



*Research and Documentation*

*Directorate*

## **RESEARCH NOTE**

### **The use of promissory notes in relations with consumers**

[...]

**Subject:** Analysis of the legal nature of promissory notes, in particular when used in relations with consumers, the possibility for the consumer to set up a defence in an order for payment procedure on the basis of a promissory note and the scope of the review by the court of the promissory note, in particular with regard to the issuance of an inchoate or 'blank' promissory note.

[...]

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[...]



## SUMMARY

### INTRODUCTION

1. The present research note examines, first, the legal nature of promissory notes, in particular when used in relations with consumers; second, the possibility for the consumer to set up a defence in an order for payment procedure initiated on the basis of a promissory note; and, third, the scope of the review by a court of a promissory note, in particular with regard to the issuance of an inchoate or 'blank' promissory note.
2. As a preliminary point, it should be borne in mind that promissory notes have been used in Europe since the 12<sup>th</sup> century.<sup>1</sup> In parallel with other instruments, namely bills of exchange and cheques, promissory notes have been standardised at international level. Accordingly, by one of three conventions adopted in Geneva in 1930, the High Contracting Parties undertook to implement in their national legal systems the uniform law set out in Annex I to the Convention providing a Uniform Law for Bills of Exchange and Promissory notes<sup>2</sup> ('the Uniform Law'). Subsequently, a significant number of European States (including the majority of current European Union Member States) adopted national laws on bills of exchange and promissory notes incorporating, often to a very large extent, the provisions of the Uniform Law.
3. However, the Uniform Law, which was the result of a compromise between two of the three main systems of law on bills of exchange and promissory notes at the time, namely the French and German legal systems,<sup>3</sup> has not been adopted by countries associated with the third main system of law on bills of exchange and promissory notes: the common law legal system.

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<sup>1</sup> The law governing bills of exchange and promissory notes originates in Italy during the 12<sup>th</sup> and 13<sup>th</sup> centuries: Dabin, L., *Fondements du droit cambiaire allemand*, Liège, 1959, p. 7.

<sup>2</sup> Convention providing a Uniform Law for Bills of Exchange and Promissory Notes, concluded at Geneva on 7 June 1930 ('the Geneva Convention').

4. The fact remains that the common law legal system has an equivalent promissory note instrument which can be taken into account for the purposes of the present note. Indeed, irrespective of the legal system in question, a promissory note<sup>4</sup> may be defined as a document evidencing a promise made by one person (the person issuing the promissory note; the maker) engaging to pay a sum of money to, or to the order of, another (the person to whom or to whose order for payment is to be made; the payee), at a fixed time.<sup>5</sup> The most important characteristics of a promissory note are the fact that it may be transferred and the abstract nature of the obligation created.
5. So far as concerns transferability, it has been observed that, in order for a promissory note to fulfil the various economic functions required of it in all countries, it must be ensured that it can be transferred (assigned) easily and that its successive bearers be offered, to that end, a maximum of possible guarantees.<sup>6</sup>
6. As for the abstract nature of a promissory note,<sup>7</sup> it has been noted that the obligation owed by the person issuing the promissory note is abstract in the sense that it is completely independent of the bearer, the existence and value of the underlying legal relationship.<sup>8</sup>

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<sup>3</sup> Machnikowski, P., *Prawo wekslowe*, Warsaw, 2009, p. 17.

<sup>4</sup> For the sake of linguistic convenience, the term 'promissory note' will be used in the present note, unless it appears otherwise from the text.

<sup>5</sup> Roblot, R., *Les effets de commerce*, Paris, 1975, p. 10.

<sup>6</sup> *Ibid.*, p. 64. Article 11 of the Uniform Law, applicable to promissory notes under Article 77 of that law, sets out the principle that: 'Every bill of exchange, even if not expressly drawn to order, may be transferred by means of endorsement.'

<sup>7</sup> It should be noted that, in the true sense of the term, it is the promissory note obligation and not the promissory note instrument which is abstract. In the present note, the concept of the abstract nature of a promissory note will often be used in respect of the characteristic of that instrument relating to the abstract nature of the obligation that it incorporates.

<sup>8</sup> Roblot, R., *op. cit.*, p. 69.

7. Those two characteristics of a promissory note lie at the heart of the issue addressed by the present note. Indeed, the abstract nature of the promissory note obligation means that a person bound by a promissory note obligation may not, in principle, invoke against the bearer, on its maturity, defences alleging the absence of, or an error or other ground vitiating, the underlying legal relationship (set-off, commingling, remittance, etc.).<sup>9</sup> Consequently, the rules applicable to promissory notes are likely to restrict, for consumers, the possibility of setting up a defence on the basis of the underlying legal relationship, in particular the presence of unfair contract terms or a lack of information. Those rules may also affect the possibility, for a court, to review the underlying legal relationship in the event that the case before it concerns only the promissory note, in particular in the context of special procedures to facilitate the recovery of the debt owed under a promissory note, such as order for payment procedures.
8. In that connection, it is interesting to note that a ban on the use of promissory notes with regard to credit for consumers was provided for in the initial proposal for 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 ('the Consumer Credit Directive').<sup>10</sup> However, such a prohibition was not included in the final text of the directive.

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<sup>9</sup> *Ibid.*, p. 69.

<sup>10</sup> Proposal for a Directive of the European Parliament and of the Council on the harmonisation of the laws, regulations and administrative provisions of the Member States concerning credit for consumers (COM(2002) 443 final – 2002/0222(COD)). Article 18 of that proposal, entitled 'Ban on the use of bills of exchange and other securities' is worded as follows: 'The creditor or assignee of the creditor's rights under a credit agreement or surety agreement shall not require or invite the consumer or guarantor to guarantee payment of their commitments under that agreement by means of a bill of exchange or promissory note. Moreover, the consumer or guarantor shall not be required to sign a cheque guaranteeing repayment, in full or in part, of the amount due.'

9. The present note has been conducted in two stages. The first stage provides an overview covering nearly all of the Member States,<sup>11</sup> aimed at providing a general review of the use of promissory notes in relations with consumers. In the second stage, 10 representative legal systems are explored in detail.<sup>12</sup>
10. In the light of the foregoing, the present note is divided into three parts: (I) the use of promissory notes in relations with consumers in the Member States; (II) the nature attributed to promissory notes in the 10 representative legal systems and the effect on the complaints raised by the consumer; and (III) special procedures facilitating the recovery of debt owed under promissory notes and their influence on the procedural situation of consumers.

## **I. THE USE OF PROMISSORY NOTES IN RELATIONS WITH CONSUMERS – OVERVIEW**

11. It should be borne in mind at the outset that there are two general models of law on bills of exchange and promissory notes in place in the various Member States. Whilst continental European countries more or less follow the aforementioned Uniform Law model,<sup>13</sup> common law countries (Cyprus, Ireland and the United Kingdom) follow their own model established in the 19<sup>th</sup> century.

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<sup>11</sup> With the sole exception of Malta.

<sup>12</sup> Namely, the legal systems of Bulgaria, Spain, Hungary, Lithuania, Poland, Portugal, Romania, the United Kingdom, Slovakia and the Czech Republic.

<sup>13</sup> It should be noted that, in some Member States, the Uniform Law model is followed, even in the absence of ratification of the convention (for example, in **Bulgaria, Spain and Romania**).

12. Irrespective of the model, the key issue to be addressed by the present note is nevertheless whether promissory notes are actually used in relations with consumers. In that regard, it is necessary to set apart a group of Member States in which the use of promissory notes is, in principle, prohibited, at least in part, in the context of relations with consumers. This group includes: **Germany,**<sup>14</sup> **Belgium,**<sup>15</sup> **Bulgaria,**<sup>16</sup> **Denmark,**<sup>17</sup> **Estonia,**<sup>18</sup> **Finland,**<sup>19</sup> **France,**<sup>20</sup> **Latvia,**<sup>21</sup>

<sup>14</sup> Paragraph 496(3) of the Civil Code (Bürgerliches Gesetzbuch), according to which the borrower may not be obliged to incur a bill of exchange commitment for the claims of the lender under the consumer credit agreement.

<sup>15</sup> So far as concerns consumer credit agreements, Book VII.88 of the Code of Economic Law provides that in the context of credit agreements, it is prohibited for the consumer, or where applicable the person who stands surety, to guarantee payment of their commitments under that agreement by means of a bill of exchange or promissory note. Moreover, the consumer is not required to sign a check guaranteeing repayment, in full or in part, of the amount due. In addition, with regard to consumer contracts, Book VI.36 of the Code of Economic Law states that, without prejudice to the specific rules which expressly authorise it, it is prohibited for an undertaking to require that the consumer signs a promissory note guaranteeing payment of his commitments under that contract.

<sup>16</sup> Article 34 of the Law on Consumer Credit (Zakon za potrebitelskia kredit) provides that consumers cannot be obliged to issue a promissory note to guarantee payment of their commitments under a credit agreement.

<sup>17</sup> Section 31 of the Credit Agreement Act (lov om kreditaftaler) states that when a credit agreement is concluded, the creditor must not be issued a promissory note or other debt security which obliges the consumer and, following a disposal, may limit the right of a consumer to invoke grounds of action with regard to the agreement.

<sup>18</sup> Article 413(1) of the Law of Obligations Act (võlaõigusseadus) provides that the consumer cannot be required to use a promissory note or cheque to secure the settlement of the application on the basis of the credit agreement; in addition, the lender cannot accept a promissory note or cheque.

<sup>19</sup> According to Section 18 of Chapter 7 of the Consumer Protection Act (kuluttajansuojalaki), a claim based on consumer credit must not be the subject of a promissory note or other commitment the transfer of which to a third party in good faith limits the rights of the consumer on the basis of the contract for the sale of goods or the provision of services. Moreover, such a commitment cannot be asked of a person living with the consumer.

<sup>20</sup> Article L. 314-21(1) of the Consumer Code states that promissory notes issued or endorsed by a consumer in certain credit operations are invalid.

<sup>21</sup> Article 8(2) of the Law on Consumer Rights Protection (Patērētāju tiesību aizsardzības likums) provides that it is prohibited to use promissory notes as a means of payment in the provision of credit for consumers.

**Luxembourg,**<sup>22</sup> **the Netherlands,**<sup>23</sup> **the Czech Republic,**<sup>24</sup> **the United Kingdom,**<sup>25</sup> **Slovakia,**<sup>26</sup> **Slovenia**<sup>27</sup> and **Sweden.**<sup>28</sup> In **Spain,** pursuant to recent case-law from the Supreme Court, a partial ban on the use of promissory notes in relations with consumers has been introduced.<sup>29</sup>

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<sup>22</sup> Article 8 of the Act of 9 August 1993 regulating consumer credit provides that, in the context of a credit agreement, it is prohibited for the consumer, or where applicable the guarantor or any other person who stands surety, to guarantee payment of their commitments under that agreement by means of a bill of exchange or promissory note.

<sup>23</sup> The Dutch Consumer Credit Act (Wet op het consumentenkrediet) provided, in Paragraph 38(b), for a prohibition on the consumer guaranteeing payment of his commitments under a credit agreement by means of a promissory note. Nevertheless, taking the view that Paragraph 38(b) concerned matters already covered by Title 2A of Book 7 of the Civil Code (Burgerlijk Wetboek), the Dutch legislature repealed it (see Kamerstukken II 2009/10, 32 339, No 3, p. 29). However, none of the provisions under Title 2A set out a prohibition on the consumer guaranteeing payment by means of a promissory note. Thus, under Dutch law, in the context of consumer credit, an express provision providing for such a prohibition no longer exists.

<sup>24</sup> Article 112(1) of the Consumer Credit Act (Zákon č. 257/2016 Sb., o spotřebitelském úvěru) states that the use of promissory notes is prohibited for the purpose of discharging or securing consumer credit.

<sup>25</sup> Section 123 of the Consumer Credit Act 1974 provides that it is prohibited take a negotiable instrument, other than a bank note or cheque, in discharge or as security for the discharge of any sum payable under a regulated consumer credit or hire-purchase agreement.

<sup>26</sup> According to Article 5a(1)(b) of Act No. 250/2007 Coll. on Consumer Protection (Zákon č. 250/2007 Z. z. o ochrane spotrebiteľa a o zmene zákona Slovenskej národnej rady č. 372/1990 Zb. o priestupkoch v znení neskorších predpisov), the repayment of a debt resulting from an agreement concluded with a consumer by means of a promissory note or the use thereof to guarantee payment of that debt is prohibited.

<sup>27</sup> Article 21(1) of the Consumer Credit Act (Zakon o potrošniških kreditih) provides that, so far as concerns consumer credit, payment guarantees obliging the consumer to issue or accept a blank promissory note, cheque or any other payment instrument with similar effects are prohibited.

<sup>28</sup> Section 30 of the Consumer Credit Act (Konsumentkreditlag (2010:1846)) states that, in the case of a credit agreement, the creditor may not accept a promissory note relating to a debt arising from the credit agreement. Nor may the creditor accept as proof of its claim a bill of exchange issued by the debtor, or any other debt instrument issued by the debtor likely to limit a defence of the debtor based on the agreement in the event that the debt instrument is assigned or pledged to a guarantor acting in good faith.

<sup>29</sup> By judgment of 12 September 2014, the Spanish Supreme Court introduced significant limitations on the use of promissory notes in relations with consumers by holding that blank promissory notes issued to guarantee the repayment of personal loan agreements concluded by consumers are invalid.



13. In most cases, that prohibition covers all agreements falling within the scope of national legislation on consumer credit, adopted for the purpose of transposing the Consumer Credit Directive. Consequently, such a ban is likely to affect many agreements where a consumer might issue a promissory note as security to ensure fulfilment of his contractual obligations.
14. The consequences of infringing that prohibition differ between the legal systems. Among the penalties provided for is the invalidity of the promissory note <sup>30</sup> (for example under **Belgian** and **French** law) and/or the obligation to compensate for the damage suffered by the consumer (for example under **German**, <sup>31</sup> **Bulgarian**, **Estonian**, <sup>32</sup> **Slovakian** and **Czech** law). Moreover, some legal systems also provide for penalties, which could be administrative and/or criminal, in case of breach of the prohibition (for example under **Bulgarian**, **Belgian**, <sup>33</sup> **Danish** <sup>34</sup> and **French** <sup>35</sup> law).
15. Furthermore, although the other legal systems covered by the first stage of the present note do not provide for a similar prohibition, it should be noted that

<sup>30</sup> It should be noted, however, that the invalidity of the promissory note might also result from the application of the rules of ordinary law.

<sup>31</sup> Paragraph 496(3) of the BGB, *in fine*; it is apparent from the preparatory work that providing for the invalidity of the promissory note obligation involves the risk of rules on bills of exchange and promissory notes which are in conflict with the principles enshrined in the Uniform Law; see, in that regard, *Kessal-Wulf* in *Staudinger*, BGB, 2012 edition, Paragraph 496(17).

<sup>32</sup> Article 413(2) of the Law of Obligations Act (*võlaõigusseadus*).

<sup>33</sup> The party who is made to sign a promissory note is required to repay to the consumer the total cost of credit to the consumer (Book VII.205 of the Code of Economic Law). In addition, that person is punished by a criminal fine in the amount of EUR 250 to 100 000 and by imprisonment of between 1 month and 1 year or one of those penalties only (Book XV.90 Title 5 of the Code of Economic Law). An infringement of Book VI.36 of the Code of Economic Law is punishable by a criminal fine in the amount of EUR 26 to 10 000 (Book XV.83 Title 7 of the Code of Economic Law).

<sup>34</sup> Section 56(1) of the Credit Agreement Act (*lov om kreditaftaler*).

<sup>35</sup> Pursuant to Article L. 341-14 of the Consumer Code, with regard to consumer credit, the underwriting, acceptance or endorsement by the borrower or buyer of a bill of exchange or promissory note is punishable by a fine in the amount of EUR 300 000.

some of them lay down, through legislation or through case-law, special measures which derogate from the general law on bills of exchange and promissory notes that include, inter alia, giving consumers a defence based on the underlying legal relationship or prohibiting the transfer of promissory notes (**Austria, Spain, Ireland, Poland and Portugal**).

16. Such special measures do not exist in **Cyprus**,<sup>36</sup> **Hungary**,<sup>37</sup> **Lithuania**,<sup>38</sup> **Croatia, Greece, Italy or Romania**.
17. Amongst Member States which do not prohibit the use of promissory notes in relations with consumers, in particular as security, this is fairly common practice in the following: **Cyprus**,<sup>39</sup> **Lithuania, Poland and Portugal**. Moreover, even in some Member States which provide for such a prohibition, it should be noted that the use of promissory notes in relations with consumers is (**Bulgaria**), or at least was until fairly recently (**Czech Republic**), common practice.
18. Lastly, the 10 legal systems explored in detail recognise blank promissory notes. This is the form of promissory note most commonly used

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<sup>36</sup> The Consumer Credit Law 39(I)/2001 (concerning loan and lease agreements) provided that the use of promissory notes, inter alia, as security for a credit agreement has no bearing on the rights and protections granted to consumers under that law. However, that provision was repealed in 2011 and the law currently in force makes no reference to bills of exchange or promissory notes.

<sup>37</sup> A special regime under which it is prohibited to oblige a consumer to issue a promissory note was in effect between 2001 and 2010.

<sup>38</sup> It is true that a provision of the Lithuanian law on consumer credit provides that the issuance of a promissory note by a consumer is without prejudice to the rights of the issuer set out in that law. However, given the very general nature of that provision, there appears to be no justification for talking about the existence of a special regime in that Member State. Nevertheless, the situation is likely to change soon. Indeed, a draft law presented to the Lithuanian Parliament aims at repealing the possibility of using promissory notes in relations with consumers, in particular as a guarantee of payment.

<sup>39</sup> In addition to the promissory note («γραμμάτιο εις διαταγήν» / «grammatio is diatayin»), the Cypriot legal system recognises a second security which plays a similar role, namely the 'bond in customary form' («γραμμάτιο συνήθους τύπου» / grammatio sinithus tipou). Both securities are used in relations with consumers.

in relations with consumers. Indeed, since promissory notes are generally issued as security to ensure fulfilment of an obligation on the part of the consumer, the debt owed under the promissory note occurs only in the event that the consumer fails to fulfil its obligations. It is therefore only at that time that the promissory note reaches maturity, in particular with regard to the amount of the debt due.<sup>40</sup> A promissory note matures in accordance with the agreement reached by the parties to the underlying legal relationship (the agreement on the maturity of a blank promissory note), which is normally in writing.

## II. NATURE OF PROMISSORY NOTES

### A. GENERAL RULES

19. Traditionally, the issuance of a promissory note is considered to create a new legal relationship (the relationship underlying the promissory note) which must be distinguished from the underlying legal relationship between the parties. Although the relationship under the promissory note stems from the underlying legal relationship, it is a distinct legal relationship. In principle, and in particular to ensure the negotiability (transferability) of promissory notes and the protection of the bearer, the law on bills of exchange and promissory notes imposes certain restrictions, in the context of disputes concerning the relationship underlying the promissory note, on a defence based on the underlying legal relationship. It is on the basis of those restrictions that the promissory note obligation may be regarded as abstract.
20. It that regard, it should be noted that the Uniform Law does not contain provisions relating to the relationship between, on the one hand, the bill of exchange or promissory note and, on the other, the underlying legal relationship. Indeed, as is apparent from the second paragraph of Article 16 of Annex II to the Geneva Convention, which is entitled 'Reserves', any question concerning the relationship on the basis of which the bill of exchange is issued falls outside the scope of the Uniform Law. That statement also applies to promissory notes.

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<sup>40</sup> However, it is not inconceivable that the issuance of the complete promissory note is used as security. That approach is adopted, for example, in the case-law of the **Polish** Supreme Court.

21. In that connection, the answer to the question of what exactly is meant in national legal systems by the word 'abstract', used to describe the nature of promissory orders, is not clear. Therefore, in order to determine the nature of promissory notes, it is necessary to determine, first of all, whether pleas based on the underlying legal relationship may be invoked in the following two situations: first, where the parties to the relationship under the promissory note are the same as the parties to the underlying legal relationship and, second, where those invoking rights stemming from the relationship under the promissory note are not the same as the parties to the underlying legal relationship, which is, in particular, the result of the endorsement of the promissory note.
22. With regard to the first situation, which falls outside the scope of the Uniform Law, the answer is the same in all legal systems of the Member States covered by the present note: a defence based on the underlying legal relationship between the debtor and the creditor is not subject to restrictive conditions.
23. In principle, the situation is different with regard to the second situation. The provisions of the Member States' laws which correspond to Articles 10 and 17 of the Uniform Law provide for restrictions on a defence based on the underlying legal relationship.
24. Article 17 of the Uniform Law provides that persons sued under a bill of exchange may not invoke against the bearer any pleas based on their personal relation with the drawer or with previous bearers, unless the bearer, in acquiring the bill of exchange, has knowingly acted to the detriment of the debtor. In accordance with Article 10 of the Uniform Law, if a bill of exchange which was inchoate when issued has been completed otherwise than in accordance with the agreements entered into, the non-compliance of such agreements may not be raised against the bearer

unless he has acquired the bill of exchange in bad faith or, in acquiring it, has been guilty of gross negligence. Similar restrictions are also provided for in common law legal systems.<sup>41</sup>

25. It follows that, in the second situation, the possibility for the debtor under a promissory note to invoke pleas based on the underlying legal relationship is subject to certain conditions and is, in principle, exceptional. Those restrictions on the possibility of invoking pleas based on the underlying legal relationship reflect the abstract nature of the promissory note.
26. In essence, it may be observed that, aside from any complaints concerning the underlying legal relationship, a promissory note becomes fully abstract in nature only after it is transferred to a third party by endorsement.
27. In the light of the foregoing, it can be concluded that whilst it is true that in all Member States the promissory note is considered to be abstract in nature, the abstract nature differs according to whether or not the promissory note has been endorsed by a third party.

#### B. SPECIAL RULES FOR RELATIONS WITH CONSUMERS

28. Having regard to the risks associated with the abstract nature of promissory notes, some legal systems, whilst not prohibiting their use in relations with consumers, have nevertheless made certain exceptions to the general rules on bills of exchange and promissory notes, in order to ensure consumer protection. In some of those legal systems, special rules have been developed, in particular, in the case-law. Accordingly, the use of promissory notes in relations with consumers is subject to special rules in **Spain, Poland, Portugal** and the **Czech Republic**.

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<sup>41</sup> See point 17 of the contribution concerning United Kingdom law.

29. As for the general characteristics of those special rules, whether originating in legislation or judge-made, several approaches have been adopted. The first consists in granting a consumer a defence based on the underlying legal relationship, either after the endorsement of the promissory note, irrespective of the restrictions set out in Articles 10 and 17 of the Uniform Law (**Czech Republic**),<sup>42</sup> or vis-à-vis a creditor under the promissory note who is not a party to the underlying legal relationship (**Spain**).<sup>43</sup> Another solution is to prohibit the issuance and acceptance of a promissory note that does not contain a ‘not to order’ clause, that is to say a transferable promissory note (**Poland, Portugal**).<sup>44</sup> Irrespective of the legal technique, the rules lead to the same result. Indeed, the application of those provisions deprives promissory notes of their abstract nature, at least so far as concerns the most important aspect with regard to consumer protection, that is to say a defence based on the underlying legal relationship.
30. As for the Member States which have laid down special rules, the scope of those rules is the same as that of national consumer credit legislation. Therefore, the special rules do not *a priori* apply to other consumer contracts. However, the scope of the special rules under

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<sup>42</sup> The same arrangement exists under **Irish** law, covered only by the first part of this research. See Part IV, Section 41, of the Consumer Credit Act 1995.

<sup>43</sup> According to Article 24 of the Law on Consumer Credit Contracts, consumers are permitted to invoke, in the context of linked credit agreements (that is to say credit agreements exclusively aimed at financing a contract relating to the supply of specific goods or the provision of specific services), pleas based on the underlying legal relationship vis-à-vis the creditor who is not a party to that relationship. However, that special arrangement does not apply when the promissory note has been endorsed, in which case it recovers its abstract nature.

<sup>44</sup> The same arrangement exists under **Austrian** law, covered only by the first part of this research. See Paragraph 11 of the Consumer Protection Act (Konsumentenschutzgesetz).

**Czech** law seems to extend beyond the scope of the law on consumer credit.<sup>45</sup>

### **III. SPECIAL PROCEDURES FACILITATING THE RECOVERY OF DEBT OWED UNDER PROMISSORY NOTES**

#### **A. OVERVIEW**

31. It should be noted that the majority of the legal systems examined in detail have special procedures to facilitate and accelerate the recovery of debt owed under a promissory note. It seems that the nature of the promissory note, the wording of which incorporates the promissory note obligation in its entirety, justifies the adoption of such special arrangements. In essence, the special procedures provide for the possibility for the applicant to obtain, on the basis of the promissory note, a court decision, or even to initiate enforcement proceedings, without the defendant being able to, first of all, submit comments.
32. In that regard, a different approach exists, however, in the **United Kingdom** where the possibility of having recourse to a simplified procedure culminating in a summary judgment, on the one hand, is possible only after the request for payment is notified to the defendant and, on the other, depends on the pleas invoked.
33. The **Slovakian** legal system constitutes an exception, in so far as the use of promissory notes has been prohibited in relations with consumers, but also to the extent that, from 22 December 2015,

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<sup>45</sup> It is apparent from the case-law of the Czech high courts that a consumer may invoke, despite the limitations provided for in the provision corresponding to Article 17 of the Uniform Law, complaints concerning the underlying legal relationship, even beyond the scope of the Consumer Credit Act.

the simplified procedure based on that instrument has been removed from the national rules on civil procedure.

34. In the other legal systems, it is generally provided that a competent authority carries out the first examination of the request for recovery of the debt, based on a promissory note, without the defendant being informed of the procedure. It is only after the decision closing that stage that the defendant, following notification of that decision, has the opportunity to defend itself against the initial application and, at the same time, against the decision in respect of which it has been notified.

#### B. PROCEDURE

35. With the exception of the **United Kingdom** and **Slovakia**, the national legal systems examined in detail for the present note provide for special procedures involving two main stages linked by an intermediate stage.

##### *1. INAUDITA ALTERA PARTE STAGE*

36. Two general solutions are used in the legal systems examined. According to the first, the initial stage culminates in a decision declaring the existence of an enforceable right which is taken, in principle, by a court (**Bulgaria, Spain, Poland, Czech Republic**), but can also be adopted by a notary (**Hungary, Lithuania**). As for the second, the promissory note allows the applicant (bearer of the promissory note) to proceed directly, after a court or bailiff has examined compliance with the formal requirements applicable to promissory notes, to the enforcement stage, the promissory note itself already constituting an enforceable right (**Portugal, Romania**).
37. In all of those systems, the defendant does not participate in the first stage of the procedure. The review carried out by the court, notary or bailiff is limited to checking compliance with the formal requirements applicable to the promissory note attached to the request. As for blank promissory notes, the fact that they are incomplete promissory notes when issued is likely to be ignored by the competent authority to which the request is submitted.



In any event, the applicant is not required to present the agreement specifying how the promissory note is to be completed or report that the blank promissory note has been completed. Moreover, the defendant is not required to explain the origin or cause of the promissory note, that is to say set out the circumstances underlying the underlying legal relationship. That stage ends with a decision taken by the competent body and the service of that decision on the defendant.

38. In the majority of systems providing for such a simplified procedure, the *ex parte* decision is subject to special rules in terms of its enforcement, by virtue of which the court decision is recognised as having the status of an enforcement order (**Spain, Poland**) or a security giving the right to initiate enforcement proceedings, either immediately or after a period of time (**Bulgaria,**<sup>46</sup> **Spain, Poland, Czech Republic**). The same applies to out-of-court proceedings before a notary in **Hungary**.

## 2. INTERMEDIATE STAGE

39. The moment in which the defendant becomes aware, following service of the decision closing the first stage, of the legal or enforcement proceedings taken against him, he is in a very different situation to that of a defendant in ordinary proceedings. Indeed, at that moment, he is already faced with a decision granting the request for payment, albeit open to challenge, or even enforcement proceedings.
40. In order to defend himself against the decision served on him, the defendant is required to act promptly, the time limit for lodging a defence may be as short as a few days (3 days under the former **Hungarian**<sup>47</sup>

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<sup>46</sup> At the request of the applicant.

<sup>47</sup> In force until 31 December 2017.

and **Czech** legal systems, 5 days under **Romanian** law), approximately 2 weeks (**Spain, Bulgaria, Hungary, Lithuania, Poland, Czech Republic**) or 3 weeks (**Portugal**). In addition, the defendant is required, in principle, to present at that stage the grounds of defence, the selection of which may alter the course of the next stage in the proceedings. Next, the defendant must follow the detailed procedural requirements in terms of the form and content of the defence (**Spain**). Lastly, in certain legal systems (**Lithuania, Romania, Poland, Portugal**), in order to make proper arrangements for his defence, the defendant is required, first, to pay stamp duty. In civil proceedings in **Poland**, the amount paid by the defendant in that regard exceeds three times the amount paid by the applicant when the application is submitted.

41. In that regard, it should be noted that the court procedures in question, generally described, albeit often incorrectly, by the generic French term '*injonction de payer*' [order for payment], differ considerably from other simplified procedures in respect of which that same term is used.<sup>48</sup> Such procedures involve lodging a straightforward defence – not subject to detailed requirements in terms of form and/or substance or pecuniary obligations – which leads, on the one hand, to the annulment of the decision (order for payment) and, on the other, to the case being dealt, in principle, within the framework of an ordinary procedure. By contrast, in some of the legal systems examined (**Spain, Poland, Czech Republic**), the same is not true of order for payment procedures based on a bill of exchange or promissory note. Indeed, as has been observed, in the course of such proceedings, lodging a defence is subject to more detailed requirements in terms of form and/or substance and the defence must contain the substantive pleas the scope of which determine the scope of the action in the second stage.

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<sup>48</sup> For example, under Spanish, Polish, Slovakian (before 22 December 2015) and Czech law, the special procedure based on a bill of exchange or promissory note has a name (respectively, '*juicio cambiario*', '*postępowanie nakazowe*', '*konanie o zmenkovom platobnom rozkaze*' and '*směnečné řízení*') different to that given to ordinary order for payment procedures (respectively, '*proceso monitorio*', '*postępowanie upominawcze*', '*konanie o platobnom rozkaze*' and '*rozkazní řízení*').

42. Furthermore, the lodging of a defence cannot lead to the automatic suspension of the enforcement procedure, irrespective of whether the proceedings are directed against a promissory note (**Romania**) or an order for payment (**Poland**).
43. In any event, before the defendant is given the opportunity to present his submissions on the substance and adduce supporting facts and evidence, he faces a number of procedural obstacles. Accordingly, the inadmissibility of the defence caused by a disregard for applicable procedural rules is likely to result in the decision adopted at the end of the first stage of the procedure becomes enforceable.

### 3. ADVERSARIAL STAGE

44. When lodging an defence, the defendant may raise all of his complaints in respect of the contested decision. At that stage of the procedure, the debtor may nevertheless face certain restrictions on the admissibility of the action in accordance with the applicable substantive law, in particular relating to the abstract nature of the obligation underlying the promissory note.
45. In that regard, as has already been stated above, in the 10 legal systems examined in the present note, it is considered that, in relations with the bearer who is also the creditor in the underlying legal relationship, complaints concerning the underlying legal relationship are always admissible. The situation of the defendant does not differ according to whether or not he is a consumer.
46. The situation is different in the case of endorsement of the promissory note. The restrictions provided for by national law, which correspond to those set out in Articles 10 and 17 of the Uniform Law, may make it impossible for the defendant to put forward complaints concerning the underlying legal relationship or the possible infringement of the agreement on completing the blank promissory note.

47. However, in certain Member States (**Spain, Poland, Czech Republic, Portugal**), there are specific rules concerning relations with consumers. Those rules make it possible to eliminate, at least in part, the potential adverse effects resulting from the application of provisions corresponding to Articles 10 and 17 of the Uniform Law. Nevertheless, the scope of those rules is limited and does not therefore cover all relations with consumers.<sup>49</sup>
48. In the absence of any special rules under **Bulgarian, Hungarian, Romanian** and **Lithuanian** law, there is therefore a risk in those countries that the consumer, where the conditions set out in Articles 10 and 17 of the Uniform Law have not been met, cannot put forward complaints concerning the underlying legal relationship or the alleged infringement of the agreement on completing the blank promissory note.
49. In that regard, it should be noted that, in order to invoke his status as a consumer and the rights related thereto, the consumer is required to lodge a defence in which he asserts his rights under the underlying legal relationship. In general, it seems that in the legal systems examined, in the absence of a defence based on the underlying legal relationship, the adversarial stage of the case is limited to questions concerning the relationship under the promissory note, since the court does not examine of its own motion the underlying legal relationship.

## CONCLUSION

50. The role played by promissory notes with regard to consumer credit differs from State to State.

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<sup>49</sup> However, as stated above, it is apparent from the case-law of the **Czech** higher courts that a consumer may invoke, despite the limitations provided for in the provision corresponding to Article 17 of the Uniform Law, complaints concerning the underlying legal relationship, even beyond the scope of the Hungarian Act on Consumer Credit.

51. First of all, several Member States have prohibited the use of bills of exchange or promissory notes in relations with consumers. In other Member States, the use of such instruments, whilst permitted, is not established practice. Nevertheless, in a small number of Member States, bills of exchange and promissory notes play a very important role as security to ensure fulfilment of the obligations of debtors, including those with the status of consumer.
52. However, even within that small group, certain Member States have adopted exceptions to the general rules on bills of exchange and promissory notes, in order to ensure consumer protection, in particular by introducing restrictions on the transferability of the security, which is likely to eliminate the potential adverse effects resulting from the abstract nature of the promissory note obligation.
53. Nonetheless, it should be noted that the attractiveness of promissory notes, in Member States where they are used in relations with consumers, lies not only in the abstract nature of the promissory note relationship, which provides for the possibility of circumventing certain provisions relating to consumer protection, but also in the existence of procedural rules to facilitate the recovery of debt owed under promissory notes.
54. In principle, such procedural rules make it possible either to obtain a preliminary decision constituting an enforceable right and

offering certain opportunities in terms of the enforcement procedure, namely to initiate enforcement proceedings directly on the sole basis of the promissory note. In all of the legal systems examined in detail, the defendant has the right to lodge a defence challenging those decisions. However, this requires more complex arrangements than the straightforward form of a defence in the procedure in question.

55. Consequently, it is the combination of substantive and procedural law that is likely to weaken the position of the consumer vis-à-vis the debtor in ordinary proceedings. Therefore, even if the special rules of substantive law derogate from the prohibition on invoking pleas based on the underlying legal relationship, the procedural rules are likely to prevent the consumer from invoking the protection conferred on him under substantive law.
56. Those procedural rules may limit the possibility for a court to examine of its own motion, having regard to consumer protection rules, the circumstances giving rise to the issuance of the promissory note. Such a possibility is practically unknown in the initial stage of the proceedings during which the order for payment is issued. The possibility exists in the adversarial stage but only once the complaints concerning the underlying legal relationship have been put forward by the defendant.
57. The same applies to a promissory note which is incomplete when issued and which is likely to be used more often in relations with consumers. The fact that it is a blank promissory note has no bearing on the possibility for a court to examine of its own motion

the circumstances giving rise to the issuance of the promissory note. The only difference lies in the scope of that examination, in so far as, with regard to a blank promissory note, the review carried out by the court may cover the underlying legal relationship and any questions relating to the agreement on completing the blank promissory note.

[...]