

EX OFFICIO APPLICATION OF EU CONSUMER LAW IN THE ENFORCEMENT OF THE ESCP JUDGMENTS*

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ABSTRACT: The main aim of the European Small Claims Procedure (ESCP) is to simplify citizens' access to justice by accelerating adjudication in small value disputes in cross-border cases, decreasing the costs of the proceedings and simplifying the recognition and enforcement of ESCP judgements rendered in another Member State. Therefore, the ESCP is organised as a summary and formal procedure. In ESCP, national courts are bound to respect and promote fundamental rights and principles recognised by the Charter of Fundamental Rights of the European Union, including the right to a fair trial and the principle of an adversarial process. At the same time, it is particularly important that in the ESCP, the principle of effectiveness and effective judicial protection is respected. In their numerous judgements, the European Court of Justice, emphasises these very principles as being crucial for effective EU law enforcement, particularly in the context of consumer legal disputes where substantive and/or procedural law of the Union is applicable. The ECJ's interpretation has often been that, because of effective protection of consumers, national courts must, under particular preconditions, ex officio apply the consumer law of the EU. The ECJ has defined a whole series of procedural rules to be complied with when applying EU consumer law ex officio. However, a question arises whether, due to specific procedural rules governing the ESCP, it is possible that national courts, when enforcing ESCP judgments, ex officio apply the EU consumer law. In the article, various aspects of ex officio application of EU consumer law in the ESCP are considered, particularly in the context of the recent ECJ case law to ex officio application of EU consumer law in enforcement procedures. The main aim of the article is to analyse specific measures by which the European standards of effective court protection of EU consumer rights in the ESCP enforcement procedures can be ensured.

Keywords: *European Small Claims Procedure, EU consumer law, ex officio application of EU law, enforcement of ESCO judgements.*

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1. INTRODUCTION

Effective private enforcement of EU consumer law has for decades been one of the biggest challenges for the European legislator. By private enforcement of EU consumer law, along with a parallel protection of individual subjective consumer rights recognized by the EU law, many of its public goals have been achieved. They are of outmost importance for its economic and social order, the area of freedom, security and justice, for both internal and digital markets, sustainable development, competitive social market economy, social justice, *et al.* Therefore, legal instruments, the concepts and methods of importance for private enforcement of EU consumer law have been simultaneously developing at several levels and, together with the public enforcement of EU consumer law, they significantly contribute to the accomplishment of the Union's goals¹. The European legislator is continuously enhancing consumer protection by modernising the substantial consumer contract law. This trend is nowadays particularly obvious because of the development of the digital market which requires a different approach to the protection of consumer rights by recognising the new subjective consumer rights, as well as the new legal remedies for their protection particularly in cross-border cases. Proper functioning of the digital market requires maximal harmonisation and even unification of all areas of consumer contract law. This is why many consumer directives have already been considerably revised, often also replaced by more modern legislative measures. In addition, various optional instruments are adopted at the European level regulating various EU civil procedures of importance for effective judicial cooperation in civil matters. These optional instruments, in the form of regulations, regulate specific civil proceedings where the procedure is simplified, comprehensive, formal and written. Their main goal is to ensure effective access to justice, to accelerate the resolution of disputes in cross-border cases and to make provisions for automatic mutual recognition and enforcement of judgments between Member States. Such optional instruments may significantly contribute to efficient private enforcement of consumer rights recognised by the EU law when it comes to cross-border cases. Lastly, an important trend in the improvement of private enforcement of EU consumer rights also includes the development of the case law of the European Court of Justice (hereinafter: ECJ) in the area of the consumer contract law and the EU civil procedure law. In its decisions, the ECJ has defined numerous legal standards of the protection of individual consumer rights which, based

¹ For more see Streatmans, G., Vereecken, J. (2024). Towards a New Balance between Private and Public Enforcement of EU Consumer Law, *European Review of Private Law/ERPL*, Vol. 32, Issue 1, 41-80. <https://doi.org/10.54648/erpl2024005>.

on the principle of sincere cooperation², must be acknowledged by national courts. They are, as a rule, very high and demanding standards of protection mostly based on the principle of effective legal protection of EU consumer rights (principle of effectiveness) and the protection of the fundamental right to a fair trial and an effective remedy. Their acknowledgement by national courts, regardless of whether they act on the basis of national procedural rules or the European procedural rules laid down in optional instruments, requires a different approach to the interpretation and application of procedural rules. The ECJ's interpretation has often been that, because of effective protection of consumers, national courts must, under particular preconditions, *ex officio* apply the EU consumer law. To safeguard proper protection of consumer rights, the courts must often assume an active role in consumer disputes.

Positive effects of private enforcement of EU consumer rights can only be achieved by a harmonised and coordinated application of all EU instruments, concepts, principles and legal standards of significance for the protection of consumer rights. In practice, however, some problems may arise because of different methods and principles on which such European instruments are based. It can happen that a parallel application of several legal instruments does not result in effective EU consumer rights' protection. Therefore, a specific question arises whether in some EU civil proceedings based on formal, summary or urgent procedures, all standards of the protection of EU consumer rights ensuing from consumer directives and the ECJ case law can really be achieved, and in particular the ECJ's interpretations of the *ex officio* application of EU consumer law.

In a specific way, the problem of achieving high standards of the protection of EU consumer rights also arises in the European Small Claim Procedure (hereinafter: the ESCP) provided for in Regulation (EC) No. 861/2007 establishing the European Small Claims Procedure (hereinafter: the ESCP Regulation)³. The ESCP is a specific EU civil procedure applied in cross-border cases in civil and commercial matters where the value of claims does not exceed 5,000 Euro⁴. The ESCP is organised as a summary, written and formal adversarial procedure. Nevertheless, in the ESCP, all standards of the protection of EU consumer rights must be met. It is uncertain, however, if this is always possible because of the specificities of the ESCP and because of specific rules governing the national courts' acting when ruling on small claims and enforcing their ESCP judgments. It is particularly questionable whether there is a possibility, and to what extent, that the courts, when deciding in the ESCP, play an active role in *ex officio* application of the EU law in accordance with the ECJ's interpretation.

² Art. 4 (3), Treaty on the Functioning of the European Union.

³ Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure (*OJ L 199, 31/7/2007, pp. 1–22*), current consolidated version published at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02007R0861-20170714> (visited: 9/5/2024).

⁴ Art. 2/1, ESCP Regulation.

In this article, various aspects of *ex officio* application of EU consumer law in the ESCP are considered, particularly in the context of the recent ECJ case law on *ex officio* application of EU consumer law. The main aim of the article is to analyse how the current organisation of the ESCP impacts the protection of consumer rights. First, the goals and characteristics of the ESCP as a comprehensive adversarial procedure are analysed, and in particular the rules of the ESCP Regulation laying down when and for what reasons the courts may act *ex officio* in such proceedings. In addition, the main points of the consumer *ex officio* doctrine are presented, as well as the reasons for *ex officio* application of the EU consumer law in the ESCP. In the third part of the article, the author considers whether it is possible, due to the valid provisions of the ESCP Regulation, to ensure also in the ESCP all the prerequisites for *ex officio* application of the EU consumer law in accordance with the ECJ' case law. In the conclusion, the author brings some proposals for the improvement of the ESCP by way of specific measures for the simplification and digitalisation of the ESCP to achieve the existing European standards of effective judicial protection of EU consumer rights based on the consumer *ex officio* doctrine.

2. GOALS AND CHARACTERISTICS OF THE ESCP

The main goals of the ESCP are expressly set forth in the Regulation. They are the following: simplification and acceleration of the settlement of cross-border litigation dealing with small claims, decreasing the costs of the proceedings, promoting fundamental rights, simplifying the recognition and enforcement of ESCP judgments by the principle of automatic mutual recognition, eliminating obstacles to the good functioning of civil proceedings and improving access to justice⁵. These goals also determine the main principles on which the ESCP is based, such as the principle of simplicity, speed and proportionality⁶, the principle of an adversarial procedure and a fair trial⁷, the principle of applicable procedural law of the Member State in which the procedure is conducted⁸, the principle of enforceability notwithstanding any possible appeal⁹, the review of the ESCP judgment only in exceptional cases,¹⁰ the principle of automatic recognition and enforcement¹¹ and no possibility of opposing recognition¹².

At the same time, the ESCP Regulation is considered as the optional instrument existing in parallel with civil procedures or small claim procedures existing under the laws of the Member States. It is an alternative to national

⁵ Rec. 7, 8, 9, ESCP Regulation; Art. 1/1, ESCP Regulation.

⁶ Rec. 7, ESCP Regulation.

⁷ Rec. 8, ESCP Regulation.

⁸ Art. 19, ESCP Regulation.

⁹ Rec. 25; Art. 15, ESCP Regulation.

¹⁰ Art. 18, ESCP Regulation.

¹¹ Rec. 30; Art. 20, ESCP Regulation.

¹² Art. 20, ESCP Regulation.

small claim procedures¹³. If the prerequisites regulated by the ESCP Regulation are fulfilled (the claim does not exceed 5,000 Euro, the cross-border case involves a matter within the scope of application¹⁴), the claimants may opt for either their national procedures or for the ESCP. The initiation of the ESCP solely depends on the decision of the claimant¹⁵, or on his/her assessment of the expediency and usefulness of the European civil proceedings for the success of the claim. If the option is the ESCP, the defendant has no legal remedies to oppose its institution. The ESCP Regulation, as an optional instrument, may apply to all civil and commercial disputes with a value under 5,000 Euro. The same procedural rules imposed on the parties, such as the filing of the claim form, taking evidence, deciding on the claim, remedies for challenging the judgment, as well as the recognition and enforcement, apply to any small claims. There are no differences in the procedure if civil, commercial or consumer disputes are involved, or whether the protection of subjective rights recognised by the law of the Union or by national law is requested. The court's acting is not differently regulated depending on the capacity of the parties in the ESCP (either consumers or traders). It is obvious that the focus of the European legislator, when drafting the ESCP Regulation, has been to lay down separate procedural rules for small claims and not to create a different procedural position for particular categories of parties (e.g. consumers) aimed at enhancing the protection of their subjective rights. If during the ESCP the consumer, as a party to the dispute, will be treated differently depends, in the first place, on the applicable procedural rules of the Member State in which the procedure is conducted¹⁶.

The fulfilment of the main goals and principles of the ESCP is safeguarded by several important principles: the ESCP is a written, formal and a summary/comprehensive procedure. Written procedure¹⁷ means that standard forms are filled in by claimants, defendants and courts. The application of the prescribed forms is mandatory¹⁸. The procedure is initiated by filling in a standard claim form and lodging it with the competent court. An answer to the claim is filed in a standard answer form. The court's request for the completion or rectification of the claim is serviced on the claimant in a standard form¹⁹. The contents of all forms (claim forms, answer forms, the court's request for completion and/or rectification of the claim, certificates of judgment) are prescribed in separate Annexes to the Regulation²⁰. The parties and the court may not in any way alter their contents. The communication between the parties and the court is

¹³ Art. 1 (2), ESCP Regulation.

¹⁴ Rec. 8; Arts 2, 3, ESCP Regulation.

¹⁵ See Garber, Th., (2020) *Kommentar EuGFVO*, p. 1306 in Geimer, R., Schütze, R.A. (Hrsg), *Europäisches Zivilverfahrensrecht*, München, 2020, 4. Aufl., C.H.Beck Verlag, pp. 1301-1387.

¹⁶ Art. 19, ESCP Regulation.

¹⁷ Art. 5/1, ESCP Regulation.

¹⁸ See Schlosser, P.F., (2021) *Kommentar EuGFVO*, pp 431,432 in Schlosser, P.F., Hess, B., *EU-Zivilprozessrecht*, München, 2021, 5. Aufl., C.H. Beck Verlag, pp. 421-460.

¹⁹ Art. 4 (1), (4); Art. 5 (2), ESCP Regulation.

²⁰ See Annexes I, II, III, IV to ESCP Regulation.

exchanged solely in writing whereby the content is determined by a particular standard form. Only exceptionally, the court may order oral hearing when it is not possible to render a judgment on the basis of written evidence, or if a party so requests. However, even when a party requests oral hearing, the court may refuse such a request if it assesses that oral hearing, with regard to the circumstances of the case, is not necessary for the fair conduct of the proceedings²¹.

The summary/comprehensive procedure is ensured by a whole series of rules. The ESCP regulation sets forth relatively short time limits (14 or 30 days) for the service of documents, submission of the responses, delivery of judgments, oral hearings or the application for a review of judgments²². Separate rules on the enforceability of judgments and their recognition and enforcement in another Member State significantly contribute to the speed of the procedure. It is expressly laid down that any possible appeal²³ does not postpone the enforceability of the judgment²⁴. Possible review of the judgment is allowed only in exceptional cases, i.e. only in the cases where the defendant, without his/her fault, was prevented from contesting the claim²⁵. Finally, a judgment will be recognised and enforced in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition²⁶. Consequently, the reasons for the refusal of enforcement are very limited.²⁷ Any review of the substance of the judgment in the Member State of enforcement is also excluded²⁸, even for the reason of the protection of public order²⁹.

Very strict rules on the formal, written and comprehensive ESCP procedure significantly determine the position and the rights and obligations of the parties to the proceedings. There is an important rule that together with the standard claim form, the claimant does not need to submit any documents/evidence to support the claim. It is sufficient to provide, in the claim form, a description of evidence supporting the claim. Documents are enclosed only where it is appropriate³⁰. There is also a possibility for their subsequent sub-

²¹ Art. 5 (1a), Art. 8, ESCP Regulation.

²² Arts 5 (2-7), 7, 18 (2), ESCP Regulation.

Time limits may be extended only in exceptional circumstances if it is necessary to safeguard the rights of the parties. See Art. 14 (2), ESCP Regulation.

²³ Availability of the appeal depends only on national procedural laws of Member States. See Art. 17, ESCP Regulation.

²⁴ Art. 15, ESCP Regulation.

²⁵ Art. 18, ESCP Regulation.

It is the European autonomous non-suspensive legal remedy against the the ESCP Judgment expressly provided for in the ESCP Regulation. See Varga, I. (2015) *Kommentar EG-BagatellVO*, p. 485 in Raucher, T. (Hrsg) *Europäisches Zivilprozess-und Kollisionsrecht EUZPR/EuIPR*, Kommentar, Band II, Köln, 2015, 4. Aufl., Verlag Dr Otto Schmidt KG, pp. 403-551; Garber (2020), p. 1374.

²⁶ Art. 20 (1), ESCP Regulation.

²⁷ Art. 22 (1), ESCP Regulation.

²⁸ Art. 22 (2), ESCP Regulation.

²⁹ See Schlosser (2021), p. 427; Garber (2020), pp. 1380, 1381.

³⁰ Art. 4 (1), ESCP Regulation, point 8, Details of Claim in Form A-Claim Form, possible subsequent service of documents depends on how the procedure of taking evidence takes place. See Art. 9 of the ESCP Regulation.

mission. As a rule, it depends on the claimant whether he/she will submit all relevant documents when submitting the prescribed claim form. The defendant also receives only the claim form to be able to respond. The supporting documents are serviced on the defendant only if they had initially been enclosed in the claim form by the claimant, or where it is applicable³¹. If no documentation is enclosed, the defendant's answer to the claim may only be based on the data given by the claimant in the claim form. Neither party is requested to make any legal assessment of the claim³². The court decides on the legal basis and foundedness of the claim based on the applicable national law. The parties' right to seek oral hearing is very limited. It is allowed only if the court assesses that, based on the circumstances of the case, oral hearing is necessary for the fair conduct of the proceedings. The refusal of the request for oral hearing cannot be separately contested but only within the challenge of the judgment by appeal if such an appeal is allowed or possible under the procedural law of the Member State³³. Indeed, the possibilities of the parties to challenge the judgment (if they even exist), are determined only by the national law of the Member State in which the procedure is conducted. The defendant's possibilities to apply for a review of the judgment are also very limited. This right may only be exercised by the defendant who did not enter appearance because the claim form had not been serviced on him/her, or because he/she was not summoned to oral hearing or was prevented from contesting the claim by reason of *force majeure*, or due to some extraordinary circumstances without any fault on his/her part. However, the defendant will not be able to seek review of the judgment if he/she had failed to challenge the judgment when it was possible for him/her to do so (if the defendant failed to lodge an appeal against the judgment in accordance with the applicable procedural law of the relevant Member State)³⁴. As regards the procedure of recognition and enforcement, there is no possibility for defendants to oppose the recognition³⁵. The only possibility is to seek stay or limitation of enforcement if the party has challenged the judgment by appeal, or has made an application for review of the judgment in some exceptional cases³⁶. In brief, the legal position of the parties, and especially defendants, although an adversarial procedure is involved, are significantly limited both in terms of the content and the form of answers to claims and the challenge of judgments and their enforcement.

The goals and characteristics of the ESCP determine the specific and active role of the court during the preliminary control of the claim form, when deciding on the parties' applications, when taking evidence or when deciding on the foundedness of the claim. In the process of deciding on the ESCP

³¹ Art. 5 (2), ESCP Regulation.

³² Art. 12 (1), ESCP Regulation.

³³ Art. 5 (1a), Art. 17, ESCP Regulation.

³⁴ Art. 18 (1), ESCP Regulation.

³⁵ Art. 20, ESCP Regulation.

³⁶ Art. 23, ESCP Regulation.

judgment in accordance with the Regulation, the court has only limited powers when it comes to *ex officio* acting. The court has *ex officio* preliminary control to establish whether the claim form has been properly filled in and whether the information provided by the claimant is inadequate or insufficiently clear. The claim form is then serviced to the claimant to be completed or rectified³⁷. The court is authorised to *ex officio* control whether the claim is clearly unfounded or inadmissible and it also, *ex officio*, dismisses clearly unfounded or inadmissible claims³⁸. In addition, the court is authorised to request further details from the parties concerning the claim, take evidence necessary for the judgment and conduct oral hearing when it is not possible to render the judgment on the basis of only written evidence³⁹. To what extent the court will be in the position to *ex officio* determine the means of taking evidence, and its extent, depends on how the applicable national procedural law regulates the admissibility of evidence and the possibility of the court to take evidence *ex officio*⁴⁰. However, after the enforcement procedure of an ESCP judgment has been initiated, the court conducting the enforcement procedure does not have any special powers to perform *ex officio* control of the judgment, refuse its enforcement or stay it. Refusal, stay or limitation of enforcement are possible only on the request of the person against whom the enforcement is sought and only for the prescribed and listed grounds⁴¹. In short, by the ESCP Regulation, the court's *ex officio* powers in the process of rendering ESCP judgments are very limited. The scope of the court's powers to *ex officio* acting when rendering its judgment in small claim procedures depends on the applicable national procedural rules applied in a subsidiary manner. However, in the enforcement phase of an ESCP judgment, the court of enforcement may not *ex officio* rule on the admissibility of enforcement and validity of an ESCP judgment.

3. *EX OFFICIO* APPLICATION OF EU CONSUMER LAW IN CONSUMER LITIGATION

The law of the Union lays down that consumers, as weaker contractual parties, in their disputes with traders, must be provided effective legal protection. The obligation to provide effective protection of consumer rights in the European Union generally arises from Article 19/1 TEU on the commitment of Member States to provide remedies sufficient to ensure effective legal protection in the areas covered by Union law. The principle of sincere coopera-

³⁷ Art. 4 (4), ESCP Regulation.
See Garber (2020), p. 1325.

³⁸ Arts 4 (4), (5), ESCP Regulation.

³⁹ 39 Art. 7 (1), ESCP Regulation.

⁴⁰ Art. 9 (1), ESCP Regulation.

⁴¹ Art. 22, 23, ESCP Regulation.

tion⁴² binds also Member States to ensure full effectiveness of the EU law⁴³. Indeed, concrete requirements to ensure effective protection are set forth in consumer directives providing for EU consumer rights in individual consumer contracts and legal remedies for their protection.

Effective protection of EU consumer rights in consumer litigation sometimes requires from national courts *ex officio* application of EU consumer law despite the fact that the consumer has not requested the protection of his/her rights or has failed to do so within the prescribed time limits. Such acting will be necessary when by the applicable national substantial and/or procedural law, the European standards of efficient protection of European consumer rights cannot be safeguarded. National courts are then requested to take up an active role in consumer litigation and to provide efficient protection of EU consumer rights by *ex officio* application of EU consumer law (so-called doctrine of active courts in the European consumer proceedings⁴⁴). It is the autonomous European interpretation of the role of national courts in the context of EU consumer law⁴⁵. The ECJ has gradually been developing this concept by interpreting various consumer directives in the context of consumer protection in consumer litigation. First, the ECJ gave the interpretation of the national courts' obligation to control *ex officio* the unfairness of contract terms in consumer contracts in order to ensure effective consumer protection in regular/ordinary civil adversarial proceedings against any imbalance between consumers and traders caused by non-negotiated unfair contract terms⁴⁶. Progressively, the ECJ expanded the so-called consumer *ex officio* doctrine⁴⁷ to other areas of consumer law, i.e. to the protection of other EU consumer rights in contractual relations recognised in other consumer directives, by interpreting also other *ex officio* court powers in consumer disputes^{48, 49}. The concept of *ex officio* application of EU consumer law has grad-

⁴² Among other things, the principle of sincere cooperation requires from Member States to take any appropriate measures, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. See Art. 4 (3) TEU.

⁴³ See Lenearts, K., Mesalis, I., Gutman, K. (2015), *EU Procedural Law*, Oxford, Oxford Univ.Press, p. 134.

⁴⁴ See Beka, A. (2018), *The Active Role of Courts in Consumer Litigation*, Cambridge-Antwerp-Chicago, Intersentia, p. 7.

⁴⁵ *Ibid.*, pp. 139, 354.

⁴⁶ The first case where the ECJ interpreted *ex officio* application of EU consumer law in the context of Directive 93/13/EEC on unfair terms in consumer contracts (*OJ L 95, 21/4/1993, pp. 29–34*) was the case *Océano Grupo Editorial SA*. See ECJ, 27 June 2000, *Océano*, ECLI:EU:C:2000:346.

⁴⁷ See Beka (2018), p. 45.

⁴⁸ See ECJ, 4 June 2015, *Faber*, C-497/13, ECLI:EU:C:2015:357; ECJ, 3 October 2013, *Duarte Hueiros*, C-32/12, ECLI:EU:C:2013:637 in connection with Directive 1999/44/EC on certain aspects of the sale of consumer goods and the associated guarantees;

See ECJ, 4 October 2007, *Rampion and Godard*, C-429/05, ECLI:EU:C:2007:575; ECJ, 21 April 2016, *Radlinger and Radlingerová*, C-377/14, ECLI:EU:C:2016:283 in connection with Directive 87/102/EEC on consumer credits;

See ECJ, 17 December 2009, *Martín Martín*, C-227/08, ECLI:EU:C:2009:792 in connection with Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business.

⁴⁹ See Law, S. (2018) *The Transformation of Consumer Law in Times of Crisis: The Ex Officio Control of Unfair Contract Terms*, p. 305 in A. Uzelac, C.H. van Rhee (eds), *Transformation of Civil Justice*

ually been applied in other specific civil proceedings, (e.g. order for payment procedure, enforcement procedure, insolvency procedure *et al.*)⁵⁰ where the ECJ's interpretation has also been that efficient protection of EU consumer rights requires the courts' *ex officio* acting. Today, the consumer *ex officio* doctrine is accepted as an integral element of EU consumer law and it has a wide scope of application⁵¹.

The ECJ's interpretation of *ex officio* application of EU consumer law starts from the basic position that in consumer disputes, it is necessary to fully achieve the purpose of EU consumer directives, i.e. to ensure the appropriate and effective protection of consumers' rights recognised by the EU law. Because of effective protection of consumers, national courts must, under particular preconditions, *ex officio* apply the EU consumer law, regardless of the fact that by so doing, the national procedural autonomy, the party autonomy and the principle of party disposition are limited. The ECJ always explains in the same way the national courts' obligation to apply *ex officio* EU consumer law in consumer litigation. The Court emphasises "*that the requirement has been justified by the consideration that the system of protection introduced by those directives is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge and that there is a real risk that the consumer, particularly because of a lack of awareness, will not rely on the legal rule that is intended to protect him.*"⁵² Therefore, the ECJ points out that "*it follows therefrom that effective consumer protection could be achieved only if the national court were required, of its own motion, to examine compliance with the requirements which flow from EU law on consumer law. The imbalance which exists between the consumer and the seller or supplier may be corrected by the court hearing such disputes only by positive action unconnected with the actual parties to the contract.*"⁵³ In this connection, many other reasons justifying *ex officio* application of EU consumer law in consumer disputes with traders are noted, such as the mandatory nature of EU consumer law, similar position of EU rules on consumers in the legal order of EU as the position of the public policy rules in national legal orders of Member States, the consumer protection as a matter of the European economic public policy, the protection of fundamental rights⁵⁴.

(pp. 283-307), Cham, Springer; Streatmans, Vereecken (2024), p. 49; Davida, Z. (2024) Consumer Decision-Making Autonomy in the Digital Environment: Towards a New Understanding of National Courts' Obligation to Assess Ex Officio Violations of Fair Commercial Practices, pp. 1038, 1041, 1047, The European Journal of Risk Regulation, Vol. 15, Special Issue 4, doi: 10.1017/err.2024.11, pp. 1034-1049.

⁵⁰ See ECJ case law cited in footnote 67.

⁵¹ See Beka (2018), pp. 177, 189; Law (2018), p. 315; Davida (2024), p. 7; Ancery, A. (2021) Consumer Credit Contracts and Ex Officio Application: A Dutch Perspective, Case Note on Profi Credit Polska (Cases C-419/18 and C-483/18), p. 162, Journal of European Consumer and Market Law/EuCML, Vol. 10, Issue 4, pp. 160-164; Streatmans, Vereecken (2024), pp. 49, 50.

⁵² Taken from ECJ judgment of 4 June 2015, *Faber*, C-497/13, ECLI:EU:C:2015:357, point 42.

⁵³ Taken from ECJ judgment of 21 April 2016, *Radlinger and Radlingerová*, C-377/14, ECLI:EU:C:2016:283, points 66, 67.

⁵⁴ See Beka (2018), pp.139, 136, 357. See, for example ECJ, 9 April 2024, *Profi Credit Polska*, C-582/21, ECLI:EU:C:2024:282, points 72-83.

The main rule resulting from the consumer *ex officio* doctrine is that “courts have the duty to raise of their own motion protective measures of EU consumer law without waiting for the submissions of the party”⁵⁵. In numerous judgments, the ECJ’ interpretation has been that national courts have an obligation to examine of their own motion various violations of EU consumer protection legislation such as the use of unfair contract terms in consumer contracts, infringements of different traders’ duties in distance contracts, sales contracts, consumer credit contracts⁵⁶. The catalogue of positive/active *ex officio* interventions in consumer litigations by national courts is very long. According to a well-established ECJ case law, national courts should of their own motion control the unfairness of contract terms in consumer contracts if the necessary legal and factual elements are available⁵⁷. Regardless of the fact that the claimant has not invoked his/her consumer status, national courts should *ex officio* establish in civil litigation whether the claimant has entered into a contract in the capacity of a consumer, or whether it is a contract within the area of application of EU consumer law⁵⁸. National courts should *ex officio* control if any information duties have been infringed to the detriment of the consumer⁵⁹ and even if the consumer contract is void because of the violation of information duties⁶⁰. *Ex officio* protection of the consumer and his/her rights should be provided by the use of alternative legal remedies although they have not been invoked by the consumer in the course of litigation⁶¹. The courts should, of their own motion, activate penalties for the violation of the consumer’s rights (e.g. for the infringement of information duties)⁶². In order to render a judgment, the court should *ex officio* take investigative measures by asking the parties to provide the court with the necessary clarifications or documents (e.g. in the absence of the legal and factual elements for the control of unfairness)⁶³.

As a rule, in its interpretations of *ex officio* duties, the ECJ refers to almost all abovementioned justifications for *ex officio* application of EU consumer law. Frequently, such interpretations are supported by the principle of equivalence and the principle of effectiveness as the fundamental EU principles on which the protection of subjective rights is based. It is sometimes empha-

⁵⁵ Taken from Beka (2018), p. 354.

⁵⁶ See ECJ, 21 April 2016, *Radlinger and Radlingerová*, C-377/14, ECLI:EU:C:2016:283, p. 62 and the case-law cited.

⁵⁷ See, for example ECJ, 9 April 2024, *Profi Credit Polska*, C-582/21, ECLI:EU:C:2024:282.

⁵⁸ See ECJ, 4 June 2015, *Faber*, C-497/13, ECLI:EU:C:2015:357, point 38.

⁵⁹ See ECJ, 28 November 2018, *PKO Bank Polski*, C-632/17, ECLI:EU:C:2018:963, points 50, 51, 52.

⁶⁰ See ECJ, 17 December 2009, *Martín Martín*, C-227/08, ECLI:EU:C:2009:792, point 28.

⁶¹ See ECJ, 3 October 2013, *Duarte Hueros*, C-32/12, ECLI:EU:C:2013:63, point 39.

⁶² See ECJ, 4 October 2007, *Rampion and Godard*, C-429/05, ECLI:EU:C:2007:575, point 65; ECJ, 21 April 2016, *Radlinger and Radlingerová*, C-377/14, ECLI:EU:C:2016:283, points 68,70,71,74; ECJ, 7 November 2019, joined cases C419/18 and C483/18, *Profi Credit Polska*, ECLI:EU:C:2019:930, point 69.

⁶³ See ECJ, 11 March 2020, C-511/17, *Lintner*, ECLI:EU:C:2020:188, points 38, 39; ECJ, 4 June 2020, C-495/19, *Kancelaria Medius*, ECLI:EU:C:2020:431, points 38, 40.

sised that these are actually the procedural rules binding all national courts⁶⁴. When it comes to the courts' obligations to request *ex officio* the submission of documentation or additional clarification, it is emphasised that such *ex officio* acting of the courts are not contrary to the principle that the parties delimit the subject matter of an action and the principle of *ne ultra petita*. The ECJ points out that such requests simply form part of the evidential framework of the proceedings and that the purpose of such requests is merely to verify the basis of the action⁶⁵.

Another important rule on which the consumer *ex officio* doctrine is based is that the specific type of procedure which the trader chooses, or which otherwise applies against the consumer, cannot reduce the fundamental procedural guarantees necessary for consumer protection under EU legislation for the benefit of consumers. Specific characteristics of court proceedings cannot constitute a factor liable to affect the legal protection to the benefit of consumers under the provisions of EU consumer legislation⁶⁶. Therefore, the consumer *ex officio* doctrine applies to all types of civil procedure, to all procedural situations and to all stages of procedure such as ordinary civil proceedings, appeal procedures, judgments in default, actions for the annulment of an arbitration award, enforcement of an arbitration award, injunctions, payment order procedures, enforcement procedures, insolvency procedures, *et al*⁶⁷.

⁶⁴ See ECJ, 9 April 2024, *Profi Credit Polska*, C-582/21, ECLI:EU:C:2024:282, point 66; ECJ, 21 April 2016, *Radlinger and Radlingerová*, C-377/14, ECLI:EU:C:2016:283, point 77; ECJ, 7 November 2019, joined cases C419/18 and C483/18, *Profi Credit Polska*, ECLI:EU:C:2019:930, point 74.

⁶⁵ See ECJ 4, June 2020, C-495/19, *Kancelaria Medius*, ECLI:EU:C:2020:431, point 45; ECJ, 7 November 2019, joined cases C419/18 and C483/18, *Profi Credit Polska*, ECLI:EU:C:2019:930, point 68; ECJ, 26 November 2020, C-807/19, *DSK Bank*, ECLI:EU:C:2020:96.

See Józson, M. (2023) The 'Ex Officio' Doctrine of the CJEU Revisited: On the Active Role in Unfair Contract Terms Law-Critical Remarks on the Lintner Ruling (C-551/17), pp. 366, 367, Croatian Yearbook of European Law and Policy/CYELP, Vol. 19, pp. 361-378

⁶⁶ See ECJ, 26 October 2006, C-168/05, *Mostaza Claro*, ECLI:EU:C:2006:675; ECJ, 6 October 2009, C-40/08, *Asturcom*, ECLI:EU:C:2009:615; ECJ, 16 November 2010, C-76/10, *Pohotovos*, ECLI:EU:C:2010:685; ECJ, 21 April 2016, *Radlinger and Radlingerová*, C-377/14, ECLI:EU:C:2016:283; ECJ, 10 September 2014, C-34/13, *Kušionová*, ECLI:EU:C:2014:2189; ECJ, 17 July 2014, C-169/14, *Morcillo*, ECLI:EU:C:2014:2099; ECJ, 30 May 2013, C-488/11, *Asbeek Brusse*, ECLI:EU:C:2013:341; ECJ, 30 May 2013, C-397/11, *Jörös*, ECLI:EU:C:2013:340.

⁶⁷ For order for payment procedure see ECJ, 14 June 2012, C-618/10, *Banco Español*, ECLI:EU:C:2012:349; ECJ, 18 February 2016, C-49/14, *Finanmadrid*, ECLI:EU:C:2015:746; ECJ, 20 September 2018, C-448/17, *EOS KSI Slovensko*, ECLI:EU:C:2018:745; ECJ, 7 November 2019, joined cases C419/18 and C483/18, *Profi Credit Polska*, ECLI:EU:C:2019:930; ECJ, 26 November 2020, C-807/19, *DSK Bank*, ECLI:EU:C:2020:96; ECJ, 17 May 2022, joined cases C-693/19 and C-831/19, *SPV Project 1503*; ECJ, 30 June 2022, C-170/21, *Profi Credit Bulgaria*, ECLI:EU:C:2022:518; ECJ, 28 November 2018, *PKO Bank Polski*, C-632/17, ECLI:EU:C:2018:963.

For default judgment see ECJ, 17 May 2018, C-147/16, *Karel de Grote*, ECLI:EU:C:2018:320; ECJ, 9 April 2024, *Profi Credit Polska*, C-582/21, ECLI:EU:C:2024:282.

For enforcement procedure see ECJ, 14 March 2013, C-415/11, *Aziz*, EU:C:2013:164; ECJ, 14 November 2013, joined cases C-537/12 and C-116/13, *Banco Popular Español*, ECLI:EU:C:2013:759; ECJ, 17 July 2014, C-169/14, *Morcillo*, ECLI:EU:C:2014:2099; ECJ 18 February 2016, C-49/14, *Finanmadrid*, ECLI:EU:C:2015:746; ECJ 26 June 2019, C-407/18, *Addiko Bank*, ECLI:EU:C:2019:537; ECJ, 17 May

4. EX OFFICIO APPLICATION OF EU CONSUMER LAW IN THE ESCP

The broad scope of application of the consumer *ex officio* doctrine requires that all the rules on *ex officio* application of EU consumer law are also fully applied in the European small claim procedure. There is no justification that in the cases where within the ESCP it is decided on a dispute between a consumer and a trader, not the same standards of effective protection of the EU consumer rights are required. All the reasons justifying *ex officio* application of EU consumer law, apply also to the ESCP. The fact that it is the European civil procedure organised as the European optional instrument must not have any impact in terms of excluding *ex officio* application of EU consumer law in the ESCP.

Indeed, so far the ECJ has not been in a situation to interpret, in this respect, the relation between the ESCP Regulation and the consumer directives providing for EU consumer rights and requiring their effective protection. However, such a conclusion can be drawn from the ECJ's interpretation of some other optional instruments based on the same principles as is the case with the ESCP Regulation⁶⁸. In the joined cases *Bondora*, C-453/18 and C-494/18⁶⁹, the ECJ interpreted the connection between the European Payment Order Regulation⁷⁰ and the Unfair Contract Terms Directive (hereinafter: UCTD), in the very context of the requirement for *ex officio* application of EU consumer law. The ECJ's interpretation has been that the requirements in terms of *ex officio* application of EU consumer law to unfair contract terms apply also when a national court conducts the European payment order procedure. Therefore, with regard to the "court" according to the European Payment Order Regulation, all the rules on *ex officio* control of unfairness of contract terms apply which the ECJ has already defined in the context of the national payment order procedure⁷¹. The ECJ's interpretation has been,

2022, C-600/19, Ibercaja Banco SA, ECLI:EU:C:2022:394; ECJ, 17 May 2022, joined cases C-693/19 and C-831/19, *SPV Project 1503*, ECLI:EU:C:2022:395.

For procedure for annulment of an arbitration award see ECJ, 26 October 2006, C-168/05, *Mostaza Claro*, ECLI:EU:C:2006:675.

Forenforcement of arbitration award see ECJ, 6 October 2009, C-40/08, *Asturcom*, ECLI:EU:C:2009:615.

For appeal procedure see ECJ, 30 May 2013, C-488/11, *Asbeek Brusse*, ECLI:EU:C:2013:341; ECJ, 30 May 2013, C-397/11, *Jörös*, ECLI:EU:C:2013:340.

For out-of-court enforcement procedure see ECJ, 10 September 2014, C-34/13, *Kušionová*, ECLI:EU:C:2014:2189.

For insolvency proceedings see ECJ 21 April 2016, C-377/14, *Radlinger and Radlingerová*, ECLI:EU:C:2016:283.

⁶⁸ It is emphasised in literature that the ESCP Regulation and other EU regulations in the field of civil procedure belong in the same group of EU legislation. Therefore, in parallel and by analogy, the same principles of interpretation are applicable to all of them. See Schlosser (2021), p. 427.

⁶⁹ See ECJ, 19 December 2019, joined cases C-453/18 and C-494/18, *Bondora*, ECLI:EU:C:2019:1118.

⁷⁰ Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (*OJ L 399, 30.12.2006, pp. 1–32*).

⁷¹ See the ECJ case law cited in footnote 69.

that the court having jurisdiction for the European payment order is bound *ex officio* to control unfairness of contract provisions. The court is thus authorised to request from the creditor additional information relating to the terms of the contract in order to carry out *ex officio* review of the possible unfairness of contract terms⁷². The ECJ emphasised that a different interpretation of the powers of the court conducting the European payment order procedure would make it possible for creditors to circumvent the requirement for effective consumer protection laid down in the UCTD⁷³. For the Court's interpretation of *ex officio* powers of the court, it was not decisive that the European payment order procedure, just like the ESCP, was a formal and a written procedure aimed at simplifying, accelerating and reducing the costs in cross-border disputes concerning uncontested pecuniary claims. It was also not essential that it was the European civil proceedings regulated by the European optional instrument, i.e. a directly applicable regulation with the rules which have direct effects⁷⁴.

By its interpretation, the ECJ has actually confirmed that EU optional regulations providing for specific European civil proceedings on the one hand, and EU consumer directives on the other hand, are secondary legal acts of the Union which have the same place in the hierarchy of legal rules and are not mutually exclusive. Such optional regulations and EU consumer directives must be interpreted together and in a coordinated manner⁷⁵. It means that in civil proceedings governed by EU regulations, all high standards of the protection of EU consumer rights must be achieved and that the courts conducting such proceedings are also *ex officio* bound to apply EU consumer law. Otherwise, the use of optional instruments may lead to different standards of the protection of EU consumer rights adopted in other civil litigations based on the consumer *ex officio* doctrine. Therefore, the courts' obligation to act of their own motion applies also to European small claim procedures and to the enforcement of the ESCP judgments.

5. EFFECTIVE CONSUMER PROTECTION IN THE ESCP

The case law of the ECJ undoubtedly shows that in the ESCP, when a consumer dispute is involved, and when small claim decisions must be rendered, all high standards of the protection of EU consumer rights must be met. This

⁷² See Józson (2023), p. 366.

⁷³ See ECJ, 19 December 2019, joined cases C-453/18 and C-494/18, *Bondora*, ECLI:EU:C:2019:1118, points 46-54.

⁷⁴ See ECJ, 19 December 2019, joined cases C-453/18 and C-494/18, *Bondora*, ECLI:EU:C:2019:1118, points 36, 37, 38.

⁷⁵ Opinion of advocat general Sharpston, 31 October 2019, joined cases C453/18 and C494/18, *Bondora*, ECLI:EU:C:2019:921, point 53.

Possibly excluded applications of the provisions of a particular consumer directive would depend on whether by a provision of an EU regulation, the application of a directive is expressly excluded or limited. *Ibid*, point 53.

is particularly important in the cases where in the ESCP, the consumer is in the status of a defendant, or when the initiation of the ESCP against the consumer depends only on the trader's decision to effectuate his/her claim against the consumer. Although it is often emphasised that the ESCP Regulation makes it easier for the consumers to have cross-border access to justice because of the simplicity of the procedure⁷⁶, the possibility that the same procedure is also used by traders for them to be able to quickly and simply collect their small cross-border claims against consumers. In such cases, a question arises whether it is possible (due to specific procedural rules governing the ESCP, the formality of the procedure, the written nature of the procedure, the specific rules on taking evidence, the enforceability of the ESCP judgments, the rules on their automatic recognition) for national courts, when deciding on the small claims and enforcing the ESCP judgments against consumers, to safeguard effective protection of consumers by *ex officio* application of the EU consumer law.

In that regard, it is important to assess the consumer's procedural position in the ESCP and whether his/her position safeguards his/her rights in the proceedings. The relevant provisions of the ESCP Regulation for the assessment are the provisions laying down that the initiation of the ESCP depends solely on the claimant. Indeed, in the claim form, the claimant not only defines the claim but also describes the pieces of evidence on which the claim is based, without having to submit them⁷⁷. In a large number of cases, such a summary claim cannot provide sufficient information for the consumer (as the sued party) either about the claim, or about the documents on which it is based, or the method of the calculation of its amount, or of any subsequent claims. Therefore, a question arises whether the consumer, because of his/her weak position *vis-à-vis* the trader, will even be able to contest the claim in the phase of his/her answer to the claim and to submit new evidence. Whether the consumer, during the continuation of the proceedings, will have the opportunity to file objections against the claim and to submit documentation depends on the court's assessment of the necessity of an oral hearing and its requests for the submission of further details concerning the claim⁷⁸.

Taking all this into consideration, the crucial question is whether the procedural rules of the ESCP Regulation, providing for the court's *ex officio* acting, make it possible for the court to also *ex officio* apply the EU consumer law in accordance with the standards of effective protection of consumer rights defined in the ECJ's case law. It seems that the procedural rules referred to in the ESCP Regulation cannot fully guarantee effective protection

⁷⁶ It is emphasised that by the ESCP Regulation, common rules to ensure minimum level of protection for creditors of law-value claims are established at the level of the Union. See Giacalone, M., Sajedeh Salehi, S. (2020), p. 182, The European Small Claim Procedure: Implementation and Enforcement Revisited in Italy and Belgium, *Journal of European Consumer and Market Law/EuCML/EuCML*, Vol. 9, pp. 181-190.

⁷⁷ See Varga (2015), pp. 454-456; Garber (2020), p. 1321.

⁷⁸ Arts 5 (1), 7, ESCP Regulation.

of consumers by *ex officio* application of the EU consumer law. However, the court does have certain *ex officio* powers in the ESCP. It must *ex officio* carry out a preliminary control to establish whether the claimant has completely and correctly filled in the claim form, and in the case of the contrary, to request the completion or rectification. The court may even reject the claim if it is *prima vista* clearly unfounded or inadmissible⁷⁹. On the other hand, taking into account the fact that the claimant does not have to enclose any pieces of evidence or documents with the claim form, but can only describe them, a question arises whether the court initially disposes of all the available legal and factual elements to establish the existence of a consumer dispute, whether one of the parties is the consumer, or whether it is a claim arising from a legal relation to which the EU consumer law applies. Namely, a description of evidence in the claim form, or its possible submission together with the claim form, solely depend on the claimant. If the claimant is the consumer, it is possible that he/she, because of lack of knowledge or lack of information, will fail to note all the relevant pieces of evidence leading to a conclusion that it is a consumer dispute to which the EU consumer law applies. However, if the claimant is a trader, it is possible that he/she, in order to succeed in the proceedings, intentionally does not mention in the claim form all the relevant evidence indicating the consumer nature of the dispute.

Furthermore, it is not clear from the ESCP Regulation when it is possible, during the court's preliminary control of the claim form, for the court to decide whether the claim is clearly inadmissible, and in particular whether it is clearly unfounded. It is obviously not done when the claim is outside the scope of the Regulation, i.e. when the claim relates to matters not stipulated in the Regulation^{80,81}. In the context of the court's decision on clear inadmissibility, it can be the control whether the claim exceeds the amount of 5,000 EUR, and whether it arises from a cross-border case, i.e. whether all the main procedural prerequisites for the institution of the ESCP Regulation are met. As a rule, such control may be carried out merely on the basis of the claim form and by direct application of the Regulation. It is disputable, however, if in this initial phase and only on the basis of the claim form it is possible for the court to decide on the claim as being clearly unfounded. On the one hand, this decision depends on the application of the national substantive law applicable to the dispute. The concept "*clearly unfounded*" cannot be interpreted autonomously at the European level but only in the context of the applicable national law⁸². Indeed, various interpretations are possible and they may lead to different court decisions regarding the unfoundedness of the claim. On the other hand, for such a control and in most cases, specific documents and other types of evidence are necessary, rather than a mere description in the

⁷⁹ Art. 4 (4), ESCP Regulation.

⁸⁰ Art. 2 (2), ESCP Regulation.

⁸¹ There are even some specific rules in the Regulation governing such a case in Art. 4 (3), the ESCP Regulation.

⁸² See Garber (2020), p. 1328.

claim form. Therefore, there is very little probability that in the phase of the preliminary control of the claim form the court will even be able to decide on unfoundedness of the claim, let alone on *ex officio* application of EU consumer law. In the largest number of cases, in that phase of the proceedings, it will not even be possible to establish whether a consumer dispute is involved. If no documents have been submitted, a question arises whether it is even possible to establish the law applicable to the dispute. The court, as a rule, will not dispose of any documents on the basis of which it could possibly decide that obvious unfoundedness of the claim is derived from a rule of the EU consumer law the court ought to apply *ex officio*. A conclusion can be made that the rules referred to in the Regulation providing for *ex officio* acting of the court in the preliminary control of the claim practically do not make it possible for the court to apply *ex officio* the EU consumer law in that phase of the procedure.

Other rules on *ex officio* acting of the courts in the ESCP could only in a limited manner contribute to effective protection of the consumer as a party to the dispute. Indeed, the ESCP Regulation expressly provides that the court may request from the parties further details concerning the claim and take evidence⁸³. On the basis of these rules, the court could *ex officio* invite the parties to provide the necessary clarifications or documents, or it could summon the parties to an oral hearing to receive the necessary elements of importance for *ex officio* application of the EU consumer law in the ESCP. However, when it comes to taking evidence of importance for *ex officio* application of the EU consumer law, the courts' powers to act of their own motion depend on the national rules applicable to the admissibility of evidence⁸⁴. In addition, the ESCP Regulation does not lay down any separate rules on the court's acting if the consumer as a defendant is passive in the proceedings, or in the cases where, because of lack of knowledge or information he/she has failed to take some procedural actions. For example, there are no specific rules on the court's acting when the defendant has failed to respond within 30 days from the service of the claim form by filling in the standard answer form, or has done it wrongly or incompletely⁸⁵, when the defendant has not participated in the oral hearing⁸⁶, or has failed to lodge an appeal against the judgment in the way and within the time limits prescribed by the applicable procedural law of the Member State⁸⁷. In such cases, the provisions of the applicable procedural law of the Member State apply to the decision making procedure regarding the claim⁸⁸. An open question remains whether the court conducting the ESCP, by invoking the principle of equivalence or the principle of effectiveness, may then *ex officio* apply the EU consumer law and

⁸³ Art. 7 (1), ESCP Regulation.

⁸⁴ Art. 9 (1), ESCP Regulation.

⁸⁵ Art 5 (3), ESCP Regulation.

⁸⁶ Art. (8), ESCP Regulation.

⁸⁷ Art. 17, ESCP Regulation.

⁸⁸ Art. 19, ESCP Regulation.

protect the consumer who failed to take any procedural action out of ignorance, lack of knowledge or fear of high costs. Finally, it all depends on the procedural guarantees by which it is possible to protect the consumer under the applicable procedural law of the Member State.

After the judgment has been rendered, the protection of the consumer in the enforcement procedure is determined by a number of rules calling for an expeditious and a summary court action. The possibility of lodging an appeal against the judgment and the prerequisites exclusively depends on the applicable procedural law of the Member State⁸⁹ which determines the possibility to appeal and under which preconditions. The ESCP Regulation expressly excludes the possibility for the appeal to postpone the enforceability of the judgment⁹⁰ and it significantly limits the grounds for a review of the judgment, excluding it in the cases where the defendant failed to challenge the judgment although such a possibility had existed⁹¹. The ESCP enforcement procedure does not envisage any possibility of opposing the recognition of judgments⁹². The grounds for refusal, stay or limitation of enforcement are very narrowly stipulated⁹³. There are no specific rules in the ESCP to safeguard consumer protection⁹⁴. All the mentioned rules point to a conclusion that in the enforcement procedure of an ESCP judgment, the court does not play an active role in ensuring effective protection of EU consumer rights. There is no possibility of control over an ESCP judgment in the Member States of enforcement⁹⁵. There is a real possibility, however, that because in the ESCP, the court failed to apply the EU consumer law, or because the consumer was passive out of ignorance or lack of knowledge, or he/she failed to lodge an appeal, an ESCP judgment, contrary to the EU consumer law, is enforced. At the end of the day, the consumer may exercise the protection of his/her rights only *ex post* in a separate civil action, after the trader has already collected the claim in a summary enforcement procedure under the ESCP Regulation. This is contrary to one of the very important rules on which the ECJ often bases its interpretation of effective protection of EU consumer rights in the enforcement procedure according to which protection must be safeguarded before the judgment is fully enforced against the consumer. This is why in many of its judgments, the ECJ has interpreted the importance of preliminary measures in the enforcement procedure against consumers, and the importance of *ex officio* application of EU consumer law in the enforcement procedure,

⁸⁹ See Simaitis, R., Vėbraité, V., Markevičiūtė, M., (2022), European Small Claim Procedure in the Realm of other European Proceedings, pp 129,130, *Revista Ítalo-Española de Derecho Procesal* (1), pp. 123-136, <https://doi.org/10.37417/rivitsproc/685> ; Kramer, X.E., (2008) *The European Small Claims Procedure: Striking Balance between Simplicity and Fairness in European Litigation*, p. 364, *Zeitschrift für Europäisches Privatrecht/ZEuP* (Heft 2), pp. 355-373

⁹⁰ Art. 15, ESCP Regulation.

⁹¹ Art. 18 (1), ESCP Regulation.

⁹² Art. 20 (1), ESCP Regulation.

⁹³ Art. 22, 23, ESCP Regulation.

⁹⁴ See Schlosser, (2021), p. 450.

⁹⁵ See Schlosser (2021), p. 447.

regardless of the fact that the order for payment has become final, so that the principle of *res iudicata* should be applied.⁹⁶

For all these reasons and in most situations, the protection standards of the EU consumer rights defined by the ECJ in its interpretations of the consumer *ex officio* doctrine cannot be achieved within the current regulation of the European small claim procedure. The characteristics of the ESCP may lead to unfavourable and harmful results when it comes to consumer protection⁹⁷. Preference over effective protection of EU consumer rights is given to expeditious enforcement of the ESCP judgments. Such approach may be justified when dealing with small claims in commercial disputes. However, in consumer disputes and in particular in the cases where the consumer is the sued party, a different balance between an expeditious enforcement procedure and the protection of EU consumer rights is necessary.

6. CONCLUSION

The European small claim procedure, as well as other European civil procedures governed by EU regulations as optional instruments, are important legal instruments for the development of judicial cooperation in civil matters in the European Union. They have a very important role in the harmonisation of the legal protection standards in civil procedures at the level of the Union. The significance of such optional instruments is particularly obvious because of the lack of EU competences for the unification of the civil procedure rules by which the same standards of access to justice, the protection of procedural rights and effective judicial remedies would be established at the level of the Union. Optional civil procedure instruments should be optimal European models for the resolution of disputes and the enforcement of claims and judgments. However, this will be possible only if they are used to provide a well-balanced and standardised protection of all parties regardless of which procedural rules of Member States are applied in a subsidiary manner. It is also important that all EU standards of the protection of subjective individ-

⁹⁶ See, for example, ECJ, 14 March 2013, C-415/11, *Aziz*, EU:C:2013:164; ECJ, 14 November 2013; ECJ, 17 July 2014, C-169/14, *Morcillo*, ECLI:EU:C:2014:2099; ECJ, 17 May 2022, joined cases C-693/19 and C-831/19, *SPV Project 1503*, ECLI:EU:C:2022:395.

Such ECJ case law would lead to the conclusion (regarding the nature and importance of the public interest underlying consumer protection against unfair contract terms) that also in the ESCP enforcement procedure, the Court should be bound to examine, of its own motion, the potential unfairness of contractual terms.

⁹⁷ See Varga (2015), p. 434.

Other faults in the ESCP Regulation regarding consumer protection are also emphasised in literature. For example, it is noted that the Regulation does not provide for special jurisdiction rule for consumers. See Kramer (2008), p. 368.

It is also pointed out that up to now, the ESCP Regulation has had a limited impact on private enforcement of EU consumer law and on improving procedural conditions for consumers at litigations because, among other things, it applies only to cross border cases. See V. Streatmans, Vereecken (2024), p. 61.

ual rights, recognised by the law of the Union, are respected. Optional civil procedure instruments can significantly contribute to effective protection of consumer rights particularly at present when the demands for their enhanced protection are increasingly expressed because of the development of the digital market and the digitalisation of the judiciary.

In future reforms of the European small claim procedure, it would be very useful to take into account very high standards of the effective protection of EU consumer rights which often require active acting on the part of the courts in consumer disputes. It would be very useful to consider the possibilities to reform some particular rules in the ESCP Regulation. A logical thing would be to incorporate, in the small claim procedure, the EU standards of consumer rights protection, on which there is a lot of insistence in the Union because of the protection of EU public policy, the social market economy and the fundamental rights. Effective protection of consumer rights can be achieved by express stipulation of separate rules on the courts' *ex officio* acting when ruling in small claim consumer disputes. It would be useful to include separate rules in the enforcement procedure to enable, even if exceptionally, an active role of the court in *ex officio* application of the EU consumer law and in reviewing judgments when EU consumer rights are violated. A reform of the European small claim procedure could be used to expressly regulate, at the European level, the national courts' acting in conformity with the consumer *ex officio* doctrine which the ECJ has been developing for more than two decades. The ECJ case law is very extensive and advanced and it can be used to define specific procedural rules for *ex officio* acting of the courts in consumer disputes. The ESCP Regulation and other optional civil procedure instruments are the right and the most suitable places for such approach. They are autonomous European civil procedures which must be directed at safeguarding effective protection of EU consumer rights. Unification at the level of the Union can be achieved by the introduction, in the ESCP Regulation, individual rules providing for an active role of courts in consumer disputes. Such an approach would exclude, or at least limit in practice, and because of the subsidiary application of the national procedural rules, different levels of the protection of consumer rights in the ESCP. It would also exclude the situations where the competent court must assess the effectiveness of applicable procedural rules in every concrete small claim procedure. In addition, this approach would not in any way impact the change of principles on which the procedural laws of Member States are based because we speak of optional and alternative instruments existing in parallel with national civil procedures. To conclude, such a reform of the ESCP seems to be extremely important, even essential, because of the increased demands for digitalisation of small claim procedures⁹⁸ due to the automatization of the decision-making process in civil procedures requiring well-developed mechanisms for the protection of individual rights.

⁹⁸ See Simaitis, Vébraité, Markeviciūtė (2022), p. 132; Giacalone, M., Sajedeh Salehi, S. (2022), Small Claims and the Pursuit of (Digital) Justice: a tiered online dispute resolution perspective, pp. 201-202, *Revista Ítalo-Española de Derecho Procesal* (1), pp. 201-212.

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