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1. Development of the Croatian Consumer Protection Law

Consumer protection law began to develop as a separate area of law in the Croatian legal system with the signing of the Stabilization and Association Agreement between the Republic of Croatia and the European Communities and their Member States (SAA)[1] on 29 October 2001[2]. The subsequent transposition of numerous

[1] Act on Confirmation of the Stabilization and Association Agreement between the Republic of Croatia and the European Communities and their Member States (*Zakon o potvrđivanju Sporazuma o stabilizaciji i pridruživanju između Republike Hrvatske i Europskih zajednica i njihovih država članica*), "Official Gazette of the Republic of Croatia – International Agreements" (OG IA) Nos. 14/01, 15/01, 14/02, 1/05, 7/05, 9/05 and 11/06.

[2] As a member of the former Socialist Federal Republic of Yugoslavia (SFRY) the Republic of Croatia belonged in the past to the planned economy system and did not develop the consumer protection as a particular area of law. However, the legislative framework contained many provisions relevant for the consumer protection. The process of development of the market economy began in 1990s with the proclamation of independence (Constitutional Decision on sovereignty and independence of the Republic of the Croatia (*Ustavna odluka o suverenosti*

EU consumer protection directives resulted from the obligation to align the Croatian existing legislation with the *acquis communautaire*, stipulated in Arts. 69 and 74 SAA. According to the general obligation of approximation of laws in Art. 69(1) SAA, the Republic of Croatia obliged itself to gradual approximation of existing acts and of future legislation with the *acquis*. Under Art. 69(2) SAA the approximation at an early stage should focus on "fundamental elements of the internal market *acquis*" and gradually extend to all elements of the *acquis* referred to in the SAA. The process should finish by the end of the period defined in Art. 5 SAA, i.e. at the latest within six years after the entry into force of the SAA[3]. Special obligations of harmonizing the legislation and aligning the consumer protection in Croatia with the one in force in the EU, together with the obligations of ensuring the policy of active consumer protection and of effective legal consumer protection, were stipulated in Art. 74 SAA. According to the latter provision, effective consumer protection is necessary for ensuring proper functioning of the market economy, and it is dependent not only upon developing an administrative infrastructure to ensure market surveillance, but also upon law enforcement. Until the SAA was signed, consumer protection in Croatia was not systematically and consistently regulated by a single act. Instead, consumers were protected indirectly through numerous separate private and public law provisions contained in different special acts[4]. The old

i samostalnosti Republike Hrvatske) OG No. 31/91) and adoption of the Constitution of the Republic of Croatia (*Ustav Republike Hrvatske*) OG Nos. 56/90, 135/97, 8/98 (consolidated text), 113/00, 124/00 (consolidated text), 28/01, 41/01 (consolidated text), 55/01 (correction), 76/10, 85/10 (consolidated text), and 5/14. According to its Art. 49, the "entrepreneurial and market freedom shall be the basis of the economic system of the Republic."

[3] The SAA entered into force on 1 February 2005 (OG IA No. 1/05; OJ L 2005/26). Until then the Interim Agreement on Trade and Trade-Related Matters between the Republic of Croatia and the European Community was in force (*Privremeni sporazum o trgovinskim i s njima povezanim pitanjima između Republike Hrvatske i Europske zajednice*) OG IA Nos. 15/01 and 3/02; OJ 2001/330, pp. 1–204.

[4] *Ex* Trade Act, OG Nos. 11/96, 30/99, 75/99, 76/99, 62/01 and 109/01 that regulated in Art. 16d distance selling contracts and in Art. 16 doorstep

act regulating general obligations law, namely the Obligations Act of 1978 (OA)[5], contained many provisions which offered a high level of protection to the consumers. In principle, these provisions protected consumers as any other contracting party, i.e. a party to obligations relations.[6] Under the monistic concept, the OA applies to all obligations relationships involving either natural or legal persons or both as parties, covering all types of contracts, both the civil law and the commercial law contracts (Art. 14(1) OA). Because of that, and with the view of preserving its consistency and protecting the OA against many amendments resulting from the alignment with the EU *acquis*, the Croatian legislator initially decided not to integrate the EU consumer protection directives into the OA[7]. The obligation of approximation stipulated in Arts. 69 and 74 SAA was fulfilled with their transposition into a special act (*lex specialis*). Therefore, the first Consumer Protection Act (CPA)[8] was enacted in June 2003 and represented partial approximation with the EU consumer protection *acquis*, transposing Directives 98/6/ /EC, 85/577/EEC, 97/7/EC, 94/47/EC, 93/13/EEC, 84/450/ /EEC, 87/102/EEC, and partially the Directive 1999/44/EC.[9] In

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selling contracts; *ex* Telecommunications Act OG Nos. 79/99, 128/99, 68/01 and 109/01; *ex* State Inspectorate Act, OG No. 76/99 etc.

[5] Obligations Act (*Zakon o obveznim odnosima*) OG Nos. 53/91, 73/91, 111/93, 3/94, 107/95, 7/96, 91/96, 112/99 and 88/01. This Act was essentially the former Yugoslav Obligations Act (OG SFRJ 29/78, 39/85, 46/85, 45/89 and 57/89) transposed into the Croatian legal system by means of the Act on the Transposition of the Obligations Act, OG No. 53/91. The OA of 1978 was repealed by the new OA enacted in 2005, OG Nos. 35/05, 41/08, 125/11, and 78/15.

[6] On provisions protecting consumers See T. Josipović, *Das Konsumentenschutzgesetz – Beginn der Europäisierung des kroatischen Vertragsrechts* in: *The Architecture of European Codes and Contract Law*, ed. S. Grundmann, M. Schauer, Wien, 2006, p. 145.

[7] See M. Baretić, *Implementacija prava Europske zajednice o zaštiti potrošača u hrvatsko pravo*, "Pravo u gospodarstvu", Zbornik XLI. susreta pravnika, 2003, p. 248.

[8] Consumer Protection Act (*Zakon o zaštiti potrošača*) OG No. 96/03.

[9] Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers, OJ 1998 L 80/27; Council Directive 85/577/

the Commission Communication of 20 April 2004: Opinion on Croatia's Application for Membership of the EU (*avis*)[10], the Republic of Croatia was encouraged to continue with the approximation process in the field of consumer protection and in June 2004 became a candidate country[11]. Despite the initial approach, the new OA, enacted in 2005, transposed excessively Directives 90/314/EEC, 1999/44/EC, 93/13/EEC, and 85/374/EEC and thus became the second most important act of the Croatian consumer protection law[12]. After the opening of accession negotiations in October 2005, the Government formed a Working group for the preparation of negotiations on Chapter 28 – Consumers and Health Protection[13]. The Working group found that, with the exception of Directives 93/13/EEC, 94/47/EC, and 85/374/EEC, the level of

/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, OJ 1985 L 372/31; Directive 97/7/ /EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ 1997 L 144/19; Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ 1993 L 95/29; Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising, OJ 1984 L 250/17; Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, OJ 1987 L 42/48; Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ 1999 L 171/12.

[10] COM (2004) 257 final.

[11] See European Council Presidency Conclusions of 17 and 18 June 2004, Brussels.

[12] Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, OJ 1990 L 158/59; Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ 1999 L 171/12; Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ 1993 L 95/29; Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ 1985 L 210/29, amended by Directive 1999/34/EC, OJ 1999 L 141/20.

[13] OG No. 49/05.

alignment of national legislation with other transposed directives was unsatisfactory. Moreover, Directives 2002/65/EC, 98/27/EC, and 2005/29/EC[14] were not even implemented[15]. With the aim of removing these deficiencies and achieving further alignment, the new CPA was enacted in August 2007[16]. Few months later, in October 2007, the negotiations on Chapter 28 were informally opened at the Intergovernmental Conference on the Accession of the Republic of Croatia to the EU. The ongoing need for approximation led to further amendments of the OA in 2008[17]. As confirmed in the Progress Report and the Commission Communication on Enlargement Strategy and Main Challenges 2008–2009[18], Croatia achieved "a good level of legal alignment" in the field of consumer protection. The amendments to the CPA in 2009 and the enactment of the new General Product Safety Act (GPSA)[19] resulted in

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[14] Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/ /EC and 98/27/EC, OJ 2002 L 271/16; Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, OJ 1998 L 166/51; Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC, and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, OJ 2005 L 149/22.

[15] See Screening Report Croatia, Chapter 28–Consumer and Health Protection, 7 Feb 2007, http://ec.europa.eu/enlargement/pdf/croatia/screening_reports/screening_report_28_hr_internet_en.pdf, last visited 15 February 2018.

[16] Consumer Protection Act (*Zakon o zaštiti potrošača*) OG Nos. 79/07, 125/07, 75/09, 79/09, 89/09, 133/09, 78/12, and 56/13.

[17] OG No. 41/08.

[18] Commission of the European Communities, Croatia 2008 Progress Report, SEC(2008) 2694, final, 5 Nov 2008, p. 36, http://ec.europa.eu/enlargement/pdf/press_corner/key-documents/reports_nov_2008/croatia_progress_report_en.pdf (access: 15.02.2018); Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2008–2009, COM(2008) 674 fin, 5 Nov 2008, p. 43.

[19] General Product Safety Act (*Zakon o općoj sigurnosti proizvoda*) OG Nos. 30/09, 139/10, and 14/14 was harmonized with the Council Directive

a temporary conclusion of negotiations on Chapter 28 in November 2009. However, the ongoing process of approximation and alignment of the Croatian legislation with the EU consumer protection *acquis* continued. Further legislative acts, such as the Unpermitted Advertising Act (UAA) transposing the Directive 2006/114/EC[20] or the Consumer Credit Act (CCA) transposing the Directive 2008/48/EC, were adopted and the existing ones aligned[21]. Following a successful conclusion of accession negotiations and signing the Treaty on the Accession of the Republic of Croatia to the EU[22] in December 2011, the intensive harmonization process

87/357/EEC of 25 June 1987 on the approximation of the laws of the Member States concerning products which, appearing to be other than they are, endanger the health or safety of consumers, OJ 1987 L 192/49 and with the Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety, OJ 2002 L 11/4. The later was also transposed in the State Inspector's Office Act (*Zakon o Državnom inspektoratu*) OG Nos. 116/08, 123/08, 49/11, 148/13, 14/14, 19/14, and the Act on the Right of Access to Information (*Zakon o pravu na pristup informacijama*) OG Nos. 172/03, 144/10, 37/11, and 77/11, now replaced by the new Act on the Right of Access to Information, OG Nos. 25/13 and 85/15.

[20] Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising, OJ 2006 L 376/2, is transposed in the Unpermitted Advertising Act (*Zakon o nedopuštenom oglašavanju*) OG No. 43/09. Although the Act regulates the protection of traders against misleading advertising and its consequences (Art. 1), the goal of the transposed Directive is also the protection of consumers from bad consequences of such advertising on them.

[21] 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, OJ 2008 L 133/66, last amended by Commission Directive 2011/90/EU of 14 November 2011, OJ 2011 L 296/35 and transposed in the Consumer Crediting Act/CCA (*Zakon o potrošačkom kreditiranju*) OG Nos. 75/09 and 112/12. See the National programme of consumer protection for period 2007–2008, OG No. 84/07; See Progress Reports for Croatia of 2009, 2010, and 2011 of the Commission of the European Communities, http://www.eupregovori.hr/Default.asp?ru=644&sid=&akcija=&jezik=1 (access: 15.02.2018).

[22] Treaty between Member States of the European Union and the Republic of Croatia concerning the Accession of the Republic of Croatia to the European Union, OJ L 112, 24 Apr2012; Act on Confirmation of Treaty between Member States of the European Union and the Republic of Croatia concerning the Ac-

continued, reflecting thereby the dynamic development of the EU consumer protection *acquis*[23]. In July 2012 and in May 2013, the CPA was amended in order to align with Directives 2008/122/EC and 2009/22/EC[24]. Due to significant structural changes to which CPA was submitted in order to align with the Directive 2011/83/EU on consumer rights[25], a new CPA was adopted in 2014[26]. Consequently, in a relatively short history of its consumer protection, Croatia changed three CPA's and introduced numerous more special acts transposing various EU Directives on consumer protection. Today, besides the CPA, as *lex generalis* for consumer protection, and the OA, as the second most important act for consumer obligation relations, our legal system knows numerous special legal acts containing consumer protection provisions. To these belong

cession of the Republic of Croatia to the European Union, OG IA Nos. 2/12 and 5/13.

[23] European Commission Report of the Fitness Check on Directive 2005/29/EC, Council Directive 93/13/EEC, Directive 98/6/EC, Directive 1999/44/EC, Directive 2009/22/EC, and Directive 2006/114/EC, Brussels, 23 May 2017, SWD(2017) 209 final.

[24] Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts, OJ 2009 L 033/10; Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests, OJ 2009 L 110/30, which repealed and codified the Directive 98/27/EC, OJ 1998 L 166/51.

[25] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending the Directive 93/13/EEC and Directive 1999/44/EC, and repealing the Directive 85/577/EEC and Directive 97/7/EC, OJ 2011 L 304/64, 22 November 2011. The CPA 2007 transposed Directives 97/7/EC and 85/577/EEC in separate chapters containing different provisions on their material scope, pre-contractual information, withdrawal periods etc. On the other hand, the Directive 2011/83/EU provides for joint regulation of these issues, covering both types of mentioned contracts. Consumer Protection Act (*Zakon o zaštiti potrošača*) OG Nos. 41/14 and 110/15.

[26] Consumer Protection Act (*Zakon o zaštiti potrošača*) OG Nos. 41/14 and 110/15. Extensively on the adjustments See S. Petrić, *Temeljna obilježja prava zaštite potrošača Republike Hrvatske u svjetlu novog zakona o zaštiti potrošača*, "Zbornik Pravnog fakulteta u Nišu" 2015, No 70, p. 719.

the abovementioned CCA and GPSA, but also the E-Commerce Act,[27] the Electronic Communications *Act*[28]*, the Mortgage Consumer Credit Act*[29]*, the* Payment System Act[30], the *Alternative Consumer Dispute Resolution Act*[31]*, etc.,* as well as various subordinate legal acts. To the most recent alignments with the *acquis* belongs the transposition of the Directive 2015/2302 into the new Act on Provision of Services in Tourism[32], while amendments of the relevant OA provisions on package travel arrangements are scheduled for 2018.

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[27] E-Commerce Act (*Zakon o elektroničkoj trgovini*) OG Nos. 173/03, 67/08, 36/09, 130/11, and 30/14 transposing the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (*Directive on electronic commerce*), OJ L 178, 17 July 2000, p. 1–16.

[28] Electronic Communications Act (*Zakon o elektroničkim komunikacijama*) OG Nos. 73/08, 90/11, 133/12, 80/13, 71/14 and 72/17 transposing thirteen EU legal acts.

[29] Mortgage Consumer Credit Act (Zakon o stambenom potrošačkom kreditiranju) OG No. 101/17 transposing the Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU, and Regulation (EU) No 1093/2010, OJ L 60, 28 Feb 2014, p. 34–85.

[30] Payment System Act (*Zakon o platnom prometu*) OG Nos. 199/09 and 136/12 transposing now *ex* Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC, OJ L 319, 5 Dec 2007, p. 1–36.

[31] Alternative Consumer Dispute Resolution Act (*Zakon o alternativnom rješavanju potrošačkih sporova*) OG No. 121/16 transposing the Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending the Regulation (EC) No 2006/2004 and the Directive 2009/22/EC OJ L 165, 18 Jun 2013, pp. 63–79.

[32] Act on Provision of Services in Tourism (*Zakon o pružanju usluga u turizmu*) OG No. 130/17 transposing the Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and the Directive 2011/83/EU of the European Parliament and the Council and repealing the Council Directive 90/314/EEC, OJ L 326, 11 Dec 2015, p. 1–33.

2. Main Sources of the Croatian Consumer Protection Law

The presented developments in the Croatian consumer protection law demonstrate that the legislator has not taken a consistent and systematic approach in regulation. Although the EU consumer protection *acquis* was mainly transposed into national legislation by the CPA and OA, a range of other acts contains provisions on consumer protection of both private and public law nature. Transparency, application, and enforcement of consumer protection legislation are therefore often affected by such sporadic and fragmented regulation. The following text will thus focus on the CPA as the fundamental and general act on consumer protection (*lex generalis*) and its legal relationship to the OA, on the one hand, and other legal acts that are relevant for the consumer protection, on the other.

2.1. Consumer Protection Act

2.1.1. Content

According to Art. 3, CPA is aligned with the following EU Directives on consumer protection: 93/13/EEC, 98/6/EC, 2002/65/ /EC, 2005/29/EC, 2008/122/EC, 2009/22/EC, and 2011/83/EU. Except for Directives 93/13/EEC and 98/6/EC, which allow the national legislator to adopt or maintain more favorable provisions to protect consumers (i.e. minimum harmonization)[33], all the others are "new generation" EU Directives based on maximum or targeted full harmonization approach[34] precluding the adoption of diverg-

[33] Art. 8 of the Directive 93/13/EEC: "Member States may adopt or retain the most stringent provisions compatible with the Treaty in the area covered by this Directive, to ensure a maximum degree of protection for the consumer."

[34] Art. 4 of the Directive 2011/83/EU: "Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in

ing and more stringent provisions. This has resulted in an almost literal transposition of enumerated EU Directives into the CPA and other more special legal acts. In order to guarantee the maximum standard of consumer protection as required by EU Directives, the Croatian legislator has used the so-called "copy-paste" technique of implementation.

When it comes to its content, the CPA is divided into eight parts. Part I contains Basic provisions incorporating fundamental consumer rights from the Council Resolution of 1975[35] (Art. 1), referring to the transposed EU Directives on consumer protection (Art. 3), defining key notions used in the CPA (Art. 5) and regulating relations of the CPA and other legal acts relevant for the consumer protection in our legal system (Art. 4). The following parts (Part II–III) are divided into special chapters implementing individual EU Directives, while the ending parts deal with the enforcement of consumer rights, such as alternative dispute resolution mechanisms, collective redress, and bodies competent for the consumer protection in Croatia, as well as supervision and penalties for the infringements of provisions on consumer protection contained in the CPA and other legal acts (Part IV–VIII)[36].

2.1.2. Scope of Application

2.1.2.1. Personal scope of application (lat. *ratione personae*)

The CPA applies to legal relations between the "consumer" and the "trader" (B2C), which can be derived from Basic provisions of the CPA establishing protection of fundamental consumer rights when

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this Directive, including more or less stringent provisions to ensure a different level of consumer protection, unless otherwise provided for in this Directive."

[35] Council Resolution of 14 April 1975 on a Preliminary Programme of the European Economic Community for a Consumer Protection and Information Policy, OJ C 92/1.

[36] For the exact structure see E. Mišćenić, *Consumer Protection Law*, in: *Introduction to the Law of Croatia*, ed. T. Josipović, Alphen aan den Rijn, 2014, p. 280.

they are buying products and services or obtaining products and services in other manners on the market (Art. 1). Both definitions were drafted upon common elements of differing definitions of corresponding notions from EU Directives and therefore amended several times in order to achieve alignment with the *acquis*[37]. According to current regulation corresponding to definitions from the Directive 2011/83/EU, a consumer is any natural person who concludes a legal transaction or acts on the market outside of its trade, business, craft or professional activity (Art. 5(15)). This narrow definition excludes workers, persons starting a business activity or any professionals. The legislator never used the opportunity to widen the personal scope of application to legal persons or natural persons who are not consumers within the meaning of the Directive 2011/83/EU, such as non-governmental organizations, start-ups or small and medium-sized enterprises[38]. However, attempts were made in the Croatian court practice, such as by the High Administrative Court, which tried to widen the protection offered by the CPA also to craftswomen concluding a contract with an operator of telecommunication services for professional purposes. It did so by interpreting more broadly the definition of the "subscriber" contained in the Electronic Communications *Act, encompassing both natural and legal persons* signing a subscription contract[39]. However, bearing in mind the findings of the CJEU in the case *Idealservice*[40], such attempts are legally destined to fail. On the other hand, the Ministry of Economy, as a competent body for the consumer protection in Croatia, gave the interpretation narrowing

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[37] More on past developments of the Croatian consumer protection law See E. Čikara, *Die Angleichung des Verbraucherschutzrechts in der Europäischen Gemeinschaft: Unter besonderer Berücksichtigung des Verbraucherschutzrechtes in der Republik Kroatien*, "Zbornik Pravnog fakulteta u Rijeci" 2007, No. 28:2, p. 1067.

[38] Recital 13 of the Directive 2011/83/EU.

[39] Judgement of the High Administrative Court of the Republic of Croatia (*Presuda Visokog upravnog suda Republike Hrvatske*) Us-3781/2011-4 of 28 February 2012.

[40] Judgment of 22 November 2001, joined cases C-541/99 and C-542/99, *Cape and Idealservice MN RE, EU:C:2001:625.*

protection of the consumer in cases of intermediary contracts[41]. By interpreting the meaning of the contract concluded with a real estate intermediary, it came to the conclusion that, according to provisions of the special Act on the Real Estate Intermediation[42], an ordering party can be both a natural and a legal party, and therefore such a contract can never be considered as a consumer contract.

This leads to another particularity of the Croatian consumer protection law, containing further definitions of the "consumer" in other more special acts on consumer protection. Most of these other definitions have been simply adjusted to the subject matter of relevant legal acts and reflect the definition contained in the EU Directive they are transposing. Consequently, definitions of the consumer can be found in Art. 2(1)(1) of the Consumer Credit Act, Art. 110 of the Leasing Act[43], Art. 375(1) of the Insurance Act[44], Art. 300 of the Credit Institutions Act[45], Art. 2(8) of the E-Commerce Act, Art. 2(1)(42) of the Electronic Communications *Act, Art. 2(14) of the* Electronic Money Act[46], *Art.* 2(1)(8) of the Payment System Act, and many others. All of these follow the approach taken in various EU Directives defining the consumer as a natural person (personality criterion) entering a transaction or signing a contract for purposes which can be regarded as outside his trade, business or profession (functionality criterion). Both of these criteria can be found in the definition of the trader in Art. 5(26) CPA. The trader is defined as any person (personality criterion) who concludes a legal transaction or acts on the market within its trade, business, craft or professional activity (functionality criterion), as well as a person acting in the name or on behalf of the trader. Definitions of the trader

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[41] IUS-INFO – Interpretation of the Ministry – Can Contract on Intermediation in Immovables be Considered as Consumer Contract (*Mišljenja ministarstva – Smatra li se ugovor o posredovanju nekretnina potrošačkim ugovorom*).

[42] Act on the Real Estate Intermediation (*Zakon o posredovanju u prometu nekretnina*) OG Nos. 107/07, 144/12 and 14/14.

[43] Leasing Act (*Zakon o leasingu*) OG No. 141/13.

[44] Insurance Act (*Zakon o osiguranju*) OG No. 30/15.

[45] Credit Institutions Act (*Zakon o kreditnim institucijama*) OG Nos. 159/13, 19/1,5 and 102/15.

[46] Electronic Money Act (*Zakon o elektroničkom novcu*) OG No. 139/10.

in previous CPA's of 2003 and 2007 did not encompass a person acting in the name or on behalf of the trader, which resulted in cases, such as the abovementioned one, where the trader, *Geneza*, offering products and services and concluding subscriptions contracts in the name of the Croatian Telecom was not recognized as a "trader"[47]. This happened despite the existence of an *ex* Art. 3(2) CPA 2007, according to which for purposes of Chapters dealing with distance contracts and unfair commercial practices, a trader was also a person acting in the name or on behalf of the trader. The disputed subscription contract was a classic B2C contract between the present parties, incorrectly characterized by the court as an off-premises contract due to the misunderstanding of the notion of the trader as defined in the CPA 2007. The concept of the trader as currently defined by the CPA encompasses both public and private law persons, such as companies and single traders, but also all other natural and legal persons who act on the market within their business or professional activity (farmers, craftsmen, providers of public services, local and regional self-government, and self-employed, such as free artists, architects, lawyers etc.). This concept has a much broader meaning than the same concept in Art. 4(1) of the Trade Act[48] or Art. 1(1) of the Companies Act[49]. The law is mute when it comes to B2C contracts with dual purpose. Initially, the legal literature followed the approach of the CJEU[50], according to which if a natural person at the time of contract conclusion acts for purposes falling within the area of its business or professional activity, this person should not be considered to be a consumer[51].

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[47] Judgement of the High Administrative Court of the Republic of Croatia, Us-3781/2011-4 of 28 February 2012.

[48] Trade Act (*Zakon o trgovini*) OG Nos. 87/08, 96/08, 116/08, 76/09, 114/11, 68/13, and 30/14.

[49] Companies Act (*Zakon o trgovačkim društvima*) OG Nos. 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08, 137/09, 152/11 (consolidated), 111/12, 144/12, 68/13, and 110/15.

[50] Judgment of 3 July 1997, C–269/95, *Francesco Benincasa/Dentalkit Srl*, EU:C:1997:337.

[51] See eds. M. Dika, Z. Pogarčić, *Obveze trgovca u sustavu zaštite potrošača*, Narodne novine, Zagreb, 2003.

Over the years both the CJEU approach and the opinion of Croatian legal scholars changed[52], and today they are both following instructions given in the recital 17 of the Directive 2011/83/EU, according to which a predominant purpose is to be observed[53].

2.1.2.2. Material scope of application (lat. *ratione materiae*)

2.1.2.2.1. Basic provisions

According to its Art. 1, the CPA offers protection of the following fundamental consumer rights:

- Right to protection of the economic interests of consumers;
- Right to protection from dangers to life, health or property;
- Right to legal protection of consumers;
- Right to consumer information and education;
- Right to join organizations for the protection of consumer interests;
- Right to consumers representation and participation of consumer representatives in the work of bodies dealing with issues of interest to consumers.

In doing so, the CPA reflects five fundamental consumer rights enumerated for the first time in the Council Resolution of 14 April 1975 and guaranteed by Art. 169(1) TFEU[54]. Although these rights ought to be protected when consumer buys or acquires products and services on the market, there are inconsistencies in this re-

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[52] On different standings of the CJEU from judgement of 20 January 2005, C-464/01, *Gruber*, EU:C:2005:32 until judgment of 3 September 2015, C-110/14, *Costea*, EU:C:2015:538, para. 31 See E. Mišćenić, *Protection of Consumers on the EU Digital Single Market: Virtual or Real One?* in: *The Influence of the European legislation on National Legal Systems in the Field of Consumer Protection*, eds. A. Viglianisi Ferraro, M. Jagielska, M. Selucka, Warsaw 2018.

[53] Recital 17 of the Directive 2011/83/EU: "in the case of dual purpose contracts, where the contract is concluded for purposes partly within and partly outside the person's trade and the trade purpose is so limited as not to be predominant in the overall context of the contract, that person should also be considered as a consumer".

[54] See consolidated version of the Treaty on the Functioning of the European Union, OJ C 202, 7 June 2016.

spect already at the outset of the CPA. For example, the definition contained in Art. 5(20) CPA defines "product" as every good or service, including immovable, rights and obligations, which makes separate mentioning of "services" in Art. 1 and many other CPA provision superfluous. There are further examples of such inconsistencies, such as in the definition of the warranty in Art. 5(4) CPA, where despite the protection offered in cases of non-conformity of "products" according to Art. 43(2) CPA, the definition bears the title "warranty for conformity of the sold thing"[55]. Another criticism can be referred to structural changes introduced by the CPA 2014, which moved certain key consumer protection instruments from Basic provisions into the part of the CPA dealing only with contractual relations. Irrespective the fact that a B2C relation can also be a non-contractual one, such as in relation to producers, provisions regulating mandatory nature of consumer rights are now reserved only for contractual relations. Under the title "Legal nature of statutory provisions regulating consumer contracts," Art 41(1) CPA prescribes that a consumer cannot waive rights nor can the rights arising for him from this Act or other acts protecting consumers be limited.

Due to the fragmentation of the Croatian consumer protection law, another basic provision deserves a special attention. This is a provision on relations between the CPA and other legal acts containing consumer protection provisions, such as the OA. Pursuant to Art. 4(2), if special statutory acts or the CPA do not regulate differently, provisions of the OA apply to obligation relations between the consumer and the trader. This provision, therefore, positioned the OA as *lex generalis* for B2C obligation relations, i.e. contractual and non-contractual B2C relations. It is therefore not surprising that by implementing the Directive 99/44/EC the legislator introduced a definition of the "consumer contract" in Art. 412(3) OA. On the other hand, such definition is missing in the *lex generalis*

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[55] Definition of the thing in the Croatian legal system can be found in Art 2. of the Act on Ownership and Other Real Rights (*Zakon o vlasništvu i drugim stvarnim pravima*) OG Nos. 91/96, 68/98, 137/99, 22/00, 73/00, 129/00, 114/01, 79/06, 141/06, 146/08, 38/09, 153/09, 143/12, and 152/14.

for consumer protection, namely in the CPA. Relation to other more special legal acts is regulated in Art. 4(1) CPA, stating that in case of collision between provision of this Act with provisions of acts regulating certain areas in accordance with the *acquis* of the European Union, provisions of these special acts apply primarily to relations between consumers and traders. Meaning, in case of a conflict between the CCA transposing the Directive 2008/48/EC and the CPA, rules of the CCA are *lex specialis.*

2.1.2.2.2. Traders Business with Consumers

Under a quite surprising title, "Traders Business with Consumers," the CPA introduced provisions regulating relations between traders and consumers when doing business, particularly provisions of the Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers and of Directive 2005/29/EC on unfair commercial practices. This Part II of the CPA is divided into four main Chapters dealing with an indication of prices and special forms of sale (Chapters I–II), public services offered to consumers (Chapter III), and unfair commercial practises (Chapter IV). Here, within provisions on products labelling, indication of prices of products and "services," sales conditions and invoices, repairing and maintaining of products, one can also find a provision prohibiting the so-called "cold calling"[56]. Although one would rather regulate it under the chapter on unfair commercial practices, Art. 11.a CPA prohibits unwonted phone calls or sending of messages only to consumers who registered against such calls in the official register of the Croatian Regulatory Authority for Network Industries[57]. Another interesting provision concerns the disposal of consumer's personal data, a trader is prohibited from

[56] One of first cases of cold calling ruled by the CJEU was the *Alpine Investment* case, dealing with unsolicited cross-border distance selling of financial services, See judgement of 10 May 1995, C-384/93, *Alpine Investments v Minister van Financiën*, EU:C:1995:126.

[57] Croatian Regulatory Authority for Network Industries, https://www.hakom.hr/default.aspx?id=7 (access: 15.02.2018).

giving consumer's personal data to any other third party without previous consumer's consent as regulated by legal act on protection of personal data (Art. 11)[58]. However, despite of provisions requiring explicit consent of consumers, traders regularly circumvent the rules on data protection by incorporating an "informed consent" into their business standard terms; the acceptance of which means that consumers allegedly give consent to data processing. It remains to be seen whether the famous General Data Protection Regulation[59] shall bring improvements in this respect. According to its recital 42, the use of pre-formulated declaration of consent is allowed under the condition that the data subject has genuine or free choice or is able to refuse or withdraw consent without detriment.

After regulating special forms of sales, such as retail sales, promotional sale, discounts, clearance sale, sale of products with a failure, or of products with an expiring use deadline (Arts. 18–23), the CPA introduces special provisions on public services offered to consumers. The CPA enumerates eleven services which are considered public services, to which, for example, belong the distribution of electricity, water, electronic communications services, communalities, chimney services, postal services, public transport services, etc. (Art. 24(1)). Interestingly enough, this chapter contains a provision prohibiting discrimination of consumers in the field of public services offered by means of distribution networks, by demanding traders to provide public services under non-discriminatory, beforehand known and contractually agreed terms and conditions (Art. 26). This provision was disputed for the first time in the case "Ponikve," where the Croatian Competition Agency

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[58] Act on Protection of Personal Data (*Zakon o zaštiti osobnih podataka*) OG Nos. 103/03, 118/06, 41/08, 130/11 as aligned with now repealed Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23 November 1995, pp. 31–50.

[59] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (*General Data Protection Regulation*) OJ L 119, 4.5.2016, p. 1–88, applicable in MS from 25 May 2018.

established its violation. In this case, the company Ponikve d.o.o. formed 32 categories of consumers, which were charged differently for water supply per cubic meter[60]. There is another provision prohibiting discrimination, which requires from traders offering public services in another MS to guarantee the same level of quality of public services also in Croatia (Art. 28(2)).

The following Chapter IV transposed almost literally the Directive 2005/29/EC on unfair commercial practices. While the basic concept and notions from Art. 2 of the Directive 2005/29/EC can be found in Art. 5 CPA containing definitions of "undue influence" (7), "business-to-consumer commercial practices" (13), "code of conduct" (18) "professional diligence" (19), "regulated profession" (35), "important influence on consumers' economic behaviour" (36), the definition of unfair commercial practice itself is literally transposed from the Directive's Art. 5 into Art. 32(1) CPA. In keeping with Art. 5(2) of the Directive, Art. 32(1) CPA stipulates that commercial practice is unfair if it is contrary to the requirements of professional diligence and if in regard to a certain product it substantially affects or is likely to substantially affect the economic behavior of the average consumer to whom such practice is directed or whom it reaches, i.e. of the average member of certain consumer group to whom such practice is directed. Basically, the Chapter follows the structure of the Directive by setting a scope of application and prohibiting unfair commercial practices and then regulates two main categories: misleading commercial practices (Arts. 33–35) and aggressive commercial practices (Arts. 36–38). Each of these sections transpose black lists of misleading and aggressive commercial practices from Annex I of the Directive 2005/29/EC. Although the form of unfair commercial practice, namely the misleading advertising is even sanctioned under the Croatian Criminal Act[61], there are not many publicly available cases dealing with the matter. Certainly the most famous one is the collective redress proceeding in the

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[60] Decision of the Croatian Competition Agency UP/I 030-02/2004-01/66, OG No. 135/05.

[61] Art. 255 of the Criminal Act (*Kazneni zakon*) OG Nos. 125/11, 144/12, 56/15, 61/15, 101/17.

case *Franak*, where the first instance Commercial Court in Zagreb analyzed more than thirty examples of misleading advertisings in the media of eight accused banks offering CHF credits to Croatian consumers in the time period from 2003 to 2008[62]. Another case deals with gathering of mixed and bio-degradable waste that was charged in the city of Zagreb not based upon the quantity of accumulated waste, but upon the size of the waste container. Here the High Administrative Court found that this represents a public service under Art. 24 CPA, which should be invoiced in accordance with the special *Act* on Sustainable Waste Management[63] and that CPA provisions on misleading commercial practice are relevant for the case[64]. There was also a case between two traders, *Kraft Food* and *Kraš* before the High Commercial Court in Zagreb, which found that the advertising of *Kraš*'s menthol candies packaged in a bag of same lilac colour as *Milka* chocolate violates the provisions of the abovementioned UAA, but also the provisions of the CPA on misleading advertising[65].

2.1.2.2.3. Consumers Contractual Relations

2.1.2.2.3.1. General Provisions

Most of *supra* enumerated EU Directives on consumer protection are transposed again literally into the Part III on consumer contractual relations. Chapter I and III implement provisions of the Directive

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[62] See the judgment and order of the Commercial Court in Zagreb of 4 July 2013, P-1401/12.

[63] Act on Sustainable Waste Management (*Zakon o održivom gospodarenju otpadom*) OG No. 94/13 and 73/17.

[64] Judgement of the High Administrative Court of the Republic of Croatia, Usoz-3/16-7 of 28 October 2016. Decision was eventually invoked before the Croatian Constitutional Court: Decision of the Constitutional Court of the Republic of Croatia of 22 March 2017, U-III/6143/201.

[65] More to this case in European Commission Study for the Fitness Check of EU consumer and marketing law, Final report Part 3 – Country reporting, P. Poretti, *National Report for Croatia*, p. 160, available at: http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332 (access: 15.02.2018).

2011/83/EU and the Directive 2002/65/EC, Chapter II of the Directive 93/13/EEC and Chapter IV of the Directive 2008/122/EC on timeshare and related tourists' contracts. As a consequence, the common characteristic of these Directives, often defined by legal scholars as consumer protection instruments, here found their entrance into the CPA. General provisions of this Chapter start by literal transposition of the provisions on the scope of application of the Directive 2001/83/EU, thus covering all B2C contractual relations, including those on public services, such as the distribution of water, gas, electricity, and heating (Art. 39). As in the Directive, protection offered by Chapters I and III is excluded in case of contracts already covered by other EU Directives, such as distance selling contracts of financial services, package travel arrangements, timeshare contracts etc., or in case of certain contracts regulated by more special acts, such as on social services, healthcare, games of chance, passenger transport services etc. (Art. 40). These are followed by the first main consumer protection instrument on the mandatory nature of consumer protection provisions (Art. 41(1))[66] and the nullity of contractual provisions that are less favorable from those set in the CPA and other acts regulating consumer protection (Art. 41(2)). One should acknowledge that national courts are obliged to watch upon this *ex lege* nullity rule *ex officio*, which arises from more general provisions on nullity of the OA[67]. Despite the title of Article 41 on the legal nature of provisions regulating consumer contracts, the following two provisions contain conflicts of law rules. Under Art. 41(3) CPA dealing with B2C contracts to which the foreign law is applicable, the consumer with residence in the Republic of Croatia cannot be deprived of protection guaranteed by the CPA or another legal act regulating certain aspects of consumer protection. The next provision implements Art. 12 of the Directive 2008/122/EC and stipulates that in case of timeshare and related tourist contracts, the consumer may not be deprived of protection granted by the CPA if the contract concerns immovable

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[66] See supra, title 2.1.2.2.1.

[67] According to Art. 327(1) OA the court watches upon the nullity *ex officio* and every interested party can invoke nullity.

property situated within the territory of the Republic of Croatia or if the trader pursues its activity in the Republic of Croatia, i.e. in any way directs its activity towards the Republic of Croatia and the contract falls within the scope of this activity.

The lines of following Article 42 CPA regulate probably the most important consumer protection instrument under the EU law: the duty of traders to inform the consumer before he is bound by the offer or concludes a contract in a clear and comprehensible manner. This pre-contractual information duty applicable to all B2C contract was copied from Art. 5(1) of the Directive 2011/83/ /EU dealing with consumer information for contracts other than distance or off-premises contracts. This led to unnecessary duplicating of traders' information duties in respect of distance and doorstep selling contracts that are again regulated in Art. 57 CPA, which transposes Art. 6(1) of the Directive on consumer information for distance and off-premises contracts. Although this informing should help consumers when deciding about the conclusion of a contract during the so-called warming-up-period, the extensiveness of information usually cause an information overload effect that is so often criticized by legal scholars[68]. The following general provisions mix original with harmonized rules, whereby Art. 43 CPA sets a general duty for traders to fulfil their contractual obligations in accordance with the contract, CPA and OA provisions. It therefore represents a sort of introduction into articles transposed from Directive 2011/83/EU on conformity with the contract, which due to a full-targeted approximation approach could not have been transposed into the OA regulating the matter. As it shall be demonstrated below, by using a minimum harmonization clause the legislator implemented the Directive 99/44/EC excessively into the OA and applied its provisions to all civil law contracts. That is why Art. 43(2) CPA refers to the application of OA provisions in case of material defect of "products," i.e. goods and services. For example,

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[68] In its paper *Legal Risks in Development of EU Consumer Protection Law*, in: eds. E. Mišćenić, A. Raccah, *Legal Risks in EU Law*, Switzerland 2016, pp. 151, the author emphasizes that "the consumer often ends up being more confused than enlightened".

in case where the Croatian Telecom tried to free itself from liability for material defects of a malfunctioning television transmitter by stating that it concluded a service contract with the consumer, the court Municipal Court in Varaždin accentuated that OA provisions on non-conformity are applicable to "products," i.e. both goods and services[69]. Nonetheless, more special B2C provisions on fulfilment of sales contracts (Art. 44 CPA) and on passing of risk (Art. 45 CPA) reflect provisions on delivery and passing of risks of the Directive 2011/83/EU, and present a derogation of more general OA provisions. Other special provisions of the Directive 2011/83/EU from the Chapter on other consumer rights found the entrance here, such as Art. 48 CPA on costs of communication by telephone, that was recently discussed in the *Zentrale zur Bekämpfung unlauteren Wettbewerbs Frankfurt am Main* case[70] or Art. 47 CPA on additional payments, as well as Art. 46 CPA on inertia selling.

2.1.2.2.3.2. Unfair Contract Terms

The control of the content of B2C contracts is at the EU level guaranteed by the Directive 93/13/EEC, which is transposed by several legal acts in the Croatian legal system. Two main ones are Chapter II of the CPA's third part and the excessive transposition in Arts. 295–296 OA on general contract conditions, i.e. standard contract terms. In addition to those, relevant provisions can be found in the sublegal act following the ECA, i.e. in Art. 10 of the *Ordinance* on Manner and Conditions for Provision of Electronic Communications Networks and Services[71]. This is not surprising,

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[69] Judgement of the Municipal court in Varaždin, Gž. 339/12-2 of 18 April 2012.

[70] Judgement of 2 March 2017, C-568/15, *Zentrale zur Bekämpfung unlauteren Wettbewerbs Frankfurt am Main*, EU:C:2017:154, para. 33, where the CJEU established that call charges relating to B2C contracts to a "telephone helpline operated by the trader may not exceed the cost of a call to a standard geographic landline or mobile telephone line."

[71] Ordinance on the Manner and Conditions for Provision of Electronic Communications Networks and Services (*Pravilnik o načinu i uvjetima obavl-*

bearing in mind the fact that most of consumer disputes arise from subscription contracts with operators of electronic communications, which is confirmed both by the national[72] and CJEU case law[73].

Besides the difference in their scope of application, whereby CPA provisions apply horizontally to all B2C contracts and OA provisions only to general contract conditions in all civil contracts, there are no major differences between these two sets of rules implementing the Directive 93/13/EEC. The most important one concerns legal consequences of unfairness. The CPA copies the unfairness test from Art. 3(1) of the Directive 93/13/EEC and sanctions unfairness of contract terms with nullity in Art 55(1) CPA[74]. According to Art. 49(1), a contract term which has not been individually negotiated shall be considered as "unfair" if, contrary to the requirement of the principle of conscientiousness and honesty[75], it causes a significant imbalance in the contractual parties' rights and obligations to the detriment of the consumer. On the other hand, the OA copies the unfairness test, adds another condition of endangering of the purpose of concluded contract, and prescribes nullity as a direct legal consequence (Art. 296(1) OA). The second difference concerns the grey letter rule transposed from Annex No. 1 of the Directive 93/13/EEC into Art. 51 CPA, while the list has been omitted in the OA. Except from the above mentioned declaration of nullity, the CPA contains no further provisions, due to the fact that the nullity is regulated in detail by the OA as *lex generalis* for contrac-

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janja djelatnosti elektroničkih komunikacijskih mreža i usluga) OG Nos. 154/11, 149/13, 82/14, 24/15, and 42/16.

[72] For many examples See P. Poretti, op.cit., p. 177–178.

[73] To the most famous cases on unfair contract terms in mobile telephone contracts belong the judgement of 6 October 2009, C-40/08, *Asturcom Telecomunicaciones*, EU:C:2009:615 and the judgement of C-168/05, *Mostaza Claro*, EU:C:2006:675.

[74] Under Art. 55(1) CPA "an unfair contract term is null and void."

[75] This general principle of Croatian contract law (Art. 4 OA) is regarded as an equivalent to the principle of good faith. See S. Šarčević, E. Čikara, *European vs. National Terminology in Croatian Legislation Transposing EU Directives* in: *Legal Language in Action: Translation, Terminology, Drafting and Procedural Issues*, ed. S. Šarčević, Zagreb, 2009, p. 211.

tual relations. To the most debated provisions belongs certainly the exclusion of the unfairness test taken over from Art. 4(2) of the Directive 93/13/EEC into Art. 52 CPA, as well as Art. 53 CPA incorporating the so-called transparency requirement. The first one was a hot stone in the collective redress proceeding *Franak*, where all court instances qualified invoked contractual terms on variable interest rate and the clause denominating credit capital in Swiss Franc (CHF) as provisions on subject matter of credit agreements. Although such qualification seems to follow the recent CJEU case law and is in accordance with the standing of the Court in recent *Andriciuc and Others* case[76], the CJEU case law was not observed when it comes to the transparency requirement. The interpretation given by the CJEU in the *Kásler and Káslerné Rábai* case stating that "the requirement of transparency of contractual terms laid down by the Directive 93/13 cannot (therefore) be reduced merely to their being formally and grammatically intelligible"[77], was rejected by Croatian courts due to factual differences between the two cases[78]. Just to remind ourselves, the *Kásler and Káslerné Rábai* case was about unfairness of currency clauses in CHF credit agreements, therefore dealing with the same issue as the Croatian case *Franak*. As rightly emphasized in the just published European Commission Report on enforcement of consumer protection in MS: "Croatian courts, including the Supreme Court, still do not see themselves as European courts"[79].

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[76] Judgment of 20 September 2017, C-186/16, *Andriciuc and Others*, EU:C:2017:703, paras. 38 and 51.

[77] Judgment of 13 April 2014, C-26/13, *Kásler and Káslerné Rábai*, EU:C:2014:282, para. 71.

[78] Judgment and order of the Supreme Court of the Republic of Croatia of 9 April 2015, Revt-249/14-2, p. 22.

[79] An Evaluation Study of National Procedural Laws and Practices in Terms of their Impact on the Free Circulation of Judgments and on the Equivalence and Effectiveness of the Procedural Protection of Consumers Under EU Consumer Law, Strand 2 – Procedural Protection of Consumers, p. 61, available at: http://ec.europa.eu/newsroom/just/document.cfm?action=display&doc_id=49503 (access: 15.02.2018).

2.1.2.2.3.3. Distance and Doorstep Selling Contracts

The following Chapter III of the part dealing with B2C contractual relations merges regulation of distance and doorstep selling with regulation of distance marketing of consumer financial services. The first four titles transfer provisions of the Directive 2011/83/ /EU on distance and off-premises contracts by the exact same order. First, we meet the pre-contractual information duty of the trader in respect of both contracts (Art. 57). What is often forgotten both by the literature and practice is that this information duty is prolonged to the contractual stage by Art. 57(3) CPA stating that all enumerated information in para. 1 form an integral part of the contract. Between more than 20 pieces of information (since some points include several pieces of information), the most important one is undoubtedly the one on the consumer's right of withdrawal (Art. 57(1)(8)). The latter is regulated in detail after provisions on formal requirements introduced by Directive 2011/83/EU for off-premises (Arts. 62–65 CPA) and distance contracts (Arts. 66–71 CPA). However, a provision introduced explicitly by the Croatian legislator pops up here and there, such as the one in Art 66.a CPA on the conclusion of distance telephone contracts. Here, the legislator introduced a rule differing from a classical reception theory by requiring that a distance contract on the sale of services is formally concluded once the consumer has sent the signed offer or acceptance to the trader (theory of dispatch). What the legislator omitted is to react to a more significant problem in the Croatian consumer protection case law concerning the question whether a subscription contract with an electronic communications operator can be concluded or prolonged by means of a telephone. In this respect, Art. 66.a(3) CPA explicitly excludes the application of this useful rule to contracts concluded with electronic communications operators.

When it comes to the consumer's right of withdrawal, translated in Croatian as the right to unilaterally terminate a contract (Cro.

pravo na jednostrani raskid ugovora)[80], provisions from Arts. 72–79 CPA literally transpose those of the Directive 2011/83/EU. The last article contains a long list of situations in which the use of this right for the consumer is excluded, as in the case of goods made according to the consumer's specifications (Art. 79(3)), sealed goods which are not suitable for return due to health protection or hygiene reasons (Art. 79 (5)), accommodation other than for residential purpose, transport of goods, car rental services,[81] catering or services related to leisure activities if the contract provides for a specific date or period of performance (Art. 79 (12)) etc. The last mentioned exception should therefore be interpreted in the meaning of the Directive, as excluding reservations made at hotels or at holiday cottages or cultural or sporting events[82]. Exactly in this respect, Croatian bodies competent for the consumer protection struggle the most. Besides in the case *Franak*, the lack of experience in interpreting domestic law consistently to the EU law was also demonstrated in the case *Geneza*, where the incorrect qualification of the "trader" led to the incorrect qualification of the subscription contract concluded in business premises as an off-premises contract[83]. As a result, the High Administrative Court qualified a craftswoman concluding a contract for her craft as a consumer and granted her the right of withdrawal. Had the judge observed the Directive 2011/83/EU, adopted few months earlier, the conclusion would have been significantly different. In its recital 22, the Directive clarifies that the "business premises of a person acting in the name or on behalf of the trader" should be considered as business premises of the represented "trader," which

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[80] On inconsistencies in legal translation of the notion "right of withdrawal" in the Croatian consumer protection law See E. Mišćenić, *Legal Translation vs. Legal Certainty in EU Law*, in: *Legal Risks in EU Law*, op.cit., p. 99, who explains that the same legal term is in the CPA translated as the right to unilaterally terminate the contract, while in the CCA as the right of withdrawal from the credit agreement.

[81] See judgment of 10 March 2005, C-336/03, *easyCar*, EU:C:2005:150.

[82] Recital 49 of the Directive 2011/83/EU.

[83] Judgement of the High Administrative Court of the Republic of Croatia, Us-3781/2011-4 of 28 February 2012.

brings us to definitions of the main notions, such as "business premises," "off-premises contract,"[84] "distance selling contract"[85], and others, all incorporated in Art. 5 CPA. Differently than the Directive 2011/83/EU, Art. 5 CPA contains also a definition of the "means of distance communication," as well as a definition of the "operator of means of distance communication." These are relicts from the old Directive 97/7/EC, improved in a manner that the new definition of means includes also Internet and e-mail.[86] What is not defined there is the distance contract on the sale of financial services, which is regulated in a separate part of the Chapter III transposing the Directive 2002/65/EC. The definition of this contract in Art. 80(1) CPA basically copies the definition of the distance contract from Art. 5(27) CPA by limiting it to the sale of financial services[87]. With respect to the definition of "financial services," there are further inconsistencies since these are defined

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[84] Art. 5(28) CPA defines it as a "contract between the trader and the consumer: – concluded in the simultaneous physical presence of the trader and the consumer in one place, which is not the business premises of the trader, even when an offer was made by the consumer, – concluded on the business premises of the trader or through any means of distance communication immediately after the consumer was personally and individually addressed in a place which is not the business premises of the trader in the simultaneous physical presence of the trader and the consumer or, – concluded during an excursion organised by the trader with the intention or aim of promoting or selling goods or services to the consumer."

[85] Art. 5(27) CPA defines it as a "contract concluded between the trader and the consumer under an organised distance sales or service-provision system without the simultaneous physical presence of the trader and the consumer in one place, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded."

[86] According to Art. 5(24) CPA means of distance communications include addressed and non-addressed printed materials, catalogues, radio, videophone, telefax, television etc.

[87] According to Art. 80(1) CPA, a contract on sale of financial services concluded at distance is a contract between the trader and the consumer, whose object is the provision of financial services and which is concluded as part of an organised distance sale of products or services of the trader, who before and at the time of contract conclusion uses exclusively one or more means of distance communication.

and enumerated differently in two places in the Act. The following paragraph of Article 80 states that "financial services" from para. 1 are: banking, crediting, insurance, voluntary pension insurance, investment, building society saving, and payment services. On the other hand, the definition of "financial services" from Art. 5(3) CPA includes all enumerated financial services with the exception of building society saving services. Therefore, when concluding a distance contract in relation to any of these financial services, the consumer enjoys a special protection offered by the CPA, but also protection arising from special acts regulating these services, such as the Payment Services Act, the Credit Institutions Act, the Consumer Credit Act etc. The following provisions of the CPA present verbatim transposition of Directive 2002/65/EC and consequently can be divided in articles dealing with traders' information duties (Arts. 81–86) and consumers right of withdrawal (Arts. 87–92). The first category divides the content of the preliminary notice (Art. 81 CPA) into information on the trader (Art. 82), financial service – subject of the contract (Art. 83), contract details (Art. 84), and dispute resolution (Art. 85), and contains the rules on the form of the preliminary notice (Art. 86).

Differently than with regular distance selling contracts, where the withdrawal period lasts 14 calendar days (Art. 72(1)), in case of financial services the deadline is longer for life insurance and voluntary pension insurance contracts, where it lasts 30 days (Art. 87(1)). If the trader omits to inform the consumer on his right of withdrawal, such a mistake leads to a prolongation of the withdrawal period for 12 more months in distance contracts (Art. 73(1)). There is no such sanction in respect of distance sale of financial services. However, the Croatian legislator used the option from Art. 11 of the Directive 2002/65/EC, according to which in case of infringements of relevant provisions, the consumer can terminate the contract at any time, free of charge and without penalties (Art. 92). These divergences, which are logical consequences of literal transposition of different Directives, also include differences relating to informing a consumer about his right of withdrawal and the manner of its exercising. Although both Directives and consequently the CPA require a clear informing on this key con-

sumer right, in case of regular distance or off-premises contracts this can be done by means of a form contained in an Ordinance transposing the model withdrawal form the Annex of the Directive 2011/83/EU (Art. 61)[88]. While distance and off-premises contracts can be unilaterally terminated by means of this form or through any other unequivocal statement expressing the will to terminate the contract (Art. 74), in case of distance sale of financial services this must be done in a written form or by means of another durable medium available to consumer (Art. 88).

2.1.2.2.3.4. Timeshare and Related Tourists Contracts

The Directive 2008/122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale, and exchange contracts was copied into the Chapter IV of Part III dealing with the consumer contractual relations. While the main definitions of the timeshare and other related contracts entered Art. 5 CPA, other Directive's provisions on the scope of application, advertising, pre- and contractual information and the right of consumer to withdraw from the contract are regulated from Art. 95 to 104 CPA. However, the legal terms and expressions used have been adjusted to the Croatian legal system. Besides the resale and the exchange contract that remained unchanged, a "timeshare" contract is named descriptively as a "contract on the right of time limited use (timeshare)" and the long-term holiday product contract became "contract on long-term touristic product." Similar to Art. 2(1)(a) of the Directive 2008/122/EC, Art. 5(31) CPA defines a *timeshare contract* as "contract concluded for a period longer than one year by which a consumer, for consideration, acquires a right

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[88] Ordinance on the Content and Form of the Right of Consumer to Unilaterally Terminate Contracts Concluded at Distance and Contracts Concluded out of Business Premises (*Pravilnik o sadržaju i obliku obavijesti o pravu potrošača na jednostrani raskid ugovora sklopljenih na daljinu i ugovora sklopljenih izvan poslovnih prostorija*) OG No. 76/14. The model form is available at: http://www.iusinfo.hr/Appendix//PROPISI_HR//PR2014B72A1354_21050_1.pdf (access:15.02.2018).

to use one or more overnights through more periods of use." Although it is obvious from the definition that opposite to the old Directive 94/47/EC, the "new" timeshare contracts are not limited to an immovable, the Croatian version of the Directive 2008/122/EC published in the "Official Journal" in its title still refers to the "contract on the right of time limited use of an *immovable*"[89].

When implementing the Directive 2008/122/EC, the legislator often went too far and even transposed the rule from its Art. 1(2) allowing the MS to determine the legal nature of timeshare. Consequently, Art. 95(3) CPA prescribes that provisions of this Chapter do not affect the rules on legal nature of the rights which are the subject of these contracts, thus leaving the matter of legal nature of timeshare in our legal system unresolved. According to *ex* Art. 88 CPA 2007, the acquirer of the timeshare was allowed to register its right into the land register, why some practitioners considered that timeshare is of real right nature. However, the provision is erased from the CPA 2014 and all of its other characteristics make it similar to a long-term lease agreement, i.e. to obligations rights. Beyond this debate, following provisions require high standard of information duty by demanding availability of information from preliminary notice during advertising (Art. 97(3)), before acceptance of the offer or conclusion of the contract (Art. 98(1)) and when concluding a contract, where these form an integral part of the contract (Art. 99(1)). The information as such are not enumerated in the Act. Instead, the CPA refers to a standard information form to be given to consumer free of charge (Art. 98(2–3)), contained

[89] See http://eur-lex.europa.eu/legal-content/HR/TXT/HTML/?uri=CELEX:32008L0122&from=EN (access: 15.02.2018). This mistake can probably be prescribed to the definition of the timeshare contract in the *ex* Art. 87(1) CPA 2007. There the "contract on the right to time limited use of immovable" was defined as "one or more contracts concluded for a period covering not less than three years by which the trader, directly or indirectly, establishes for the consumer or transfers to the consumer, the right to use one or more immovable properties or one or more special parts of the immovable property during a specified or specifiable period of the year, while the consumer agrees to pay him the total price."

in an Ordinance on the Content and Form of Information on the Timeshare, Long-term Holiday Product, Resale and Exchange Contracts[90]. Before contract conclusion the consumer must be "explicitly" warned about his right of withdrawal, as well about prohibition of advance payment during withdrawal period (Art. 99(4)) and must sign these provisions separately (Art. 99(6)). This is done by means of another standard information form taken over from Directives Annex into the Ordinance on the Content and Form of Notification on the Right of the Consumer to Unilaterally Terminate Timeshare, Long-term Holiday Product, Resale and Exchange Contracts[91]. In the rules introduced by the Directive 2008/122/EC, the practices sees the opportunities for consumers to misuse the timeshare and other products. According to some authors[92], prohibition of advance payment (Art. 102) and legal consequences from Art. 101(1) prohibiting the payment of any costs for services fulfilled prior to the use of the right of withdrawal, enable the consumer with a kind of "free trial." As in the Directive, the period of withdrawal is 14 calendar days (Art. 100(1)), with the exception of cases where the trader omits to give preliminary notice (3 months and 14 days) or standard information form on the right of withdrawal (1 year and 14 days) (Art. 100(3)). This could be interpreted as a questionable norm is the rule on the manner of exercising the right of withdrawal, stating that the consumer can do it in written form, on paper or by using some other durable medium, whereby he uses a standard information form (Art. 100(7)). Such a request is contradictory to

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[90] Ordinance on the Content and Form of Information on the Timeshare, Long-term Holiday Product, Resale and Exchange Contracts (*Pravilnik o sadržaju i obliku obavijesti o ugovoru o vremenski ograničenoj uporabi, dugotrajnim proizvodima za odmor, ponovnoj prodaji i zamjeni*) OG No. 134/12.

[91] Ordinance on the Content and Form of Notification on the Right of the Consumer to Unilaterally Terminate Timeshare, Long-term Holiday Product, Resale and Exchange Contracts (*Pravilnik o sadržaju i obliku obavijesti o pravu potrošača na jednostrani raskid ugovora o vremenski ograničenoj uporabi, dugotrajnim proizvodima za odmor, ponovnoj prodaji i zamjeni*) OG No. 134/12.

[92] A. Petrović, *Pravni položaj potrošača kod ugovora o timeshareu – Analiza Direktive 2008/122/EZ*, "Anali Pravnog Fakulteta Univerziteta u Zenici"2015, Vol. 14(7), p. 231.

the Art. 7 of Directive 2008/122/EC, which prescribes that "the consumer may use the standard withdrawal form." Although the timeshare contracts were a subject to a long forgotten regulation during the Yugoslav regime[93], and despite the fact that Croatia is primarily a tourist destination, the timeshare and other related products were never really recognized as a potential tourist advantage and there are no cases available in this respect.

STRESZCZENIE

Chorwackie prawo ochrony konsumentów:
od zbliżenia do rozdrobnienia prawodawstwa (część I)

John F. Kennedy niegdyś rzekł: „Z samej definicji wynika, że konsumenci to my wszyscy". I tak jest w istocie w chorwackim systemie prawnym, ponieważ gdzie nie spojrzymy, mamy do czynienia z jakiegoś rodzaju konsumentem. Czasem jest to konsument chroniony przez *lex generalis* w zakresie ochrony konsumentów, czyli przez ustawę o ochronie konsumentów. Innym razem jest to konsument chroniony ustawą o zobowiązaniach, a dokładniej ustawą o kredycie konsumenckim, a jeszcze bardziej szczegółowo: ustawą o kredycie konsumenckim hipotecznym. Jeżeli konsument zapłaci za jakiś nabytek, stanie się również konsumentem chronionym ustawą o systemie płatności, a jeżeli ida się w podróż w ramach zorganizowanej imprezy turystycznej, będzie konsumentem korzystającym z ochrony na mocy ustawy o świadczeniu usług w turystyce. Pierwsza część niniejszego opracowania poświęcona jest rozwojowi prawa ochrony konsumentów w Chorwacji oraz prezentacji praw konsumentów gwarantowanych przez główne źródło ochrony konsumentów w tym kraju, a mianowicie przez ustawę o ochronie konsumentów.

Słowa kluczowe: Chorwackie prawo ochrony konsumentów; ustawa o ochronie konsumentów; ustawa o zobowiązaniach; zbliżenie prawodawstwa; rozdrobnienie prawodawstwa

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[93] Act on the Right of the Time-use of the Tourist Object (*Zakon o pravu vremenskog korištenja turističkog objekta*) of 1986, OJ SFRJ Nos. 24/86 and 31/86.

SUMMARY

Croatian Consumer Protection Law:
From Legal Approximation to Legal Fragmentation (Part I)

John F. Kennedy once said: "Consumers, by definition, include us all." Indeed, no matter where we look in the Croatian legal system, we come across a new consumer. Sometimes this is a consumer protected by *lex generalis* for consumer protection, the Consumer Protection Act. Another time it is a consumer protected by the Obligations Act or, more specifically, the Consumer Credit Act and even more specifically by the Mortgage Consumer Credit Act. If he pays for something he has bought, he is also a consumer protected by the Payment System Act, and if he has decided to travel around by means of a package travel arrangement, he is a consumer enjoying protection under the Act on Provision of Services in Tourism. The first part of this paper is devoted to legal development of the Croatian consumer protection law and presentation of consumer rights as guaranteed by the main source of consumer protection in Croatia, namely, by the Consumer Protection Act.

Keywords: Croatian consumer protection law; Consumer Protection Act; Obligations Act; legal approximation; legal fragmentation

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