the EEC/EU (1986).

In recent years, and due to the economic crisis that has affected Spain particularly harsh, a concern for the most vulnerable sectors of society has been put in the spotlight. Some pieces of legislation have been passed to specifically protect those consumers in need, particularly in respect of the repayment of loans, the default of which could lead to foreclosure of their homes (Royal Decree-Law 6/2012, Law 1/2013 and Law 25/2015).

The crisis has also fostered litigation, mainly in the financial sector, with consumers challenging the validity of contractual terms as well as provisions of the LEC in force. Some recent changes to legislation for the purpose of correctly enforcing consumer law (mainly: the right to appeal against foreclosure; the possibility that a judge may declare a clause to be unfair in payment procedures as well as in execution proceedings, being them entirely judicial or due to the enforcement of an arbitration award; and the preclusion to revise the content of a contract by the judge, filling the gap left by an unfair term) find their origin in judicial proceedings, especially as a result of the intervention of the Court of Justice of the European Union (cases *Banesto*, ECLI:EU:C:2012:349; *Aziz*, ECLI:EU:C:2013:164, *Asturcom*, ECLI:EU:C:2009:615; *Sánchez Morcillo*, ECLI:EU:C:2014:2099). There has been a clear increase in requests for a preliminary ruling to the CJEU in respect of consumer law, amounting to 40% of the total requests sent by Spain in 2014 and 2015, compared to 10% in 2010.[29] This tendency has been perceived as a tool by the judiciary (especially lower instance judges) to trigger reforms and raise the level of consumer protection.[30]

Apart from the internal reforms, as a result of legislative changes and judicial pressure, Spanish consumer law has also been affected by European provisions, among which, in respect of the enforcement mechanisms, the following provisions

[29]See CJUE and *Consejo General del Poder Judicial*.

[30]Gómez Pomar and Lyczkowska (2014).

should be highlighted: (a) the Regulation on Consumer ODR[31] and (b) the Directive on Consumer ADR.[32]

The enforcement of consumer law is still very court-centred, a fact that is fostered by the incapacity of consumer agencies to resolve (compulsory) conflicts in B2C contracts. Additionally, the relatively cheap access to courts (no court fee neither litigation costs below 2000 euros, plus free litigation if certain thresholds are met) make this enforcement mechanism attractive. This situation is saturating the judiciary, making proceedings longer and, as a consequence, hindering the enforcement of consumer law. Yet, it is perceived as the most efficient mechanism to solve B2C disputes.

There is a tendency to foster ADR mechanisms, a solution that is expected to receive further impulse by the Directive on Consumer ADR and the Regulation on Consumer ODR. However, for the time being, ADR has proved to be of little success, a result that may have cultural roots, with an inclination to judicial outcomes. A more efficient solution, taking into account this factor, could be the generalisation of the special administrative proceedings that exist in particular sectors (e.g. telecommunications) in which the participation of the business is compulsory and, as well, allows the consumer to recover the harm suffered (but not damages, a remedy that, however is not common in Spanish B2C disputes). This mechanism grants the parties the right to challenge the administrative decision in court (different to arbitration), which is an incentive for consumers to participate in it, although, in practice and in most cases, what the Administration decides could be definitive. Notwithstanding, we are aware that an efficient Administration would be required for the success of such alternative mechanism, a task that is still to be achieved by the Spanish bureaucracy.

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[32]Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, OJ 2013 L 165/63.

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Effectiveness and Enforcement of Consumer Law in Sweden

Antonina Bakardjieva Engelbrekt

1 Introduction

Sweden is widely regarded as a country with high profile in consumer protection policy and well functioning consumer law and institutions. The foundations of the legal and institutional framework of consumer policy were laid down already at the end of the 1960s and the beginning of the 1970s.[1] This framework, with specialised consumer law statutes and prominent public institutions entrusted with the implementation and enforcement of consumer law and policy, has generally stood the test of time. Most of the original institutions, like the Swedish Consumer Agency (*Konsumentverket, KOV*) with the Consumer Ombudsman (*Konsumentombudsmannen, KO*) and the Public Board for Consumer Complaints (*Allmänna reklamationsnämnden, ARN*), are still in place. There is furthermore remarkable continuity in the overall structure and general principles of consumer legislation. Certainly, in the course of the almost six decades of active consumer policy, some important changes in the approach to enforcement and more generally, to the governance of consumer policy have taken place in response to various political and societal developments. A particularly significant factor for change has been Sweden's accession to the European Union (EU) in 1995 and the ensuing process of Europeanisation.[2]

In the present chapter, I first go back to the historical roots of Swedish consumer policy, outlining the distinctive features of the original model of consumer law

[1] A useful introduction to the early development of consumer protection in Sweden in the English language is provided by Bernitz and Draper (1986). In Swedish see Grobgeld and Norin (2013).

[2] On the influence of Europeanisation on Swedish consumer law and policy, see Bakardjieva Engelbrekt (2003).

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enforcement, the way it was conceived in the early 1970s. Then I briefly review some of the central elements of current consumer law and policy in terms of policy priorities, legislative and institutional framework. Next, the chapter gives account of the chief avenues for enforcement of consumer law, addressing enforcement of legislation in defense of collective consumer interests, on the one hand, and of individual consumer rights, on the other.[3] Special attention is paid to the role of consumer organisations, of private regulation and of various schemes for alternative dispute resolution (ADR). Throughout the chapter, an attempt to estimate the actual working of the system is made on the basis of available empirical data. In conclusion, I venture a tentative assessment of the efficiency and effectiveness of the Swedish model of enforcement and gauge the direction of current reform endeavours.

2 Historical Background

Early precursors of public consumer policy in Sweden can be dated back already to the 1940s. At the time of World War II, the Swedish state encouraged the existing women's guilds to work for efficient household management under conditions of undersupply of goods and subsidised bodies such as the Public Bureau on Active Household Management and the Household Economics Research Institute. However, Swedish consumer law and policy developed as a legal and regulatory area in its own right first in the 1960s and 1970s. The increasing affluence of the post-war years brought along all the well-known problems of contemporary consumers. In 1968, a study group composed of representatives of the then governing Social Democratic Party and of the country's most influential labour union (*Landsorganisationen*, LO) submitted a report, allegedly introducing the concept 'consumer policy' for the first time in the Swedish public discourse.[4] The report proceeded from an understanding of power imbalance in the relations between producers and consumers on the market. To compensate for this imbalance, the report presented a broad concept of consumer policy and argued that the institutional responsibility for such a policy should lie with the state.

A number of Government inquiries on consumer-related issues followed and the first specialised consumer protection law, the Unfair Marketing Practices Act, was introduced in 1970, soon to be followed by the Consumer Contract Terms Act of 1971 and the Consumer Sales Act of 1973.

The new consumer protection legislation raised the question about the place of this complex of rules within the national legal system and its overall effects on system

[3]For a comprehensive account of the existing schemes for consumer redress in Sweden see Bakardjieva Engelbrekt (2006).

[4]*Vill Du komma till tals?* Rapport om försöksverksamheten med lokala konsumentkommitteér, 12 maj 1967–30 juni 1970, Bilaga 2 Skoglundsgruppen slutrapport, 'Om konsumentpolitik'.

coherence. This issue was addressed with pragmatism in Swedish legal doctrine. Some of the new laws, like the Consumer Sales Act and the Consumer Services Act, modified the principles of classical private law. However, these new pieces of legislation did not wreak doctrinal havoc, but were interpreted as piecemeal interventions to solve real-life problems.[5] Clearly, the strong engagement of public institutions in protection of collective consumer interests rendered this legal area a public law flavour. At the same time, the rules were often enforceable upon private action in situations where predominantly private interests were concerned. This hybrid nature of consumer law was noticed at an early stage. The classification problem was solved by outlining the contours of a new legal area, Market Law. Market Law was conceived as this part of the legal order, which by way of framework rules governed the carrying out of business or trade. It defined, but also limited, the fundamental freedoms in a market economy, namely freedom of establishment, competition, contract, consumption and association.[6]

Particularly decisive for the institutional design of consumer policy was the Government Inquiry "Consumer Policy: Guidelines and Organisation" (SOU 1971:37), where among others, proposals for new public institutions in the area of consumer protection were advanced. Indeed, in 1971 the Office of the Consumer Ombudsman was founded, and in 1973 the Swedish Consumer Agency. In 1976 the Ombudsman and the Agency merged into a single institution, whereby KO became the Head of the Agency. ARN was started on a trial basis already in 1968. Finally, the so-called Market Court was founded in 1971 as a specialised court competent to examine cases under a number of market law and consumer law statutes.

In many respects, Sweden emerged as a pioneer in the domain of consumer law and policy in Continental Europe. Swedish legal and institutional solutions were studied and occasionally followed by other countries, notably by the other Nordic countries.[7] Early Swedish consumer law was inspired and partly influenced by the consumer activism and consumer law initiatives in the US of the 1960s. However, in its institutional design and main features Swedish consumer law developed in an original way, building on Swedish institutional traditions, like the institution of the ombudsman and reliance on independent public agencies. Importantly, the institutional design and the approach of Swedish consumer policy were very much influenced by the prevailing governance model at the time, usually referred to as corporatism, or neo-corporatism.

Political scientists define corporatism as 'institutional arrangements whereby important political-economic decisions are reached via negotiation between or in consultation with peak-level representatives of employees and employers, or other interest groups and the state'.[8] It implies that the state institutionalizes its contacts

[5] See Wilhelmsson (1996), p. 120.

[6] Bernitz (1979), pp. 56, 62.

[7] See Madsen (1990).

[8] Lindvall and Sebring (2005), p. 1059.

with certain organised interests, thus according these interests a privileged position and legitimating their participation in the public decision-making process.[9]

In this line of research, Sweden is given as a typical example of a democratic system with strong corporatist elements, ever since the agreement between representatives of Swedish industry and Swedish trade unions was concluded at Saltsjöbad in 1938.[10] At the level of political decision-making, increased interest representation in the legislative process is ensured through the procedure of government commissions of inquiry, which are tasked with investigating different policy issues and proposing legislative and other measures (*kommitteväsendet*), as well as the follow-up consultation procedure (*remissförfarande*). This procedure has traditionally ensured a smooth avenue for representation of corporate interests in the political process. At the level of implementation, corporatism has been visible in the structure of free-standing agencies. Representatives of the most important interest groups occupied, at least until the beginning of the 1990s, strong positions in the management boards of such agencies.

Predictably, consumer policy in Sweden in the 1970s and 1980s also came to be organised along corporatist lines. This was reflected both in the structure of the consumer protection institutions and in the general approach to enforcement. Concerning institutional structure, until the beginning of the 1990s the Management Boards of KOV and ARN consisted of representatives of industry, trade unions and consumer associations. Even the specialized Market Court for decades included interest representatives of consumers, labour and industry, a composition hardly typical for a judicial body.[11]

Concerning the general approach to enforcement, it could be described as soft and dialogical, also in line with the corporatist tradition. Even though public agencies were awarded prominent place in the implementation and enforcement of consumer law, they were not given particularly strong sanctioning powers. Instead, preparatory works underlined the importance of negotiations with the affected trade and industry sectors and seeking voluntary compliance. One of the important steering instruments at the disposal of KOV were the so-called guidelines (*riktlinjer*), elaborated in consultation with industry and setting up standards for marketing, product information and product quality. Formally, the guidelines did not have binding effect, but they were considered authoritative and were as a rule followed by the Market Court.[12]

On the positive side, corporatism provides a way of active post-electoral participation in the political process and anchoring political decisions in a broader circle of actors and interests.[13] On the negative side, the special position enjoyed by certain organisations, like trade unions and industry confederations, may lead to

[9]See SOU 1999:121, *Avkorporativisering och lobbyism – konturerna till en ny politisk model*, pp. 22 ff.

[10]See Lewin (1992).

[11]The original name of the Market Court was the Market Council (marknadsrådet) and its status as a tribunal was uncertain during the first years of its activity. See Bakardjieva Engelbrekt (2017b).

[12]See Bakardjieva Engelbrekt (2017a), pp. 119–169, 144.

[13]See Dahl (1970).

overrepresentation of certain interests at the expense of others and to decisional bias. The model tends to be successful in a relatively homogenous social and business environment with well-established networks of stakeholders, organisations and patterns of representation. Conversely, it can produce 'lock-in' effects and impede desirable change in times of societal crisis or upheaval.[14]

3 Main Characteristics and Priorities of Current Swedish Consumer Policy

Current Swedish consumer policy has lost much of its neocorporatist flavour, partly as a result of a general process of rethinking of the governance model in Sweden, starting at the beginning of the 1980s and onwards.[15] One step in this process has been reducing the role of interest representatives in the management of public agencies and bodies. Thus, the management boards of KOV and ARN were replaced by consultative boards with mostly advisory role and composed by experts, rather than interest representatives. Also, the composition of the Market Court was in the mid 1990s revised to more clearly comply with principles of judicial independence and impartiality.[16] The need for economic expertise in the court was ensured by economic experts rather than interest representatives. In terms of steering tools and enforcement techniques, the previous heavy reliance on guidelines, was gradually toned down. The name of the instrument was changed from guidelines (*riktlinjer*) to advisory notes (*allmänna råd*).

Nevertheless, in some important respects there has been remarkable institutional continuity. Thus, enforcement today still builds on a soft and participatory approach. Enforcement policy proceeds from the assumption of a responsible business community expected to commit to high standards of business ethics, to cooperate with public institutions and comply voluntarily with binding legal rules and mutually agreed norms. In this view, public intervention and formal sanctions are not seen as primary enforcement tools but rather as remedies of last resort.

3.1 Policy Objectives

The goals and priorities of Swedish national consumer policy are specified in the annual Government Budget Bill, which also sets out the budgetary frame for the expenditures on consumer policy and on consumer protection institutions. In addition, more ambitious government inquiries are regularly commissioned to analyse

[14]See SOU 1999:121.

[15]See SOU 1999:121; Lindvall and Sebring (2005).

[16]See Bakardjieva Engelbrekt (2017b).

consumers' situation on certain markets, the effectiveness of particular regulatory measures, etc.[17]

The current goals of consumer policy are stated to be: "well functioning consumer markets and environmentally, socially and economically sustainable consumption."[18] Obviously, the priorities of consumer policy are influenced by the political orientation of the government and by developments at EU level. While the preceding center-right government emphasized consumer empowerment and information, the present coalition government, made up of Social Democrats and the Greens, emphasizes sustainable and socially responsible consumption.

3.2 Legislative Framework

There is in Sweden no overarching consumer protection act or consumer code. The legal framework for consumer protection is formed by a number of specific consumer protection statutes. Some of these statutes concern foremost collective interests of consumers, the most important acts being the Marketing Act (MFL),[19] the Consumer Contract Terms Act (AVLK),[20] the Electronic Commerce Act (2002:562), the Price Information Act (2004:347), the Distance and Doorstep Selling Act (2005:59), etc. This legislation is of a mixed public/private character. Other legislative acts govern different types of consumer contracts and are of prevailingly civil law nature. The most important examples are the Consumer Sales Act (1990:932), the Consumer Services Act (1985:716), the Consumer Credits Act (1992:830) and the Insurance Contracts Act (2005:104).

The general approach of Swedish consumer law is functional and pragmatic. In contrast to other continental countries, there has been no major legislative and doctrinal debate about the relationship between consumer protection law and civil law, partly because the issue of civil law codification has not been central to Swedish law and Swedish legal scholarship.[21] It is generally accepted that consumer law is an area in-between private and public law, often placed within the domain of market law.[22] The predominant part of Swedish consumer legislation is today based on EU legal instruments and to be interpreted in conformity with EU law, taking into account the case law of the CJEU.

[17]Examples of such government reports are the reports SOU 2000:29 'Strong consumers in a borderless world' and SOU 2014:4 'It Should be Possible to Trust Consumer Protection Policy'.

[18]See Budgetproposition 2016/17:1, p. 55.

[19]Marknadsföringslagen (2008:686), last amended SFS 2016:1223.

[20]Lag (1994:1512) om avtalsvillkor i konsumentförhållanden, last amended SFS 2016:794.

[21]On the relation between consumer law and civil law in the Nordic countries, see Wilhelmsson (1996), pp. 120 et seq.

[22]See Bernitz (2013) and Nordell (2017).

The legislative style of Swedish consumer law is concise and straightforward, avoiding lengthy and all too detailed provisions. This corresponds partly to the Scandinavian legal realist tradition inimical to abstract conceptualisations, but is also an express ambition with regard to consumer legislation seeking to increase its accessibility. This goal is at odds with the more detailed and complex style of EU legislation, something that occasionally creates difficulties when ensuring full compliance with EU law.[23]

Although Swedish consumer law mainly consists of specialised consumer law statutes, some general civil law and procedural law acts are of relevance for consumers as well. Thus, the general Contracts Act of 1915 contains a provision on setting aside, or modification, of unconscionable contract terms (36 §). This provision applies to both B2B and B2C contracts and can occasionally provide higher level of protection than the corresponding consumer law rules.

3.3 Institutional Framework

The institutional framework of Swedish consumer law and policy was set out already at the end of the 1960s and beginning of 1970s, when the most important institutions such as KO, KOV and ARN were established.

3.3.1 Consumer Agency with Consumer Ombudsman (KO/KOV)

The main authority in charge of implementation of consumer policy and of consumer law enforcement in Sweden is KOV with KO. KOV is an independent public agency, following a long-standing Swedish tradition of public administration characterised by small ministries and strong specialised and independent public agencies.[24] The agency acts in a centralised manner and has its seat in the city of Karlstad.

The legal basis for the activity of KOV is the 2009 Government Ordinance with Standing Instructions (SI) for the Consumer Agency, most recently amended in 2015.[25] KOV receives annual funding from the public purse and is accountable to the Government. For 2016 the overall contribution from the state budget for the activities of KOV amounted to ca SEK 141.7 million; for 2015 the amount was SEK 135.2 million.[26] Obviously, these resources are adequate but not unlimited. Partly

[23]See Bakardjieva Engelbrekt (2017a), pp. 132 et seq.

[24]The model of public administration has its origins in the 1600s and is associated with the re-known Chancellor of State Axel Oxenstierna.

[25]Förordning (2009:607) med instruktion för Konsumentverket, last amended by SFS 2015:740.

[26]The sums are given in Swedish crowns for exactness. The exchange rate between the Swedish crown and the Euro is approximately 10:1.

due to scarce resources, there is a conscious strategy to pursue voluntary compliance on the part of traders and to have recourse to judicial proceedings only where voluntary compliance cannot be expected, or when the outcome would have an important precedent-setting effect.

The Director General and Head of KOV is also acting as Consumer Ombudsman. KO is a public official of high repute and juridical competence, appointed by the Government. KO is entrusted to bring proceedings in defense of consumers interests under a number of consumer protection statutes.

The main responsibilities of KOV/KO are to (1) ensure compliance with consumer protection rules, (2) see to it that consumers have access to information and advice and (3) work for strengthening consumers' position on the market (1 § SI).

3.3.2 Public Board for Consumer Complaints (ARN)

Another important institution for the enforcement of consumer law is ARN. This is a public body for out-of-court dispute settlement specialised in business-to-consumer matters. ARN was initially appended to KOV, but since 1981 functions as an independent public authority. The legal basis for the activity of ARN is provided by Ordinance 2015:739 with Standing Instructions (SI) for ARN.[27] The Board is financed directly by the state budget. The funding for 2016 was SEK 42.1 million.[28]

3.3.3 Sectoral Supervisory Authorities

Apart from the general consumer legislation, applicable horizontally, across all industry sectors, there is a large body of rules and regulations governing particular sectors of the economy and enforced by sectoral authorities. The activity of these authorities is of relevance for consumers, although consumer complaints are usually directed to ARN or private ADR bodies. Some of these authorities are briefly introduced below along market sector:

Financial Markets The Financial Supervisory Authority (*Finansinspektionen*, FI) is a central administrative authority, which supervises financial markets and monitors, among others, that companies disclose complete and clear information to consumers.

Communications The Swedish Post and Telecom Authority (*Post- och telestyrelsen*, PTS) monitors the electronic communications and postal sectors in Sweden.

[27]The current Ordinance was adopted following the implementation of EU Directive 2013/11/EU on ADR for consumer disputes.

[28]See Budget Bill 2015/2016:1, area of expense 18, at p. 66.

The Swedish Press and Broadcasting Authority (*Myndigheten för press, radio och TV*) has broad responsibilities in the area of electronic media and the press. It hosts the Broadcasting Commission (*Granskningsnämnden för radio och TV*), where complaints against program content and radio and TV-advertising can be lodged.

Electricity Markets The Swedish Electricity Safety Board (*Elsäkerhetsverket*) is an administrative authority working under the Swedish Ministry of Industry, Employment and Communications and responsible for electrical safety. Another agency in the same regulatory domain, the Swedish Energy Agency, works for a sustainable energy system and is subordinate to the Ministry of the Environment and Energy.

Real Estate Markets The Real Estate Agents Inspectorate (*Fastighetsmäklarinspektionen*) supervises the required registration of real estate agents and with supervision of their activity.

In their work, Swedish public institutions responsible for implementation and enforcement of consumer law are bound by general principles of administrative law and of good administration, such as transparency, proportionality and accountability. All public authorities issue annual reports, which include statistical data about their performance.

3.3.4 International Cooperation

As a member state of the EU, Sweden is bound to transpose and implement all EU legislative instruments in the consumer policy field, including those devoted to consumer law enforcement. The EU Injunctions Directive 2009/22 has been transposed through the Act (2000:1175), which gives foreign qualified entities right to bring an action in defence of collective consumer interests before Swedish courts. EU Regulation 2006/2004 on Consumer Protection Cooperation (CPC) is directly applicable in Sweden.

KOV is the competent agency or contact point under most relevant EU consumer legislation. Thus, the Agency is the only Swedish qualified entity, which can bring action for cross-border infringement of consumer interests under the Injunctions Directive 2009/22/EC. It is the Swedish single liaison office and competent authority under the CPC Regulation 2006/2004 and hosts *Konsument Europa*, the Swedish partner in the European Consumer Centres Network.

At the international level, KOV is member of the International Consumer Protection Enforcement Network (ICPEN). Sweden held the presidency of ICPEN in 2014–2015.

Participation in the above-mentioned European and international enforcement networks contributes to raising the confidence of enforcers and creates platforms for exchange of good practices. On a practical level, these forms of cooperation allow Swedish enforcement institutions to receive information about actions undertaken in other countries and to participate in common enforcement actions (sweeps). Given

the increase in cross-border trade and the advance of new communication technologies, infringements typically involve several jurisdictions, whereby cross-border enforcement cooperation is indispensable.

4 Enforcement of Consumer Law in Defense of Collective Consumer Interests

A number of Swedish consumer law statutes aim at protecting collective consumer interests and grant powers to various public and private institutions to act in defense of these interests. Among these statutes are the MFL, AVLK, etc.

4.1 Sanctions and Remedies

Different consumer law statutes envisage different sanctions, partly depending on the type of regulatory subject matter, on the institutions involved in supervision and enforcement, and on the type of infringement.

4.1.1 Injunctions

Probably the most important sanction for infringements that harm collective consumer interests is the injunction. A possibility to seek injunction is stipulated in the MFL, AVLK, the Consumer Credit Act, etc. There are two types of injunctions and injunctive orders: (1) a negative injunction, ordering the infringer to cease and desist from the infringing conduct, and (2) a positive injunction, prescribing certain conduct, e.g. information, changing a contract term, etc (see e.g. 47 § MFL). Court injunctions and injunctive orders are typically issued upon penalty of a fine. The fine is adjudged in separate proceedings before a general court, if the injunction is violated.

4.1.2 Fines and Penalties

Another sanction, often stipulated in consumer protection statutes is the financial penalty, or the fine. Thus, infringements under the Consumer Credit Act can incur penalties in the size between SEK 5000 and 10 million, in case companies do not carry out the required assessment of creditworthiness (51–52 §§ Consumer Credit Act). The MFL envisages a so called 'market disturbance penalty' (*marknadsstörningsavgift*) upon infringement of some of the specific prohibitions in the Act (see 29 § MFL). The size of this penalty was recently increased and can now be between SEK 10,000 and

10 million (EUR 1000 to 1 million), but not higher than 10% of the annual turnover of the perpetrator's business (30–32 §§ MFL).

It is worth noting that recourse to penalties and fines is relatively rare in the Swedish consumer enforcement context, if compared to other jurisdictions. The penalty is usually reserved for more serious violations of consumer law, or for infringers, showing non-cooperative behaviour. However, recent reforms have sought to increase the size and use of penalties and generally to sharpen the system of sanctions.[29]

4.1.3 Damages

Some of the laws protecting collective consumer interests envisage a right for individual consumers or traders to claim damages. MFL has from its inception accorded traders a right of action for damages on grounds of unfair competition. More unusually, with a revision of the MFL in 1995, a right for individual consumers to claim damages on grounds of unfair marketing was introduced (see now 37 § 1 MFL). However, whereas actions for damages on grounds of unfair competition on the part of traders are very common, cases of consumers claiming damages are hardly known to day. This is probably not surprising, given the typically low size of individual consumer's damages and the lacking incentives to engage in court proceedings.[30]

4.2 Enforcement by KOV/KO

The central public institution engaged in the defence of collective consumer interests is KOV/KO. KOV can open an investigation of alleged infringement *ex officio*, or upon notification by a consumer, public authority, or a trader. Usually, the Agency seeks to achieve voluntary compliance and to obtain binding commitment by the trader. Consumers are not a party in the procedure before KO/KOV.

4.2.1 Investigative Powers of the KOV

To perform their multiple functions KOV and KO are equipped with wide-ranging powers. Under all relevant consumer statutes, KO has the power to request information and assistance from any physical and juridical person. It may require, upon penalty of a fine, information, documentation and other relevant materials from

[29]Government Bill 2015/16:168 Strengthened sanctioning powers for the Consumer Ombudsman; see also Government Promemoria Ds 2015:45.

[30]See Bakardjieva Engelbrekt (2006).

business operators in the course of an investigation. KO can also require access to business premises, take product samples, etc. (cf. 42–45§§ MFL; 8–9§§ AVLK).

4.2.2 Sanctioning Powers of KOV/KO

Under the original conception of Swedish consumer law, KO/KOV was not equipped with strong own sanctioning powers. As a rule, KO had to file an action before the competent court and it was the court that would impose the sanction, be it injunction or penalty. In recent years, this traditional distribution of competences has been changing, whereby the competence of KO/KOV to directly impose sanctions has been strengthened. For instance, the Consumer Credit Act now grants KOV direct powers to impose financial penalties. Under the MFL and the AVLK, KO used to have some direct powers to issue injunctive orders. However, these injunctive orders could become effective solely if they were approved by the trader. With a recent legislative reform (in force as of 1 October 2016) the powers of KO were enhanced and injunctive orders no longer require approval by the trader in order to be effective (29 § MFL; 7 § AVLK).

Arguably, this cautious shift of power from the judicial to the administrative branch has taken place at least partly under the influence of European integration and with increasing obligations of Member States to ensure effective, dissuasive and proportionate sanctions for infringements of consumer rights under relevant EU consumer law instruments.[31]

4.3 Judicial Enforcement

Despite the above-described trend towards strengthening the direct enforcement powers of public agencies, enforcement of legislation protecting consumers' collective interests still has its center of gravity with the courts.

4.3.1 Competent Court

Until 1 September 2016, most cases concerning collective consumer interests were tried in the specialized Market Court, briefly introduced above. The Court had jurisdiction for matters under MFL, AVLK, as well as under the Competition Act. It functioned as a court of first and last instance in injunction proceedings under MFL, and as a court of appeal in all other cases. However, following a much debated reform, the Market Court was closed down and its functions were transferred to two new judicial bodies, which are integrated in the system of general courts: a Patent

[31] See Bakardjieva Engelbrekt (2017a), p. 158; cf. Ds 2015:45, p. 23.

and Market Court, and a Patent and Market Court of Appeal, jointly called the Patent and Market Courts (see below).[32]

The reform was prompted by the perception of fragmentation of the previous structure of litigation, where disputes in IP, marketing and competition law matters were divided between general courts, administrative courts, the Court of Patent Appeals and the Market Court. This situation was perceived as unsatisfactory, especially given the fact that these matters were among the most complicated and voluminous ones before Swedish courts. Therefore, the possibility for joint handling in the new courts is expected to ensure greater procedural efficiency and higher quality of substantive outcomes.[33]

What may probably be lost in the new judicial architecture is the speed and simplicity of the procedure before the Market Court and the previously existing possibility to get expeditiously final judicial injunctions from the Market Court, acting as a court of first and last instance. In the new system, all types of actions can potentially be tried in two instances. Furthermore, the new courts would hardly have the visibility of the Market Court.

4.3.2 Standing

Serious cases of infringement of collective consumer interests are typically brought before the competent courts by KO. Judgments in such cases are expected to play an important precedent-setting and 'pacemaker' role.

However, consumer laws protecting collective consumer interests often grant standing to a broader range of actors and organisations, for instance: to consumer, wage-earner and business associations for injunctions under the MFL and the AVLK (47 § MFL and 4 § AVLK) and to individual traders for actions under the MFL. The standing of these organisations and actors is sometimes designed as subsidiary to that of KO, meaning that the action can only be brought if KO decides not to pursue the case (see 4 § AVLK concerning injunctive action and 48 § MFL concerning market disturbance penalty).

4.4 Application in Practice

According to KOV's annual reports, neither the number of judicial proceedings instituted by KO, nor the number of injunctive orders issued, is particularly high, reflecting again the soft enforcement approach, where negotiations, guidelines and

[32]Lag (2016:188) om patent- och marknadsdomstolar (Patent and Market Courts Act).

[33]Government Bill 2015/16:57 (Prop. 2015/16:57 Patent- och marknadsdomstol), 1; cf. Government Inquiry, SOU 2010:44, pp. 409–415.

voluntary settlements are preferred over rigorous policing and sanctioning. The distribution between injunctive orders and judicial proceedings can occasionally shift, some years showing greater focus on injunctive orders, and others—on judicial enforcement.[34]

The Ombudsman issues annually between 10 and 15 injunctive orders, which have the effect of court decisions if they are approved by the trader. Thus, in 2015 KO issued 10 and in 2014, 7 approved injunctive orders.[35] More unusually, in 2013 KO issued 35 orders, which is explained by a targeted investigation of consumer credit markets.

As to judicial proceedings, in 2015 KO initiated altogether 8 judicial proceedings before the Market Court and the general courts. The corresponding number for 2014 was 9 and for 2013, 13 judicial proceedings.[36]

The Market Court had been deciding an average of 20–30 cases per year. Of the total number of cases, around 20 were cases on the basis of MFL and AVLK, while the rest were cases under the Competition Act. KO brings an average of 5–8 cases per year. The rest of the cases, between 15 and 25, have been initiated by traders and their associations. Somewhat surprisingly, consumer associations are making use of their standing only rarely, if at all. In contrast, individual traders (and occasionally business associations) are bringing actions frequently, in particular under the MFL. In this way, they act indirectly in the interest of consumers.[37]

The majority of cases before the Market Court has been about misleading advertising and unfair marketing practices and only rarely about unfair terms in consumer contracts. Some years, a surge of cases concerning certain market sectors or certain types of unfair practices can be noted, chiefly due to targeted enforcement measures by KO.[38]

4.5 Assessment

The main advantage of the above-described soft regulatory approach is that infringements are terminated and solutions achieved in a relatively smooth and cost-efficient way, relying on the authority of KO and on traders' concern for their reputation and willingness to cooperate. Among the shortcomings, legal practitioners have singled out KO's tendency to formulate too broad injunctive orders, extending to future

[34]KOV Annual Report 2013, p. 19.

[35]KOV Annual Report 2015, p. 22.

[36]KOV Annual Report 2014, 20; and Annual Report 2013, pp. 19–20.

[37]On the dynamic of participation in fair trading law enforcement in Sweden see Bakardjieva Engelbrekt (2003), pp. 585 et seq and 592 et seq.

[38]See e.g. cases of misleading information about healing products and cosmetics; unfair marketing of consumer credits; misleading environmental advertising; unfair marketing of financial services on the Internet; see Nordell (2017) and Bernitz (2013).

conduct not fully identical with the infringing conduct and arguably exerting a constraining effect on business freedom.[39]

However, the main disadvantage of the soft approach is that it is less—or not at all—efficient against non-cooperative and rogue traders. Therefore, as mentioned above, KOV recently sought an increase of the size of the sanctions under the MFL and strengthening of its own sanctioning powers.[40] Eventually, the size of the fines for infringements under MFL was increased, Yet, the fine can still be imposed only by the court and not by KOV itself.

As to judicial enforcement, the more than 40-year-long experience with the Market Court can be positively assessed.[41] This Court has ensured fast and competent handling especially of marketing practices cases, where delivering timely decisions is of the essence. The injunction action before the Market Court as a court of first and last instance has been a useful enforcement instrument for KO. The average length of proceedings before the Market Court used to be approx. 11–12 months.[42]

Still, the regime with a specialised Market Court, has had its critics. Misgivings were expressed that the Court occasionally applied the rules of judicial procedure in an all too relaxed manner and did not always offer sufficiently rigorous reasoning in its judgments. As already mentioned, the more overarching criticism concerned the fragmentation of the system of enforcement of IP and market law. It remains to be seen, whether the new judicial order with Patent and Market Courts will meet the high expectations and bring about improvement in the system of consumer law enforcement.

5 Enforcement of Individual Consumer Rights

Apart from the protection of collective consumer interests, individual consumers enjoy a broad spectrum of rights under specialized consumer laws governing consumer contracts and torts, as well as under general civil law. The rights of consumers under these legal acts can be enforced by way of civil proceedings brought by the affected consumer either individually, or jointly (on collective redress see Sect. 7).

There is no special court or special civil law procedure particularly designed for consumer redress. Cases concerning individual consumer rights are to be tried in the general courts. Still, the Swedish Code of Judicial Procedure (*Rättegångsbalken*, RB)[43] contains rules on simplified procedure in cases of small value (small-claim cases), which can be relevant for consumer disputes (below Sect. 5.1). In addition, KO can intervene in court proceedings in support of individual consumers (below Sect. 5.2).

[39]C. Löfgren, 'Skriv inte under', *Brandeye: Brandnews*, 2009/4, pp. 7–17.

[40]See Ds 2015:45, pp. 23 and 40.

[41]See Carlsson et al. (2017).

[42]See Market Court Annual Report (Årsredovisning) for 2010.

[43]Rättegångsbalken, RB, 1942:740.

5.1 Small Claims Procedure

The first rules on simplified procedure for small claims were introduced in Sweden in the mid-1970s with the Small Claims Act (1974:8). The rules were later integrated in RB.[44]

5.1.1 Applicability

The small claims procedure is not limited to consumer disputes, but is available as simplified judicial procedure in all civil law cases amenable to out-of-court settlement, with the exception of family law matters. The procedure applies provided that the value of the claim does not exceed half of the base amount according to the National Insurance Act (cf. RB 1:3d), or at present SEK 22,150 (approx. EUR 2200). The simplified small claims procedure is applicable in all district courts of general jurisdiction (*tingsrätt*). The district court institutes the procedure as a simplified procedure *ex officio*.

5.1.2 Standing and Procedure

There are no limitations on standing. This means that in consumer disputes the small claims procedure can be used by consumers and by traders alike.

If the conditions for the simplified procedure are met, the bench is composed by a single legally qualified judge (RB 1:3d). In cases which have been tried under the rules for simplified procedure (RB 1:3d:1) leave to appeal is required for review of the district court's judgment (RB 49:12).

5.1.3 Advice and Guidance

Under the current rules of small claims procedure there is only limited duty on the courts to provide information and assistance At the same time, Swedish courts have generally relatively wide-reaching prerogatives to offer substantive procedural guidance, both at the preparatory stage and during the main hearing (cf. RB 42:8:2 and RB 43:4:2). The *travaux préparatoires* acknowledge that such guidance is more needed in small-claim proceedings than in ordinary proceedings due to the limited possibility or motivation to rely on professional legal advice.[45]

[44]Cf. prop. 1986/87:89.

[45]See prop. 1986/87:89, 107, at p. 117.

5.1.4 Jurisdiction

Pursuant to a beneficial jurisdictional rule in RB 10:8a, in small-claim disputes between consumers and commercial enterprises, an action against the commercial enterprise may be instituted in the court for the place where the consumer resides.

5.1.5 Costs of Litigation

RB sets limitations to the possibility of getting compensation for litigation costs in simplified proceedings. Following RB 18:8a, compensation in such cases can only be awarded for one hour of legal advice, on one single occasion for each court instance and cannot exceed the fee for one hour of legal advice according to the Legal Aid Act (1996:1619). Moreover private litigation insurance does not usually cover litigation costs for small-claim disputes, something of particular importance, given that every Swedish citizen normally has such insurance as part of his/her household or car insurance. These limitations can seriously inhibit consumers' incentives to litigate.[46]

5.1.6 Application in Practice and Evaluation

The number of small-claim cases before Swedish court was in 2015 reported to be 20,142.[47] However, estimating the proportion of consumer cases among these cases is difficult. A study conducted in 1978 demonstrated that only a small number of consumers were making use of the rules. Of 17,000 small-claim cases at the time, only about one quarter were 'consumer cases'. Paradoxically, since the rules are open to all parties, it turned out that the overwhelming part (three quarters) of the 'consumer cases' were initiated by traders against consumers, typically in the form of summary proceedings for collection of outstanding debts.[48] A later study conducted in 2004 showed that the situation may even have deteriorated since the 1970s.[49]

In principle, the small claims procedure provides a speedy and cost-efficient settlement of disputes. The average time for a civil law case before the district courts was in 2015 estimated to be 7 months, but the time for small claims cases is typically shorter (ca 3–4 months).[50] However, the above-mentioned limitations on the possibilities to claim compensation for litigation costs and on the validity of legal litigation insurance decrease the attractiveness of the procedure for consumers.

[46]Lindblom (2000), pp. 218–219.

[47]Domstolsverket, Annual report 2015 (Årsredovisning 2015).

[48]See Lindblom (2000), p. 219.

[49]The study was based on small-claim cases before three Swedish district courts, but can be seen as reasonably representative. See Hällströmer (2004).

[50]Domstolsverket, Annual report 2015 (Årsredovisning 2015).

One can therefore agree with the critics that the small-claim procedure contributes little to the enforcement of consumer rights in Sweden.[51]

5.2 Cost of Consumer Litigation and Legal Aid

There is in Sweden no special court tariff or special court fees (or exemptions from fees) for consumer disputes. The court fee for a dispute with a value of the lawsuit lower than half-base amount (which at present equals SEK 22.150) is SEK 900 and for disputes of a higher value—SEK 2.800.

The general prerequisites for granting legal aid from the public purse apply also for consumer disputes. A natural person can be granted legal aid in case his or her economic subsistence does not exceed SEK 260.000 (6 § Legal Aid Act). If legal aid is granted, then the state bears the cost for legal advice of maximum 100 h, the cost of evidence gathering, etc. (15–16 §§ Legal Aid Act). However, legal aid for small claims litigation is granted only under exceptional circumstances.

5.3 KO as Representative of Individual Consumers

Since 1997, KO is granted a power of attorney to represent individual consumers before a court of law or an enforcement office if the case is of general interest for law making and interpretation.[52] For the time that KO is assisting a consumer, the consumer benefits from the free legal representation by KO. Furthermore, the state bears the cost for necessary evidence, for expert opinions, mediation, etc. Once KO steps in the proceedings, the rules for small-claim procedure do not apply. The state covers the litigation costs in case of loss of the dispute.

The scheme has been employed on several occasions so far with considerable success and KO's interventions have contributed to obtaining Supreme Court decisions and clarification on issues of central interest for Swedish consumer law.[53] The scheme has been popular among consumers. However, KO dismisses the majority of incoming applications for intervention, either because the case is not considered of principal importance for law building and law interpretation, or because the case does not fulfil other requirements in the Act. Thus, in 2016, KO received altogether 84 applications, and in 2015, 56 for representation from consumers, but approved none.

[51] See Lindblom (2000), p. 219; Hällströmer (2004).

[52] Lag (2011:1211) om Konsumentombudsmannens medverkan i vissa tvister (Act on Assistance by the Consumer Ombudsman in certain disputes).

[53] See Supreme Court judgements NJA 2015 s. 110 *Myresjöhus* and NJA 2014 s. 978 *OneTicketAway*; cf. KOV Annual Report 2014, p. 11.

5.4 Assessment

Swedish judicial procedure can be regarded as relatively accessible and efficient. The court fee is not prohibitive and it is not mandatory for a consumer to be represented in court by a qualified attorney (member of the Bar), although such representation, of course increases the chances for a successful outcome. Courts are allowed to provide substantive procedural guidance, something that can be useful in the context of consumer disputes where there often is an information and power imbalance between the parties.

The time for handling a case in Swedish courts is reasonable. The simplified rules for small-claim disputes seem to facilitate efficient handling of cases. Still, the small-claims procedure has not substantially improved the actual access of consumer to the courts, partly due to the above-discussed limitations concerning legal aid and litigation insurance, and partly due to the general aversion of consumers to engage in judicial proceedings.[54]

6 Alternative Dispute Resolution

Most disputes between individual consumers and traders are in Sweden resolved by way of ADR (on group actions before ARN see below Sect. 7.2). A 2012 comparative study on consumer ADR in Europe described Sweden as 'the ADR state'.[55] The main scheme for out-of-court settlement of consumer disputes is ARN (on private ADR schemes see below Sect. 8).[56]

6.1 Competence

ARN handles disputes concerning sales of consumer products and services, some insurance disputes, as well as disputes for damage compensation on the basis of the Real Estate Agents Act (2011:666). ARN examines complaints in different divisions (panels) according to the subject matter of the dispute, i.e. the type of products and services concerned. At present there are thirteen divisions: general (miscellaneous); banking services; housing; boats; electronics; real estate agents; insurance; motor vehicles; furniture; travel; footwear; textiles; and cleaning and laundry. Certain types of disputes are explicitly excluded from the scope of competence of the Board, e.g. disputes on sale, renting and lending of housing (5 § SI) and disputes requiring medical expertise.

[54]Lindblom (2000), p. 219.

[55]See Weber et al. (2012), p. 251.

[56]Heuman (1980) and Lindell (2000).

6.2 Organisational Structure

ARN is composed by a chairperson, a vice-chairperson, and chairpersons of the divisions, who are appointed by the Government and have to be lawyers qualified for the bench. ARN also includes ordinary members, who are appointed by the chairperson upon proposal by organisations and public authorities determined by the Government (15–16 §§ SI). The lay members of the Board shall be objective and not act as party representatives.

6.3 Procedural Rules and Requirements

There is a threshold in terms of minimum value of a dispute tried by the Board. It is currently SEK 2000 for banking services and SEK 500 for other goods and services. One condition for ARN to handle a complaint is that the consumer had tried to achieve voluntary settlement with the trader (26 § 3 SI). A complaint must be lodged with ARN no later than 1 year after the trader has turned down the consumer complaint (8 § 1, p. 3 SI).

Following the transposition of Directive 2013/11/EU, the Board cannot take on disputes that are within the competence of other approved consumer ADR bodies. Neither can the Board take on disputes that are pending before, or have been decided by a court or other competent judicial or administrative body (6 § SI).

The procedure before ARN is simplified and in written form. The parties are not entitled to be present at the meetings of the panel (see 19 § SI). No oral evidence can be collected, but the Board can be assisted by experts on specific aspects of the dispute (33 § SI).

Disputes that raise more complex legal issues or are important in other respects, can be tried by an extended panel, composed by the chairperson or the vice-chairperson of the Board, two external chairpersons and four other members (32 § 3 SI). The ARN decisions are not subject to appeal, but there is a possibility for reviewing a decision, if it is manifestly wrong due to a mistake or omission on the part of the Board (35–36 §§ SI).

The decisions of the Board have the character of recommendations. They are not binding, but enjoy high authority and are usually followed by the affected traders.

6.4 Application in Practice

ARN is a well-known and popular institution among Swedish consumers. The number of complaints filed with the Board is consistently high, although a relatively large percentage of all submitted complaints are dismissed on formal grounds. Thus, in 2016 the Board handled the files in 13,694 cases. Approx. 42% of the complaints

were dismissed on grounds of procedural or substantive shortcomings; alternatively, the file was closed down, due to settlement between the parties. As many as 6628 disputes, or 48% of the disputes, were resolved on the merits. Of the overall number of cases decided on the merits, approx. 42% were decided in favour of the consumer. The most numerous decisions of ARN in 2016 concerned contracts about car purchases or repairs (1434 disputes), followed by passenger rights (1170) and home electronics (949).[57]

The statistics from the last few years shows similar distribution. In 2015, the number of files handled was 11,997 and the number of disputes resolved—5672 (or 48%). In 2014, the number of files handled was 10,795 and the number of disputes resolved 5237. The number of files has increased during the last 10 years, probably due to the simplification of complaints procedures with digital communication technologies.

In terms of expenses for the public purse, the average costs of a dispute at the ARN was in 2016 estimated at SEK 3.273 (approx. EUR 300). The average time for handling a dispute was in 2016 approx. 6 months.[58] Following the implementation of Directive 2013/11/EU, a mandatory time-limit for settling disputes is set out of 90 days after ARN has received the complete file (see 23 § SI).

Generally, the confidence in the procedure seems to be high on the part of both consumers and traders. Traders tend to follow the decisions of the Board. Statistics show that the rate of compliance may vary between different trade sectors, being around 90% in the banking and in the consumer electronics sectors and between 70 and 80% in shoes and textiles.[59]

6.5 Evaluation

In legal doctrine, the work of ARN has been criticised for a number of deficiencies. The fact that the legal basis for the scheme is provided in an administrative regulation is pointed out as unsatisfactory from a constitutional point of view.[60] Other disadvantages brought forward are: imperfect procedure for taking of evidence, insufficient guarantees for due process and most importantly the fact that ARN decisions are not binding and hence, 'lack bite'.[61] Most of these deficiencies are to a certain extent inherent in the nature of the scheme as a simplified out-of-court procedure for consumer dispute settlement. On a more principled level, scholars express concern that general courts remain little exposed to consumer law disputes and do not influence law finding and interpretation in the field.

[57] ARN Annual Report 2016, pp. 16–18.

[58] See ARN Annual Report 2016, p. 19.

[59] See detailed statistics on the webpage of ARN http://www.arn.se/om-arn/statistik/.

[60] Heuman (1980).

[61] Heuman (1980) and Lindblom (2008a), pp. 63–93.

These flaws do not appear, however, to outweigh the basic advantages of ARN. The procedure is simple, flexible and inexpensive in terms of both private and public costs. It is easily accessible. ARN has a transparent website and reaching the Board by electronic and other means of communications is easy. The procedure is relatively rapid. All in all, ARN has indeed come to play the role of a 'clearing house' for consumer disputes.

A Government Inquiry preparing the transposition of the EU Directive on consumer ADR, raised the question whether major changes should be introduced in the current design of ARN, including whether the decisions of the Board should be made binding. However, the Inquiry concluded that the system functioned well and that making the decisions binding could jeopardise the advantages with the current procedure.[62]

7 Enforcement Through Collective Redress

Sweden was the first country in Europe to introduce a possibility for collective redress of the sort comparable to the American class action institute.[63]

7.1 Group Proceedings Before the General Courts

The Swedish Group Proceedings Act (*Lag 2002:599 om grupprättegång*, GrL) was adopted in 2002. The Act has a long history, the first proposals having been advanced in the early 1990s.[64] The idea of collective redress similar to the American 'class action' met considerable resistance on the part of industry, but also on the part of the legal profession.[65] Consequently, it took more than 10 years of deliberations and redrafting before the proposals materialised into a final legislative product. In many respects, the original bold ideas were significantly trimmed down, the legislator finally opting for a far more cautious compromise version of the Act.[66]

7.1.1 Conditions and Types of Group Action

The GrL provides a possibility for bringing group proceedings when a plurality of claims against the same defendant are based on the same or equivalent grounds

[62] See Government Bill 2014/15:128, ADR in consumer relations, pp. 20–21.

[63] See Lindblom (2008c), p. 833.

[64] Lindblom (1989).

[65] Lindblom (1995), p. 85; Nordh (1996–97), p. 229.

[66] Lindblom (2008b), pp. 129–191.

(commonality) and when the claims cannot be better pursued through other procedural forms (superiority, 8 § GrL). There are three types of group actions. Group proceedings can be instituted: (1) by an individual member of the group (private group action, 4 § GrL), (2) by an association of consumers or wage-earners (organizational group action, 5 § GrL) and (3) by a designated public authority (public group action, 6 § GrL). KO is the designated public authority for consumer disputes.

Courts have broad discretion to steer the procedure on issues such as suitability of the dispute for group proceedings (8 § GrL), or the attorney fees (38 § GrL). This is an overall positive aspect, allowing credible control and reducing the risk for abuse.[67]

7.1.2 An 'Opt-in' Approach

The GrL is based on the 'opt-in' principle (14 § GrL). The members of the group have to notify their desire to be included in the group in order to be covered by the *res judicata* of the decision. This solution has been criticized as limiting the feasibility and the attractiveness of group proceedings, since the process of communication with potential group members is a costly and complex one.[68] On the other hand, once the group is defined in a clear way, the communication between the court, the plaintiff and the group members is more reliable and easily managed.[69] Legal certainty is also increased for the defendant.

7.1.3 Litigation Costs

The GrL makes no particular concessions on the issue of litigation costs. The general rules of civil procedure apply (i.e. the loser pays principle). Among the few exceptions is the possibility for the plaintiff to enter a conditional-fee (so-called 'risk') agreement with an attorney, to be endorsed by the court, whereby the attorney would be paid a reduced fee upon loss of the suit and an increased (premium) fee in case of success (38–41 §§ GrL). Disappointingly, all insurance companies have firmly declined extending the conventional litigation insurance to litigation costs for group proceeding.[70]

[67] Lindblom (2008c), p. 833.

[68] Lindblom (2008c), p. 843.

[69] See 13 § and 49–50 §§ GrL on communication with the group, cf. Bakardjieva Engelbrekt (2006).

[70] Lindblom (2008c), p. 843.

7.1.4 Application in Practice

The group proceedings institute has been part of the Swedish system of consumer redress for around 15 years now, but has so far been employed in only a limited number of cases. In 2008, a Government Inquiry was commissioned to evaluate the first years of experience with the Act.[71] Altogether ten cases initiated as group proceedings were reviewed, of which only a few consumer cases. In 2013, the overall number of collective redress cases was estimated at 15 since the entry of the legislation in force; of these only a few cases were consumer cases.[72] The number of settlements achieved under the threat of group proceedings was appreciated to be higher.[73]

The experience of KO with organisation action under the GrL has been quite disappointing and even bitter. In 2003, KO initiated proceedings on behalf of a group of approx. 2000 consumers on grounds of a company's failure to deliver electricity services according to contract. First 8 years later, in 2011, the Court of Appeal decided the case in favour of the consumer group.[74] However, it took three more years before the case was finally settled in 2014 and consumers received a compensation of SEK 3.5 million, to be distributed among them.[75] The experience from this case has obviously strongly diminished KO's interest for such proceedings.

The general assessment by the 2008 Inquiry was that the GrL has increased access to justice for Swedish citizens. Contrary to expectations, the Act had not led to legal blackmail and abuse, and had not negatively impacted the investment climate in the country.[76] However, the Inquiry concluded that the Act did not meet expectations in terms of efficiency. In particular, the fact that the court's decision on instituting a case as group proceedings is subject to separate appeal leads to considerable protraction of the handling of a case. In addition, a number of unresolved issues were identified, in particular concerning constituting the group and funding. Somewhat surprisingly, the Inquiry advanced proposals that were directed rather at setting even stricter requirements for forming the group and for communication with group members. As pointed out in legal doctrine, these proposals could hardly be expected to increase the attractiveness of GrL for individual litigants.[77] Eventually, the Inquiry's proposals were not followed and the Act remained unchanged.

[71]Ds 2008:74 Evaluation of the Group Proceedings Act.

[72]See Ervo et al. (2013).

[73]One example is the case against *Acta/Haupthing* concerning misleading information to consumers of investment services. See http://www.grupptalanmotacta.se/.

[74]The Court of Appeal for Northern Norrland, T 154-10, KO v Kraftkommission/Stävrullen, 4.11.2011.

[75]KOV Annual Report 2013, 23. On the many turns in the case see Lindblom (2008b), p. 237.

[76]See Government promemoria Ds 2008:74, cf. Lindblom (2008c), p. 836.

[77]Lindblom (2008c), p. 835.

7.2 Group Action Before ARN

As mentioned above, apart from the possibility to initiate group action before the courts of general jurisdiction, since 1997 KO has been granted the right to bring action before ARN on behalf of a group of consumers seeking out-of-court settlement of a series of individual claims stemming from the same circumstances (commonality). In case KO decides not to pursue a case, group complaint can be filed by a consumer organization. The group action before ARN is based on the opt-out principle. The recommendation of the Board extends to all consumers affected by the infringement, even those who have not stated their willingness to be included in the group. The experience from the group proceedings by KO before ARN has been overall positive, although this avenue is used somewhat cautiously.[78]

7.3 Assessment

Group actions can be seen as a welcome complement to the Swedish system of consumer redress.[79] Although the number of proceedings that have culminated in final judicial decision is not high, one should not underestimate the indirect effects of this avenue for redress, in terms of strengthening the position of consumers and incentivising favourable settlements on the part of traders. The scheme has formidable potential to fill the gap in consumer law enforcement.

Still, as pointed out in legal doctrine, in order to achieve its full potential, the procedure may need to be considerably refurbished. One proposal has been to follow the example of Denmark and Norway and introduce the opt-out principle for public group actions and for actions where opt-in procedure would be impractical.[80] For the time being, however, there are no signs of legislative ambition for major reforms of the existing Act.

8 The Role of Consumer Organisations in Enforcement of Consumer Law

Despite its high reputation in the area of consumer law and policy, Sweden does not have a strong grass-root consumer movement. Historically, certain activity in the consumer field was exercised by the cooperative movement, by women and housewives associations as well as by the powerful Swedish trade unions, which also

[78] KO has in the period of 2013–2015 initiated three group proceedings before ARN, among others a well-observed case concerning boat travel.

[79] Lindblom (2008c), p. 833; see also Ervo et al. (2013).

[80] Lindblom (2008c), p. 843.

supported the relatively early active intervention of the state for the promotion of consumer interests. However, the building up of an extensive system of public bodies in the consumer domain may have exerted a pre-empting effect on the emergence of a broad decentralised consumer movement.[81]

8.1 Setting Up and Funding of Consumer Organisations

At the beginning of the 1990s, partly in view of the forthcoming Swedish membership in the EU and the need for representation of Swedish consumers in the European network of consumer associations, the Swedish Government started to provide financial support to private consumer organizations, administered via KOV. In 1993/94 KOV was empowered to allocate financial support for the setting up of new consumer organizations. In this way the main consumer organisation in Sweden, the Organisation of Swedish Consumers (*Sveriges konsumenter*), was founded.

Since 2007, the distribution of public funding to consumer organisations is governed by the Ordinance on public support for organisations in the consumer area (2007:954).[82] The Ordinance defines three categories of public support: so called (1) organisation support, (2) activity support and (3) project support. Consumer organisations have to apply for each type of funding separately.

Consumer organisations are not-for-profit organisations working on the basis of their by-laws. Normally they have a managing board, running the day-to-day activity of the organisation. In principle, there are no formal requirements for the establishment and operation of consumer organisations. However, such organisations have to meet certain requirements in order to qualify for public funding. According to the relevant ordinance, support can only be provided to democratically organised, politically unbound and not-for-profit associations. Furthermore, organisation support can be provided solely to an organisation which has as its objective to promote the interests of consumers in Sweden and internationally and has carried out such activity for at least 2 years prior to the application. The organisation has to have national coverage and a minimum of 1000 paying members (3–5 §§ Ordinance 2007:954). In 2015 KOV distributed SEK 10 million to around 20 different consumer organisations and projects.

8.2 Existing Consumer Organisations

The main Swedish consumer organization nowadays is still the Organisation of Swedish Consumers. It is an umbrella organization with more than 20 member

[81] See Bakardjieva Engelbrekt (2003), pp. 587 et seq.

[82] Förordning (2007:954) om statligt stöd till organisationer på konsumentområdet.

organisations, including women and pensioners organizations, local consumer associations, youth organisations, etc. It is a member of the European consumer organisation, BEUC.

Apart from *Sveriges konsumernter*, there is a number of other associations active in the area of consumer policy. Some of these organisations focus on specific issues of particular relevance for consumers, for instance fair trade, or environmental consumption. Others are active on certain consumer markets, for instance automobiles or real estate markets. Examples of organisations, which have received organisation support in 2015, are Fair Trade Center, Green Drivers, the Swedish Association for Protection of Nature, the National Federation of Houseowners, etc.[83]

8.3 Role in Consumer Law Enforcement

Consumer organisations have the right to bring action in defense of collective consumer rights under a number of statutes. They can file an action for injunction on grounds of unfair, misleading and aggressive commercial practices under the MFL, or on grounds of unfair contract terms under the AVLK. They are also granted right to institute group proceedings (see 5 § GrL) and group action before the ARN.

In reality, however, the role of consumer organisations in consumer law enforcement is very limited. There are practically no lawsuits filed by consumer organisations before the general courts, or before the Market Court, and no group proceedings before ARN either. Interviews with consumer organisation representatives indicate that the organisations do not consider themselves as having sufficient expertise and resources to engage in risky judicial procedures or dispute settlements. Instead, they rely on the system of public institutions in Sweden, and chiefly on KO.[84]

9 Private Regulation and Enforcement

Traders in Sweden are well organised in various horisontal and sectoral organisations and actively engaged in private regulation and enforcement. In the area of marketing and advertising, Swedish business has been involved in the elaboration and update of the ICC Codes of Advertising Practice ever since the 1930s. Compliance with the Codes is nowadays ensured by the Advertising Ombudsman (*Reklamombudsmannen*, RO). In addition, there is a number of private codes and enforcement bodies in individual industry sectors. A 2004 report for the Swedish Parliament listed 45 self-regulatory schemes existing at the time.[85] The forms of these schemes vary and

[83]KOV Annual Report 2015, 106.

[84]See Bakardjieva Engelbrekt (2003), p. 589.

[85]Sveriges Riksdag, Lagutskottet, Näringslivets självregleringsorgan, 2003/04:URD.

include customer ombudsmen in individual companies, dispute settlement boards and ethical boards. Particular engagement is visible in sectors such as insurance and real estate services, probably due to the complexity of these markets, but also in an attempt by industry to preempt more burdensome public regulation.

The 2015 Act on consumer ADR, while confirming the central position of ARN, also encourages private ADRs, if they meet the requirements of the Directive 2013/11/EU, such as accessibility, competence, independence, impartiality, efficiency, transparency and adequate information provision. Importantly, the Act requires that dispute settlement panels are composed by equal number representatives of consumer organisations and traders. The public agency competent to approve consumer ADR-bodies under the Directive and the implementing Swedish law is the Legal, Financial and Administrative Services Agency (*Kammarkollegium*).

9.1 Dispute Settlement Boards for Individual Industry Sectors

In a number of industry sectors, business associations and companies have taken the initiative to set up formalised conciliation or dispute settlement bodies and procedures for handling consumer complaints.[86] These private complaints settlement boards are not arbitration schemes. The parties cannot influence the composition of the panels. The decisions are usually issued in the form of non-binding recommendations and are non-enforceable. Nevertheless, the importance of such procedures should not be underestimated since the recommendations are most often followed by the affected businesses, especially those who are members of the respective association.

One example is the real estate sector with the Real Estate Markets Complaints Board (*Fastighetsmarknadens reklamationsnämnd*, FRN) founded already in 1968. FRN is run by the main associations in the real estate business and handles disputes between real estate agents and their customers.

Another example is the insurance sector, where Insurance Sweden (*Svensk Försäkring*) hosts a number of complaints boards that have functioned successfully since the 1940s. The most important at present are the Board for Insurance of Persons (*Personförsäkringsnämnden*), the Board for Legal Protection Insurance Issues (*Nämnden för Rättsskyddsfrågor*) and the Board for Bodily Injury Liability Insurance (*Ansvarsförsäkringens Personskadenämnd*). In addition, a specific form of co-regulation exists in the area of compensation for road traffic injuries, where the Road Traffic Insurance Board (*Trafikskadenämnden*) plays a central road.

The private complaint settlement schemes mentioned above have a number of common characteristics: the procedure is in writing, the time for handling the complaint is relatively short (between a few weeks and some months). The composition of the boards usually reflects the expertise and the interests in the respective

[86]See Weber et al. (2012), pp. 231 ff.

business sector, but increasingly includes representatives of consumer organisations. There is also an effort to ensure legal competence. The decisions of the boards are not binding, but enjoy high authority.[87]

So far, *Kammarkollegiet* has approved, apart from ARN, the following private bodies as consumer ADR schemes under Directive 2013/11/EU: FRN, the Board for Insurance of Persons, the Board for Legal Protection Insurance Issues, the Road Traffic Insurance Board, the Swedish Bar Association Consumer Disputes Committee and the Swedish Funeral Agents Union Dispute Settlement Board.

9.2 Boards for Ethical Marketing

The most important board in the area of marketing is the Advertising Ombudsman (RO).[88] RO is a not-for-profit organisation funded by business and advertising associations and companies. Its main steering instrument is its by-laws. The governance structure is multi-layered and consists of a Management Board, the Ombudsman (*Reklamombudsmannen*, RO) and an Opinion Board (*Reklamombudsmannens opinonsnämnd*, RON). RON is chaired by a lawyer with judicial competence and is composed by representatives of industry, consumers, academics and other experts. RO is member of the European Advertising Standards Alliance.

RO has a number of information and awareness-raising tasks (see § 2 By-laws). However, its main responsibility is to give opinion on the conformity of marketing and advertising with the standards of good marketing as set out in the ICC Codes. RO acts upon complaint by consumers, traders and citizens. Complaints are handled in a two-tier procedure: (1) Clear-cut cases are decided by the Ombudsman. (2) If the case is more complicated, the Ombudsman has to refer it to RON. RON gives opinion also on cases where the decision of the Ombudsman has been appealed (§ 3 By-laws). The work of RO is particularly relevant in cases of marketing practices, which fall outside the scope of the Swedish MFL, due to conflict with freedom of expression, such as gender-discriminatory marketing.[89]

9.3 Evaluation

Private enforcement through private dispute-settlement bodies have gained on importance as a lean, cost-efficient mechanism for ensuring compliance with consumer law and with commitments undertaken on the basis of business self- and

[87]See Van der Sluijs (2013), pp. 285 at 298 on the Supreme Court requesting the opinion of the Road Traffic Injuries Board with reference to NJA 1996, p. 639.

[88]On the Ethical Board for Direct Marketing, see Bakardjieva Engelbrekt (2006).

[89]Nordell (2017).

co-regulation. The advantage is the saving of public resources and harnessing the expertise of traders. A common weakness is that, based on the principle of voluntary compliance, the procedures do not affect fly-by-night sellers or other less serious entrepreneurs who do not care for membership in sectoral organizations. This notwithstanding, there is a clear tendency in Sweden to promote the activities of similar arrangements for informal dispute resolution.[90]

10 Conclusion

In conclusion, the account above witnesses that Sweden is indeed a country with rich traditions and well establish good practices in the area of consumer law enforcement. There are active public institutions working in this field, such as KOV/KO, ARN and sectoral regulatory authorities. The confidence in these public institutions is high. According to recent opinion polls (July 2016) the KOV is the public authority enjoying the highest degree of confidence among Swedish citizens, followed by authorities such as the Tax Authority and the Patent Registration Authority and scoring higher than the police and the courts.[91] The work of these public bodies is complemented by a large variety of private and public-private bodies working on the basis of self- and co-regulation, like RO, various private boards for consumer complaints, etc. Furthermore, the legal system offers possibilities for collective consumer redress, albeit in a cautious and controlled manner.

What emerges as distinctive of the Swedish tradition in this area of regulation, is the positive and dialogical approach[92] and the trust in the willingness of traders to voluntarily comply with the consumer laws in force, and generally to act in the interest of consumers. This attitude transpires in the drafting style of consumer legislation, in the system of sanctions and in the enforcement approach of the competent public and private bodies.

On the positive side, such deliberative, benevolent approach creates confidence and a climate of cooperation between honest businesses, public regulators and other stakeholders, something that is generally in the interest of consumers. Regulatory bodies can gain valuable information and insight from the business community. Interpretation and application of the law can be carried out in a competent, cost-efficient and not all too obtrusive way, with respect to freedom of enterprise.

On the negative side, the soft approach described above may be less efficient in the combat of dishonest market practices and may give too broad a leeway to rogue traders. Historically, the approach has been nurtured in a relatively homogeneous commercial environment and a close-knit community of traders, where reputation and cooperation have played a significant role. The approach may be less adapted to

[90] See Haglind (2001), pp. 263–271.

[91] https://www.svd.se/har-ar-myndigheterna-vi-har-minst-fortroende-for (last visited 17-05-2017).

[92] Hodges et al. speak of a consensual approach; see Hodges et al. (2012), p. 393.

a 'brave new world' of open borders, Internet commerce and increasing mobility of both business operators and consumers, where a considerable number of traders is not interested in building a steady reputation in the country.

Apparently, these limitations of the traditional Swedish model of consumer regulation and enforcement have recently been acutely acknowledged. It seems that not least as a consequence of the changing market and regulatory environment described above, and partly as a result of harmonisation and cooperation between consumer authorities within the EU, there is a trend in Sweden toward strengthening the enforcement powers of public consumer authorities. This is done by shifting the competence for imposing injunctions and sanctions from the courts to the competent administrative authorities (notably KOV). In addition, pecuniary sanctions like penalties and fines are increased in size and enforcers are encouraged to use such sanctions more frequently.

Institutionally, some noteworthy reforms in the enforcement powers of public bodies consist in giving KO the competence of issuing binding injunctive orders under MFL and AVLK; increasing the size of the 'market disturbance penalty' under MFL and giving the KOV the power to impose penalties under the Consumer Credit Act. The recent dismantling of the Market Court and transferring of its competences to the new Patent and Market Courts can also influence the effectiveness of consumer law enforcement and should be followed closely.

On a parallel track, one can note activisation of private regulators and private enforcement bodies. Maybe this can be seen as a countermovement and an attempt to pre-empt too stringent public regulation and enforcement.

One limitation not mentioned so far is the relatively modest resources devoted to consumer protection and in particular to public enforcement, if compared to other areas of regulation. This inevitably influences the capacity and the willingness of KO to undertake time-consuming and 'risky' enforcement measures, for instance group actions or intervention in individual consumer disputes. Still, having in mind the general, and probably insurmountable, limitations, which any system of enforcement of consumer law faces, the Swedish case can be considered as a positive example.

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Enforcement and Effectiveness of Consumer Law in Turkey

Ece Baş Süzel and Evrim Erişir

1 National Legal Framework for Consumer Protection

1.1 In General

Turkey harmonises its national consumer law with EU legislation since its aim is to become a member of the European Union ("EU"). The Turkish Parliament has recently enacted the current Consumer Protection Code No. 6502 (*CPC*), which is in line with EU legislation. Besides, EU directives such as Directive 2015/2302 on package travel and linked travel arrangements, Directive 2011/83 on consumer rights and Directive 2002/65 concerning the distance marketing of consumer financial services are translated into Turkish and entered into force through national regulations. However, the full harmonisation has not been achieved to date. For instance, in the area of dispute resolution, Turkish domestic legislation is still not compatible with Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR).

The name of the authors is listed in alphabetical order. The references made to the legislations, literature and court decisions are updated as of June 2016. The authors would like to express their sincere appreciation to the research assistants, Gökçe Kurtulan and Zeynep Damla Taşkın.

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1.2 Development of Consumer Legislation in Turkey

The legislative history regarding consumer protection in Turkey commenced with the decision of harmonising Turkish Codes with the EU legislation. The very first Consumer Protection Code, No. 4077, entered into force in 1995. In 2003, significant amendments were made to with Code No. 4822 in order to ensure harmonisation with the EU. Besides, a considerable amount of domestic regulations had simultaneously entered into force. However, in accordance with the amendments in EU legislation, the Turkish Consumer Protection Code had become outdated and thus initiated studies on the draft of a new consumer protection code. As a result of those studies, in 2013, the current Consumer Protection Code No. 6502 was enacted by the Turkish Parliament and entered into force as of 28 May 2014.[1]

Regarding the enforcement, a dual dispute settlement mechanism (namely the Consumer Arbitration Boards and the Consumer Courts) has been foreseen both in the previous and in the current CPC. In 1995, even though it was obligatory to take the disputes under a certain monetary limit to a consumer arbitration board, the decisions rendered by the latter had no binding character and they were considered merely as a discretionary proof before the consumer courts. Following the 2003 amendment, the decisions given by the consumer arbitration boards regarding the disputes falling under the certain monetary limit have gained the force equal to a court judgment.[2] In the current CPC, this structure has been followed.

1.3 Consumer Regulations

1.3.1 Main Regulations

The principal legal framework for consumer protection has been separately regulated in Turkey by "Consumer Protection Code No. 6502" (*CPC*). The relevant Code regulates business to consumer relations in detail.

The purpose of the CPC is to take measures to protect the health, safety and the economic interests of the consumer, to compensate the losses, to ensure protection of the consumers from environmental hazards, to inform and educate consumers in accordance with public interest, to promote self-protecting initiatives and voluntary organisations in order to establish policies regarding this matter.

The CPC includes 88 articles under nine different chapters. The first chapter covers three articles which regulate respectively, the aim, the scope of the Code and definitions of the terms such as consumer, consumer transaction, services, goods, producer and trader. The second chapter has been organised to outline general

[1] As for legal development of consumer law in Turkey, please see Aydoğdu (2015), pp. 9–17.

[2] For the structure of the first Consumer Arbitration Boards until 2003 please see, Pekcanıtez (1996a), pp. 39 ff. Ulukapı (1996), pp. 77 ff.

provisions. For instance, Article 5 of this part regulates unfair terms in consumer contracts.

The third chapter has been divided into two parts and is dedicated to defective goods and services. The fourth chapter provides articles relating to specific consumer contracts such as instalment sales, consumer loan contracts, package tour contracts, and distance contracts. The disclosure duties of the trader have been provided for in Chapter Five. Subsequently Chapter Six regulates the commercial advertisements and unfair commercial practices. The Code, under its seventh chapter, includes articles for consumer council, advertising council and consumer arbitration boards.

Dispute resolution has been regulated under Chapter Eight which outlines provisions relating to consumer arbitration boards and consumer courts. These specific rules have two objectives: (1) establishment of consumer courts and an introduction of rules different from the general procedural rules in order to facilitate and accelerate the resolution of consumer disputes; (2) introduction of a procedure that is rather close to a public prosecution in order to reduce the work load of these courts and increase the litigation motivation of consumers.

The administrative fines to be collected in case of an infringement have also been rendered within the same chapter. Miscellaneous provisions take part in Chapter Nine.

1.3.2 Other Relevant Regulations

Article 84, paragraph 1 of CPC No. 6502 renders competence to the Ministry to regulate and publish regulations in accordance with the Code. Such competence has been used and various regulations have been published in the Official Gazette and entered into force. Most of the said regulations are translated directly from EU directives and transposed to national legislation (for instance, Directive 2015/2302 on package travel and linked travel arrangements, Directive 2011/83 on consumer rights and Directive 2002/65 concerning the distance marketing of consumer financial services). To this end, the application of the CPC has become more coherent with EU legislation and consumer policy.

According to Article 83 of CPC, in the event of a gap in the Code, the corresponding provisions of TCO shall be applicable as a supplementary to the CPC.

The procedural provisions that shall apply to consumer disputes are not specifically regulated under the CPC. Therefore, the provisions of the general act, namely the Code of Civil Procedure, where the procedural rules concerning the disputes to be settled before the consumer courts are regulated with reference to CPC Article 74 (4), shall apply.

2 The General Design of the Enforcement Mechanism

2.1 The Main Enforcement Authority

The main authority in Turkey in charge of enforcement of consumer law is specialised the consumer courts where, consumer disputes were filed before. However, only the disputes over a certain monetary limit shall be filed before the consumer courts.

Consumer arbitration boards are statistically the most important mechanism for the protection of consumer rights. By May 2016, the total number of arbitration boards was 1011. On the other hand, the total number of consumer courts has reached only to 26 since their first establishment in 1995. It is apparent that this number is insufficient for Turkey, which is divided into 81 provinces. In those provinces and towns where there is no consumer court, the civil courts of first instance are responsible for the dispute settlement. These courts are applying the CPC while rendering a judgment under the title of consumer courts.

The consumer arbitration boards are established by statute, Article 66 of the CPC. According to Article 72, the Ministry has the authority to make secondary regulations. The Ministry has published the Regulation on Consumer Arbitration Boards in 2014. The consumer courts are also established by statute according to Article 73 of the CPC.

The legal status of the consumer arbitration boards is widely debated in Turkey. As the boards are established within public local authorities, meaning within provincial Directorates of Trade in provinces and within governorships in towns, it seems that the boards have a public character. On the other hand, as the boards do not take part in any hierarchic structure, they are a dispute settlement mechanism that is strictly independent of the courts. As a result, the boards are not all made up of civil servants.[3] The president of the consumer arbitration boards is the director of the provincial Directorate of Trade, district governors or those authorised by them. Only one member of the consumer arbitration boards is a law related, which is obviously a shortcoming for many reasons.

Besides the members, in accordance with Article 67, rapporteurs also take place in the consumer arbitration boards, and they are commissioned to prepare the files that will be the basis of the boards' work and decisions and to present the report regarding the dispute.

Besides the consumer arbitration boards, consumer courts are specialised courts and operate on a one-judge basis. The judges are law graduates. The appointments are made by the High Council of Judges and Prosecutors presided over by the Ministry of Justice.

[3]As for different opinions regarding the legal nature of consumer arbitration boards, please see, Ermenek (2013), pp. 571 ff. Özbek (2016), pp. 971 ff. Yeşilova (2014), pp. 109 ff. Atalı (2014), pp. 411–412; Erişir (2015), pp. 44 ff. Budak (2015), pp. 78 ff. Yılmaz and Yardım (2016), pp. 1090 ff.

2.2 The Characteristics and Competencies of the Main Authority

Consumer courts have all the power that a general court has and as a result they render judgments like the general courts. They may also grant preliminary measures if required. Consumer courts may force the entrepreneur to present proof to the court and may accept the declaration of the consumer in case the entrepreneur abstains from presenting it. Additionally, the courts may force examination of said proof within the presence of the entrepreneur.

As the consumer arbitration boards do have court status, the scope of their power and the types of the decisions they render is controversial. For example, it has been accepted that there is no direct sanction if the entrepreneur abstains from presenting proof to the boards, even though the latter has the authority to demand it. This deficiency is open to abuse, especially by the banks which generally do not present any proof that they have obtained.[4] It has been also argued that the consumer arbitration boards have no power to listen to witnesses or to grant compensation for non-pecuniary loss, to hear a dispute on the annulment of an objection which would allow the enforcement proceeding to continue and to grant preliminary measures. On the other hand, there is no doubt that the consumer arbitration boards may grant such decisions which would force the entrepreneur to give, to do or to abstain from doing something such as decisions of monetary compensation, replacement or repair of the product.[5]

2.3 Consumers' Awareness Regarding the Main Authority

Consumers are well aware of the existence of the main authorities which are the consumer courts and the consumer arbitration boards. As evidence of this, one can show the high rates of cases filed before the consumer arbitration boards. In 2013 there were 833,854 cases, in 2014 5,445,308 cases and in 2015 there were 3,118,842 cases filed before the consumer arbitration boards.[6]

[4] Yeşilova (2014), p. 126; Erişir (2015), pp. 71 ff. Yılmaz and Yardım (2016), pp. 1152 ff.

[5] For different opinions, please see, Tutumlu (2015a), pp. 71 ff.

[6] See http://risk.gtb.gov.tr/data/572b46c31a79f50cd8a22b2f/7-Tuketici%20Sorunlari%20Hakem%20Heyetlerine%20Ulasan%20Tuketici%20Sikayetleri.pdf.

3 Number and Characteristics of Consumer Disputes

3.1 An Overview

The official statistics regarding disputes directed to the consumer courts in 2015 have been published in the Ministry's website.[7] The official statistics relating to consumer complaints directed to consumer arbitration boards are held and announced by the Ministry's Directorate General of Consumer Protection and Market Surveillance.[8]

First of all, Consumer Arbitration Boards' workload has increased extremely in 2014 because of an incorrect decision of the Court of Cassation about file expenses.[9] As a result, in 2015, the numbers of applications are decreasing.[10] But still, the workload is extreme.

Consumer Courts' workload has been increasing as well. For example, in 2008, the numbers of applications were 23,991, whereas in 2015 it amounts to 276,303.

3.2 The Number of Disputes in 2015

3.2.1 Disputes Initiated in 2015

The total number of disputes filed before the consumer arbitration boards in 2015 was 3,118,842. However, the current workload for 2015 were much higher than this number since an important amount of files were transferred from 2014.[11]

The number of outstanding cases before the consumer courts in 2015 was 276,303. However, that number does not represent the number of cases filed in 2015 since 106,912 of them were pending from previous years. Only 168,120 cases have been initiated in 2015. Also 1271 cases have been reversed by the Court of Cassation and returned to the consumer courts.

[7] See http://www.adlisicil.adalet.gov.tr/istatistik_2015/ist_tab.htm.

[8] See http://risk.gtb.gov.tr/web/ic-ticaret-i%CC%87statistikleri/tuketicinin-korunmasi-ve-piyasa-gozetimi-verileri.

[9] Following the decision of the Court of Cassation concerning the return of the file expenses of consumer loan agreements, in 2014 the relevant number was 5,445,308, whereas in 2013, the numbers of applications were 833,854.

[10] In 2015, the numbers of applications was 3,118,842.

[11] The number of files from 2014 was 2,933,276.

3.2.2 Disputes Resolved in 2015

In 2015, the consumer arbitration boards resolved 4,525,565 disputes.[12] 4,258,556 of the judgments were in favour of the consumers (94.1%) whereas only 267,009 of them were resolved against the consumer. Such numbers also represent the consumer arbitration boards' initiative in protecting the consumers.

Consumer courts rendered 163,169 judgments in 2015. 68,287 of them have been resolved against the consumers, whereas the remaining 94,882 cases have been resolved in favour. In 65,345 cases, consumer claims have been fully accepted. 105 cases have been settled amicably. For the rest, consumer claims have been partially accepted.[13]

3.3 The Number of Disputes in the Last 3 Years

The number of cases initiated before the consumer arbitration boards between 2013 and 2015 is 9,398,004. For the same period, the number of new hearings before the consumer courts is 708,567.

Within the same years, the consumer courts resolved 390,904 cases. However, such official statistics have not been published for the disputes held before the consumer arbitration boards.

3.4 The Number of Disputes in the Last 10 Years

During 2005–2015, 10,589,150 disputes were initiated before the consumer arbitration boards. As for the consumer courts, the relevant number is 1,036,569. 570,752 cases of this total were resolved between 2005 and 2015. However, similar official statistics have not been published for the disputes held before the consumer arbitration boards.

3.5 Main Characteristics of Consumer Disputes

The groundings of disputes held before the consumer arbitration boards in 2015 is summarised as follows:

1. Banking and finance complaints—92.33%

[12] 1,526,011 files were left to be resolved in 2016.

[13] See http://www.adlisicil.adalet.gov.tr/istatistik_2015/ihtisas/9.pdf.

2. Defective goods—5.67%
3. Distance contracts and subscription agreements—1.30%
4. Installments, prepayment and off-premises contracts—0.70%

The main causes of the disputes held before the Consumer Courts in 2015 are summarized as follows:

1. Objection of the Consumer Arbitration Boards decisions—123.099
2. Disputes on consumer credits—6.417
3. Disputes on contracts of guarantee concluded with the banks—1.452
4. Defective services—4.124
5. Defective goods—3.635
6. Other—30.861

3.6 Average Period of Time of Dispute Resolution

According to Article 23(1) of the Consumer Arbitration Boards Regulation, consumer arbitration boards shall render a decision within 6 months. This period may be extended for another 6 months taken into account the nature and subject of the dispute.

Even though, there are no official analysis on the average period of time to resolve a dispute before the consumer arbitration boards, according to the statements of the authorities representing the Ministry, due to the extraordinary increase in the number of the disputes, the period for a judgment reached 1 year in 2014 and 2015 but has now decreased to fewer than 3 months for the disputes regarding defective goods and services.

For consumer courts, there are procedural provisions regarding the "accelerated dispute resolution". According to official statistics, dispute resolution took approximately 274 days in 2010; 283 days in 2011; 258 days in 2012; 227 days in 2013; 250 days in 2014, and 239 days in 2015.[14]

4 Courts and the Enforcement of Consumer Law

4.1 The Structure and Main Characteristics of Judicial System

In Turkey, consumer disputes are solved under civil jurisdiction unless they are under the jurisdiction of the consumer arbitration boards. In civil jurisdiction, the

[14]See http://www.adlisicil.adalet.gov.tr/istatistik_2015/HUKUK%20MAHKEMELER%C4%B0/5.pdf.

first instance courts are divided into two: general and specialised courts. Civil courts and civil courts of peace are the general courts. Commercial courts, labour courts, enforcement courts and consumer courts are among the special courts. With the exception of some certain cases solved in the commercial courts, the first instance courts are composed of only one judge.[15]

In the general and specialised courts, two ways of jurisdiction exist: written and summary trial. In principle, one must prove every legal transaction above 2500 Turkish liras (equivalent to 780 euros as of 24 June 2016) with conclusive evidence.[16] Oaths are still considered to be among conclusive evidence in Turkish law.

4.2 Consumer Courts and Consumer Arbitration Boards

As mentioned above, the consumer courts are specialised courts, operation on a one-judge basis. In order to resolve the dispute in a quick and costless way, the summary trial procedure is applicable for the consumer courts. According to this procedure, in principle, the inquiry phase of the dispute has to be finalised in two hearings and the period in between these two hearings cannot exceed 1 month.[17]

Consumer arbitration boards have been organised separately in provinces and towns, and they give judgments independently (without a hierarchical and administrative order). They give their decisions based merely on the documents and on expert opinion; other evidences shall not be used.[18] Also it is based on the file and there is no place for a hearing.

The consumer arbitration boards are not a dispute settlement procedure to be satisfied in order to apply to the court. In fact, they are an alternative to the court for disputes falling under the abovementioned monetary limit. However, upon the objection of the parties, the consumer court may act as an appeal court, render a new inquiry on the dispute and decide on the merits of the case.

The parties may have decided on mediation before applying to the court or arbitration board. In this case, the Mediation in Civil Disputes Act which entered into force in 2013 applies. In Turkey mediation is not institutional but individual. Only law graduates may act as mediators. The mediator tries to provide the parties with a proper negotiation environment where they can create solutions for themselves.

[15]For more details please see, Kuru (2016), pp. 55 ff. Pekcanıtez et al. (2016), pp. 61 ff. Arslan et al. (2016), pp. 65 ff. Tanrıver (2016), pp. 139 ff.

[16]The limit was raised to 2.590 Turkish liras (equivalent to 650 euros as of 10 January 2017) beginning from 1.1.2017.

[17]For detailed information regarding the hearing procedure in consumer courts, please see, Pekcanıtez (1996b), pp. 40 ff. Tutumlu (2015b), pp. 411 ff.

[18]For different views, please see, Budak (2015), p. 93; Yılmaz and Yardım (2016), p. 1155.

Even though we have not been provided with official statistics relating the percentage of consumers are satisfied with the outcome and timing of a consumer dispute before the court; according to the Ministry, 94.1% of the disputes were resolved in favour of the consumers in 2015.[19] This shows a consumer-friendly approach adopted by the judiciary authorities. However, these statistics are not per se sufficient to tell that the consumers enjoy an efficient legal protection at consumer courts and consumer arbitration boards.

4.3 Conditions to Apply to the Consumer Courts or Consumer Arbitration Boards

According to Article 68 of the CPC, a dispute amounting above 3610 Turkish liras shall be filed before the consumer courts.

As for the competence of the consumer arbitration boards, the thresholds set in 2016 are as follows:

- Disputes amounting up to 2320 Turkish liras (equivalent to 713 EURO as of 24 June 2016) shall be brought before the consumer arbitration boards in towns.[20]
- Disputes between 2320 Turkish liras and 3480 Turkish liras (equivalent to 713 euros and 1070 euros as of 24 June 2016) shall be brought before the provincial consumer arbitration boards.[21]

The monetary limits are subject to an increase every year.

In consumer courts and consumer arbitration boards, the legal representation is not mandatory and as a result, consumers are able to apply to both without paying any fees or taxes. In order to expedite the application, standard application forms for both ways are available via the official website of the Ministry.

4.4 Fees and Taxes Regarding Consumer Proceedings

Consumers and consumer associations are exempt from court fees when applying to consumer courts whereas the entrepreneur has to pay the court fee. In case the dispute is taken before the court by the federations of consumer organisations (usually class actions), the expert's fee and the counsel's fee (in case the dispute is settled against the applicant) are paid by the Ministry.

[19]See https://www.gtb.gov.tr/haberler/bakan-tufenkci-20-tuketici-konseyinin-acilisini-yapti.

[20]That monetary limit was raised to 2.400 Turkish liras (equivalent to 603 euros as of 10 January 2017) beginning from the date of 1.1.2017.

[21]That monetary limit was raised to 3.610 Turkish liras (equivalent to 907 euros as of 10 January 2017) beginning from the date of 1.1.2017.

In consumer arbitration boards, neither of the parties is subject to court fees. If the consumer arbitration boards decide against the consumer, the notice and expert fees are paid by the Ministry.

5 The Role of Consumer Organisations in Enforcement of Consumer Law

5.1 In General

In Turkey, according to the information supplied in the government-based website, the total number of consumer organizations is 75. Even though Turkey's capital city is Ankara, numerous consumer organisations are located outside Ankara and have branches in different cities such as, TükDer (*Consumers Protection Association*), THD (*Consumer Rights Association*), TÜDEF (*Consumer Associations Federation*), TÖF (*Consumer Organizations Federation*), TBF (*Consumer Union Federation*), and Tüketiciler Birliği (*Consumers Union*). Some organisations are incorporated exclusively in one city, such as ESTükDer (*Eskişehir Consumers Protection Association*).

The establishment and operation of the consumer organisations in Turkey is mandatorily regulated under Associations Code No. 5253 and Foundations Act No. 5737. According to the provisions of the relevant Codes, such organisations may be established either as an "association" or a "foundation". The individual associations may also unite under a union. As of June 2016, the number of consumer unions in Turkey is two: TÜDEF (*Consumer Associations Federation*), TÖF (*Consumer Organizations Federation*). Besides, according to the official website, there are two consumer foundations which are the "Consumer and Environment Education Foundation" and the "Turkish Consumer Protection and Education Foundation".

Association is defined under Article 2 of the Associations Code as a non-profit group which has a legal entity formed by at least seven real or legal persons in order to fulfil a certain common goal which is not illegalised, and enable constant exchange of knowledge and labour. In accordance with Article 3 of the Associations Code, an association may be incorporated without granting any prior permission.

5.2 Competences of Consumer Organisations

There are no specific provisions on the associations, foundations or unions established for the sole purpose of consumer protection. Therefore, the relevant provisions of the Turkish Civil Code, the Associations Code and the Foundations Code will be applied. According to the abovementioned codes, all consumer organisations have a legal entity.

The most important power of the consumer organisations is to bring a class action. The CPC has given the plaintiff title to the consumer organisations for such collective actions. Also, it grants the consumer organisations the right to demand preliminary measures in order to prevent or cease any action conflicting with the Code, if needed. The consumer organisations have also the authority to ask for the publication of the court decision rendered in a class action. If the court accepts such a request, the decision is published in at least three country-wide newspapers and the costs are covered by the defendant. The consumer organisations can also bring administrative action against the individual and regulatory acts of the State.

The consumer organisations which have their administrative centre or a branch in the places where provincial consumer arbitration boards are located, also have the right to vote for the election of a member of that board.

5.3 The Role of Consumer Organisations

Unfortunately, the consumer organisations are especially passive about collective redress. It has been seen that the number of class actions is relatively low. Up to the present, fewer than ten decisions have been published. The underlying reasons are first of all, most of the consumer organisations do not employ lawyers and secondly, they do not have a sufficient financial budget.[22] And last but not least, the Court of Cassation has a relatively reluctant attitude with regards to class actions. For instance, in 2014, although not exactly a consumer related action, a class action that had been brought by a bar regarding a dispute on the removal of a cell tower on the roof of the court house has been rejected by the Court of Cassation on the grounds that the bar does not have the aim to protect the health of its lawyer members.

6 Private Regulation and the Enforcement of Consumer Law

6.1 Banking Act

Banking Act No. 5411 regulates under its Article 80 the Banks Association of Turkey. Such association is empowered to set up a board of arbitrators in order to evaluate and settle the disputes between the members and their individual clients with the reservation of their rights to legal application pursuant to the CPC (Article 80(j)). The "Consumer Complaints Arbitration Panel", which was established

[22]There are many other reasons why consumer organisations are not effective enough. Regarding this, please see, Aslan (2014), pp. 96 ff. Özbay (2009), pp. 226–227.

pursuant to the relevant article, is solving disputes between the banks and the consumers.[23]

6.2 Insurance Act

According to Article 30 of Insurance Act No. 5684, in order to settle the disputes arising from an insurance contract between the policy holder or people benefiting from the insurance contract on the one side and an insurance company on the other side, an Insurance Arbitration Commission is established. The Insurance Arbitration Commission is established within the Association of the Insurance, Reinsurance and Pension Companies of Turkey. All local or foreign insurance, reinsurance and pension companies operating in Turkey shall be members of the association. As of the present, the Association has 70 members. An insurance contract concluded between a consumer and an insurance company is defined as a consumer contract under CPC No. 6502. Therefore, in the event a party to an insurance contract is a consumer, it may bring his/her claim against an insurance company before the Insurance Arbitration Commission. In accordance with Article 30 of the Insurance Act, a consumer who is in conflict with an insurance company operating in Turkey may file suit before the Insurance Arbitration Commission even if there is no special arbitration provision in the insurance contract. Therefore, a consumer dispute arising from an insurance contract may also be brought before the Insurance Arbitration Commission. Such a solution is cheap and fast. As a result, specialised insurance arbitration may be a better solution to consumers as well.

6.3 The Role of Private Regulators

The Consumer Complaints Arbitration Panel established in accordance with Banking Act No. 5411 is the competent authority for a consumer to initiate arbitration. A Memorandum of Information has been drafted in order to inform the consumer relating to the actions required to be taken at the time of application to the Banks Association of Turkey, the Consumer Complaints Arbitration Panel, and the relevant conditions of application. A consumer shall at first direct his/her complaint to the Bank concerned. The Bank, after receiving the complaint, shall render an application confirmation certificate to the consumer. The Bank shall respond within 20–30 days. In the event either the demand is denied or has not been responded to by the Bank, the consumer may directly apply to the Banks Association of Turkey Consumer

[23]Communique for Arbitration Panel's duties, responsibilities and procedures. See the English translation at https://www.tbb.org.tr/en/Content/Upload/Dokuman/4/ms.pdf.

Complaints Arbitration Panel via its website (www.tbb.org.tr) by fulfilling the application form which is also available on the same website.

As for the Insurance Association Commission, a consumer who is in conflict with an insurance company shall at first address his/her application to the insurance company. In the event the insurance company fails to reply in writing within 15 business days as from the application date, or the application has been rejected by the insurance company, a consumer may direct his/her claim before the Insurance Association Commission. According to Article 30 of the Insurance Act, the arbitrators shall within 4 months issue their awards at latest. However, this period may be extended with the express and written consent of the parties.

7 Enforcement Through Collective Redress

7.1 In General

In Turkish law, the only form of collective redress is class action. However, as with most of the continental European systems, the class action that is permitted under Turkish law differs from the US-style. Moreover, there are other instruments of collective litigation as well, the most common form being the complaints alleged by interest groups or associations (*Verbandsklagen*).[24]

The Code of Civil Procedure gives all the legal persons the right to bring a class action for the protection of the interest of their members or the community that they represent. In the CPC, the class action is regulated under two different articles. Article 73(6) enables consumer organisations to file a law suit in disputes which are involving the consumers in general and if a threat contradicting the Code arises. Additionally, it has been stated in Article 74 that the consumer organisations can file a lawsuit to determine whether a series of goods offered for sale is defective, to suspend the production and sale of such, to remedy the defect and to recall such from those who are holding such goods for sale.

7.2 The Main Characteristics of Collective Redress in Turkey

In consumer law, the subject matter of the class action is to determine the situation that conflicts with the law, to prevent it from happening or to put an end to it. On the other hand, an action for performance cannot be brought by a class action. Therefore,

[24]Yıldırım (1997a), pp. 137 ff. Yıldırım (1997b), pp. 308 ff. Özbay (2007), pp. 1967 ff. Hanağası (2009), pp. 351 ff. Özbay (2012), pp. 246 ff.

the consumer organisations may not collectively bring an action for the compensation requests of the consumers.[25]

The CPC falls behind the Code of Civil Procedure which entitles all the legal persons the right to bring a class action in every matter. For example, Article 73(6) of the CPC prevents the consumer organisations from bringing class action with regards to the provisions for unfair commercial practices and commercial advertisement. Additionally, the consumer organisations can only bring class action in cases where there is a violation of the current Code alone. In other words, they cannot bring class action if there is a violation of the provision(s) of another piece of legislation even though such legislation is consumer related as well.[26]

The class actions brought by the consumer organisations are settled in the consumer courts. The consumer organisations are exempt from the court fees. The expert's fee and the ruled attorney's fee arising in the event the case is resolved against the complainant, in cases to be filed by the higher institutions of consumer organisations (federations) shall be borne by the Ministry (Article 73(2) and 73(3)). The influence of the court decision rendered in favour of the consumer organisations has not been regulated. In scholarly writings, it is accepted that the decision given at the end of the class action has merely the character of discretionary proof in the action that would be brought by the consumer him/herself.[27]

8 Sanctions for Breach of Consumer Law

8.1 Administrative Law Sanctions

Article 77 of CPC No. 6502 is the general provision that regulates the administrative fines to be collected from the ones who breach the provisions of the act.[28] As for an example, Article 77(2) provides that in the event failing to remove the unfair term from the consumer contract text within the time allowed by the Ministry, the contracting party shall pay an administrative fine equivalent to 232 Turkish liras for each contract where conflict has been determined.

The Ministry of Customs and Trade is empowered to revaluate the fines. The latest determination was made in December 2015[29] and the amount of the fines was increased by approximately 5.58%. However, since the fines are bearable by the

[25]Pekcanıtez et al. (2016), p. 269; Özkaya Ferendeci (2012), p. 67; Erişir (2015), p. 120; Tanrıver (2016), pp. 619–620; Taşpolat Tuğsavul (2016), pp. 169, 227.

[26]For detailed review of this article, please see, Erişir (2015), pp. 120 ff. Taşpolat Tuğsavul (2016), pp. 64 ff.

[27]For the views on the effects of class action decisions to the individual cases, please see, Pekcanıtez et al. (2016), p. 270; Umar (2014), pp. 336–337; Erişir (2015), p. 121; Uysal (2014), p. 1195; Kekeç (2015), pp. 1284 ff. Tanrıver (2016), pp. 619–621; Taşpolat Tuğsavul (2016), p. 308.

[28]Aydoğdu (2015), pp. 339 ff.

[29]Official Gazette No. 29568, 20.12.2015.

traders, administrative sanction may not be a sufficient remedy to motivate the traders to obey the provisions of the Code. Besides, there is not an effective collective redress under the Turkish Consumer Law.

In order to empower administrative fines' deterrent influence, the Consumer Protection Head Office enables consumers to file a complaint via its official website.

8.2 Private Law Sanctions

8.2.1 In General

There are different types of private law sanctions in consumer law since it regulates various types of consumer contracts. The main sanctions will be explained below such as invalidity of the contract, compensation, specific performance, withdrawal of the contract. However, there are many other sanctions in order to balance the information asymmetry.[30]

8.2.2 Invalidity

The CPC aims to protect the consumers and therefore contains mandatory rules. However, such protection is only one sided. In other words, only the consumer, but not the trader, may allege the invalidity of the consumer contract.[31]

8.2.3 Compensation

A consumer suffering pecuniary or non-pecuniary losses due to the violation of either a consumer contract or the CPC may claim that the trader compensates any losses. Articles 51 and 52 of the TCO shall be applicable for the determination of losses and evaluation of the compensation. Even though there are no official statistics, the most common sanctions are compensation and pecuniary fines according to the Court of Cassation decisions which were given between 2010 and 2016.

8.2.4 Specific Performance

The remedy of specific performance is also granted to the consumer. Such remedy is provided under Articles 11 and 15 of the CPC. Article 11 regulates consumer's right

[30] Atamer (2016), pp.107 ff.

[31] Kocayusufpaşaoğlu (2014), § 43 N. 30–32.

of choice when the good subject to the consumer contract is defective. According to Art. 11(1)(c) and (d), the consumer may demand repair and replacement. Similarly, in accordance with Article 15(1), a consumer may demand specific performance which was defectively supplied by the contractor.

8.2.5 Withdrawal of the Contract

The other right of choice provided in favour of the consumer is to right to void the consumer contract. To give an example, in accordance with Article 11(1)(a) of the CPC, the consumer may void the contract by notifying that it is ready to return the defective good.

8.3 Criminal Liability

Article 80(2) prohibits organising and promoting pyramid sales. The ones who use or promote pyramid selling schemes for commercial purposes contrary to Article 80 of the CPC are to be punished pursuant to Article 157 of Turkish Criminal Code No. 5237. The sanction is determined as 1–5 years' imprisonment.

Unfair competition is also directly linked to the consumer policies. According to Article 62 of Turkish Commercial Code No. 6102, the merchant who intentionally violates the unfair competition regulations set within the Turkish Commercial Code shall be punished up to 2 years' imprisonment.

9 Alternative Mechanisms for the Resolution of Consumer Disputes

9.1 In General

There is no any ADR mechanism that is exclusive to consumer protection.[32] However, consumer disputes may be settled via mediation and arbitration as well. In Turkey, there exist two separate institutional arbitration mechanisms exclusive to consumer protection. As previously stated, the insurance contracts not concluded by professional or with commercial purposes are considered as consumer transactions.

[32]The Consumer Arbitration Board is not typical ADR mechanism. As explained above, it is mandatory to apply to the consumer arbitration boards for the pecuniary claims that fall under a certain monetary limit. Furthermore, Consumer Arbitration Board is not based on negotiations or reconciliation, this Board settle the dispute in a contentious manner, by applying the relevant consumer legislation to the concrete case.

In order for the settlement of disputes stemming from insurance contracts, the Insurance Commission on Arbitration has been established by the Insurance Association of Turkey. The other arbitration mechanism exclusive to consumer protection involves the arbitration board established within the Association of Turkish Travel Agencies [TÜRSAB] in order to settle the disputes that may arise between the supplier members of the Association and the consumers. All the other consumer disputes may be settled via *ad hoc* arbitration in terms with the general provisions of arbitration and mediation applicable to all disputes related to civil law or via institutional arbitration in terms with ISTAC [Istanbul Arbitration Centre] or ITOTAM [Istanbul Chamber of Commerce Arbitration Centre] arbitration rules.

One other way to settle a dispute in an amicable way is the conciliation procedure carried out by attorneys in accordance with Article 35(A) of the Legal Practitioners Act, pursuant to which the attorneys may invite their respective clients to negotiation and encourage them to settle their dispute in an amicable way.

9.2 The Establishment of the ADR Mechanism

Mediation procedure is regulated in Mediation in Civil Disputes Act that entered into force in 2013. As for the arbitration, there are two acts in force. For the disputes where a foreign element is involved and the place of arbitration is Turkey, the International Arbitration Act that entered into force in 2001 shall apply; whereas the procedure to be followed with respect to the disputes that do not involve a foreign element is regulated under the Code of Civil Procedure that entered into force in 2011. Insurance arbitration is carried out in accordance with the Insurance Act, and TÜRSAB arbitration is carried out pursuant to the Regulation on Arbitration Board issued by TÜRSAB.

The Court of Cassation in its decision rendered in 2008 stated that the former CPC that was in force in 2008 was related to the public policy and that it intentionally closed the doors to settlement of consumer disputes through voluntary arbitration by establishing the consumer arbitration boards and the consumer courts.[33] Even though this argument was brought solely with respect to the arbitration procedure, in Turkish legislation the conditions of arbitrability of a certain dispute apply to mediation as well and in this regard, for a dispute to be settled through arbitration or mediation, the parties' will on the dispute not be limited by the legislator. Taken into account the close relationship between arbitrability and mediation, it would not be possible to settle consumer related disputes through arbitration despite the Mediation in Civil Disputes Act. However, such debate has come to an end since CPC Article 68(5) explicitly allows the consumers to apply to alternative resolution authorities, which in our opinion makes it impossible to rely on such an argument.[34] On the other hand, there is no doubt that the arbitration and mediation

[33] 13. Circuit, 25.9.2008, 3394/11120 (www.kazanci.com.tr).

[34] Erişir (2015), pp. 90, 91; Atalı (2014), p. 406; Yeşilova (2014), pp. 117, 118.

clauses which are included in standard terms shall be considered as unfair terms and therefore shall be deemed as invalid.

9.3 The Main Features of the ADR Mechanism in Turkey

In Turkey, mediation is characterised as an individual and private procedure rather than a public and institutional one. In order to serve as a mediator, one shall complete a special training consisting of negotiation techniques and the legislation on mediation. After succeeding an examination carried out by the Ministry of Justice, the candidate shall be recorded in the registry of mediators. Only law undergraduates who have at least 5 years of experience in practice may apply to become a mediator.

Parties are free to apply to a mediator, to continue or finalise the process, or to cease such a process. In principle, the mediation activity is of a confidential nature. None of the documents and drafts that are presented during the mediation may be used as legal proof in future lawsuits, and parties' admissions shall not be binding.

The mediator brings the parties together to discuss and negotiate, and establishes a communication process between the parties in order to aid them in understanding each other and thus enabling them to work out their own solutions. While doing so, the mediator shall not make any suggestions to guide the parties. In case an agreement is reached at the end of the mediation process, the parties may issue an agreement document. If one of the parties does not comply with the terms of the agreement that is reached at the end of the mediation, the other party may apply to an enforcement court and obtain a commentary of enforceability for such document.[35]

With respect to insurance arbitration,[36] a consumer may resort to arbitration for the settlement of disputes that may arise between him/her and members of the Insurance Commission on Arbitration, even in the absence of an arbitration clause in their contracts. Once the dispute is brought before the consumer court or the consumer arbitration boards, it is no longer possible to resort to insurance arbitration.[37] Arbitrators must have at least 10 years of experience in insurance law or 10 years of experience in insurance.

9.4 The Development of ADR Mechanisms in Turkey

Turkish legislation accepted the ADR mechanism as a mandatory mechanism by imposing the obligation to resort to consumer arbitration boards for pecuniary claims

[35] As for detailed information regarding mediation, please see, Pekcanıtez et al. (2016), pp. 669 ff. Özbek (2016), pp. 1117 ff.

[36] Ünan (2016), pp. 242 ff.

[37] Aras and Yeşilova (2013), pp. 338 ff.

under a certain monetary limit and taking away the possibility to bring such disputes before the consumer court.

ADR is also promoted by legislation, taking into consideration that the current code grants the consumers the right to apply to alternative resolution authorities in accordance with the relevant legislation.

The other signs showing that the ADR mechanism has spread in a wider range is among the State's priorities as follows:

1. establishment of a special unit called the Head of Department of Mediation within the Ministry of Justice, in order to regulate mediation activities;
2. the fact that the Istanbul Arbitration Centre is established by law as opposed to other institutional arbitration examples in the world, and
3. the fact that the Draft Code focusing on the obligatory mediation procedure for employment disputes was conveyed to the Parliament.

10 External Relations and Cooperation of the State, Enforcers and Consumer Organisations

10.1 In General

Turkey harmonises its domestic law with EU legislation. Therefore, Turkey strictly follows the EU consumer policy. Besides, Turkey is an OECD country. OECD's consumer policy is also being followed by Turkey. Turkey has also accepted United Nations Guidelines for Consumer Protection as a UN member state. At last but not least, Turkey has been a full member of ICPEN (International Consumer Protection and Enforcement Network) since 2010. The Network operates under a rotating presidency, currently held by the UK Competition and Markets Authority until July 2016. Between 2017 and 2018, Turkey will hold the presidency. ICPEN is also closely related to OECD as well since OECD is an institutional member of ICPEN.

EU's consumer policy is currently based on two measures: the European Consumer Agenda, which is the new strategy for EU consumer policy in line with the EU's growth strategy—Europe 2020—and the consumer programme 2014–20—the financial framework complementing the strategy.[38] The consumer agenda has five main objectives: improving consumer safety; enhancing knowledge; improving implementation; stepping up enforcement and securing redress as well as aligning rights and key policies to economic and societal challenges. Despite the fact that EU's legislation is not directly enforceable in Turkey, the same agenda has been accepted by Turkey as well.

[38] See http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/565904/EPRS_IDA(2015)565904_EN.pdf.

OECD's Committee on Consumer Policy (CCP) is the only intergovernmental forum addressing a broad range of consumer issues. It aims to help public authorities enhance the development of effective consumer policies. It does so by (1) carrying out research and analysis and developing policy guidelines on topics of common interest; (2) exchanging information on current and emerging issues and trends; and (3) examining ways to strengthen policy outcomes, both among governments and with other stakeholders. However, OECD's recommendations are not directly enforceable in Turkey.

The United Nations Guidelines for Consumer Protection had been accepted in a UN meeting on 9 April 1985. After that the guidelines were expanded in 1999. The guidelines' objectives are: (1) to assist countries in achieving or maintaining adequate protection for their population as consumers; (2) to facilitate production and distribution patterns responsive to the needs and desires of consumers; (3) to encourage high levels of ethical conduct for those engaged in the production and distribution of goods and services to the consumers; (4) to assist countries in curbing abusive business practices which adversely affect consumers by all enterprises at the national and international levels; (5) to facilitate the development of independent consumer groups; (6) to further international cooperation in the field of consumer protection; (7) to encourage the development of market conditions which provide consumers with greater choice at law prices; (8) to promote sustainable consumption.

10.2 International Networks

As explained above, since 2010, Turkey is a full member of ICPEN. ICPEN is an organisation composed of consumer protection authorities from over 50 countries, whose aims are to (1) protect consumers' economic interests around the world, (2) share information relating to cross border commercial activities that may affect consumer welfare, (3) encourage global cooperation among law enforcement agencies. ICPEN's website includes guidelines for consumers such as online-shopping and avoiding scams.

ICPEN especially has effects of enforcement of consumer law. Within the body of ICPEN, an initiative, "econsumer.gov", has been established. The main target of the initiative, which is operated by USA Federal Trade Commission, is to enable consumers to report international scams via this website.

Today including the Republic of Turkey, 36 countries participate in "econsumer.gov", from where consumers can report international scams and learn about available steps for taking on combat fraud. Besides English, French, German, Korean, Japanese, Polish and Spanish, the website also provides service in Turkish.

10.3 International Agreements

First of all, Turkey is a party to the New York Convention. According to Article 1, this Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to the arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought. As a result, consumer arbitration boards' awards are respected within this scope.

Secondly, Turkey has recently signed the Consumer Protection and Market Surveillance and Supervision Cooperation Agreement with the Arab Republic of Egypt. The agreement's aim is to provide bilateral and continuous cooperation in order to protect consumers' safety, health and economic interests regarding transactions between the two countries.

Moreover, a cooperation protocol has been signed in 2015 between Turkey and Hungary. This protocol aims to share best practices regarding consumer disputes and market surveillance systems, effective regulations and enforcement mechanisms in order to protect consumers.

And last but not least, Turkey is in close relations to make cooperation agreements with Algeria, England, Afghanistan, Slovenia, Tunisia, Croatia, Iran, France and Kyrgyzstan in order to protect consumers and control the quality of goods and services.

10.4 Cross-Border Enforcement

In the Private International Code of Turkey, enforcement of court judgments and arbitral awards are regulated by Articles 50 through 63. The enforcement of court judgments pertaining to civil lawsuits given by foreign courts and having become final under the laws of that State shall be subject to a judgment of enforcement given by the Turkish court having jurisdiction.

Any person who has a legal interest in the enforcement of a judgment may demand enforcement. Enforcement shall be demanded by written petition. The court having jurisdiction shall give the enforcement judgment provided that: (1) there exists an agreement based on reciprocity between the Republic of Turkey and the State where the judgment was given or a provision of law or actual practice enabling the enforcement of judgments given in Turkish courts at that state; (2) the judgment is given regarding an issue that is not within the exclusive jurisdiction of Turkish courts or not given by the court of a state granting itself jurisdiction although it does not have a genuine relationship with the subject of the case or the parties, on the condition that the defendant raises an objection to that effect; (3) the judgment is not expressly contrary to *ordre public*; (4) although the person against whom

enforcement is sought has, under the laws of that place, not been summoned properly to the court giving the judgment or represented properly at that court or a default judgment or a judgment in his/her absence has been given contrary to these laws and that person has not raised an objection based on these grounds before the Turkish court against the seeking of enforcement.

10.5 Consumer Organisations' International Network

The Consumers Rights Association (*Tüketici Hakları Derneği*) is a member of Consumer International (CI) which was founded in 1960. Consumer International is the world federation consumer group that, working together with its members, serves as the only independent and authoritative global voice for consumers. Within the Consumer International network, 240 member organisations from 120 different countries exist. According to the official website, CI aims (1) to defend, promote, develop and pursue consumer rights as the international basis of consumer protection; (2) to support, develop and work directly with our constituent member organisations, seeking to protect, inform, give a voice to and secure rights for consumers worldwide.

11 The General Evaluation of Enforcement and Effectiveness of Consumer Law in Turkey

11.1 The Main Advantages

The main advantages of our national system of enforcement of consumer law may be summarised as follows. First of all, the consumer, who is usually reluctant to apply to a complex court procedure, is granted the right to resort to consumer arbitration boards as a dispute resolution mechanism for claims under the abovementioned monetary limit, is the other factor that encourages the consumer with respect to judicial enforcement.

Secondly, the consumer applications before the consumer arbitration boards and consumer courts are exempt from fees facilitates the access to such mechanisms. Besides, the consumers are granted the right to resort to the court of his/her place of residence facilitates the access to the court.

At last but not least, legal provisions in relation to legal representation notice and expert fees in favour of the consumer and consumer associations encourage the consumer to seek judicial enforcement.

11.2 The Main Shortcomings

The main shortcomings in the enforcement of consumer law in Turkey and our suggestions to overcome those shortcomings may be summarised as follows.

Firstly, consumer arbitration boards are structured as an independent extra-court dispute settlement mechanism which does not take place in any hierarchic structure within any of the administrative authorities. However, the fact that consumer arbitration boards do not have a secretariat of their own and that they benefit from the secretariat of the Ministry makes it harder to understand the legal nature of such a mechanism. Another issue that damages the independence of the consumer arbitration boards is that the Ministry has the power to intervene in the content of arbitration boards' decisions by way of the circulars that it issues. In order to solve this problem, the Ministry's close connection to the consumer arbitration boards should be terminated and a separate secretariat should be provided for both consumer arbitration boards and the Board of Advertisement.

Secondly, the weakness in the profile of consumer arbitration boards' members which causes rendering unqualified decisions is another shortcoming. To solve this issue, the number of law graduate members within the consumer arbitration boards should be increased.

Thirdly, the procedure before the consumer arbitration boards is regulated only by a Regulation and said procedure has quite a lot of shortcomings. Despite these shortcomings, the decisions rendered by the arbitration boards are still equivalent to a court judgment and the trust put in this legal protection mechanism regardless of its deficiencies threatens the legal certainty. Even though the consumer arbitration boards are not at the status of consumer courts, they still aim to settle the disputes in a contentious manner and therefore their working principles should be regulated in detail by law.

Moreover, the fact that the consumer courts are established "only" in 10 provinces in Turkey and that general courts are responsible for consumer related matters in the remaining provinces where there are no consumer courts damages the principle of equality in the sense that some of the consumers do not have the right to access to a specialist judge.

Another shortcoming is that the decisions rendered by consumer arbitration courts may be appealed before the consumer courts whereas the decision that will be given by the latter is final and a right to appeal before the Court of Appeals or to the Court of Cassation has not been granted. Therefore, there is no unity and uniformity in the applicable law. In order to solve this problem, a similar approach to the one that is regulated in § 543(2) of the German Code of Civil Procedure (Zulassungsrevision) may be adopted. Such an amendment would allow the appeal courts, for the sake of an accurate interpretation of law provisions, to fill a legal gap or to secure unity and uniformity in practice.[39]

[39]Erişir (2015), p. 96.

Besides, with the enlargement of the 'consumer' concept with the entry into force of the current CPC, the workload of the consumer arbitration boards and the consumer courts has increased dramatically which leads to a longer (and no longer reasonable) decision-making process. Granting the opportunity of collective redress may be considered instead of obliging the consumer arbitration boards to go through numerous cases with similar content.[40]

Lastly, the backbone of the consumer protection system is the supervision of unfair terms covered in standard form contracts. The Directorate General for Consumer Protection and Market Surveillance does not have the power to intervene in such terms in an efficient way. The consumer organisations that are supposed to take initiative regarding collective redress fail to meet the expectations. Due to the fact that the influence on the consumers of the decisions rendered by class actions by the court in favour of the consumer organisations has not been regulated, there is a decrease in the number and efficiency of these cases.

12 Conclusion

Since Turkey aims to become a member of the EU, Turkey harmonises its national law with EU legislation. This unification distinguishes itself especially in consumer law. As a result, the current CPC entered into force in 2014 and related regulations are effective, in our opinion.

The CPC, which has fundamentally amended the material law, did not indeed reform the enforcement mechanism in relation to consumer dispute resolution. There have been discussions of a possible revision of the consumer dispute resolution system as the number of the applications before the consumer arbitration boards has exceeded five million. However, there has not as yet been a draft amendment.

Due to the variety of alternatives, it may be argued that Turkey has developed a rich mechanism when it comes to the enforcement of consumer law; however, the efficiency of said mechanism is doubtful. The non-efficiency of the legal protection may be explained by the lack of an accurate legal base and the shortcomings that occur due to human factors which are faced while operating the system. Lastly, it must be taken into consideration that in Turkey disputes arise quite easily; yet the proper motivation to resolve them is missing; which causes the system to fall behind.

[40]De lege ferenda, the class action with compensation claim, please see, Karaaslan and Eroğlu (2009), p. 215; Tanrıver (2016), p. 619; Taşpolat Tuğsavul (2016), pp. 236 ff.

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Enforcement and Effectiveness of Consumer Law in the UK

Christine Riefa and Chris Willett

1 National Legal Framework for Consumer Protection

Consumer protection in its present form within the UK began its development in the mid-twentieth century, particularly with the Unfair Contract Terms Act 1977 and the Sale of Goods Act 1979.[1] However, the Sale of Goods Act finds its consumer protection origins as far back as the Sale of Goods Act 1893, which codified the common law of sales up to that point. Indeed, the tradition of criminal law regulation of food safety, weights and measures etc., goes back 1000 years. However, none of the various attempts at codification of consumer protection law have led to any sort of civil/commercial code, instead the legislatures enacting the legislation have focused on specific areas of law.[2] The consumer protection policy in the UK has heavily been influenced by EU consumer law, as well as by the prevailing policy agenda of the incumbent government, e.g. currently an approach based around improving the accessibility of the law and enhancing competition.

[1]Borrie (1984), p. 2.

[2]Riefa (2015), p. 4.

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1.1 Policy Documents

The UK does not have an official national consumer policy, however, the Department for Business Innovation and Skills (BIS) has outlined government policy from 2010–2015. In addition to implementing the Consumer Rights Directive and the ADR Directive, reforming private law rules on aggressive and misleading practices and codifying key aspects of consumer contract law on quality of goods, services and digital content, and on unfair contract terms (under the Consumer Rights Act 2015), other key goals of this policy were as follows[3]:

- Food information and labelling—to improve the information provided to consumers through food packaging and advertising so that it is clear accurate and consistent, with the goal of assisting consumers to make the right choices.
- Community buying—to encourage collective purchase schemes across the country, which allow consumers to group together to negotiate advantageous terms with traders.
- Personal data—to give consumers greater access, control and knowledge about the personal date that is held by traders.
- Giving more power to consumers—to give consumers greater confidence and knowledge when they make purchases and about claims they are entitled to purse should there be faults with their products, with focus on consumers from ethnic minority groups.
- Improving the consumer and competition landscape—to reorganise the network of institutions that provide information to consumers and make competition decisions for traders easier to understand, more accessible and cost efficient.
- Settling consumer disputes—to improve the opportunities available to consumers to use alternative dispute resolutions, such as mediation and arbitration, in line with the European directive on ADR.

The Department for Business, Innovation & Skills was replaced by the *Department for Business, Energy & Industrial Strategy* in July 2016. This new department has now released a Green Paper on Modernising Consumer Markets that lays out some suggested plans for future reform work. The Consultation with stakeholders will close on 4 July 2018.[4]

[3]Department for Business Innovation and Skills, 'Policy paper – 2010 to 2015 government policy: consumer protection' [2015] <https://www.gov.uk/government/publications/2010-to-2015-government-policy-consumer-protection/2010-to-2015-government-policy-consumer-protection#appendix-5-giving-more-power-to-consumers> accessed 21 March 2016.

[4]Department for Business, Energy and Industrial Strategy, Modernising Consumer Markets, Consumer Green Paper (April 2018, Cm9595).

1.2 Consumer Education and Awareness

Given that the Consumer Rights Act 2015 has only recently come into force in October 2015, an analysis of the most up-to-date rights does not provide an accurate picture of consumer awareness. Rather, the Consumer Engagement and Detriment Survey commissioned by the BIS in 2014[5] portrays an accurate account of consumer right awareness. The survey consisted of over 4000 interviews and tested for a wide range of consumer issues, including awareness of consumer rights.[6]

The results indicated that most consumers (70%) were aware of their right to return a product after 4 days, yet the awareness of the right to a replacement or repair to a fridge that breaks after 18 months significantly drops (67% did not know).[7] Consumer awareness about the right to be informed of all taxes and charges imposed by airlines was low (43%).[8] When consumers had problems, most took some form of action (87%) and of those that did not take action only a very small number failed to take action from a lack of awareness of consumer rights (2%).[9] Overall, the survey showed that consumers are in a very general sense educated about their rights due to the high awareness of the existence of consumer rights. However, the quality of the consumer rights education on the detail is poor.

1.3 Anatomy of the Legal Framework of Protection

The legal framework for consumer protection in the UK is made up of several statutes and statutory instruments (including a number implementing EU directives) and rules of common law, some of which have recently been consolidated (the new Consumer Rights Act 2015 does not cover all areas). The Consumer Rights Act 2015 is an independent Act of Parliament that has aimed to consolidate various statutes and modernise key aspects of the law-the general aims being to make the law more accessible and to improve competition. However, the statute only applies to consumer contracts entered into from the 1 October 2015. Previously the position was as follows. The Sale of Goods Act 1979[10] implied terms into consumer contracts to protect consumers, yet it exclusively applied to contracts for the sale of goods. The

[5]Department for Business Innovation and Skills, 'Consumer Engagement and Detriment Survey 2014' [2014] JN121550 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/319043/bis-14-881-bis-consumer-detriment-survey.pdf> accessed 21 March 2016.

[6]Ibid, p. 3.

[7]Ibid, p. 19.

[8]Ibid, p. 20.

[9]Ibid, p. 44.

[10]Note that the Sale of Goods Act is a general sales code, which covers not only the terms on quality, fitness etc (which now only apply to B2B contracts), but also rules on passing of property and title, delivery, acceptance etc, all of which still both apply to B2B, B2C and C2C.

Supply of Goods (Implied Terms) Act 1973 and the Supply of Goods and Services Act 1982 implied the same terms in contracts for hire, hire purchase, work and materials etc.; while the 1982 Act also implied terms based on care and skill in relation to the service element in contracts for the supply of services, work and materials.[11]

In regards to remedies, the Sale and Supply of Goods to Consumers Regulations 2002 provided for various remedies such as repair of goods, replacement of goods, price reduction or rescission.[12]

With respect to unfair contract terms, the Unfair Contract Terms Act 1977 (UCTA) and the Unfair Contract Terms in Consumer Contracts Regulation 1999 (UCTCCR) governed the area. There were overlaps between the two pieces of legislation, however, the scope of the UCTA was wider than the UCTCCR, as it also covered business to business contracts. On the other hand, the UCTA only applied to exclusionary terms, while the UCTCCR applied to all terms that have not been individually negotiated. In terms of enforcement, the UCTA focused on private enforcement, whereas the UCTCCR allowed for public bodies to enforce the rules.[13]

Updated rules on all of the above, as well as rules on digital content (based on the goods rules) are now contained in the Consumer Rights Act (CRA) 2015.[14]

Any situations that fall beyond the scope of the statutory protections are governed by various common law rules.[15]

The main features of this Consumer Rights Act 2015 are as follows:

- Statutory terms in all contracts for the supply of goods and digital content (terms that may not be excluded or limited). The terms ensure that goods, including the previously unclear area of digital content, are of satisfactory quality, fit for purpose, match the given description and correspond to any provided sample. As a remedy for breach of these terms, the consumer has the right to reject up to 30 days after delivery or installation. Also, a breach may entitle the consumer to a repair, replacement, price reduction or a final right to reject the goods.
- Similar to the implied terms for goods, a term requiring reasonable care and skill to be taken is implied into contracts for the supply of service. In addition, any information that is said or written to a consumer in respect of a service or the trader by the trader or someone acting on their behalf of the trader become binding contractual terms. The remedies for breach of these terms include repeat performance and a price reduction.

[11]Riefa (2015), p. 10. On the competing ideologies or ethics of the Consumer Rights Act, Willett (2018).

[12]Ibid., p. 11.

[13]Ibid., p. 12–13.

[14]European Commission, 'Consumer Associations and Networks – United Kingdom' [2010] <http://ec.europa.eu/consumers/eu_consumer_policy/consumer_consultative_group/national_consumer_organisations/docs/national-consumer-organisations_uk_listing.pdf> accessed 22 March 2016, 20.

[15]Ibid.

- All unfair contractual terms, except for core terms, are not binding if they, contrary to good faith, create a significant imbalance in the parties' rights and obligations to the detriment of the consumer.
- Stand alone claims may now be brought before the Competition Appeals Tribunals.
- Aside from private enforcement and enforcement by public authorities, courts are now obligated to assess the fairness of contractual terms without expressly being asked by the parties, as long as there is sufficient factual and legal material to allow this to be done.

More generally, there is other legislation on key areas, e.g., consumer credit (Consumer Credit Act 1974, Consumer Credit Act 2006); misleading and aggressive practices (Consumer Protection from Unfair Trading Regulations 2008-implementing the Unfair Commercial Practices Directive, the Consumer Protection (Amendment) Regulations 2014-giving private law remedies based on breaches of the 2008 Regulations); information and cancellation rights (the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, implementing the Consumer Rights Directive); provisions on public enforcement (the General Product Safety Regulations 2005, the Enterprise Act 2002, Part 8); and various sector specific provisions (e.g. the Toys (Safety) Regulations 1995, The Cosmetic Products (Safety) Regulations 2008, the Children's Clothing (Hood Cords) Regulations 1976, and the Food Safety Act 1990).

1.4 Strategic Outlooks for the Future

Although the government has not released an official plan for consumer protection past 2015, the Financial Conduct Authority has release a strategic plan for 2016. The main characteristics of the plan are as follows[16]:

- Creating a sustainable model of regulation given the significant increase in the number of firms the body is now responsible for regulating.
- Forming a common view of markets and sectors, by bringing together the intelligence collected from a wide range of sources, such as firms, consumer bodies and consumers.
- Establishing a new way of setting priorities, to make it more cost efficient and flexible.
- To engage and influence more strategically on regulatory and policy developments, particularly on the international stage.
- To make the most efficient use of resources.

[16]Financial Conduct Authority, 'FCA Business Plan 2015/16' [2015] <http://fca.org.uk/static/channel-page/business-plan/business-plan-2015-16.html?utm_source=businessplan2015&utm_medium=businessplan2015&utm_campaign=businessplan2015#c2> accessed 22 March 2016.

More generally, in addition to the above approach based around improving the accessibility of the law and enhancing competition (see Consumer Rights Act 2015), the government is currently considering improving consumer protection in trader's use of legal small print,[17] product recall procedures[18] and supermarket pricing practices.[19]

There is no change in direction by the government focusing on small print, since the transparency in contractual terms is an established feature of UK consumer protection law.[20]

In respect of the product recall procedure, there is a slight shift in policy as government is looking for a non-legislative solution to this problem. The government intends to create an online portal to provide a clear and trusted source of information for product recalls.[21]

The route the government is taking in regards to supermarket pricing practices is a departure from the legislation avoiding protecting pricing terms in consumer contracts.[22]

2 Enforcement Mechanisms in the UK

2.1 Administrative Enforcement of Consumer Law

There are two main authorities that are in charge of enforcement of consumer protection in the UK, the Competition and Markets Authority and the Financial Conduct Authority.

In addition, National Trading Standards delivers national and regional consumer protection enforcement. Its purpose is to protect consumers and safeguard legitimate

[17]Department for Business Innovation and Skills, 'Press Release – Government to tackle the small print' [2016] <https://www.gov.uk/government/news/government-to-tackle-the-small-print> accessed 22 March 2016.

[18]Department for Business Innovation and Skills, 'UK Consumer Product Recall Review - The Government response to the Independent Recall Review by Lynn Faulds Wood' [2016] <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/500422/bis-16-69-consumer-product-recall-government-response.pdf> accessed 23 March 2016, 4.

[19]Department for Business Innovation and Skills, 'Pricing Practices in the Groceries Market - Government response to the Competition and Markets Authority's report and recommendations on the super-complaint made by Which?' [2015] <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/467326/BIS-15-568-government-response-to-the-CMA-report-on-Which-super-complaint.pdf> access 23 March 2016, 3.

[20]Consumer Rights Act 2015, s68(1).

[21]Department for Business Innovation and Skills, 'UK Consumer Product Recall Review - The Government response to the Independent Recall Review by Lynn Faulds Wood' [2016] <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/500422/bis-16-69-consumer-product-recall-government-response.pdf> accessed 23 March 2016, 5.

[22]Consumer Rights Act 2015, s64(1)(b).

businesses by tackling serious national and regional consumer protection issues and organised criminality and by providing a "safety net" to limit unsafe consumer goods entering the UK and protecting food supplies by ensuring the animal feed chain is safe.[23]

Both the CMA and the FCA are run independently and were created by statute. They are centralised organisations that are based in London. However, the CMA does have representatives in the devolved nations of Scotland, Wales and Northern Ireland.[24] Both the FCA and the CMA deal with law areas outside of consumer law, particularly in relation to competition law.

The CMA was established by section 25(1) Enterprise and Regulatory Reform Act 2013, replacing the Competition Commission and the Office of Fair Trading. The Secretary of State must appoint a Chair, a board of directors to consist of at least five members and a panel of members. And at least one person must be a member of both the panel and the board.[25] Below the Board and the panel sit three directorates that consist of Enforcement, Markets & Mergers and Corporate Services. Finally, the three departments of Legal Services, Policy & International and The Office of the Chief Economic Advisor sit below the Directorate.[26] The CMA is responsible for investigating company mergers that could lessen competition, conduct studies into market where there could be competition or consumer problems, investigate companies that may be breach anti-competitive agreements or abused their dominant position, bring criminal proceedings against individuals who commit cartel offences, enforce consumer protection legislation and conduct regulatory appeals.[27]

The FCA was established by section 1A(1) Financial Services and Markets Act 2000 as amended by section 6(1) Financial Services Act 2012, replacing the Financial Services Authority. A governing body (a board) consisting of a chair, a chief executive and at least one other member appointed by the Treasury, the Bank of England deputy governor for prudential regulation and two members jointly appointed by the Treasury and the Secretary of State.[28] The board has six committees which it may delegate functions to, these are the audit, risk, remuneration, oversight

[23] http://www.nationaltradingstandards.uk/.

[24] Competition and Markets Authority website, 'CMA in Scotland, Wales and Northern Ireland' <https://www.gov.uk/government/organisations/competition-and-markets-authority> accessed 24 March 2016.

[25] Enterprise and Regulatory Reform Act 2013, schedule 4 s1.

[26] Competition and Markets Authority, 'CMA Structure' [2016] <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/509100/CMA_organogram.pdf> accessed 23 March 2016.

[27] Competition and Markets Authority, 'Towards the CMA – CMA Guidance' [2013] <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/212285/CMA1_-_Towards_the_CMA.pdf> accessed 24 March 2016, p. 11.

[28] Financial Services and Markets Act 2000, schedule 1ZA section 2(2)(a–e) as amended by the Financial Services Act 2012, schedule 3.

and regulatory decision committees.[29] The FCA is then split into nine divisions, which are supervision—retail and authorisations, supervision—investment, wholesale & specialists, strategy and competition, enforcement and market oversight, markets policy and international, risk and compliance oversight, General Counsel, internal audit and operations.[30] The main objectives of the FCA are consumer protection, protecting and enhancing the UK financial system and promoting effective competition in the financial services market.[31] The main functions of the FCA are to make regulatory rules, codes of practice, provide guidance and determine policy and principles for the financial services industry.[32] The authority must supervise the financial market,[33] consult with practitioners and consumers[34] and has the right to obtain any documents that would be reasonably required to complete its investigations[35] conducted through its duty to investigate and report on any regulatory failure.[36]

Data obtained by the above mentioned 2014 survey commissioned by BIS indicates that most consumers are aware of one or more consumer protection agency (96%), thus it is fair to suggest that there is likely to be a high level of consumer awareness of the two main consumer protection authorities.[37] The survey goes on to demonstrate that the vast majority of consumers (85%) are likely to contact a consumer agency when they have problems with goods or services, meaning that there is also a high level of awareness of the regulatory function of the two main authorities.[38]

In addition to those two main authorities, a number of sectoral bodies are in operation. They include:

- Gas and Electric Markets Authority (GEMA). It protects the interests of existing and future consumers of energy. These interests may relate to the reduction of

[29]Financial Conduct Authority website, 'The Board' [2016] <http://www.fca.org.uk/about/structure/board> accessed 24 March 2016.

[30]Financial Conduct Authority website, 'Our structure' <http://www.fca.org.uk/about/structure> accessed 24 March 2016.

[31]Financial Services and Markets Act 2000, section 1B(3)(a–b) as amended by the Financial Services Act 2012, section 6(1).

[32]Financial Services and Markets Act 2000, section 1B(6)(a–d) as amended by the Financial Services Act 2012, section 6(1).

[33]Financial Services and Markets Act 2000, section 1L(1) as amended by the Financial Services Act 2012, section 6(1).

[34]Financial Services and Markets Act 2000, s1M as amended by the Financial Services Act 2012, section 6(1).

[35]Financial Services and Markets Act 2000, section 1T(1)(a) as amended by the Financial Services Act 2012, section 6(1).

[36]Financial Services Act 2012, section 3(3).

[37]Department for Business Innovation and Skills, 'Consumer Engagement and Detriment Survey 2014' [2014] JN121550 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/319043/bis-14-881-bis-consumer-detriment-survey.pdf> accessed 21 March 2016, p. 4.

[38]ibid.

greenhouse gases, the security of the energy supply and promoting effective competition in the sector. The GEMA is also the governing body for OFGEM[39] the Office of Gas and Electricity Markets which promote value for consumers, secure the supply of energy for future generations, supervise and regulate the energy industry.[40]

- Office of Communications (OFCOM) charged to promote a wide range of high quality communication services, promote competition, ensure consumers are protected from offensive or harmful material, ensure the existence of a universal postal service and regulate the efficient use of the radio spectrum.
- Food Standards Agency, which is the agency is responsible for food safety and hygiene.[41]
- Water Services Regulation Authority (OFWAT). This authority promotes competition in the water industry, ensure the functions of water companies are carried out and that they are able to finance those functions and secure the regular supply of water.[42]
- Office of Rail and Road (ORR) regulates National Rail and railway operators to ensure the safety of the rail network and the monitor the management of the strategic road network.[43]
- Civil Aviation Authority (CAA). It is the regulator for the aviation sector that ensures that the industry adheres to high standards, there is competition that allows consumer choice and value, to drive improvements in airlines and airports and that security risks are managed.[44]
- Medicines and Health products Regulation Agency (MHRA). This is the government agency responsible for ensuring that medical and medical equipment functions correctly.[45]

Despite those many enforcers being in place, there are no official statistics on consumer complaints across all industries. If this data is collected it is not published, with the exception of the FCA, which collects complaint data in relation to the

[39]Office of Gas and Electricity Markets, 'Powers and duties of GEMA' [2013] <https://www.ofgem.gov.uk/publications-and-updates/powers-and-duties-gema> accessed 24 March 2016.

[40]Office of Gas and Electricity Markets website, 'Who we are' <https://www.ofgem.gov.uk/about-us/who-we-are> accessed 24 March 2016.

[41]Food Standards Agency, 'Food we can trust' [2016] <https://www.gov.uk/government/organisations/food-standards-agency> accessed 24 March 2016.

[42]Water Services Regulation Authority website, 'Our duties' <http://www.ofwat.gov.uk/about-us/our-duties/> accessed 24 March 2016.

[43]Office of Rail and road website, 'What and how we regulate' <http://orr.gov.uk/what-and-how-we-regulate> accessed 24 March 2016.

[44]Civil Aviation Authority website, 'Our role' <https://www.caa.co.uk/Our-work/About-us/Our-role/> accessed 24 March 2016.

[45]European Commission, 'Consumer Associations and Networks – United Kingdom' [2010] <http://ec.europa.eu/consumers/eu_consumer_policy/consumer_consultative_group/national_consumer_organisations/docs/national-consumer-organisations_uk_listing.pdf> accessed 22 March 2016, 6.

financial services industry. For the first 6 months of 2015, the number of complaints was 2.1 million.[46] Some older research on consumer complaints was compiled by Consumer Focus. However, the study is out-of-date, not accessible and the organisation has now been dissolved into Citizen's Advice who have not commissioned any further research into the area. It is therefore difficult to evaluate complaints levels with accuracy. However, the total number of consumer cases published by the superior courts in England and Wales in 2012 was 1254. Data from 2012 indicates that on the small claim track the average time taken for a dispute to be resolved in the courts is 30 weeks from the issuing of the claim. While, under fast and multi track claims take 58 weeks on average.

2.2 Courts and the Enforcement of Consumer Law

The civil court structure in England and Wales is based on claims originating in the County Court, with appeals first to the High Court and then to the Court of Appeal and the Supreme Court. In addition, the UK imposes a three track system for the handling of claims based on their financial value and legal nature. The three tracks are small claims,[47] fast[48] and multi track.[49] There is no specialist court for consumer disputes, instead claims are handled through the regular civil procedure and the above mentioned courts. However, the County Court system is adapted to accommodate a small claims court with informal rules for the small claims track. Also, Money Claims worth less than £100,000 must originate from an online portal managed HM Courts and Tribunal Service. The small claims and the online money claims are the main routes for disputes to be dealt with.

If problem is a money claim, the consumer must complete the online Money Claim form on the HM Courts and Tribunal Service website.

For any other claim, the consumer must complete a claim form from the HM Courts and Tribunal Service to start a County Court level action. The form sets out the claimant's details, how much is being claimed and the particulars of claim.[50]

The main advantages of judicial enforcement of consumer rights in the UK are as follows. First, courts are able to provide a final resolution to consumer disputes, with the opportunity for appeal. Second, for any consumer related issues that overlap with criminal law, courts are able to prosecute individuals for any offences they that have

[46]Financial Conduct Authority website, 'Complains data' [2015] <https://www.fca.org.uk/consumers/complaints-and-compensation/complaints-data> accessed 24 march 2016.

[47]Ministry of Justice, Civil Procedure Rules – Rules and Directions, Part 27 <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part27> accessed 6 April 2016.

[48]Ibid., part 28.

[49]Ibid., part 29.

[50]Citizen's Advice website, Starting a Claim <https://www.citizensadvice.org.uk/law-and-rights/legal-system/taking-legal-action/small-claims/#h-before-applying-to-the-court> accessed 6 April 2016.

been committed. Third, for complex issues the courts system is a more cost effective route for dispute resolution.[51] Fourth, judges have a wide range of remedies at their disposal, including the granting of damages, injunctions, price reductions and replacement of goods.[52]

Nevertheless, there are also a number of disadvantages to judicial enforcement. First, court actions are generally more expensive and time consuming than alternative dispute resolutions.[53] Second, legal proceedings can be too complex for consumers to manage without legal counsel.[54] Third, legal aid does not cover consumer disputes.[55]

2.3 *Financial Services Ombudsman and Other ADR Mechanisms*

The most high profile Ombudsman scheme in the UK, is the Financial Ombudsman Scheme (FOS), which, although funded by the industry, is public in the sense that it has a statutory basis, and is overseen by the Financial Conduct Authority (FCA). In addition, FOS involves elements of mediation, adjudication by an adjudicator, and a final decision by the Ombudsman (another form of 'adjudication' understanding this in broad general terms)[56];

The resolution of a dispute may take anything from a few weeks to 2 years to resolve.[57] Three quarters of the consumers who have used the service would

[51]Department for Business, Innovation and Skills, 'Government response to call for evidence – EU proposals on Alternative Dispute Resolution' [2012] <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/190192/12-674-government-response-eu-proposals-alternative-dispute-resolution_1_.pdf> accessed 24 March 2016, 9.

[52]See Part I Question 4.

[53]Department for Business, Innovation and Skills, 'Alternative Dispute Resolution for consumers - Government response to the consultation on implementing the Alternative Dispute Resolution Directive and the Online Dispute Resolution Regulation' [2014] <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/377522/bis-14-1122-alternative-dispute-resolution-for-consumers.pdf> accessed 24 March 2016, 8.

[54]Department for Business, Innovation and Skills, 'Consumer Rights Bill: Proposal on Services – Revised Impact Assessment – Final' [2014] 3 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/274823/bis-13-1361-consumer-rights-bill-proposals-on-services-impact-final.pdf> accessed 6 April 2016.

[55]Her Majesty's Government website, 'Legal aid' <https://www.gov.uk/legal-aid/what-you-can-get> accessed 24 March 2016.

[56]NB, however, that there are a large number of other Ombudsman schemes, some public and some private: covering Energy, Estate agents (Property), Furniture, Glazing, Health services, Higher Education (Independent Adjudicator), Housing, Independent Football, Legal services, Pensions, Removals, Retail, Surveyors, Telecommunications, and Waterways. Details of the various schemes can be found at http://www.ombudsmanassociation.org.

[57]The Financial Ombudsman Service website, FAQs – How long does it take? <http://www.financial-ombudsman.org.uk/faq/answers/complaints_a6.html> accessed 6 April 2016.

recommend it to their friends and family.[58] 73% of people were satisfied with the length of time a dispute took to resolve and the same amount of users were generally satisfied with the service.[59]

The Financial Ombudsman Service (Financial Services) offers a number of advantages[60]: First, the service is free for consumers to use. Second, it is mandatory for businesses to participate. Third, the service is highly structured, layered,[61] expert, independent and unbiased. Fourth, the matter can be resolved at the stage of mediation or adjudication if both parties accept the decision. Fifth, if the dispute reaches the actual Ombudsman, the decision is binding on the business, i.e. the business cannot appeal to the courts, while the consumer *is* entitled to appeal to the courts. Finally, assistance is provided by the ombudsman to the consumer.

Nevertheless, three are disadvantages. First, both parties must agree before a binding resolution can be produced prior to the Ombudsman stage in the process.[62] Second, time restrictions apply to use the service.[63] Third, there is an upper limit to compensation of £150,000.[64] Finally, the Ombudsman does not monitor or regulate the financial services industry.[65]

There is the possibility of consumer disputes going to other forms of ADR, such as arbitration, based on a term in the contract providing for this. Such clauses can operate unfairly and legislation to control them has been in force since 1988. Under section 91 of the Arbitration Act 1996 a clause referring present or future disputes to arbitration is to be treated as "unfair" under Part II of the Consumer Rights Act 2015 where the value in dispute does not exceed a specified amount—currently £5000.

There are also a vast array of ADR bodies (that are not labelled as Ombudsmen, and do not fit the characteristics to qualify as arbitration), which were not *set up* by legal provisions,[66] rather they were set up, and are run, by trade associations, i.e. they are private.[67]

[58]The Financial Ombudsman Service, 'Annual Report 2014/2015' [2015] 11 <http://www.financial-ombudsman.org.uk/publications/ar15/ar15.pdf> accessed 6 April 2016.

[59]Ibid., p. 137.

[60]Ibid., p. 1.

[61]Broadly, the process starts with mediation, continues to adjudication (if mediation is unsuccessful), and ends with a decision of the actual Ombudsman (if adjudication could not resolve matters).

[62]Ibid.

[63]The Financial Ombudsman Service website, 'Information for businesses covered by the ombudsman service' <http://www.financial-ombudsman.org.uk/faq/businesses/answers/before_we_get_involved_a7.html> accessed 6 April 2016.

[64]The Financial Ombudsman Service website, 'FAQs - complaining to the ombudsman' <http://www.financial-ombudsman.org.uk/faq/answers/complaints_a3.html> accessed 6 April 2016.

[65]Ibid.

[66]But see under question 4 below as to the legal framework now provided following the ADR Directive.

[67]For a list of such trade associations, see Part V above.

Following implementation of the ADR Directive, all ADR bodies (Ombudsmen, Arbitration services, or any of the bodies mentioned above and set up by trade associations), must be registered, and be in compliance with the requirements emanating from the Directive, i.e. on impartiality, independence, expertise etc. The UK law providing for this is the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015.[68] The purpose of the Directive is to ensure that there are ADR mechanisms available for every type of consumer dispute, and these 2015 Regulations are concerned with the process for establishing and certifying ADR schemes. Much of this work is undertaken by the Chartered Institute of Trading Standards,[69] alongside the regulators in the regulated sectors. Whilst participation in ADR is not made mandatory for businesses, there is an obligation to inform consumers about the availability of ADR schemes. Many existing ADR schemes will continue to operate, but for sectors which did not previously have such schemes, so-called "residual bodies" have been appointed. One such body is the Retail Ombudsman, which offers alternative dispute resolution between consumers on the one hand, and retailers (in-store and online), supermarkets, garden centres, restaurants and takeaways, hotels and leisure providers, boiler installation and repair providers, and airlines, on the other hand.[70] A list of certified bodies, both in the UK and throughout the EU, can be viewed on the European Commission's website.[71]

In addition, it is possible to utilise the ODR platform to submit a claim online for alternative dispute resolution, particularly for goods or services acquired online.[72] This builds on a long-established EU initiative known as the ECC Net which enables consumers in one EU country to contact ADR organisations in other countries. Its UK European Consumer Centre is run by the TSI. We are not aware of any overall figures covering all forms of ADR. However, data is available for specific industries.[73]

[68]SI 2015/42, amended by the Alternative Dispute Resolution for Consumer Disputes (Amendement) Regulations 2015 (SI 2015/1392).

[69]See http://www.tradingstandards.uk/advice/AlternativeDisputeResolution.cfm.

[70]See https://www.theretailombudsman.org.uk/.

[71]See https://webgate.ec.europa.eu/odr/main/?event=main.adr.show.

[72]This can be accessed at https://webgate.ec.europa.eu/odr/main/index.cfm?event=main.home.show&lng=EN.

[73]The following are links to data on financial services and energy: http://www.financial-ombudsman.org.uk/publications/complaints-data.html and https://www.ombudsman-services.org/complaints-data.html. The following is a link providing a much broader picture, covering retail, energy, finance, telecom, public transport, leisure, tradesmen, property, post and professional services: https://www.ombudsman-services.org/more-brits-taking-action-against-poor-service.html.

2.4 Private Regulation and Enforcement of Consumer Law

There is a strong tradition of self-regulation in the UK, complementing the legal controls. This typically arises through codes of practice that provide for substantive standards of behaviour, and for ADR mechanisms (whether that the trader should administer, or that the trade association will administer itself).[74] These codes arise across the vast majority of key trade sectors, including, e.g., electrical, travel, vehicles, shoes, windows, finance etc.[75] Sometimes, the trade association will be able to impose sanctions on members that do not adhere to the codes (e.g. imposition of penalties, even also sometimes expulsion from the trade association). In other cases, the only sanction is the "club" threat of social ostracism by their peers.[76]

A link is forged between self-regulation and formal enforcement bodies through the role of the local authority trading standard authorities in relation to codes of practice under the Consumer Codes Approval Scheme (CCAS). According to the website, the scheme 'aims to bolster consumer protection and improve customer service standards by: the approval and promotion of codes of practice, setting out the principles of effective customer service, and recognising approved traders—look for the CTSI approved code logo'.[77]

There is a particularly strong tradition of self-regulation in the advertising industry. The key body is the Advertising Standards Authority (ASA), which is funded by the industry. The key rules are contained in the UK Code of Non-Broadcast Advertising, Sales Promotion and Direct Marketing and the UK Code of Broadcast advertising.[78]

This is well supported by a good advice system and pre-clearance system. It is well accepted that it is the ASA, enforcing these codes, that is the 'front line' of regulatory control over advertising in the UK. Assurances are sought by the ASA, and it is only when this fails to produce results, that more formal legal regulation steps in.[79]

Generally, the self-regulatory system is considered to work well. A good and recent example involved the ASA telling Reckitt Benckiser, makers of Nurofen, to withdraw a high profile TV advert, considered to mislead consumers into believing that Nurofen Joint and Back, was able to target pain in specific parts of the body.[80] The ASA ruling was to the effect that the advert breached three rules from the Code

[74]On which, see Part X below.

[75]Twigg-Flesner et al. (2016), Ch. 11.

[76]Generally, see discussion in Twigg-Flesner et al. (2016), ibid.

[77]For more information on how this works see the website, at http://www.tradingstandards.uk/advice/ConsumerCodes.cfm.

[78]See http://www.bcap.org.uk/Advertising-Codes.aspx.

[79]This more formal regulation would involve exercise of the powers of bodies such as the CMA to seek enforcement orders under the Enterprise Act 2002, on which see Part VIII below.

[80]See https://www.asa.org.uk/Rulings/Adjudications/2016/6/RB-UK-Commercial-Ltd/SHP_ADJ_338459.aspx#.V3ZiQbgrK00.

(3.1, 3.9 and 3.12), i.e. that it was not only misleading, but also unsubstantiated and exaggerated. It showed an anatomical image of a woman with the Nurofen making its way down her body to her back, with a voiceover saying: 'Just a single dose of *Nurofen Joint and Back provides you with* constant *targeted pain relief for up to eight hours*'.

Of course, private law claims[81] are open to consumers whatever is happening in terms of ASA self-regulation. In addition, in deliberately fraudulent cases-clocking cars, clear food fraud, etc.-there is likely to be routine criminal prosecution, without waiting for ASA action.[82] In terms of the internal sanctions of the ASA, in general if an advertiser does not comply with ASA rulings, they will find it difficult to get their adverts 'out there'. Specifically, in relation to broadcast advertising, there are stronger sanctions, including fines, withdrawal of licenses etc.

The ASA self-regulatory system is based around the general principle that marketing communications should be 'legal, decent, honest and truthful'. This is wider than the formal legal concepts which (as per the UCPD), only step in where advertisements are 'misleading' or 'aggressive'.[83] The ASA system also has tailored rules-e.g. for children and for specific sectors like alcohol, gambling, tobacco, motoring, health and financial products. It also contains special rules-e.g. on placement (juxtaposition—e.g. High Fat, Salt, Sugar etc. foods not next to children's programmes); and the distinction between advertising and editorial (e.g. specific rules in broadcast advertising on product placement and sponsorship-the principle being that an advert's commercial nature should be made clear) (NB Ofcom does the rulings on sponsorship and product placement, not ASA).

The ASA remit was formally extended in 2011 to be clear that it covers online, bluetooth, internet, text etc. (new media) adverts. This enables coverage of issues such as the blurred line between adverts and blogs and paid for facebook "likes".

2.5 The Role of Consumer Organisations in the Enforcement of Consumer Law

There are two main generalist and powerful bodies-Which?[84] and the Citizens Advice Bureaux (CAB)[85]; then a number of specialist bodies, too numerous to all be mentioned, but key ones include, e.g. Fair Finance,[86] Financial Services

[81] E.g. for common law misrepresentation, duress etc, and now in relation to the (UCPD based) misleading and aggressive practice concepts for which there are private law remedies under the Consumer Protection (Amendment) Regulations 2014.

[82] See Part IX below.

[83] See Part VIII below.

[84] See http://www.which.co.uk/.

[85] See https://www.citizensadvice.org.uk/.

[86] See https://www.fairfinance.org.uk/.

Consumer Panel,[87] Advisory Committees on Telecommunications (ACTs),[88] Ofwat Customer Service Committees (CSCs) (water)[89]; Energy Watch,[90] Transport Focus,[91] Good Garage Scheme.[92]

They (e.g. Which? and CAB) have seats in London and around the UK. Both Which? and CAB are charities, so governed by UK charities legislation, committing them to various charitable and 'social' objectives; while Which? is also a limited company, governed by the company law statutes, committing it to its objects and of course, to ensure profits (which are intended to feed back into supporting the charitable goals).

The activities of consumer bodies include free information, education, advice, campaigning in relation to law reform, research into law and policy (current and future challenges); and, in the case of Which? in particular, comparative testing (and publishing the results), provision of commercial products and services (e.g. magazines, conveyancing, mortgage), but 'commercial' infused by the principle that these products should (in their mode of selling and in their substance) not result in the sort of consumer detriment that Which? itself campaigns against more generally.

Which? (not the CAB) (along with Financial Conduct Authority, Competition and Markets Authority, local authority Trading Standards Authorities and the various *regulators*[93]), have powers to seek assurances from, and ultimately to seek court actions to prevent continued use of unfair contract terms (Consumer Rights Act, Sch. 3).

Which? does not generally have powers to take such preventive action beyond the sphere of unfair terms-so, e.g. it is not one of the bodies that can take enforcement action under the Enterprise Act Part 8, where traders are in breach of domestic of EU law that damages the collective interests of consumers.[94] Which? is however a designated enforcer capable of initiating a so called 'super-complaint', involving making a complaint to the CMA that any feature, or combination of features, of a market in the United Kingdom for goods or services is or appears to be significantly

[87]See https://www.fs-cp.org.uk/.

[88]See http://www.ofcom.org.uk/about/how-ofcom-is-run/committees/england/.

[89]See http://businesscasestudies.co.uk/water-services-association/regulating-a-utility/customer-service-committees-cscs.html#axzz4D9fi4sb7.

[90]See http://www.ukenergywatch.org/.

[91]See http://www.transportfocus.org.uk/about/history/.

[92]See https://www.goodgaragescheme.com/.

[93]I.e. the actual regulators—the Office of Communications (http://www.ofcom.org.uk/), the Information Commissioner (https://ico.org.uk/), the Gas and Electricity Markets Authority (https://www.ofgem.gov.uk/), the Water Services Regulation Authority (http://www.ofwat.gov.uk/), the Office of Rail Regulation (http://orr.gov.uk/), and the Northern Ireland Authority for Utility Regulation (http://www.uregni.gov.uk/). The above consumer bodies that are attached to the regulators (the Advisory Committees on Telecommunications, Transport Focus, Energy Watch etc) do NOT have these powers under the Consumer Rights Act.

[94]See further below in Part VIII, on these Enterprise Act powers.

harming the interests of consumers.[95] Which? recently (December 2015) submitted a super-complaint to the Office of Rail and Road (the regulator for these issues), arguing that most delayed rail passengers are not aware of, nor do they apply for, the compensation to which they are entitled; and that this is contributed to by certain features of the passenger rail market.[96]

In practice neither Which? nor the CAB represent consumers in court in enforcement of their rights.

Legal aid in the UK does not extend to consumer protection.[97]

Money Saving Expert is a financial service focussed body, informing and educating consumers, obtaining finance from advertising; and also having donated money in the past to support the CAB.[98]

If we understand consumer law broadly, to include public and private sector rented housing, then Shelter (a housing and homelessness charity) should be mentioned.[99]

Finally, one might mention Age UK, as an example of a body focussed on a particular demographic (the elderly)-focussing on all, including the consumer rights, of that demographic.[100]

2.6 Enforcement Through Collective Redress

Group Litigation Orders under Civil Procedure Rules 19 (practice direction 19B) enable claims that give rise to common or related issues to be managed collectively, but they are seldom used in the application of consumer law.[101]

There is the abovementioned specific unfair terms regime, whereby, e.g., Which? FCA, CMA, local authority Trading Standards Authorities and various regulators, have powers to seek assurances from traders that they will cease, and ultimately to seek court actions to prevent, continued use of unfair contract terms (Consumer Rights Act, Sch. 3). These powers have existed only since implementation of the Unfair Contract Terms Directive, in particular Article 7-originally in the Unfair Terms in Consumer Contracts 1994/1999, now in the 2015 Act. On prior to 1994, see below on the typical UK piecemeal approach, which also applied to unfair terms.

The OFT (now CMA) has dealt with many thousands of terms under these powers (over the past 20 years-many of these in the past year, 3 years, 5 years and 10 years),

[95]Enterprise Act section 11.

[96]See http://orr.gov.uk/info-for-passengers/complaints/rail-compensation-super-complaint.

[97]Her Majesty's Government website, 'Legal aid' <https://www.gov.uk/legal-aid/what-you-can-get> accessed 24 March 2016.

[98]See http://www.moneysavingexpert.com/.

[99]See http://www.shelter.org.uk/.

[100]See http://www.ageuk.org.uk/.

[101]https://www.gov.uk/guidance/group-litigation-orders.

without having to actually go to court (i.e. by seeking assurances, and obtaining them-with the 'stick' of the ability to seek an injunction, hovering in the background).[102]

It is also crucial to appreciate that a vital element of the success of the CMA in dealing with unfair contract terms, is that it produces an enormous amount of guidance for consumers and businesses, as to the meaning of unfairness, and how they view terms on the indicative list of terms, as well as how they view other sorts of terms.[103] This makes it much easier for businesses to comply with the rules, and for consumers to understand when there may be cause for complaint.

In addition to the unfair terms regime, there is the more general regime (that referred to above) under Part 8 of the Enterprise Act 2002, whereby bodies such as the FCA, CMA, local authority Trading Standards Authorities and utility regulators, take enforcement action under the Enterprise Act Part 8, where traders commit so called 'domestic' or 'Community' infringements to such a degree as to harm the collective interests of consumers. A domestic infringement involves a breach of home grown domestic consumer law. A Community infringement is a breach of any of the standards emanating from EU Directives. This includes, for example, the UCPD, so that this is the source of formal preventive action against misleading advertising (given that this would count as a misleading practice under the UCPD.[104]

These powers to take such action, covering most breaches of the law, did not really exist before 2002 Act. Prior to then, the UK system (under the old Fair Trading Act 1973), was based on a much more piecemeal approach, covering only those specific practices that were set out in legislation.[105]

When it comes to cases that have actually reached court, there are no definitive statistics, as many cases reaching the lower courts go unreported. There have only been a handful to reach the High Court and beyond, the following being leading examples in the key areas where action has been taken:

Unfair contract terms
Director General of Fair Trading v First National Bank plc[106]
Office of Fair Trading v Abbey National Plc[107]
Office of Fair Trading v Foxtons Ltd[108]

[102]See the work of the CMA at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/450440/Unfair_Terms_Main_Guidance.pdf.

[103]Ibid.

[104]The UCPD is implemented by the Consumer Protection from Unfair Trading Regulations 2008, which provide for misleading and aggressive practices to be viewed as domestic infringements under the Enterprise Act. The 2008 Regulations also make misleading and aggressive practices criminal offences, and on criminal sanctions generally in the UK, see Part IX below.

[105]Generally, see Twigg-Flesner et al. (2016), chapter 18.

[106][2001] UKHL 52.

[107][2009] UKSC 6.

[108][2009] EWHC 1681 (Ch).

Office of Fair Trading v Ashbourne Management Services Ltd[109]

Unfair commercial practices
R v Goring[110]
Office of Fair Trading v Ashbourne Management Services Ltd[111]
Purely Creative Ltd and others v Office of Fair Trading[112]
Price v Cheshire East Borough Council[113]
R v Scottish and Southern Energy plc[114]
R v Rodney Stone and others[115]
R v X Ltd[116]

Finally, we should mention the new so called 'enhanced consumer measures' (ECMs). Schedule 7 of the Consumer Rights Act (CRA) has amended Part 8 of the Enterprise Act (EA) to introduce the option of ECMs. So, EA sections 217–219 now provide that where a court makes an enforcement order or accepts an undertaking under part 8 of the Act, it may also attach ECMs to such an enforcement order or undertaking, and where an enforcer (such as a trading standards officer) obtains an undertaking, such an undertaking can also include ECMs.

A new section 219A provides for three categories of ECM: the redress category; the compliance category; and the choice category.

The redress category aims to facilitate redress for consumers who suffer loss as a result of breaches of consumer law (e.g. compensation, a refund, or other remedies such as repair or replacement). Where redress to individuals is not viable or proportionate (e.g. because consumers cannot be identified or can only be identified at a disproportionate cost) an ECM can require a trader to make a payment "in the collective interests of consumers" (for example, to a consumer charity).

The compliance category is concerned with measures aimed at preventing or reducing the risk of traders committing future breaches of the law, so the focus is preventive. So, e.g., a trader might be required to give a member of staff responsibility for supervising particular matters and to improve staff training, to eradicate a pattern of pressure selling that violates the CPRs-see above.

The choice category includes measures to help consumers to make more effective choices between traders, e.g. requiring a trader to advertise the fact that it had breached some consumer protection law, and to explain the steps taken to address this, i.e. to stop it happening in future.

[109][2011] EWHC 1237 (Ch).
[110][2011] EWCA Crim 2, [2011] All ER (D) 54 (Jan).
[111][2011] EWHC 1237 (Ch).
[112][2012] All ER (D) 247 (Oct).
[113][2012] EWHC 2927 (Admin).
[114][2012] EWCA Crim 539.
[115][2012] EWCA Crim 186.
[116][2013] EWCA Crim 818.

Under the new section 219B ((a) & (b)) it is provided that ECMs can only be used where they are just and reasonable, this taking into account the likely benefit of the measures to consumers, the costs likely to be incurred by the subject of the enforcement order or undertaking, and the likely cost to consumers of obtaining the benefit of the measures.

It is likely that firms will frequently contest the proportionality of ECMs (probably at the earliest stage), so this will be likely to act as a brake on some proposals, and the above test may ultimately be much argued over, perhaps ultimately in the courts. At the same time, in practice, it is likely that enforcers and traders will often negotiate their way to an informal conclusion and agreed course of action.

Use of ECMs is open to all public enforcers under Part 8 EA 2002. Again, this includes, importantly, the CMA, FCA, local trading standards authorities, utility regulators; and there is scope for future provision to be made to extend the use of the ECMs to Which?[117]

2.7 Sanctions for Breach of Consumer Law

There is an extremely broad range of sanctions that are provided for by an enormous range of statutory and common law sources. It cannot really be said that any of these are more common than others, as they are also used to such a widespread degree, and there are no reliable statistics that could put things in terms of which are more used than others. As to which are satisfactory, it is well accepted that all of these sanctions have complementary roles to play in the overall system. Here are the most important examples:

First, there is individual private redress-including, general courts, small claims, ADR, the Financial Service Ombudsmen in particular-where traditional private law corrective redress can be obtained (damages, refunds, repair, replacement of goods, repeat performance of services-see, e.g. Consumer Rights Act 2015 for examples of most of the main private law sanctions available);

Second, as we have seen immediately above, there is also now the scope for ex post collective redress to be delivered along with preventive enforcement-i.e. under the new 'enhanced consumer measures'.

Third, there can be enforcement orders/injunctions under the unfair terms regime and the general administrative preventive regime under the Enterprise Act (Sect. 2.6 above).

Fourth, there are prudential/supervisory type requirements, focussing on changing business culture and practice, e.g. FCA requirements on businesses to engage in a programme of training staff to a new (not misleading) selling culture;

[117]For useful guidance on the ECMs (in this case aimed generally at enforcers, mainly Trading Standards Authorities, but also dealing with the general position), see BIS, Enhanced Consumer Measures, Guidance for enforcers of consumer law, May 2015.

Fifth, sanctions may be imposed by self-regulatory bodies, whether financial, warnings, expulsion etc.

Sixth, there could be sanctions intended to influence market behaviour, e.g. the 'choice category' enhanced consumer measures discussed above, which are intended to help consumers to make more effective choices between traders, e.g. requiring a trader to advertise the fact that it had breached some consumer protection law, and to explain the steps taken to address this, i.e. to stop it happening in future (thereby enabling customers to make more informed market choices as to whether to deal with this trader).

Seventh, there is scope for (criminal law based) fines for contempt of court, if the above orders/injunctions are not respected.

Finally, there may be criminal law fines (and in serious enough cases, imprisonment) in relation to the variety of criminal offences under, e.g., the Food Safety Act 1990,[118] the General Product Safety Regulations 2005, the Consumer Protection from Unfair Trading Regulations 2008 (implementing the UCPD),[119] and the Financial Services and Markets Act 2000.

3 Conclusion

The system in place in the UK is positive in terms of its breadth of tools: private redress-including, general court, small claims, ADR (the Financial Service Ombudsmen in particular); prudential/supervisory (i.e. grand scale, business culture type) regulation (the FCA in particular); administrative/collective (i.e. prevention via assurances, enforcement orders in relation to behaviour harming the collective interests of consumers, backed by guidance and information) (but now there is also the scope for ex post redress to be delivered along with preventive enforcement-via the new 'enhanced consumer measures' discussed above); criminal law enforcement; and self-regulation (especially strong in advertising and combining well with the administrative/collective and criminal law control carried out by local authorities and the CMA).

One key shortcoming remains in the overall structure of the regime. Certainly it is true that the Consumer Rights Act has improved matters in drawing together key contract law rules on quality etc. of goods, services, digital content and unfair terms. Yet, large areas of B2C contract law remain outside the Act: general principles of contract law (agreement, capacity, general vitiating factors, remedies etc.) in the common law; implementation of many of the information and cancellation rules from the Consumer Rights Directive in the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013; remedies for misleading

[118] E.g. it is an offence to sell food that is injurious to health, or not of the nature, substance or quality demanded.

[119] So, misleading and aggressive practices are criminal offences under the 2008 Regulations (in addition to there being the collective redress powers discussed in Part VIII above.

and aggressive practices (mirroring the definitions of these concepts from the UCPD) in the Consumer Protection (Amendment) Regulations 2014.

These are just a few examples, but the point is that consumers are very likely to encounter problems with a given trader, that are not restricted to the matters in the Consumer Rights Act, but that also involve issues as to the information provided, cancellation rights, misleading and aggressive selling etc. If the law on these issues is spread over a range of different common law and statutory sources, it is not accessible for consumers, businesses, advisers, or indeed the ADR bodies that offer cheaper, less formal redress (but who are less expert in the law and therefore more likely to be confused by the existence of disparate sources).

Another shortcoming is that in the case of the Retail Ombudsman (a key residual ADR) while participation is mandatory for businesses that are registered with the Ombudsman,[120] the retailer is ultimately entitled to reject in their entirety the findings of the Ombudsman, and to pursue the case through the courts.[121]

Consumer law continues to evolve in the UK but reforms are coming to a close for the time being. The latest round of reforms included the Consumer Rights Act (see above), seeking to consolidate, modernise and clarify core rights and remedies on goods, services, digital content and unfair terms and the new 'enhanced consumer measures', bringing more scope to combine preventive enforcement with ex post redress.

When it comes to enforcement policy in the UK a number of important general themes should be noted by way of conclusion. One might certainly point to a trend in the past 25 years (beginning with art 7 of the Unfair Terms Directive, and continuing with the Injunctions Directive) to broader powers for administrative bodies (CMA, FCA, trading standards authorities etc.), to take preventive action[122] against traders breaching consumer law. Before, so much was dependent on private law enforcement by individuals (preventive enforcement being so piecemeal), and it hardly needs to be said that this (at least the traditional court based private law enforcement that has traditionally been available) is extremely limited. One might point as well, to the enormous success of the Financial Ombudsman Service, as a high profile system, that routinely provides ex post redress to large numbers of consumers, and on high profile issues, e.g. mis-selling of payment protection insurance. Then, there is the new 'enhanced consumer measures', bringing more scope to combine preventive enforcement with ex post redress. Finally, there is the new ADR regime brought in following the ADR Directive. Whatever the above criticisms (in terms of the lack of a mandatory and binding approach for the Retail Ombudsman), it is yet to be seen whether, we nevertheless find that the practical consequences of the new regime are

[120]Terms of Reference and Membership Rules (https://www.theretailombudsman.org.uk/terms-of-reference-membership-rules/), 3.2.a.

[121]Ibid., 3.37 (in contrast to decisions of the Financial Ombudsman Service, which cannot be appealed to the courts by the business).

[122]This encompassing the spectrum from enforcement orders obtained in court, back through seeking assurances, negotiation, informing/educating).

that there is a significant increase in the number of problems being adequately resolved via ADR.

In the light of the recent decision to exit the EU, the so-called Brexit,[123] it is difficult to predict what changes government may decide to impose on the way consumer law, so influenced by the EU up to now, is enforced in the UK and develops in the future. We hope that all EU rules that have improved the position of consumers will continue to apply and that in future, the UK will continue to be inspired by positive EU law modifications.

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[123]For a discussion of the ways in which EU law has benefited UK consumers and the possible risks of Brexit, see House of Lords EU Justice Sub-Committee (2017) Brexit: Consumer Protection Rights https://www.parliament.uk/brexit-consumer-protection-rights and Willett (2018). The Possible Impact of Brexit on Consumer Protection Law—Written evidence (CPR0003) to House of Lords EU Justice Sub-Committee on Brexit: Consumer Protection Rights http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/brexit-consumer-protection-rights/written/70882.html

Compliance and Effectiveness of Consumer Law in Venezuela

José Ignacio Hernández G.

1 Introduction

In Venezuela, Consumer Law has been characterized by the recognition of special rights of consumers and users whose legal protection is mainly entrusted to the Administration.

In its beginnings, these rights were associated to the price control of goods and services. Therefore, for decades Consumer Law was focuses mainly on ensuring the access to goods and services subject to price control. This changed in 1974, when the first *Consumer Protection Law* was enacted. Since then and until 2004, special Laws acknowledged specific rights of consumers and users that were considered "*weaker parties*". Among other, those Laws set rights related to public services; information and advertising and contracts, specifically in adhesion contracts. Likewise, rights related to the price of goods and services were preserved.

The 1974 *Consumer Protection Law* marked a change in the compliance and effectiveness of the Consumer Law. Thus, consumers and users have been subject to Private Law, especially to Commercial and Civil Law. The base of that Civil Law system is the freedom of contract, including the freedom to acquire goods and services. However, during the past century relations between consumers and users on one hand and suppliers on the other were subject more frequently to a special administrative regulation. From then on, the compliance and effectiveness of the Consumer Law has been mainly a function of the Public Administration.

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In 2007 this system changed again. In the framework of the economic model qualified as "transition to socialism", preference was granted to the price control and to the regulation of the crimes associated to said control, such as speculation and hoarding. The selective price control—this is, the price control over specific goods and services identified by the Administration—was abandoned in order to adopt a centralized system—this is, the price control over all goods and service. Eventually, the socialist regulation repealed the Venezuelan Consumer.

Precisely, the purpose of this work is to present a general view of the compliance and effectiveness of the Consumer Law in Venezuela, following the evolution I just indicated. For this purpose, this article starts its *first* part with an analysis of the legal framework of consumer protection in Venezuela. There, I study the social-economic conditions of consumers; the origin and evolution of the Consumer Law; the mixed regimen of said Law; the influence in Venezuela of the International Consumer Law and the evolution of the consumer defense policies. The *second* part covers the analysis of the protection mechanisms of consumers and users in Venezuela, specifically studying six mechanisms of protection by the Public Administration; defense from the Private Law through the Courts; defense through *class actions*; defense through Criminal Law; defense through Ombudsman and the role played by the consumer associations. The article finishes with its *third* part, with a critical balance of the current status of the compliance and effectiveness of consumer law in Venezuela.

2 Legal Framework of Consumer Protection in Venezuela

2.1 Social Economic Conditions of Consumers in Venezuela: General Overview of the Country

The development and evolution of Consumer Law in Venezuela has been intensely influenced by the social and economic conditions of the country. Until the twentieth century, Venezuela was essentially a country with an agricultural economy, with scarce industrial and commercial development. The appearance of the oil industry at the beginning of the twentieth Century drastically changed the scene: in a very short time Venezuela became an oil-dependent economy. As a result, the country reached very important levels of social and economic development, but based on the dependence on the State as holder of the oil wealth.[1]

As a consequence of the above, the private sector of the economy has had a marginal role compared to the public sector. Additionally, given the dependence on oil rent, the import of goods and services was preferred over local production. However, this did not hinder a quick development of the private sector.

[1]This was particularly intense beginning 1975, when the State nationalized the industry and commerce of hydrocarbons. See: Rodríguez Sosa and Rodríguez Pardo (2013), p. 102.

The country has a population close to thirty million inhabitants,[2] with near eighty per cent (80%) of Venezuelans in the lowest social classes.[3] This has determined that except certain mass consumption products, the goods and services market is relatively small. Paradoxically, however, in the last years, Venezuela has maintained a high level of private consumption, which is equivalent to close to two thirds of the Gross Domestic Product (GDP).[4]

This paradox is a consequence of the distortions that oil gives to our economy and the set of controls that since 2006 formed a "socialist model" based on the central planning of the economy.[5] A very important component of this model has been the exchange control that during the times of high oil prices allowed the State to discretionally assign foreign currencies, lowering the prices of imported goods and services.[6] When oil prices started to go down in 2013 and the perverse consequences of the economic model were felt, consumers and users faced a new reality: an economic crisis marked by shortage, scarcity and inflation. Such is the current social economic context for Venezuelan Consumer Law.

2.2 *Origins and Evolution of Consumer Law in Venezuela*

The tradition of consumer protection in Venezuela has been associated with price controls implemented by the State. Since 1939, the Venezuelan State adopted an intense regulation of the economy, specifically through price controls and the control over economic crimes such as speculation and hoarding. That is the reason why consumer protection in Venezuela has been traditionally focused in a Public Law regulation with relevant dispositions of Criminal Law.[7] In 1974 the Venezuelan Consumer Law changed. In that year was enacted the *Consumer Protection Law* influenced by the Spanish Law. From a Public Law regulation based on price controls, the consumer protection evolved into a more complete framework. The *Consumer Protection Law* was the first law enacted in Venezuela to promote consumer protection through an administrative regulation based on several consumers rights.

However, the practical application of that Law was affected by exceptional economic measures that maintained a broad price control system. When those measures were lifted starting in 1989, a new *Consumer Protection Law* was enacted (1992). The new Law preserved the principles of the 1974 Law which was to

[2]See the summary of the 2011 Census at: www.ine.gov.ve.

[3]See generally: España (2015), p. 13.

[4]H García, Henckel, 'Es Venezuela una sociedad consumista', in runrun.es/la-economia/economia/28490/%C2%BFes-venezuela-una-sociedad-consumista-por-henkel-garcia.html.

[5]See generally: Casal and Suárez (2011), p. 177.

[6]Salmerón (2013), p. 87.

[7]Brewer-Carías (1980), p. 36.

develop a framework for the protection of the consumer under the new rules of the economic model, based on economic freedom and free competition. In 1995 that Law was reformed, in part to extend the protection to users, in the *Consumer and User Protection Law*.[8]

The Venezuelan Constitution, of 1999, reaffirmed the basic principles of the *Consumer and User Protection Law*. According to article 117 of the Constitution:

> All persons are entitled to have quality goods and services, as well as an adequate and not deceiving information on the contents and characteristics of the products and services they consume, to have freedom of choice and a fair and good treatment. The Law will set the necessary mechanisms to guarantee those rights, the quality control and the amount of goods and services, the procedures to defend the consumers, the redress of caused damages and the corresponding sanctions due to the infringement of these rights

That constitutional norm proclaims the ***consumers' sovereignty principle***, according to which the consumers are the ones that must decide what goods and services to acquire, which supposes the existence of companies that in effective competition conditions, offer such goods and services in the market. That is why the above mentioned Article 117 complements Article 113 of the Constitution, which brings forward the basis for free competition in Venezuela.[9]

In 2004, and pursuant to the new Constitution, a new *Consumer and User Protection Law,* was enacted. It incorporated different dispositions of the Argentinean Law. That is why it can be stated that the immediate background to the consumer protection in Venezuela comes from the Spanish and Argentinean Law.[10]

However, the Consumer Law underwent a drastic change as of 2006. That year, the Government decided to modify its economic policies, which began to focus on the construction of a model of *transition to socialism.* Under that socialist model, the center of attention was no longer the user and consumer protection, but the control over private companies, in order to assure that their activities were oriented to the socialist model. When trying to suppress the market economy institutions, that model influenced the contents of the Consumer Law[11] as follows.

In *first place,* in 2007 was enacted the *Special Law for the Popular Defense against Hoarding, Speculation, Boycott and any other behavior affecting the consumption of food or products subject to price control*.[12] The purpose of that Law was to broaden the control over the private enterprise through price control and regulation of different economic crimes. In *second place,* even though the 2007 Law was initially applied together with the 2004 *Consumer and User Protection Law,* both

[8]See generally: Salomón de Padrón (1988), p. 44. Even when the first Law to defend the consumer was issued in Venezuela in 1974, in 1947 was the *Law Against Hoarding and Speculation*, an in 1984 the *Law that Creates the National Commission of Costs, Price and Salaries*. See: García Soto (2012), p. 15. See also: Pinto (2012), p. 179.

[9]See: Hernández (2006), p. 27.

[10]Hernández (2004), p. 55.

[11]Morles (2007), p. 319.

[12]Hernández (2008a).

Laws were unified as the *Defense of Persons in the Access to Goods and Services Law,* of 2008,[13] that dramatically changed the tradition of Consumer Law in Venezuela. The new Law abandoned the concept of consumer and user in favor or the generic concept of "person". This emphasized that from the Law perspective, the State only guaranteed access to the goods and services regulated by the Administration, excluding any legal protection to the right of freedom of choice. Given the above, the consumer protection was limited to guarantee the compliance with the controls deriving from the socialist model.

In *third* place, and as a consequence of the relevance that the price control has for the socialist model, a Special Law of Price control, named *Fair Prices and Costs Law*, was enacted in 2011.[14] That Law was applied together with the 2008 Law, until it was issued in 2014 the *Fair Prices Organic Law* that repealed the substantive regulation of the Venezuelan Consumer Law. That way, and in *fourth place,* the *Fair Prices Organic Law*, reformed in 2015, kept the basic structure of the *Fair Prices and Costs Law* of 2011, but repealed, in whole, the *Defense of Persons in the Access to Goods and Services Law*, repealing the special regime for the consumer protection contained in said Law, that went back to 1974.

Therefore, as of 2014, it can be affirmed that Consumer Law disappeared in Venezuela as a special legal system. In fact, only two articles of the *Fair Prices Organic Law* enunciate in a disordered and incomplete manner, some rights of consumers and users. In summary, that is the sole special legal regime for consumer protection currently in force in Venezuela.[15]

According to Alfredo Morles Hernández, this change responds to the basis of the socialist model implemented in Venezuela since 2006.[16] Under this socialist model, the exchange of goods and services cannot be the consequence of the free market, but of the central planning of the Government, based on the price control and the concentration of goods and services offers in companies managed by the State.[17]

For that reason, since 2007 the legal regime of consumers in Venezuela varied significantly. It went from a special regime based in the defense of the rights of consumers and users to a centralized regime of price control based in the sovereignty of the planner. As a result of that change, the traditional content of the Consumer Law disappeared and only two imprecise and isolated norms remain in the *Fair Prices Organic Law* currently in force.

However, some specific consumer regulations remain in a scattered manner, such as special Laws in the banking, insurance and telecommunication sectors, among others, that define certain rights of the users. However, those special regimes lack a

[13]See generally: Arias et al. (2011).

[14]See Zubillaga (2012), p. 80.

[15]Article 10 regulates in a disordered manner some of the consumers and users rights, while Article 11 contains some general guarantee regulations.

[16]Morles (2015).

[17]See Hernández (2008d), p. 83.

general legal framework and are insufficient to properly cover the protection of consumers and users, as set in article 117 of the Constitution.

Another matter of relevance is Antitrust Law. Traditionally in Venezuela, the defense of competition and consumers protection had responded to coordinated policies. That is why in 1992, together with the reform of the *Consumer Protection Law,* the *Promotion and Protection of Free Competition Law,* the first antitrust Law was enacted in Venezuela. In that sense, the conclusion in Venezuela is that the ultimate purpose of the defense of competition is to protect the consumers and users. But that is not achieved directly regulating the relationship between them and the goods and services suppliers, but defining the rules that promote the effective competition in the market.[18]

The socialist model has also impacted the Competition Law. A new *Antitrust Law* was enacted in 2014, which although it maintains many of the principles of the 1992 Law, incorporates among the objectives of the competition policy, the objectives of the socialist model, based on the idea of the "socialist public order".[19] This confirms that under the socialist model, there are no institutions of the market economy and therefore, there is no need to promote consumer protection.

2.3 The Consumer's Defense Policy in Venezuela: Past, Present and Future

In Venezuela there is currently no formal consumer protection policy, partly as a consequence of the inexistence of any substantial regulation since the 2014 *Fair Prices Organic Law*. Prior to that, that is since 1939 up to the present date, it is possible to identify three broad phases of the public policies of consumer protection according to the Laws issued during that period and that were summarized in the previous section:

The *first* phase (1939–1974) corresponds to the regulation based on exchange controls, price controls and the regulation of economic crimes such as speculation. In this phase the main objective of the public policies was to guarantee access to certain goods and services and for such purpose a selective price control system was set which maintained the freedom of price for the goods and services that were not regulated.

The *second* phase (1974–2007) corresponds to the substantive regulation of the consumers protection. That regulation started from the principle according to which consumers and users are "weaker parties" that require a special protection, in areas such as adhesion contracts, advertising, promotions, product guaranty and consumers and users safety. That regime was implemented through norms of Administrative Law. As a result, Consumer Law has been regulated with more

[18]Hernández (2008c), p. 25.

[19]Mónaco (2015), p. 82.

preponderance by norms of Administrative Law rather than by norms of Private Law.

Thus, this second phase was influenced by the increase of the administrative intervention in the economy, partly as a consequence of the Venezuelan economy dependence on oil, which monopoly management was assumed by the State in 1974. As a consequence, the Administrative Law broadened its scope over the economy, thus reducing the scope of the Commercial Law.[20] This explains why the defense of the consumers and users has been a task of the Administrative Law more than of the Commercial Law.

The *third* and last phase (2007–2016) is characterized by the socialist model. According to that model, the offer of goods and services must be subordinated to the central planning of the Government outside the market economy. Additionally, said offer must be mainly in charge of State companies, especially in areas of social interest, such as food and medicine. Under this point of view, it is not necessary to guarantee the right of access and choice of goods and services, but simply the equal conditions of access to such goods and services.[21]

Under the socialist model, consumers and users became simple passive subjects of the goods and services offered by the Government. This can explain why in 2014 the Consumer Law in Venezuela was eliminated. Consumer Law is only justified in systems based on a market economy. Once the market economy is eliminated—as set by the socialist model—the defense of consumers and users stops being a relevant task.

3 General Framework for Enforcement and Effectiveness of Consumers Law

While it existed, the enforcement and effectiveness of Consumer Law in Venezuela was a duty of the Public Administration and Judicial Power.

Thus, from the *Consumer Protection Law* of 1974, consumer defense was assigned to the Public Administration, basically through administrative sanctions. That way, since 1974 the Law defined a group of rights of consumers and users with correlative duties by the suppliers. Failure to comply with those duties allowed the Administration to impose sanctions, typically, fines.

Together with those administrative means, consumers and users could address the Judicial Power, typically to file a suit against suppliers for damages. However, with the increased administrative intervention in the defense of consumers and users, this led to the Administration to be assigned duties are similar to those of a Judge, which

[20] Brewer-Carías (1978), p. 261.

[21] This model is contrary to the economy articles of Venezuelan Constitution, since that Constitution starts from the principle of the consumers' sovereignty, not from the principle of the sovereignty of the planner. See Brewer-Carías (2014), p. 95.

reduced the scope of judicial defense of consumers. This was the case especially in the defense of users in special areas, such as banks and insurance companies.

More recently and especially after the 1999 Constitution, another judicial mechanism to defend consumers and users arose: the so called "*action for the protection of diffuse and collective interests*", similar to the *class actions*. Through those actions consumers and users groups could file actions against suppliers for the infringement of their rights.

Together with those mechanisms, consumer protection was also a matter belonging to the Criminal Law. The scope of Criminal Law has recently increased, since administrative Laws that regulate consumer protection, more often, regulate a broad catalogue of crimes.

As will be detailed below, the enforcement of Consumer Law in Venezuela has taken several forms: (1) by the Public Administration; (2) by the Judicial Power; (3) through Criminal Law; (4) through class actions; (5) the defense of consumers right by the Ombudsman and (6) the protection of consumer rights by consumers and users associations.

3.1 The Enforcement of Consumer Law by the Public Administration

As we previously observed, as of 1974 consumer protection has been specifically a task of the Public Administration. At that point, Consumer Law was no longer a matter regulated exclusively by Private Law but rather a matter mainly regulated by Administrative Law. As a result, the defense of the consumers and users rights stopped being an exclusive matter of the Judicial Power, to become also a matter belonging to the Administration. Disputes usually resolved by the Judicial Power, were assigned to the Administration. In this way, the Venezuelan scholars considered that the Administration could exercise a "*jurisdictional function*" when resolving conflicts among consumers and users on one hand and the suppliers on the other.[22]

The most relevant aspects of consumer protection from within the Administrative Law regime will be analyzed in this section.

3.1.1 Public Administration in Charge of the Defense of Consumers and Users

Specialized administrative agencies were created to provide for the defense of consumers and users. The organization and competence of this model can be divided into three stages following the earlier historical classification:

[22]Rondón de Sansó (1990), p. 5.

From 1974 to 2007, the first administrative agency specialized in the defense of consumers and users was created.[23]

In 2007, the situation changed and the defense of consumers and users within the framework of price controls was entrusted not only to the Administration but also to instances of the "Popular Power".[24] The 2007 *Defense of Persons in the Access of Goods and Services Law*, whose objective was not the defense of the consumers and users rights but the guarantee of access to goods and services in the framework of the central planning, created a new administrative agency in charge of assuring said access, reducing the legal protection of other rights of consumers and users.[25]

Finally, since 2009 and to the present date, the duty of the Administration is focused on the supervision of price controls, and for this purpose created a special agency of price control, that works together with the consumer protection agency.[26] In 2014, however, the *Fair Prices Organic Law* repealed the *Defense of Persons in the Access of Goods and Services Law* and with it the consumer protection agency was suppressed. Therefore a new agency was created (the current Superintendence) mainly dedicated to supervise price control, with very marginal competences in matters of consumers and users defense.[27]

The functions of the Superintendence may be divided into three big groups: (1) inspections; (2) price control over goods and services and (3) the imposition of administrative sanctions and other measures, mainly for the violation of the price control regime. These duties correspond to the contents of the Law, since it eliminated the substantive content of the Consumer Law.

The Superintendence is thus divided into three Divisions, which organization also responds to the purpose of the Law. According to its Article 13, the Superintendence will have the Costs, Profits and Fair Prices Division in charge of price control; the Protection of the Socioeconomic Rights Division, in charge of the inspections and

[23]The Consumer Protection Law of 1974 created the *Superintendence of Consumer Protection*. From the *Consumer Protection Law* of 1992, it was decided to create autonomous institutes, as specialized administrative entities. This way, the 1992 Law created the *Institute for the Defense and Education of the Consumer*, which then was named *Institute for the Defense and Education of the Consumer and User in* the 1995 reform. That denomination remained until 2008.

[24]The Popular Power is the group of associations promoted by the National Government, which sole objective is to promote the socialist model. The *Special Law for Popular Defense against Hoarding, Speculation, Boycott and any other behavior affecting the consumption of food or products subject to price control* of 2007, created the "Committee of Social Controllership for Supply" as figures of the Popular Power, which purpose was to control the correct supply of goods and services.

[25]In 2008 was created the *Institute for the Defense of Persons in the Access to Goods and Services*.

[26]The *Costs and Fair Prices Law* created in 2011, the *National Superintendence of Costs and Prices* that works together with the *Institute for the Defense of Persons in the Access to Goods and Services*.

[27]The *Fair Prices Organic Law*, of 2014, created the *National Superintendence for the Defense of Social Economic Rights*.

sanctions, and the National Intendance for the Protection of the Workers Salary, that intends to promote workers control over the suppliers.[28]

Together with the above indicated regime, special Laws have created specific agencies for consumer protection. Such is the case, among others, of *National Telecommunications Commission (CONATEL)*; *Banking Sector Superintendence (SUDEBAN)*[29] and *Insurance Activity Superintendence (SUDEASEG)*.[30] These agencies are in charge of the consumer protection within such frameworks, related to basic rights, like the right to proper information; the protection of contractual rights, and the right to formulate claims before the supplier, among others.[31]

3.1.2 The Traditional Content of the Administrative Activity of Consumers and Users Defense

All the administrative agencies created since 1974 for the defense of consumers have developed an activity qualified as "administrative police", i.e., the activity according to which the right of freedom of enterprise of suppliers is limited to defend the rights of consumers and users.[32] Traditionally, said police activity has had four great subjects: (1) price control; (2) administrative controls over advertising and promotions; (3) control over contracts and (4) administrative sanctions. Other regulations can be found in the different laws enacted since 1974, but these are the four main goals of the administrative consumer protection in Venezuela.

However, since 2014, the administrative activity oriented to the supervision of the price control has prevailed, because at the present time the Consumer Law in Venezuela has been reduced to the supervision of the price controls under the framework of the socialist model.

Price Controls

As explained above, the Consumer Law, through regulations of Administrative Law, appeared in Venezuela within the framework of price controls of goods and services considered essential. Likewise, the administrative regulation over price controls has been associated with economic crimes such as hoarding and speculation.[33] Until 2011, price controls were based on distinguishing "*essential goods and services*" from the "*non-essential goods and services*". The first category of goods and services could be subject to price control, in which case, the Administration was in charge of guaranteeing access to those goods and services by the consumers and

[28]The creation of this Division is a consequence of one of the principles of the socialist model, which is the co-management, i.e., the participation of workers in the management of the business.

[29]Madrid (2011), p. 413.

[30]Madrid (2010), p. 99.

[31]See Hernández (2008b), p. 261.

[32]Brewer-Carías (1991), p. 51.

[33]García (2012).

users.[34] On the contrary, price freedom was the general rule in the non-essential goods and services, taking into consideration that the majority of the good and services were non-essential. Thus non-essential products were only regulated for information purpose, that is, the consumer and user right to be informed about the retail price.

Starting in 2011, that system was modified with the adoption of the centralized price control of all goods and services. This is the system currently in force and according to which all the goods and services are subject to price controls in two different grades: (1) the price unilaterally fixed by the Administration (the so called *fair price*) and (2) the price fixed by the importer or producer, but according to the regulation of the Administration (so called *maximum sale price*).[35]

The Administrative Controls Over Advertising and Promotions

Another matter traditionally regulated is the control over advertising and promotions. The purpose of that regulation is to protect consumers and users against advertising considered illegal, and especially against deceiving or false advertising.[36] According to that system, the Administration in charge of the defense of consumers and users may decide when advertising is false or deceiving and in consequence impose a sanction.[37] That attribution also corresponds to the administrative agency in charge of the competition defense, currently the *Antitrust Superintendence*. According to the 2014 *Antitrust Law*, illegal advertising may constitute an act of unfair competition, which may be known by the Administration within the framework of the corresponding sanctioning procedure.[38]

Control Over Adhesion Contracts

Another traditional component of the Consumer Law, according to Consumer Laws enacted since 1974, is the contractual protection of consumer and users, especially in adhesion contracts. In Venezuela, the adhesion contract is the contract where the clauses are drafted by the supplier and the consumer or user is not entitled to modify those clauses. Due to said condition, the consumer or user is deemed to be in a position of legal weakness that requires the administrative intervention in order to protect their rights.[39]

[34] Allan (1989), p. 37.

[35] Alfonso Paradisi (2014), p. 234.

[36] Hung Vaillant (1982), p. 11.

[37] When the special regime of consumer protection was repealed in 2014, it eliminated all the administrative regulation in matters of advertising. Only one regulation has been issued in promotions matters (Cfr.: regulation number N° 077/2014, published in the Official Gazette number 40.571, dated December 30, 2014).

[38] According to the Antitrust Law, the party affected by an act of unfair competition (including illicit advertising) may opt to file a claim in the Judicial Power or file a petition in the Antitrust Superintendence, in order to start the administrative procedure in which context it may (1) declare the infringement of the freedom of competition; (2) order reparatory measures and (3) order the imposition of the corresponding fine. See generally: Hernández (2016).

[39] See generally: Kummerow (1981), p. 17.

The increase of the administrative intervention in the economy during the past century led to a progressive reduction of the autonomy of the contracting parties will. As a consequence thereof, the concept of "*public order*" as a limit to said autonomy, according to the Civil Code, has broadened, in order to encompass the various administrative limitations to the contractual freedom.[40]

That administrative intervention has been particularly intense in the area of adhesion contracts,[41] to the degree where the Law tends to give the Administration the power to annul clauses of adhesion contracts.[42] Special Laws, such as in the case of bank regulations, have notably increased the administrative intervention over contracts.[43]

The Administrative Sanctions

The administrative regulation of the Consumer Law translated into a broad catalogue of administrative sanctions. The Administration, according to said catalogue may declare the infringement of the prohibitions set in the Law and impose administrative sanctions, typically fines for the violation of those prohibitions.[44]

Since 2007, the administrative Laws have aggravated the sanctions that the Administration may impose. That way, the Law has acknowledged that the Administration may decide the expropriation of the companies that have committed administrative crimes. Also the Administration has been granted broad powers to adopt precautionary measures, such as the intervention of the companies or the occupation of goods. All this violates the due process right.[45]

3.2 The Enforcement of the Consumer Law by the Judicial Power. The Progressive Broadening of the Administration Power

As observed, the natural scope of the Consumer Law in Venezuela should be the Private Law, and specially, the Commercial Law. In fact, the legal relations among consumers, users and suppliers, are typically commercial relations. In Venezuela, contractual relations of suppliers are subject to two kinds of sources of Private Law:

[40]Mélich-Orsini (2012), p. 761. See also: Adrián (2004), p. 35.

[41]Morles (2008), p. 131.

[42]The Constitutional Chamber of the Supreme Court of Justice has endorsed the competence of the Administration to annul clauses of adhesion contracts. Cfr.: decision dated July 23, 2009 in nullity case of the *Law for the Consumer and User Protection.*

[43]Morles (2016), p. 385.

[44]Hernández (2005), p. 9.

[45]Anzola (2008), p. 271.

Commercial Law, as a special system applicable to the merchant and Civil Law, as general or common system.[46]

For that reason, the controversies among consumers, users suppliers should be controversies decided by the Judicial Power or if applicable, by private arbitration. In fact, every dispute arising from a contractual relation between consumers and users on one hand and the supplier on the other, must be decided by the Judicial Power, specifically, by the Courts with competence in Mercantile Law. Specially, the interpretation and validity of the agreement and the decision on the compliance and noncompliance of the contract are matters to be known by the Judge.[47] Likewise, the Judge must determine the civil liability of the supplier for torts, as well as the liability arising from the noncompliance of the contract.[48]

Also, the disputes among consumers and users, on one hand, and suppliers on the other, may be solved through arbitration. The arbitration is not a usual mechanism in Venezuela to solve controversies, especially in consumers' matters, even though the Commercial Arbitration Law of 1998 has been enacted in this matter.[49]

Now, the increase of the administrative intervention in the Consumer Law has not only implied the substantive reduction of the Private Law, but also the progressive reduction of controversies that can be subject to the Judicial Power or private arbitration. That way, since 1974, the Law has given the Administration the competence to solve those controversies, through two kinds of administrative measures that must be differentiated.

The *first* measure is the acknowledgement of the Administration competence to solve disputes among consumers and suppliers in case of violation of the duties set in the administrative regulation. In such cases, the Venezuelan doctrine has concluded that the Administration "acts as a judge", exercising the jurisdictional function. The consequence thereof is that, as a rule, those disputes are excluded from the Judicial Power, or at least, a "prior stage" exists in favor of the Administration.[50]

The *second* measure is the acknowledgement of the arbitration and conciliation duties by the Administration. This competence has been common in the Administrative Laws of consumer protection, and also in the special regulations, for example, in the case of insurance.[51] The consequence thereof is that the private arbitration has lost space regarding the arbitration managed by the Administration.

[46]Adrián (2004).

[47]Mélich-Orsini (2001).

[48]Except for a very general reference in the 2004 Law, civil liability of the supplier has not been subject to special rules. On this matter see Annicchiarico (2010), p. 129; Rodner (2002), p. 410.

[49]Private arbitration in consumption matters has been reduced due to the principle according to which, the consumers and users' rights have a public order nature. See generally Guerra and Escovar (2013), p. 123.

[50]This means that the dispute cannot be subject to the Judge, at least not before filing the controversy with the Administration.

[51]Acedo (1998), p. 13.

Both administrative measures have been traditionally present in Laws enacted since 1974 and they remain in force in the 2014 Law.[52] As a result thereof, the compliance with the Consumer Law in Venezuela has been mainly a duty of the Administration.

The accelerated institutional changes developed since 2006, together with the disappearance of the substantive content of the Consumer Law, has notably affected these administrative mechanisms for the enforcement of the Consumer Law. There are no existing official statistics on the ruled arbitration or sanctioning procedures.

3.3 Compliance with the Consumer Law Through Criminal Law

Traditionally, the Consumer Law has been part of the Criminal Law in the sense that the Law defines specific economic crimes on matters of consumer protection. This has been common regarding illegal price control activities such as hoarding, speculation or usury. This reality is also acknowledged by the Constitution when Article 114 sets forth that "*the economic crime, speculation, hoarding, usury, cartelization and other related crimes shall be severely punished pursuant to the Law*".[53]

Since 2007, the contents of Criminal Law applicable to the consumer protection increased significantly, again as a result of price control. The 2008 *Special Law for Popular Defense against Hoarding, Speculation, Boycott and any other behavior affecting the consumption of food or products subject to price control* was therefore mainly a criminal Law. This same tendency is followed by the *Fair Prices Organic Law* in force.[54]

Within the framework of the *Fai Prices Organic Law* in force, there are two changes that should be analyzed:

The *first* is related to the expansion of the criminal offenses: behaviors which were traditionally deemed as administrative infringements are now criminal offenses.[55]

[52]The *Fair Prices Organic Law*, in its article 10 acknowledges the competence of the Superintendence to decide the sanctioning procedures, which tend to be started upon the request of the consumer and user according to its article 77. Even though the current Law—as opposed to the previous Laws enacted in matters of consumers protection—does not indicate anything on the arbitration duty of the Superintendence, it does acknowledge the possibility to submit before the Administration the conciliation and amicable resolutions of controversies that may arise (article 10).

[53]Bentata (1995), p. 369; Bello (2008), p. 281.

[54]See A Santacruz, Andrea 'La responsabilidad penal en la Ley de Costos y Precios Justos', in *Ley de Costos y Precios Justos* 233.

[55]For example, the violation of the administrative system applicable to the transportation of goods may give rise to imprisonment from fourteen (14) to eighteen (18) years according to Article 57 of the *Fair Prices Organic Law*.

The *second* is related to the broad definition of crimes based on the violation of the "socialist public order". The application of Criminal Law regarding these crimes is made regardless of the guarantees inherent to the criminal procedure—such as the presumption of innocence—upon considering that punishments must be applied to control the "abusive" behaviors of the private company.[56]

Under this perspective, Criminal Law is actually not a mechanism for compliance with the Consumer Law. Therefore such Criminal Law is not based on the protection of the subjective rights of consumers and users but on the application of punishments as a mechanism for controlling behaviors which are deemed as contrary to the "socialist public order".

3.4 Compliance with the Consumer Law Through Class Actions

Specifically as of the Constitution of 1999, another mechanism was implemented for purposes of compliance with the Consumer Law such as the "*action for the protection of diffuse and collective interests*" which is a type of class action. This action allows defending the rights of a collectivity, such consumers and users' rights. As a result, consumers and users whose rights have been violated may bring a class action seeking the protection of the entire group of affected consumers.

However, this action has been denaturalized by virtue of the jurisprudence of the Constitutional Chamber of the Supreme Court of Justice. Despite of the fact that the duty of the Constitutional Chamber is to exercise the judicial control of the Constitution, the Chamber has assumed the competence to hear any action for the protection of diffuse and collective interests of "*national interest*".[57] This has led the Constitutional Chamber to assume competence to hear several actions filed by consumers and users.

As a consequence, the Constitutional Chamber of the Supreme Court of Justice sets limitations to the activity of private companies oriented towards promoting the socialist model. In this sense, the most relevant decision in this sense is the judgment N° 84/2002 dated 24 January. There, the Constitutional Chamber ruled on an action for the protection of diffuse and collective interests filed by an association of users against banking institutions and regulatory authorities for alleged irregularities committed regarding loans for the acquisitions of housing and vehicles. However, the decision issued by the Constitutional Chamber in order to decide the action

[56]The best example is the crime of "*destabilization of the economy*" defined by Article 57 of the *Fair Prices Organic Law* which applies in the event of seeking "*the destabilization of the economy; alteration of peace*" or in the event of attempting "*against the security of the Nation*". The use of the Criminal Law as a coercion mechanism regardless of the basic criminal guarantees, as a sort of "Criminal Law of the Enemy", has extended to other areas such as the Criminal Tax Law. See Weffe (2014), p. 345.

[57]Badell Madrid (2013), p. 13.

considered that the private company could not act autonomously in areas of social interest since it should always be subordinated to the objectives imposed by the State.[58]

As of such date, few controversies have been solved through this type of actions. The Constitutional Chamber has ruled on controversies related to the electrical[59] and credit card[60] sectors. Moreover, the Constitutional Chamber is currently hearing actions related to the telecommunications sector[61]; tobacco products[62] and medicines.[63] It is really a very limited number of cases.[64] As seen, those in which decisions have been already issued are based on a clearly biased point of view that diminishes the scope of the private business autonomy with no relevant considerations regarding the subjective rights or consumers and users.

3.5 The Ombudsman's Office

The Ombudsman's Office, pursuant to Article 280 of the Constitution, is responsible for "*the promotion, defense and vigilance of the rights and guarantees provided for in the Constitution and international treaties on human rights, in addition to the legitimate, collective and diffuse interests of citizens*". In the broadest sense, such role includes the defense of the rights of consumers and users pursuant to the provisions of Article 117 of the Constitution.

In this sense, the Constitution emphasises the defense of the rights of users of public services, including diffuse and collective rights. For such purposes, the Ombudsman's Office is responsible for the defense of the rights of users affected by "*the arbitrariness, power deviations and errors*" occurring in the rendering of public services. However, that Office had not developed a strong defense of consumers and users rights. This may be a consequence of the lack of autonomy of that Office, generally subordinated to the interest of the National Government.[65]

[58]See Madrid (2004), p. 757.

[59]Decision N° 1042/2004, dated May 31st.

[60]Decision N° 1419/2007, dated July 10th.

[61]Decision N° 1295/2008, dated August 13th.

[62]Decision N° 1587/2008, dated October 21st.

[63]Decision N° 382/2009, dated April 2nd.

[64]I have accounted for a total of 12 actions for the protection of diffuse and collective interests filed in defense of consumers and users since 2002. Prior to such date, and especially before the 1999 Constitution, there was no specific regulation for this action.

[65]See generally Briceño (2000), p. 57.

3.6 The Role of Consumer and User Associations

The Laws issued on matters related to the defense of consumers and users acknowledged *consumer and user associations* as organizations responsible for the defense and promotion of the rights of consumers and users.[66] However, after the changes made to the regulations as of 2007, such associations were no longer taken into consideration by legal provisions, such as in the *Fair Prices Organic Law* currently in force.[67]

This has been no impediment whatsoever for the associations established under previous laws to maintain their legal status and carrying on with their activities. This is the specific case of the *National Alliance of Users and Consumers* (ANAUCO). Despite of the regulatory framework adverse to the defense of consumers, ANAUCO has maintained an intense activity which is mainly oriented towards the defense of Article 117 of the Constitution within the framework of the socialist model.[68]

4 Final Considerations on the Enforcement and Effectiveness of the Consumer Law in Venezuela

The analysis made herein leads me to conclude that the enforcement and effectiveness of Consumer Law in Venezuela is highly disappointing. In this sense, it is our opinion that the conditions affecting such enforcement and effectiveness are:

First of all, enforcement and effectiveness of the Consumer Law in Venezuela have been lessened as a result of excessive administrative intervention. As previously explained, the constitutional framework within which the Consumer Law must develop should be based on the right of consumers and users to the free access and selection of goods and services. This requires that the allocation of goods and services must derive from the free gathering of companies in conditions of effective competition. The above is not in opposition to the administrative regulation of such free exchange. However, such regulation cannot denature the essence of free exchange, based on the private autonomy of suppliers to offer goods and services, and the right of consumers to have access and select those goods and services of their choice.

[66]Pursuant to Articles 72 and 73 of the 2004 *Protection of Consumers and Users Law*, these associations represent consumers and users for promoting the defense of interests; the protection of their information and promoting their rights in general. Generally see: Guerrero-Roca (2005), p. 287.

[67]Some special laws regulate consumer and user associations, such as the "water technical committees" ("*mesas técnicas de agua*") governed by the *Rendering of Potable Water and Sanitation Services Organic Law*.

[68]See the website of ANAUCO: www.lavozdelconsumidor.com.

However, the economic model in Venezuela, influenced by its oil dependency, has turned the Public Administration into the major figure in the economy. Therefore, the Consumer Law has been translated into strong administrative limitations to the exercise of economic freedom which are based on considering consumers and users as the "weaker party".

This consumer defense system based on the administrative regulation of the economy was therefore not oriented towards the promotion of conditions for the free exchange of goods and services under conditions of effective competition but, instead, towards the restriction of such exchange, especially through price controls. This led into a wrong extension of the Administrative Law to areas which should have remained governed by Private law and Commercial Law, all of which affected the essence of the system for the protection of consumers and users which should be, as already said, the right to free access and selection of goods and services.

In the *second* place, the enforcement and effectiveness of Consumer Law have been affected by the practical elimination of the substantive regulation for consumer protection, which has been replaced by the regulation of the centralized price control system within the framework of the socialist model. This model tends to the practical elimination of the free exchange of goods and services.

As a result, there is currently no Consumer Law in Venezuela, i.e. there is no set of specific rules that protect the right to access and selection of goods and services. On the contrary, the administrative regulation is only focused on limiting the supply of goods and services within the context of a centralized price control system.

In order to overcome this precarious situation it is necessary to rebuild the Consumer Law in Venezuela. We must point out that it is not only about the mere repealing of the Laws that set forth the centralized price control system in order to go back to the legislation applicable until 2004, since, as seen, that legislation was questionable as well. Our proposal is rather to reestablish a new Consumer Law based on four premises briefly described below:

In the *first* place, the basis for the Consumer Law should be the freedom of supply of goods and services, on one hand, and the right to the free selection and access to goods and services, on the other hand. This requires therefore that the exercise of such freedoms derives from contracts governed by Private Law which conflicts must be solved by the Judicial Power or by means of private arbitration. For purposes of enabling the access of consumers and users to these conflict resolution mechanisms, simple proceedings at reasonable costs should be established.

In the *second* place, the Consumer Law should be subject to the administrative intervention to regulate the exercise of these freedoms. However, such intervention must be based on principles of less intervention and proportionality. Also, that regulation must be justified for economic reasons, such as, for example, information asymmetries. As a result, it cannot be an administrative intervention that replaces the freedom to access and selection of consumers and users but, instead, an intervention that guarantees the effective exercise of such freedom.

In this context and, in the *third* place, it is necessary to give up the centralized price control system for a system based on price freedom. I must point out that this does not oppose the administrative intervention over such freedom, as long as such

intervention is based on principles of less intervention and proportionality and responds to economic reasons. Such as the case, specifically, of the administrative intervention for the protection of competition which must be conceived as a guarantee for consumer protection.

Finally, and in the *fourth* place, the duties of the Public Administration responsible for the defense of consumers and users must be circumscribed to the implementation of specific restrictions on the suppliers of goods and services, expressly excluding the competence of the Administration for resolving conflicts on matters of consumption, which must be reserved to the Judicial Power or private arbitration.

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