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III

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BEOGRAD, 2010.

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Introduction

CHRISTA JESSEL-HOLST AND GALE GALEV

The working group 7 of the Civil Law Forum South East Europe dealing with EU consumer contract law in Albania, Bosnia and Herzegovina, Croatia, Macedonia, Montenegro and Serbia consists of the following members: Prof. Gale Galev (Skopje), Dr. Nada Dollani (Tirana) and Dr. Christa Jessel-Holst (Hamburg).

In order to define the scope and the structure of the intended work, a preparatory meeting was held in Skopje. Here the decision was made to restrict the investigation to only four directives and to follow basically the structure of the EC Consumer Law Compendium edited by Prof. Schulte-Nölke.[1]

It was clear from the start that the ultimate success depended on the right choice of national reporters. For this, mainly two criteria were used, namely a) prior excellent experience in the field of European consumer contract law and b) perfect knowledge of the English language, since all contributions were originally to be prepared in English as the only common language within the group.

On this basis, the following national reporters were selected: Nada Dollani (Albania), Zlatan Meškić (Bosnia and Herzegovina), Emilia Čikara (Croatia), Neda Zdraveva, Jadranka Dabović-Anastasovska, Nenad Gavrilović (Macedonia), Zvezdan Čađenović (Montenegro), Marija Karanikić-Mirić (Serbia).

In the Part 1, the team presents an overview of the legislative techniques of each participating state which has been prepared by the respective national reporter. The Part 2 demonstrates the transposition of the individual directives in the six countries. Due to lack of space it has unfortunately not been possible to publish the corresponding national reports. Instead, this publication contains a comparative analysis on the four directives which is, however, based on the national reports and can be considered as their synthesis. This approach has the great advantage that the reader has at his disposal a comparative survey which clearly shows the similarities and differences in the way the four directives have been transposed in the participating states. It has also enabled the national reporters to work not only on their domestic law, but on five other legal orders as well.

For 31 January 2010, the national reporters were invited to a workshop in Tirana which proved not only very pleasant, but also highly successful. In Tirana, the work was assigned as follows: Doorstep Selling Directive – Coordinators Emilia Čikara and Zlatan Meškić; Unfair Contract Terms Directive – Marija Karanikić-Mirić and Zvezdan Čađenović; Distance Selling Directive – Nada Dollani and Neda Zdraveva/Jadranka Dabović-Anastasovska/Nenad Gavrilović; Consumer Sales Directive – Zlatan Meškić and Neda Zdraveva/Jadranka Dabović-Ana-

[1] H. Schulte-Nölke in cooperation with Ch. Twigg-Flesner, M. Ebers (eds), EC Consumer Law Compendium – Comparative Analysis, Universität Bielefeld, Feb. 2008. For update Jan. 2010 see: http://www.eu-consumer-law.org/index_en.cfm.

stasovska/Nenad Gavrilovic. It was also decided to include a Part 3 on the Future of the Consumer Contract Law in EU and the participating states, which presents the Commission Proposal for a Directive on Consumer Rights and broaches the issue of implementation into the national laws of the Western Balkan. This part is completed by an overview over private international law in consumer contracts.

The national reporters have done their best to identify published decisions of the courts of their country regarding consumer contracts, but the result can only be called disappointing: In three countries (Albania, Macedonia and Serbia) not a single case was found; the result for Bosnia and Herzegovina, Croatia and Montenegro is only slightly better (for details see Part 4 Annex B 4).

Part 4 inter alia also offers a list the EU sources of law, including the recent Green paper on policy options for progress towards a European Contract Law for consumers and businesses, as well as an overview of the case law of the Court of Justice in Luxembourg on the four Directives.

It is worth mentioning that cooperation within the team has been greatly facilitated by the use of google groups where the team has been registered as "Civil Forum Consumer". Internet was in this way used not only for discussions (and for showing pictures from the workshop), but also for gathering a comprehensive collection of laws which are of relevance for consumer contracts in the six participating states and which thus were made available to all, in local and/or English language.

Special thanks appertain to Prof. Tatjana Josipović (Zagreb) who, although a member of the working groups 4 and 5, has supported also the working group 7 with her precious advice.

The Serbian translation of all contributions has been organized by GTZ Belgrade.

16 July, 2010

Part 1:
OVERVIEW OF THE "LEGISLATIVE TECHNIQUES" OF THE RESPECTIVE STATE

A. ALBANIA – LEGISLATIVE TECHNIQUES *(Nada Dollani)*

Directive	Transposed in	Date of Transposition
Directive 85/577	Consumer Protection Act (CPA) 2008 Decision of Council of Ministers No.63/2009	17 April 2008 21 January 2009
Directive 90/314	CPA 2008 Council of Ministers Decision No.65/2009	17 April 2008 21 January 2009
Directive 93/13	CPA 2008	17 April 2008
Directive 94/47 (from 23.02 2011: Directive 2008/122/EC)	CPA 2008 Council of Ministers Decision No.833/2009	17 April 2008 8 July 2009
Directive 97/7	CPA 2008 Council of Ministers Decision No.64/2009	17 April 2008 21 January 2009
Directive 98/6	CPA 2008	17 April 2008
Directive 98/27 (codified version: Directive 2009/22/EC	CPA 2008	17 April 2008
Directive 99/44	CPA 2008	17 April 2008
Directive 87/102/EEC (from 12.05.2010: Directive 2008/48/EC)	CPA 2008 Bank of Albania Decision No.5/2009	17 April 2008 11 February 2009
Directive 85/374	CPA 2008 Civil Code	17 April 2008 29 July 1994
Directive 86/653	not transposed	-
Directive 99/34	CPA 2008 Civil Code	17 April 2008 29 July 1994
Directive 99/93	Electronic Signature Act	25 February 2008
Directive 2000/35	not transposed	-
Directive 2000/31	Electronic Commerce Act	11 May 2009
Directive 84/450	CPA 2008	17 April 2008
Directive 2002/65	Council of Ministers Decision No.64/2009	21 January 2009
Directive 2005/29	CPA 2008	17 April 2008

Directive 87/357	not transposed	-
Directive 97/5	not transposed	-
Directive 98/26	not transposed	-
Directive 2000/46	not transposed	-
Directive 2001/95	Act "On general safety, substantial requirements and assessment of non-food products' conformity" No. 9779/2007	16 July 2007
Directive 2002/22	Electronic Communication Act No.9918/2008	19 May 2008
Directive 2002/58	Electronic Communication Act No.9918/2008	19 May 2008

I. State of consumer protection in the field of the Directives 99/44 (sale of goods), 93/13 (unfair terms), 97/7 (distance contracts) and 85/577 (doorstep) before transposition

Before the transposition of the directives, Albanian law has provided some basic general rules on consumer protection since 1997. Those rules were provided by Act No.8192, dated 06.02.1997 "On Consumers Protection". The scope of this act was the safety of consumers and protection of their health and economic interests. It was never effective; it hardly transposed any Directive and was repealed by another ineffective act "On Consumers Protection" No. 9135, dated 11.9.2003. The Act of 2003 made some attempt to comply with the consumers' *acquis*, but it was barely observed by consumers, or by competent state authorities, or courts. The Consumer Protection Act, adopted in 2003, covered a wide range of consumer safety issues, consumer contracts and monitoring consumer protection. Parts II and III regulated specific aspects of consumer safety, consumer information, packaging and labelling and misleading advertising. Parts IV and V addressed specific aspects of specific consumer contracts, including unfair terms and conformity of contracts, distance selling, consumer sales, timeshare contracts, doorstep selling, and electronic transactions. Parts VI and VII dealt with governmental institutions responsible for consumer protection and specific issues of consumer associations. However the consumers' *acquis* were never fully transposed. Also, Albanian Civil Code, regardless of the fact that it does not contain any expressed provision on consumer definition and protection, protects the consumer as any other person. Referring to the wording of Civil Code, some of the provisions of the Directive 93/13 were "transposed" by Articles 686, 687, 688. These articles refer to general and unfair terms of contracts and article 688 contains the *contra proferentem* rule. However, Civil Code extends its application to every natural and legal person. So the protection is not limited to consumer. The right to withdrawal as in Directive 85/577 is also provided by the Civil Code, in its Article 672. And Directive 85/374 on product liability is transposed by the Civil Code, Article 628 et seq.

In the framework of the Stabilization and Association Agreement between the European Communities and their Member States and the Republic of Albania, signed on 12 June 2006[2], Art. 76; the National Action Plan on Enforcement of Stabilization and Association Agreement adopted by the Albanian Government (Council of Ministers Decision No. 463, dated 5.7.2006); and the Council of Ministers Decision No.797, dated 14.11.2007 "On Approval of inter sector strategy on consumer protection and market surveillance, in the period

[2] SAA was ratified by Act No.9590 of 27.7.2006, OG RAl No. 87/06

2007-2013", Albania came under the obligation to observe and respect the consumers' rights and protection, thus as a consequence came into force the Act No.9902, dated 17.04.2008 "On Consumers Protection".

II. Legislative techniques of transposition

Albania transposed all the four Directives by means of enacting different transposition acts. The legislative acts used for the implementation of the Directives were either Acts enacted by the Albanian Parliament, to provide rules complying with Directive 99/44, Directive 93/13, Directive 97/7and Directive 85/577, or Decisions of the Council of Ministers enacted by the Albanian Government to complement the full implementation of the Directives, as in case of Directive 97/7 and Directive 85/577, further transposition of which was complemented by the Decision of Council of Ministers No. 64/2009 "On distance contracts" and the Decision of the Council of Ministers No. 63/2009 "On contracts away from business premises", respectively.

The Albanian Consumer Protection Act of 2008 aims on protecting the interests of the consumers on the market as well as to define the rules and to set up the relevant institutions, in order to protect consumer rights. It is organized in ten Parts. Part I contains general provisions on the object, scope of application, definitions, consumer rights; Part II provides some requirements on consumer safety; Part III deals with consumer information, labelling, price indication, invoice, packaging and language obligations, thus transposing Directive 98/6; Part IV covers unfair trade practice and advertisement, by implementing Directives 2005/29 and 84/450; Part V contains provisions on unfair contract terms and contractual conformity, thus transposing Directive 93/13 on unfair terms and Directive 99/44 on the sale of goods; Part VI regulates contracts negotiated away from business premises as well as distance contracts, thus transposing Directives 85/577 and 97/7; Part VII concerns particular contracts such as: supply of water, energy and telecommunication, timesharing contracts, consumer credit contracts and package travelling contracts, thus transposing Directives 94/47, 87/102 and 90/314; Part VIII deals with the institutions for consumer protection, thus transposing Directive 98/27; Part IX covers administrative violations and administrative sanctions; and finally, Part X contains the transitory and final provisions.

The Albanian acts do not comprise any express reference regarding the implementation of a certain directive while actually transposing the provisions of the relevant directive. It can be said that the Albanian legislator follows a tacit copy and paste approach.

III. Use of minimum harmonization

When transposing the directives, Albania made use of minimum clauses on various occasions. Thus, the Consumer Protection Act, when transposing Directives 85/577 and 97/7 on doorstep selling and distance contracts provides, that the consumer has the right to withdrawal without any reason within 14 calendar days, rather than the minimum term of seven working days envisaged under both Directives for exercising such right.

IV. Other extensions

According to the Consumer Protection Act the notion of consumer is broader than that provided by the directives, in so far as non-profit organisations are also regarded as consumers.

The Council of Ministers Decision No. 64/2009 "On distance contracts" extends its scope also to financial services. Also, the Act No. 9779 of 16.7.2007 "On general safety, sub-

stantial requirements and assessment of conformity of non-food products" to which the Consumer Protection Act refers for the definition of the producer, contains a slightly more extensive meaning of producer in comparison to the definition given by the Directive 99/44.

V. Possible infringements of EC law

Not every provision of the Directives is transposed into the Albanian legislation. There are several provisions which are not transposed at all. As the Albanian legislator uses the verbatim technique, on some occasion parts of sentences of Directives have been forgotten, such as in case of Article 3(2) 2nd indent of Directive 97/7 on Distance Selling. Furthermore, the implementation of the transposed provisions has met with difficulties so far, inter alia because of some inconsistencies in internal harmonization.

VI. Court practice

There is a significant lack of court practice. The courts prefer to apply the provisions of the Civil Code and to protect the consumer like every other person, ignoring the existence of special provisions on consumer protection. Another reason for the non-application of the legislation on consumer protection is to be seen in the systematic inconsistency, because no provision of the Consumer Protection Act regulates the priority of norms in case of a conflict or a "better protection" rule.

However, apart from the regular court procedure, the consumer can also have access to justice through instruments of alternative dispute resolution and through administrative procedure.[3] The Commission on Consumer Protection[4] has already adopted three decisions, two of which refer to unfair trade practice and misleading advertisement, while the third one refers to the protection of the consumer in case of a breach of Article 40 CPA regarding the invoice for the supply of telecommunication services[5].

VII. Summary

The approximation of legislation to the *acquis communautaire* in the field of consumer protection started by signing the Stabilisation and Association Agreement between the Republic of Albania, on the one part, and the European Communities and their Member States, on the other (SAA) on 12 June 2001. The first Consumer Protection Act was enacted in 2003 and transposed most of the European consumer protection directives. Because of the necessity for further transposition and improvements a new Consumer Protection Act has been adopted in 2008. The Consumer Protection Act implements Directives 98/6, 2005/29, 84/450, 99/44, 93/13, 85/577, 97/7, 94/47, 87/102, 90/314, 98/27. By transposition of these directives into national law, the level of consumer protection was increased significantly by using the minimum harmonization principle on numerous occasions. However, the special consumer protection rules in practice are rarely observed by traders and even by the courts, so that the level of protection of consumer rights is still not satisfactory.

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[3] Article 56 CPA, OG RAl No. 61/08..

[4] This Commission was set up on 27.07.09 under the Ministry of Economy, Trade and Energy.

[5] The Commission on Consumer Protection has made use of sanctions provided by Art. 57 by its decision no. 2 of 04/2010, http://www.mete.gov.al/doc/20100407113914_vendimi_nr_2_-_date_01_prill_2010_kmk.pdf, last visited on 30 April 2010.

B. BOSNIA AND HERZEGOVINA – LEGISLATIVE TECHNIQUES

(Zlatan Meškić)

Directive	Transposed in	Date of Transposition
Directive 85/577	Consumer Protection Act (CPA) (also in Draft Law of Obligations 2006, left out of the Draft Law of Obligations 2010)	12.4.2006
Directive 90/314	CPA (also in Draft Law of Obligations 2006, left out of the Draft Law of Obligations 2010)	12.4.2006
Directive 93/13	CPA (also in Draft Law of Obligations 2006 and 2010)	12.4.2006
Directive 94/47 (from 23.02.2011: Directive 2008/122/EC)	CPA (also in Draft Law of Obligations 2006, left out of the Draft Law of Obligations 2010)	12.4.2006
Directive 97/7	CPA (also in Draft Law of Obligations 2006, partly transposed in Draft Law of Obligations 2010)	12.4.2006
Directive 98/6	CPA	12.4.2006
Directive 98/27 (codified version: Directive 2009/22/EC)	CPA	12.4.2006.
Directive 99/44	CPA (also in Draft Law of Obligations 2006 and 2010)	12.4.2006
Directive 87/102/EEC (from 12.05.2010: Directive 2008/48/EC)	CPA (also in Draft Law of Obligations 2006, left out of the Draft Law of Obligations 2010)	12.4.2006
Directive 85/374	not transposed (only in Draft Law of Obligations 2006 and 2010)	-
Directive 86/653	not transposed (only in Draft Law of Obligations 2006 and 2010)	-
Directive 99/34	not transposed (only in Draft Law of Obligations 2006 and 2010)	-
Directive 99/93	Law on Electronic Signatures	14.5.2007
Directive 2000/35	not transposed (only in Draft Law of Obligations 2006 and 2010)	-
Directive 2000/31	Law on Electronic Legal and Commercial Transactions (also partly in Draft Law of Obligations 2006 and 2010)	29.10.2007
Directive 84/450	CPA (also in Draft Law of Obligations 2006 and 2010)	12.4.2006

Directive 2002/65	Not transposed	-
Directive 2005/29	Not transposed	-
Directive 87/357	Law on General Product Safety 2009 (replacing the Law on General Product Safety of 9.9.2004) Amendments to the Law on the Supervision of the Market in Bosnia and Herzegovina of 9.9.2004	15.12.2009 15.12.2009
Directive 97/5	not transposed (only in Draft Law of Obligations 2006, left out of the Draft Law of Obligations 2010)	-
Directive 98/26	Not transposed	-
Directive 2000/46	Not transposed	-
Directive 2001/95	Law on General Product Safety (replacing the Law on General Product Safety of 9.9.2004)	15.12.2009
Directive 2002/22	Not transposed	-
Directive 2002/58	Not transposed	-

I. State of consumer protection in the field of the Directives 99/44 (sale of goods), 93/13 (unfair terms), 97/7 (distance contracts) and 85/577 (doorstep) before transposition

Before the transposition of consumer protection directives, the legal system of Bosnia and Herzegovina did not contain any provisions whose application was limited to consumers. However, some provisions of the Yugoslav Law of Obligations of 1978[6] offered a high level of protection, particularly in case of contracts for the sale of goods and producer's liability for damage caused by defective products. Since the split of Yugoslavia this Act by virtue of succession remained applicable in two slightly different versions in each entity of Bosnia and Herzegovina, as the Law of Obligations of the Republic of Srpska[7] and the Law of Obligations of the Federation of Bosnia and Herzegovina[8]. Since the provisions relevant for this analysis do not differ, in order to ensure more clarity this text will only refer to "Bosnia-Herzegovina's Law of Obligations (BLO)"[9]. The first Consumer Protection Act of Bosnia and Herzegovina has been adopted in 2002[10]; due to the lack of application in practice, it was replaced in 2006 by the current Consumer Protection Act[11].

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[6] OG SFRY No. 29/78, 39/85, 46/85, 45/89, 57/89.

[7] OG SFRY No. 29/78, 39/85, 46/85, 45/89, 57/89 and OG *of the Republic of Srpska*, No. 17/93, 57/98, 39/03, 74/04.

[8] OG SFRY No. 29/78, 39/85, 46/85, 45/89, 57/89, OG *of the Republic of Bosnia and Herzegovina*, No. 2/92, 13/93, 13/94 and OG *of the Federation of Bosnia and Herzegovina*, No. 29/03.

[9] This name seems appropriate, because of the ongoing process of re-uniting the Laws of Obligations on the state level. The last attempt to adopt the united Law of Obligations of Bosnia and Herzegovina started on January 8th 2010. However, the Draft Law of Obligations 2010 failed to pass the parliamentary procedure in February 2010.

[10] OG BA No. 17/02.

[11] OG BA No. 25/06.

II. Legislative techniques of transposition

Bosnia and Herzegovina transposed most of the Directives, including the four relevant directives, in the Consumer Protection Act which came into force on April 12th 2006. In addition, single transposition laws have been adopted concerning more specific areas of law, for example Law on Electronic Legal and Commercial Transactions[12], Law on Electronic Signatures[13] and Law on General Product Safety[14].

III. Use of minimum harmonization

When transposing the consumer protection directives Bosnia and Herzegovina made use of minimum clauses on various occasions. The time limit for withdrawal for doorstep selling and distance selling has been extended to 15 days, whereas the directives only require seven days (Directive 85/577 and 97/7). Furthermore, the Bosnian Consumer protection Act contains a "blacklist" of clauses that are always considered unfair (per se unfair), whereas the Directive uses a list of clauses that may be considered unfair (Article 3(3) of the Directive 93/13).

In accordance with the Consumer Protection Act consumers may request damages and return of the payment without the obligation to previously require the seller to repair or replace the goods, provided in Article 3 (5) of the Directive 99/44. Opposite to the Directive 99/44 the right of consumer to have the contract rescinded exists even if the lack of conformity is minor (Article 3(6) of the Directive 99/44).

IV. Other extensions

Consumer Protection Act regulates the sale of services which are not covered by Directive 99/44, on the model of sale of goods in accordance with that directive. The scope of application of the provisions transposing Directive 85/577 additionally includes contracts concluded as a result of an unexpected approach to the consumer at a public transport or any other public place.

Further extensions of the scope of application of the consumer protection provisions are the result of the lack of transposition of provisions regulating the restriction of the scope of application of the relevant Directives, such as Article 3 (2) of the Directive 85/577, Article 3 (2) of the Directive 97/7 and Article 4 of the Directive 93/13.

V. Possible infringements of EC law

1. The most important possible infringement of EU law lies in the definition of consumer. In accordance with the Consumer Protection Act, consumer is any natural person who purchases, acquires or uses products or services for his personal needs and the needs of his household. This definition is twice narrowed in comparison to the most common definition of consumer in the Directives. Instead of the general concept of "action", which is used in the definition of consumer in the Directives, Bosnian Consumer Protection Act limits the acting of a consumer to the purchase, acquisition or use of a service or product. Even of greater importance is the reduction to "personal needs and the needs of their household", which due to the conjunction "and" should be understood cumulatively, while the negatively worded def-

[12] OG BA No. 88/07.

[13] OG BA No. 91/06.

[14] OG BA No. 102/09, replacing the previous Law on General Product Safety, OG No. 45/04.

inition in the Directive includes every purpose which is not related to consumers trade, business or profession.

The same applies to the term trader, which is in the Consumer Protection Act defined as any person who is, directly or as an intermediator, selling products or providing services to the consumer. Given that both definitions are narrower than the appropriate definitions in the Directives, in accordance with the Consumer Protection Act there is a free space between the concepts of consumers and traders. In the consumer protection directives these terms are complementary, therefore any person who is not a consumer is a trader, and vice versa. The restriction of these terms inevitably reduces the level of consumer protection, opposite to the Directives.

2. Article 1 (2) Doorstep Selling Directive is not transposed in the Consumer Protection Act. Regarding contracts negotiated away from business premises the Consumer Protection Act provides a withdrawal period of 15 days from the conclusion of the contract, without postponing the commencement of the withdrawal period in case when the trader does not inform the consumer about his right to withdraw, what is explicitly provided by the Directive[15]. According to Article 41 (2) of the Consumer Protection Act consumers pay the costs of returning the goods, which can be considered as consistent with Articles 5 and 7 of the Doorstep Selling Directive.[16]

3. The analysis of unfairness in accordance with the provisions of Article 95 Consumer Protection Act applies to all provisions of the contract that the consumer did not negotiate „personally". The use of this term leads to a different scope of application of the fairness clause, than it is provided by the term "individually negotiated".

4. With regard to Directive 97/7 there are fewer possibilities for infringements of EU law considering that it is transposed using the "copy and paste" technique.

5. The most complex legal situation exists in regard to the transposition of Directive 99/44. Article 3 (2) and Article 5 (1) and (2) of Directive 99/44 are directly transposed in the Consumer Protection Act, with the exception that the consumer does not have the right to require the seller to make an appropriate reduction in the price. The non-transposed Article 2 (1)- (3) of the Directive may be considered as already existing in the Law of Obligations (1978), while the provisions of the Article 2 (4) and (5) are not included in the positive law. In addition, the assumption regarding the lack of conformity which appears within six months of delivery of the goods according to Article 5 (3) of the Directive is not transposed.

6. Finally, it is necessary to emphasize that the adoption of the Draft Law of Obligations of Bosnia and Herzegovina 2006 (BDLO 2006)[17] would have prevented most of the possible infringements of EU law listed above. The BDLO 2006 would have transposed 14 Consumer Protection Directives.[18] However, the political will for a uniform Law of Obligations on the state level seemed questionable until now. The latest attempt started on January 8th 2010, when a new Draft Law of Obligations (BDLO 2010) was adopted by the government and sent to the Parliamentary Assembly. Unfortunately, the Draft failed to pass the parliamentary

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[15] See also ECJ judgment of 13 December 2001, C-481/99 - *Georg Heininger and Helga Heininger v. Bayerische Hypound Vereinsbank AG* [2001] ECR I-09945.

[16] See ECJ, 22 April 1999, C-423/97 –*Travel Vac SL v Manuel José Antelm Sanchi* [1999] ECR I-02195; ECJ judgment of 25 November 2005, C-229/04 - *Crailsheimer Volksbank eG v Klaus Conrads, Frank Schulzke and Petra Schulzke-Lösche, Joachim Nitschke* [2005] ECR I-9273.

[17] See B. Morait, A. Bikić, *Objašnjenja uz Nacrt Zakona o obligacionim odnosima*, in Cooperation with GTZ, Sarajevo 2006.

[18] See the index above.

procedure in February 2010. Given that the failure of the last two versions of the Draft Law of Obligations to pass the parliamentary procedure, among the most important reasons that are political in nature[19], was caused by the inclusion of large number of consumer provisions in the draft, it is difficult to predict which of the provisions will remain in the final version of the new Law of Obligations and whether a new Law of Obligations will be adopted on entity or state level. The chances for a long-awaited adoption still might be good, since many of the provisions referring to a specific type of a consumer contract such as the doorstep sales contracts or timesharing contracts have been left out of the latest Draft and the adoption of a new Law of Obligations is one of the priorities of the "European Partnership with Bosnia and Herzegovina".

VI. Court practice

The most recent cases of unfair terms in general conditions of consumer credit contracts were the first cases to raise the awareness level of the CPA in Bosnia and Herzegovina. However, only proceedings for administrative offence were started before the competent courts by the Federal Administration for Inspection Affairs and the Ombudsman for consumer protection. The basic facts of these 192 cases[20] were that private banks one-sidedly and heavily raised the floating rate of the consumer credits due to economic factors related to the recession. In the accessible cases neither the consumer credit contracts nor the standard terms concluded with the consumer specified the factors which could justify such considerable change of the rate, and the courts stated a breach of Articles 54 and 57 (2) CPA, which provide necessary content of a consumer credit contract. The competent courts ordered administrative offences from 750-2000 euro, but there are still no known collective or individual civil procedures based on these orders.[21]

It is deplorable that even the Constitutional Court of Bosnia and Herzegovina when deciding on consumer contracts, which it recognized as such, ignored the existence of the Consumer Protection Act and relied only on the BLO.[22] This is clearly an argument in favour of the incorporation of the consumer contracts provisions into the future Law of Obligations.

VII. Summary

Bosnia and Herzegovina transposed most of the consumer protection directives in its first Consumer Protection Act in 2002, which was replaced due to the lack of application in practice by the current Consumer Protection Act (CPA) in 2006. The CPA transposed 10 consumer protection directives, partly or entirely, while four other are transposed in single transposition laws, the Law on Electronic Legal and Commercial Transactions, Law on Electronic Signatures and Law on General Product Safety. The transposition laws used the minimum

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[19] The political representatives of the Republic of Srpska argue that the Constitution of Bosnia and Herzegovina does not provide competence for the adoption of a Law of Obligations on the state level. The Council of Ministry named Article I (4) of the Constitution as the legal basis, stating that the freedom of movement of goods, persons, services and capital shall be ensured in Bosnia and Herzegovina and will not be hindered by Bosnia and Herzegovina or the entities.

[20] Report of the Federal Administration for Inspection Affairs, 22.6.2009.

[21] In the accessible cases the competent courts did not review the fairness of the standard terms but only referred to the missing information which the banks were obliged to provide due to the provisions of the CPA on the consumer credits.

[22] Constitutional Court of Bosnia and Herzegovina, AP-1385/06**,** 26.06.2007, OG BA No. 60/05.

harmonization clause on various occasions to provide a higher level of protection, mostly by extending their scope of application or determining a longer withdrawal period. The transposition of at least five other consumer protection directives as well as the revision of some of the provisions of the CPA was planned for a new Law of Obligations of Bosnia and Herzegovina, which is still not enacted. The introduction of consumer protection provisions in the Law of Obligations shall additionally solve the problem of the ignorance of the CPA in practice.

C. CROATIA – LEGISLATIVE TECHNIQUES
(Emilia Čikara)

Directive	Transposed in	Date of Transposition
Directive 85/577	Consumer Protection Act	10.6.2003
Directive 90/314	Civil Obligations (also relevant Act on Providing Services in Tourism)	17.3.2005
Directive 93/13	Consumer Protection Act	10.6.2003
Directive 94/47 (from 23.2.2011: Directive 2008/122)	Consumer Protection Act	10.6.2003
Directive 97/7	Consumer Protection Act	10.6.2003
Directive 98/6	Consumer Protection Act	10.6.2003
Directive 98/27 (codified version: Directive 2009/22)	Consumer Protection Act	30.7.2007
Directive 99/44	Civil Obligations Act Consumer Protection Act	17.3.2005 10.6.2003
Directive 87/102 (from 12.5.2010: Directive 2008/48)	Consumer Protection Act Consumer Credit Act	10.6.2003 1.1.2010
Directive 85/374	Civil Obligations Act	17.3.2005 9.4.2008
Directive 86/653	Civil Obligations Act	17.3.2005 9.4.2008
Directive 99/34	Civil Obligations Act	17.3.2005
Directive 99/93	Electronic Signature Act	30.1.2002
Directive 2000/35	Civil Obligations Act	17.3.2005
Directive 2000/31	Act on E–Commerce	15.10.2003
Directive 84/450	Consumer Protection Act	10.6.2003
Directive 2002/65	Consumer Protection Act	30.7.2007
Directive 2005/29	Consumer Protection Act	30.7.2007
Directive 87/357	General Product Safety Act	9.3.2009
Directive 97/5	Foreign Exchange Operations Act	10.6.2003
Directive 98/26	Act on Settlement Finality on Payment and Financial Instruments Settlement Systems	13.10.2008
Directive 2000/46	Electronic Money Institutions Act Credit Institutions Act	13.10.2008 13.10.2008
Directive 2001/95	General Product Safety Act (also relevant State Inspector's Office Act and Act on Access Right to Information)	7.10.2003
Directive 2002/22	Electronic Communications Act	26.6.2008
Directive 2002/58	Electronic Communications Act	26.6.2008

I. State of consumer protection in the field of the Directives 99/44 (sale of goods), 93/13 (unfair terms), 97/7 (distance contracts) and 85/577 (doorstep selling) before transposition

Before the transposition of the European consumer protection directives, there was no special law provided in Croatia protecting consumers and therefore only the general rules which protected the consumer as any other person were applicable. However, these rules enabled a quite high level of protection, for instance, through provisions of Civil Obligation Act[23] (COA) on contracts in general and on contracts for the sale of goods. The COA contained also some of provisions concerning liability for defective products even before the transposition of Directive 85/374/EEC.[24] Consumers were also protected indirectly through a number of provisions of the other laws, e.g. through provisions of the old Trade Act,[25] Act on Telecommunications,[26] State Inspector's Office Act[27] etc. The approximation of Croatia's existing legislation to the *acquis communautaire* in this field started as a consequence of the obligations prescribed in Arts. 69 and 74 of the Stabilization and Association Agreement signed between the Republic of Croatia, on the one part, and the European Communities and their Member States, on the other[28] (SAA) on 29. October 2001. The Consumer Protection Act[29] (CPA) was introduced for the first time in 2003 and replaced in 2007 by the current Consumer Protection Act.[30]

II. Legislative techniques of transposition

The CPA 2003 transposed most of the consumer protection directives. The necessity for transposition of new directives and for further improvement of existing provisions led to the adoption of a new CPA in 2007.[31] While the CPA 2007 transposes Directives 98/6, 87/102, 93/13, 97/7, 85/577, 94/47, 98/27, 2002/65 and 2005/29, the Directives 90/314 and 99/44 are implemented in the new Civil Obligation Act[32] (COA) enacted in 2005. For the transposition of the new Consumer Credit Directive (Directive 2008/48), however, the legislator adopted a separate Consumer Credit Act[33] in June 2009.

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[23] Civil Obligation Act, *OG RH*, No. 53/91, 73/91, 111/93, 3/94, 107/95, 7/96, 91/96, 112/99, 88/01. The Yugoslavian Law of Obligations (*OJ SFRY* No. 29/78, 39/85, 46/85, 45/89, 57/89) was taken over as Croatian national law by the Law on adopting the Law of Obligations, *OG RH,* No. 53/91.

[24] T. Josipović, "Das Konsumentenschutzgesetz – Beginn der Europäisierung des kroatischen Vertragsrechts", in S. Grundmann, M. Schauer (ed.), *The Architecture of European Codes and Contract Law*, Kluwer Law International, Alphen aan den Rijn (et al.) 2006, 129 etc.

[25] Trade Act, *OG RH* No. 11/96, 30/99, 75/99, 76/99, 62/01, 109/01.

[26] Act on Telecommunications, *OG RH* No. 79/99, 128/99, 68/01, 109/01.

[27] State Inspector's Office Act, *OG RH* No. 76/99.

[28] Stabilization and Association Agreement between the Republic of Croatia, of the one part, and the European Communities and their Member States, of the other part, *OG IA RH* No. 14/01.

[29] Consumer Protection Act, *OG RH,* No. 96/03.

[30] Consumer Protection Act, *OG RH* No. 79/07, 125/07, 79/09, 89/09, 133/09.

[31] E. Čikara, "Die Angleichung des Verbraucherschutzrechts in der Europäischen Gemeinschaften: Unter besonderer Berücksichtigung des Verbraucherschutzrechtes in der Republik Kroatien", *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, Vol. 28, 2/2007., 1082.

[32] Civil Obligation Act, *OG RH,* No. 35/05, 41/08.

[33] Consumer Credit Act, *OG RH* No. 75/09.

III. Use of minimum harmonization

When transposing the European consumer protection directives Croatia made use of minimum clauses on numerous occasions. The withdrawal period of seven working days prescribed in Directive 85/577 and Directive 97/7 is longer in CPA and amounts to 14 working days. The same goes for timeshare contracts where CPA provides a period of withdrawal of 14 working days whereas the Directive requires only 10 days. The CPA goes beyond the requirements of the consumer protection directives also when it comes to information duties. For instance, the CPA prescribes more stringent provisions than the Directive 97/7, by regulating that the written confirmation of prior information by distance contracts includes all the information provided in prior information. Also, Art. 41 CPA prescribes a higher level of consumer protection than the Directive 97/7 by prohibiting the conclusion of contracts on the sale of drugs and medical and veterinarian products by means of distance communication. Furthermore, by holding the organizer of the package travel liable for all the damage inflicted on the traveller by non–performance, partial performance and improper performance of obligations under the principle of strict liability, Art. 888 COA offers a more far reaching protection to consumers than Art. 5 of the Directive 90/314. The Croatian legislator made use of minimum harmonization also when transposing Directive 99/44. The COA provisions on material defects are applicable on contracts for the sale of goods and all the other onerous contracts.

IV. Other extensions

Croatia extended the level of consumer protection by adopting broader definitions of the term consumer than required by the Directives in other *leges specialissimae*. For instance, until the last amendment from the year of 2009[34], Art. 304 of the Credit Institutions Act[35] (CIA) defined consumer as a natural person, who is client of a credit institution. According to the original version of Art. 304 CIA a consumer was also a natural person who was acting within his commercial activity, which was in contrast to the definition of consumer under Art. 3 (1) 4th indent CPA, This inconsistency was removed by the amendment of the CIA of 2009, pursuant to which a consumer is a natural person, who is a client of credit institution and who is acting outside of his or her business or professional activity.

Furthermore, the CPA provisions implementing the Doorstep Selling Directive would apply also if the consumer offered the conclusion of contract during excursions organized by the trader away from his business premises, during the trader's visits to the consumer's home, the home of another consumer, or the consumer's place of work. Also, Croatia did not transpose the option laid down in Art. 3 (1) of the Directive 85/577 pursuant to which the provisions on contracts negotiated away from business premises do not apply to contracts for which the payment to be made by the consumer exceeds a specified amount.

V. Possible infringements of EU law

More detailed information on possible infringements of the EU law are provided in the Part 2 on the transposition of the individual Directives (reports on Doorstep Selling in Part 2.A., Unfair Terms in Part 2.B., Distance Selling in Part 2.C., and on Consumer Sales in Part 2.D.).

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[34] *OG RH* No. 153/09.

[35] Credit Institutions Act, *OG RH* No. 117/08, 74/09, 153/09.

VI. Court practice

There is a significant lack of court practice based on the provisions of the CPA. The courts are rather applying e.g. the COA provisions and protecting the consumer as every other person, ignoring at the same time the existence of special consumer protection provisions. As far as already known, there are very few court judgments concerning the CPA provisions on consumer credit[36] and COA provisions on sale of goods.[37] However, beside the regular court procedure the consumer can access to justice through instruments of alternative dispute resolution and through administrative procedure.[38]

VII. Summary

The approximation of Croatia's existing legislation to the *acquis communautaire* in the field of consumer protection started by signing of the Stabilization and Association Agreement between the Republic of Croatia, on the one part, and the European Communities and their Member States, on the other on 29. October 2001. The first Consumer Protection Act was enacted in 2003 and it transposed most of the European consumer protection directives. Because of the necessity for further transposition and improvements a new Consumer Protection Act (CPA) was adopted in 2007. The CPA implements Directives 98/6, 87/102, 93/13, 97/7, 85/577, 94/47, 98/27, 2002/65 and 2005/29, while the Directives 90/314 and 99/44 are transposed within the Croatian new Civil Obligation Act from 2005. When transposing these directives into national law, the Croatian legislator significantly increased the level of consumer protection by using the minimum harmonization principle on numerous occasions. However, because of ignorance of the existence of special consumer protection rules in practice (from traders on the one side and courts and consumers on the other) the level of protection of consumer rights is still not satisfactory.

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[36] County Court in Varaždin, Gž. 1052/08–2 from 12. June 2008.

[37] County Court in Varaždin, Gž. 1074/08–2 from 4. August 2008.

[38] See Part V. of the CPA under the title "Protection of the Consumer's Rights", which is divided into Chapter I on alternative consumers' dispute resolution and Chapter II on protection of collective interest of consumers. The first case of protecting consumer rights based on CPA was the case "Ponikve" regarding the provision of public services, see the Decision of the Croatian Competition Agency, UP/I 030-02/2004-01/66, *OG RH* No. 135/05.

D. MACEDONIA – LEGISLATIVE TECHNIQUES

(Neda Zdraveva, Jadranka Dabović-Anastasovska, Nenad Gavrilović)

Directive	**Transposed in**	**Date of Transposition**
Directive 85/577	Law on Consumer Protection	29.07.2000 partial, 30.06.2004 full
Directive 90/314	Law on Tourist Business	30.09.2006
Directive 93/13	Law on Consumer Protection	29.07.2000 partial, 30.06.2004 full
Directive 94/47 (from 23 02. 2011: Directive 2008/122/EC)	Law on Consumer Protection	30.06.2004
Directive 97/7	Law on Consumer Protection	29.07.2000 partial, 30.06.2004 full
Directive 98/6	Law on Consumer Protection	29.07.2000 partial, 30.06.2004 full
Directive 98/27 (codified version: Directive 2009/22/EC)	Law on Consumer Protection	29.07.2000 partial, 30.06.2004 full
Directive 99/44	Law on Consumer Protection	30.06.2004
	Law amending the Law on Obligations	11.07.2008
Directive 87/102/EEC (from 12 May 2010: Directive 2008/48/EC)	Law on Consumer Protection Regarding Contracts for Consumer Credits;	30.04.2007
	Rulebook prescribing the form and the contents of the application for obtaining an authorisation to grant consumer credits and the form and the contents of the authorisation to grant consumer credits;	06.08.2007
	Rulebook on the form and contents of the Register of consumer loan issuers having obtained authorisation from the Minister of Economy to grant loans and on the Register of Consumer Loan Intermediaries having obtained loan approval authorisation from the Minister of Economy;	06.08.2007
	Rulebook prescribing the form, contents and manner of filing reports which consumer loan issuers need to submit to the Ministry of Economy, on the number of concluded loan agreements and on the agreed annual rate of total costs;	06.08.2007
	Rulebook on the technical equipment availability, i.e. the technical conditions that need to be fulfilled by the consumer credit lenders	30.08.2007
Directive 85/374	Law on Consumer Protection	30.06.2004
Directive 86/653	Law amending the Law on Obligations	11.07.2008
Directive 99/34	Law amending the Law on Obligations	11.07.2008
Directive 99/93	Law on Electronic Data and Electronic Signature	31.03.2002
Directive 2000/35	Law amending the Law on Obligations	11.07.2008

Directive 2000/31	Law amending the Law on Electronic Data and Electronic Signature	04.08.2008
Directive 84/450	Law on Consumer Protection	29.07.2000 partial, 30.06.2004 full
Directive 02/65	Law on Personal Data Protection	01.02.2005
Directive 05/29	To be transposed in Law Amending the Law on Consumer Protection	Scheduled for not later than 01.11.2010
Directive 87/357	Law on Consumer Protection	29.07.2000 partial, 30.06.2004 full
Directive 97/5	Law on Swift Money Transfers Law on Foreign Exchange Operations	03.12.2003 30.06.2003
Directive 98/26	Law on Payment Operations	20.09.2007
Directive 2000/46	Law on electronic money issuers	30.12.2007
Directive 01/95	Law on Consumer Protection	29.07.2000 partial, 30.06.2004 full
Directive 02/22	Law on Electronic Communications	31.03.2005
Directive 02/58	Law on Personal Data Protection	01.02.2005

I. State of consumer protection in the field of the Directives 99/44 (sale of goods), 93/13 (unfair terms), 97/7 (distance contracts) and 85/577 (doorstep) before transposition

In Macedonia much of the legislation on consumer protection was contained in the Law on Consumer Protection of 2000, and amended in 2002. Step forward was made by the enactment of the new Law on Consumer Protection in 2004, as amended in 2007 and 2008[39]. Important rules could also be found in the Law on Obligations (the principle of protection of consumers, fair dealing principle, equity of parties and the general rules of contracting, guarantee for products and product safety liability).

The legislation that was in place was dealing with most of the issues covered by the directives. The question of the unfair rules was covered in general by the Law on Obligations, but not to the extent of the Directive. The Law on Obligations has number of provisions in regard to the conformity of the products to be delivered under the sales contract and the associated guarantees.

Under the Stabilisation and Association Agreement between the European Communities and their Member States and the Republic of Macedonia, signed in April 2001, the country is under obligation to approximate its legislation and practices in the field of consumer protection.

II. Legislative techniques of transposition

The legislative act that covers the majority of the rules regarding the consumer protection in Macedonia is the Law on Consumer Protection. In this regard the Law on Consumer Protection acts as lex specialis in the field, while the general provisions on contracting and liabilities arising out of contract are regulated in the Law on Obligations. Instead of amending the law, in 2004 the legislator decided to enact a new Law on Consumer protection where the directives are implemented in full. Furthermore, special provisions on the rights of the con-

[39] OG RMac No. 38/2004, 77/2007 and 103/2008.

sumers in financial matters are contained in the special Law on Consumer Protection Regarding Contracts for Consumer Credits and the by-laws enacted on the basis on this Law.

III. Use of minimum harmonization

In general the Macedonian legislation used the minimum harmonisation in various occasions when approximating the national legislation with the *Consumer Acquis*. Additional rules on what is to be considered an unfair clause were included in the law beside those prescribed by the Directive. In certain cases the prescribed deadlines are extended (thus, the period for cancellation of a contract negotiated outside of business premises is set to 8 working days). The same is applied to the period of cancellation of the contract due to deficiencies of the product. Most of the more stringent provisions exist in regard to the information duties and the content of specific documentation to be delivered to the consumer (for example, the written notification in the cases of the distance contract, the mandatory content of the guarantee certificate, etc.). The LCP prohibits the distant conclusion of contract on the sale of medicines, medicinal products and veterinary products, as well as explosives, by which it goes beyond the requirements of the respective Directive. Further, the Law provided the opportunity to request replacement of foodstuff that is beyond the rights set forth for the consumers by the Directive 99/44.

IV. Other extensions

Most of the extensions could be found in the rules related to the liability for product deficiencies.

V. Possible infringements of EC law

Formally, as Macedonia is not a Member state we cannot speak of infringements of the EC Law. However, it is to be noted that some provisions of the Directives are not implemented into the national legislation. As minor as they may be, compared to the scope of the Directives, the lack of rules in the national legislation may have negative impact. As amendments on the Law on Consumer protection are to be expected, it is to be considered that this situation will be overcome.

VI. Court practice

There are no available data on court practice in consumer protection. The Administrative Court has jurisdiction in the cases when decisions of a relevant Inspectorate[40], by which traders are sanctioned for specific infringements of their duties (misdemeanours), are contested. In accordance with the Law, the Inspectorates are obliged prior to undertaking misdemeanour procedure to offer settlement procedure i.e. conciliation procedure. In certain cases mediation can be undertaken as well.

The Civil Courts do not have per se jurisdiction in the consumer protection. Under the Law on Consumer Protection, a consumer may claim damages when such arise and declara-

[40] By Art. 130 of the Law on Consumer Protection, the surveillance of the application of the Law is undertaken by the Ministry of Economy. The Inspectorate surveillance of the application of the provisions of the Law is carried out by the State Market Inspectorate, Food Directorate and Department for veterinary, State Sanitary and Health Inspectorate and the State Environment Inspectorate in accordance with their competencies and procedures as set by law.

tion of invalidity of a contract when grounds for this exist. These cases are carried out in accordance with the Law on Obligations[41] and the laws that regulate the court procedures[42]. There is no data on the number and content of these cases.

Activities are underway by the Organisation for the Protection of the Consumers in cooperation with relevant state bodies to develop system of monitoring the practice of the relevant state bodies in the protection of the consumers, so relevant policies could be developed in this field as well.

VII. Summary

The approximation of the Macedonian legislation in the field of the consumer protection formally started within the framework of the Stabilisation and Association Agreement between the European Communities and their Member States and the Republic of Macedonia, signed in April 2001 which has put the country under obligation to approximate its legislation and practices in the field of consumer protection. However, even before that the legislation on consumer protection contained in the Law on Consumer Protection of 2000, and subsequently amended in 2002, observed to certain extend the rules of consumer protection of the *acquis communautaire*. Step forward was made by the enactment of the new Law on Consumer Protection in 2004, and its amendments in 2007 and 2008. Important rules can also be found in the Law on Obligations (the principle of protection of consumers, fair dealing principle, equity of parties and the general rules of contracting, guarantee for products and product safety liability), which was also amended in 2008 to meet the consumer protection requirements.

Further efforts should be made, and are under way, in order to improve the specific consumer protection legislation so as to provide for full approximation of the Macedonian legislation to the *acquis communautaire.*

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[41] Law on Obligations, OG RMac *No 18/2001; 4/2002; 5/2003; 84/2008; 81/2009 and 161/2009.*

[42] Law on Courts, OG RMac *No.58/2006; 62/2006 and 35/2008;* Law on Contentious Procedure, OG RMac *No 79/2005; 110/2008 and 83/2009.*

E. MONTENEGRO – LEGISLATIVE TECHNIQUES

(Zvezdan Čađenović)

Directive	Transposed in	Date of Transposition
Directive 85/577	Law on Consumer Protection	16. May 2007.
	Law on Internal Trade	07. August 2008.
	Regulation on the type of goods and manner of conducting doorstep type of sale	to be adopted
Directive 90/314	Law on Obligations	07. August 2008.
	Law on Tourism	25. June 2002 (with amendments)
Directive 93/13	Law on Consumer Protection	16. May 2007.
Directive 94/47(from 23 Feb. 2011: Directive 2008/122/EC)	Law on Consumer Protection	16. May 2007.
Directive 97/7	Law on Consumer Protection	16. May 2007.
	Law on Obligations	07. August 2008.
Directive 98/6	Law on Consumer Protection	16. May 2007.
Directive 98/27 (codified version: Directive 2009/22/EC)	Law on Consumer Protection	16. May 2007.
Directive 99/44	Law on Consumer Protection	16. May 2007.
	Law on Obligations	07. August 2008.
Directive 87/102/EEC (from 12 May 2010: Directive 2008/48/EC)	Law on Consumer Protection	16. May 2007.
	Law on Obligations	07. August 2008.
	Law on Banks	11. March 2008.
	Decisions of the Central Bank of MN	
Directive 85/374	Law on Consumer Protection	16. May 2007
	Law on Obligations	07. August 2008.
Directive 86/653	Law on Obligations	07. August 2008.
Directive 99/34	Law on Obligations	07. August 2008.
Directive 99/93	Law on Electronic Signature	01. October 2003. (with amendments)
Directive 2000/35	Law on Obligations	07. August 2008.
Directive 2000/31	Law on Electronic Commerce	29. December 2004.
Directive 84/450	Law on Consumer Protection	16. May 2007.
Directive 02/65	Law on Consumer Protection	16. May 2007.
Directive 05/29	Law on Consumer Protection	16. May 2007.
Directive 87/357	Law on General Product Safety	11. August 2008.
Directive 97/5	The Law on Foreign Current and Capital Operations	28. July 2005.
Directive 98/26	The Law on Foreign Current and Capital Operations	28. July 2005.
	Law on National Payment Operations	13. October 2008.
	Law on Securities	27. December 2000. (with amendments)

Directive 2000/46	Law on National Payment Operations Decisions of the Central Bank of MN Law on Electronic Money Instruments	13. October 2008. to be adopted
Directive 01/95	Law on General Product Safety	11. August 2008.
Directive 02/22	Law on Electronic Communication	27. August 2008.
Directive 02/58	Law on Electronic Communication	27. August 2008.

I. State of consumer protection in the field of the Directives 99/44 (sale of goods), 93/13 (unfair terms), 97/7 (distance contracts) and 85/577 (doorstep) before transposition

Before the transposition of the four Directives, the situation compared to the one today was quite different. More detailed rules on the here elaborated pieces of the acquis existed only in relation to the Sales Directive. Besides the general application of the former federal Law on Consumer Protection[43], the latter subject was mostly regulated through the general contract law (Law on Obligations[44]).

The same cannot be stated for the other three directives, as specific rules did not exist, at least not to a considerable extent.

In relation to unfair terms, at a certain point of time, the former federal Law on Trade in its chapter "Consumer Protection" contained a provision on the monitoring of standard contracts (and terms therein) and on the powers of state bodies regarding terms which are misbalancing the equal position of the contracting parties[45]. Afterwards, the federal Law on Consumer Protection in two articles addressed the transparency rule[46] and the rule that clauses in standard contracts will be interpreted for the benefit of consumers[47]. In parallel, again the general trade law applied, and although it did not contain rules as can be found under the Unfair Contract Terms Directive, it still had an approach on its own with a whole set of terms to be regarded as unfair, which exist even now in parallel to the pure consumer legislation.

As regards distance and doorstep sales, the federal Law on Consumer Protection from 2002 contained only one article[48] that dealt with this subject. Namely, it dedicated three paragraphs to doorstep and distance selling contracts, granting the consumer seven days to renounce the effect of the undertaking, without costs and justification. The time limit for renunciation for goods counted from the day of receiving them, and for services from the day of concluding the contract, and finally, the consumer was obliged to pay the costs of returning the goods.

II. Legislative techniques of transposition

Now the situation is to a significant effect different. Montenegro submitted its application for membership in the European Union on 15th December 2008 and in accordance with Art. 72 of the Stabilisation and Association Agreement between the European Communities

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[43] Law on Consumer Protection, *OG FRY* No. 37/02.

[44] Law on Obligations, *OG SFRY* No. 29/78, 39/85, 57/89 and OG FRY No. 31/93.

[45] Art. 39 of the Law on Trade, OG FRY No. 32/93, 50/93, 41/94, 29/96.

[46] Art. 18 of the Law on Consumer Protection, OG FRY No. 37/02.

[47] Art. 19 of the Law on Consumer Protection, OG FRY No. 37/02..

[48] Art. 21 of the Law on Consumer Protection, OG FRY No. 37/02..

and their Member States and the Republic of Montenegro (SAA)[49] has the obligation to ensure that its existing laws and future legislation will be gradually made compatible with the Community *acquis*.

Thus, the Montenegrin Law on Consumer Protection[50] from May 2007 meant a big step forward in comparison with previous federal laws and attempts for harmonization with the consumer acquis[51]. In parallel, changes occurred in the general contract law as well. Montenegro adopted its own Law on Obligations in 2008[52] which, as will be seen below, transposes a whole set of relevant provisions of the Sales Directive that are being applied in parallel[53] to specific consumer protection provisions.

Also, among the other pieces of law, it is worth mentioning the related Law on Internal Trade[54] which regulates internal trade, conditions and ways of doing trade. Besides providing for a definition of traders, expanding this notion, defining trading premises, etc. it also contains important provisions on distance and doorstep sale.

III. Use of minimum harmonization

There is an evident number of minimum harmonisation clauses that have been used by Montenegro, although Montenegro has not made use of all of them (e.g. Art. 3(1) of Directive 85/577 provides for the option for member states to exclude contracts that do not exceed the sum of 60 ECU from the scope of their national transposition law, where Montenegro set the limit exactly on 60 EUR.). On the other side, under the same directive, Montenegro opted that the consumer is entitled to withdraw from the contract within seven working days, instead of merely seven days. Furthermore, it provided additional rules in case of withdrawal, which are identical to the provision of Art. 6 (4) of the Directive 97/7 which regulates the automatic termination of both the main and the credit contract.

In the case of Directive 97/7 and of Art. 6 (4), the Montenegrin law goes far beyond the Directive as it is more favourable toward the consumer, freeing him not merely from penalty when terminating the credit contract, but from compensation for the damages whether in the form of costs, interests, penalty, or similar costs.

Montenegro has through the Law on Consumer Protection, together with requirements to be found in the general legislation on sale, stipulated additional kinds of conformity requirement factors than those provided for in Directive 99/44, such as: exact measure or quantity of goods; suitable packaging material in accordance with the type and properties of the goods; prescribed or agreed quality, where if the quality was not prescribed or agreed – usual quality of goods and services; way of determining or calculating price, etc.

Finally, for example, the way in which Montenegro approached the clauses from the Annex of the Directive 93/13 is very important. Namely, the terms from no. 1 of the Annex are always regarded as unfair (black list), while Annex no. 2 (exceptions in relation to claus-

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[49] Stabilisation and Association Agreement between the European Communities and their Member States, on one part and the Republic of Montenegro, on the other part, OG RMN, No. 07/07.

[50] Law on Consumer Protection, OG RMN No. 26/07.

[51] The draft Law was prepared with support of the EU funded project PLAC ("Policy and Legal Advice Centre"), implemented by a GTZ International Service led consortia.

[52] Law on Obligations, OG RMN No. 47/08.

[53] Art. 6 of the Law on Consumer Protection stipulates that unless otherwise provided by it, the provisions of the Law on Obligations shall apply to obligation relations.

[54] Law on Internal Trade, OG RMN No. 49/08.

es used by suppliers of financial services) is transposed only to the case provided under no. 2 d. Both approaches provide for a higher level of consumer protection (black-listing the terms, and non-transposition of no. 2 of the Annex).

IV. Other extensions

When transposing Art. 1 of Directive 85/577 and determining the situations falling within its range, Montenegro opted to extend these and covered public places as well. This term seems to embrace whole set of places such as streets, squares, parks, beaches, marinas, restaurants/pubs/discos, railway stations, airport buildings, internal marine transport facilities, schools, etc. In regard to the burden of proof which might increase the level of consumer protection, even not being subject to the Directive's provisions, Montenegro has used the general rule relating to existence of compliance with time-limits.

Montenegro has transposed provisions of Directive 85/577 to exclude certain type of contracts as listed in Art. 3 para. (2). To this extent, for the supply of foodstuffs, beverages or other goods intended for current consumption in the household, the Law on Consumer Protection does not require that the goods are supplied by "regular roundsmen".[55]

When transposing Art. 5 2nd sentence of the Directive 93/13, the *contra proferentem* rule applies not only to clauses that have not been drafted in plain language ("clear"), but to unintelligible clauses as well ("comprehensible to the consumer"), which means an advantage when compared with the Directive and can be seen as a means for achieving a higher level of protection of consumers.

The rules for implementing Directive 99/44 extend beyond the scope envisaged in the Directive. Thus, the provisions of the Law on Consumer Protection, beside goods, apply to services, which is in contrast to the definition in Art 1(2) (b) of Directive 99/44. Furthermore, the conformity rules, as well as mandatory guarantee rules are open not only to consumers, but also to legal persons, meaning any person that is a party of a contract. This is the consequence of these rules being transposed by general contract law, namely the Law on Obligations.

V. Possible infringements of EC law

Montenegro did not transpose Art. 1 para. 3 and 4 of the Directive 85/577 which attempts to clarify that the consumer must also be able to withdraw from an offer made in a doorstep situation, irrespective of whether the offer is binding or not binding.

It may be seen as a minor departure from the acquis rules when, similarly to only few EU member states, Montenegro does not mention the words "in good time" or some variation of the same, when transposing Art. 4(1), 5(1) and 7(2) of the Directive 97/7. Having in mind that the omitted words intend to provide a sufficient period for the consumer to reflect on the information (e.g. before concluding the contract) it can be argued that the omission could narrow the efficient protection of consumers in practice.

Exclusion of consumer right of withdrawal (if not agreed otherwise) in respect of certain contracts in doorstep selling situations which are the same as those found in Art. 6 of Directive 97/7 should not be seen as minor departure from EC law, as this can significantly reduce the level of consumer protection.

The transposition of the Art. 5, 2nd sentence of the Directive 93/13 seems problematic since the Directive requires not only an interpretation "favourable" to the consumer, but the interpretation "most" favourable to the consumer.

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[55] Art. 54 point 3 of the Law on Consumer Protection, OG RMN No. 26/07.

VI. Court practice

In Montenegro there is still no visible court practice which would be based on provisions of the Consumer Protection Law[56]. As well as in other participating countries at this moment, the sole decisions that can be found are those deriving from court practice which is based on the Law on Obligations.

On the other side, Montenegro paved the way for the development of a very important scheme for out-of-court dispute settlement. In this regard, in less than a year and a half of its formal existence[57], four cases can be reported, while a fifth is pending. Two of these cases are referred to as settled by protocols on consensual dispute settlement by the Arbitration Board for out-of-court settlement of consumer disputes.

Finally, beside the regular court and out-of-court procedure, the consumer can access justice through administrative procedure.

VII. Summary

The EU integration process was definitely the main trigger for the harmonization of the national legislation with the EU consumer acquis. Namely, consumer protection is one of the priority areas for harmonization as stipulated by Title VI "Approximation of Laws, Law Enforcement and Competition Rules", Art. 72 in conjunction with Art. 78 of the SAA.

In that regard, the Montenegrin Law on Consumer Protection from mid 2007 made a big step forward in harmonization with consumer acquis. While the Directives 85/577, 97/7, 93/13 are transposed with the said Law, the Directive 99/44 has been mainly transposed by the new Montenegrin Law on Obligations. By doing so, in Montenegrin Law on Consumer Protection one can observe an evident number of minimum harmonisation clauses that have been used, while at the same time opting to extend some rules even beyond the scope envisaged in the respective directives.

While there is still no visible court practice based on provisions of the Consumer Protection Law, a very important scheme for out-of-court dispute settlement is at present effectively being implemented.

Finally, further harmonization is a must, and is therefore thoroughly planned by the Government for the year 2010-2011; this will also be subject of technical support by the IPA 2009 programming assistance (Project "Accession to Internal Market"[58]).

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[56] Albeit there are pending cases on consumer rights, but based on sector specific legislation. Most important in Montenegro is one case on the method of calculation of prices for electricity which keeps the attention of general public at this moment.

[57] The 20 members of the Arbitration Board were selected and appointed in December 2008 for a four years mandate. Being still young, this body primarily needs more awareness for its rising activities in order to, even further, promote itself and fully exploit the provisions of the Law on Consumer Protection and the Rulebook on Arbitration Board for Settlement of Consumer Disputes, OG RMN*, No. 28/08.*

[58] Implemented by Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH.

F. SERBIA – LEGISLATIVE TECHNIQUES *(Marija Karanikić-Mirić)*

N.B. *The fact that certain laws touch upon the specified areas does by no means imply that they are in compliance with the respective directives*.

Directive	**Transposed in**	**Date of Transposition**
Directive 85/577	Not transposed	-
Directive 90/314	Not transposed [Certain rules in: 1) Law of Obligations; 2) Tourism Act]	- [30.03.1978 (as amended in 1985, 1989, 1993)] 13.05.2009.
Directive 93/13	Consumer Protection Act (CPA) (very limited) [Also relevant: LoO]	16.09.2005. [30.03.1978 (as amended in 1985, 1989, 1993)]
Directive 94/47 (from 23.02.2011: Directive 2008/122/EC)	CPA	16.09.2005.
Directive 97/7	CPA (very limited)	16.09.2005.
Directive 98/6	CPA	16.09.2005.
Directive 98/27 (codified version: Directive 2009/22/EC)	CPA (only touches upon the issues of market surveillance and consumer organizations)	16.09.2005.
Directive 99/44	CPA (very limited) [Also relevant: LoO]	16.09.2005. [30.03.1978.]
Directive 87/102/EEC (from 12.05.2010: Directive 2008/48/EC)	CPA (very limited)	16.09.2005.
Directive 85/374	Product Liability Act	14.11.2005.
Directive 86/653	Not transposed [Certain rules on commercial agents in: LoO, Art. 790 et seq.]	- [30.03.1978.]
Directive 99/34	Not transposed	-
Directive 99/93	Electronic Signature Act E-Commerce Act	21.12.2004. 29.5.2009.
Directive 2000/35	Not transposed [Certain rules on late payments in: LoO, Art. 277-279]	- [30.03.1978.]
Directive 2000/31	E-Commerce Act; CPA	29.5.2009. 16.09.2005.
Directive 84/450	CPA (very limited)	16.09.2005.
Directive 2002/65	Not transposed	-
Directive 2005/29	CPA (very limited)	16.09.2005.
Directive 87/357	General Product Safety Act	29.5.2009.
Directive 97/5	Not transposed. [Some rules on cross-border credit transfers in Foreign Exchange Operations Act]	- [14.7.2006.]

Directive 98/26	Not transposed.	-
Directive 2000/46	Not transposed.	-
Directive 2001/95	General Product Safety Act	29.5.2009.
Directive 2002/22	Telecommunications Act; CPA (to a very limited extent)	24.4.2003 (as amended in 2006). 16.09.2005.
Directive 2002/58	Telecommunications Act; Personal Data Protection Act	24.4.2003. 23.10.2008.

I. State of consumer protection in the field of the Directives_99/44 (sale of goods), 93/13 (unfair terms), 97/7 (distance contracts) and 85/577 (doorstep selling) before transposition

The first framework law on consumer protection was enacted in 2002. It was repealed by the existing Consumer Protection Act of 2005.[59]

Prior to 2002, there were no separate laws pertaining to the issues of consumer protection, so the general rules applied. The general rules of contract law offered a fair level of protection to a buyer. In addition, the Law of Obligations of 1978 contained (and still contains) certain provisions on the producer's liability in delict for damage caused by a defective product.

There were at least two attempts to draft the amendments to the existing Consumer Protection Act (CPA) of 2005, but none of them was successful; and the CPA of 2005 was never improved. At some point, the Government became fully aware of the deep flaws in the existing Act, which led to the decision to abandon the ideas of improving it, and to draft a new comprehensive piece of legislation instead of amending the existing one.

II. Legislative techniques of transposition.

The CPA of 2005 was intended to serve as an umbrella law on consumer protection. The Act considers the protection of economic interests of consumers and, to a certain extent, the protection of their health and safety, in a very broad and sketchy manner, without expanding on the issues covered by the European Consumer Protection Directives.

Even though there has been a single piece of framework legislation in the sphere of consumer protection since 2002, the legislative technique is still quite segmented, as there are other laws relevant to the consumer protection. In addition, there are some fundamental areas of consumer protection that are not even touched upon by the CPA of 2005.

The CPA of 2005 includes 81 articles organized in ten chapters, relating to: (1) fundamental consumer rights; (2) protection of consumers' life, health and safety (including the rules on safety of products and packaging, protection of minors, notification about quality of water and air, genetically modified products); (3) protection of economic interests of consumers (including rules on pricing and price indication, packaging material, invoice issuing, guarantees, delivery of the product, distance shopping, consumer credit, paying in instalments, discount sale, sale of defective products, customer complaints); (4) special forms of consumer protection related to services (duties of service providers, pricing, products and services of general interest, services in tourism, time-sharing); (5) contracts of adhesion; (6) consumer information and education; (7) right to compensation (including rules on burden of proof, judicial protection and out-of-court settlement); (8) national program and subjects of

[59] OG RS No. 79/2005, 16th September 2005.

protection (including rules on National Program for Consumer Protection, powers of the line Ministry, Consumer Protection Council, consumer protection at local level, consumer organizations and their funding); (9) market surveillance; and (10) penalty provisions.

CPA of 2005 indicates some feeble attempts to transpose the following directives: Directive 93/13/EEC on unfair terms in consumer contracts; Directive 97/7/EC on the protection of consumers in respect of distance contracts; Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers; Directive 99/44/EC on certain aspects of the sale of consumer goods and associated guarantees; Directive 87/102/EEC concerning consumer credit (from 12 May 2010: Directive 2008/48/EC on credit agreements for consumers); Directive 84/450/EEC concerning misleading advertising; and Directive 94/47/EC on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis (from 23rd February 2011: Directive 2008/122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts). The CPA contains only one article (Art. 27) relating to e-commerce.

It would be fair to say that CPA of 2005 only touches upon these areas, which in no way suggests that it is in compliance with the relevant directives. As regards the civil law aspects of CPA of 2005, it only roughly indicates the main principles of the acquis.

Product Liability Act of 2005 (Official Gazette of the Republic of Serbia No. 101/05, 14th November 2005) represents a separate effort to transpose Directive 85/374/EEC concerning liability for defective products, and it is generally in compliance with the Directive. Still, there are several infringements: Product Liability Act (PLA) explicitly excludes primary agricultural products (products of the soil, stock-farming and fisheries) from the notion of product; the criterions of defectiveness differ from the ones prescribed by the Directive; the notion of imported product is restricted to those intended for sale (*i.e.* the imported products which are intended for hire, leasing or other forms of distribution are excluded from the scope of PLA); etc.

There are no indications of any intentions to amend the Law on Obligations in order to transpose any of the European Consumer Protection Directives.[60]

The ideas of reforming the Law of Obligations, as presented in the Report of the Government Commission (2009), are predominantly inspired by the *Skica za zakonik o obligacijama i ugovorima* (a 1969 Draft written by Professor Mihailo Konstantinović, founder of the Belgrade school of Civil Law), on which the existing Law of Obligations heavily relies. Namely, in the year 1978 the Legislator left out some of the proposals of *Skica*, and the Government Commission considers revisiting these proposals. Also, the Commission reflects on introducing certain changes based on national jurisprudence and on comparative perspective, *i.e.* the well-settled concepts of other European legal systems. However, there are no traces in the works of the Commission, of taking into account Consumer directives.

Attention must be called to the fact that, at the time of this writing (June 2010), the Serbian Ministry of Trade and Services, as the line ministry for the area of consumer protection, finds itself at the final stages of drafting a proposal for the new act on consumer protection,

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[60] *Cf.* Report of Serbian Civil Law Drafting Commission (2007): Vlada Republike Srbije. Komisija za izradu Građanskog zakonika, Rad na izradi Građanskog zakonika. Izveštaj Komisije sa otvorenim pitanjima, Pravni život, Tom III, 11/2007, 5–407. Report of Serbian Civil Law Drafting Commission in respect of reform of the Law of Obligations (2009): Komisija za izradu Građanskog zakonika, *Prednacrt. Građanski zakonik Republike Srbije. Druga knjiga. Obligacioni odnosi*, Vlada Republike Srbije, Beograd 2009, 1-451.

which should enter the parliamentary procedure during the autumn 2010, and which aims to fully transpose the following directives, regulations and recommendations, or at least their provisions relevant to the issues of consumer protection:

Directive 98/6/EC on price indication; Directive 85/577/EEC on doorstep selling; Directive 97/7/ EC on distance selling; Directive 2000/31/EC on e-commerce; Directive 93/13/EEC on unfair contract terms; Directive 99/44/EC on sale of consumer goods and associated guarantees; Directive 2005/29/EC on Unfair Commercial Practices; Directive 2002/22/EC on universal service (telecommunications); Directive 2003/54/EC on electricity; Directive 2003/55/EC on natural gas; Directive 90/314/EEC on package travel; Directive 2008/122/EC on timesharing; Directive 2008/48/EC on credit agreements for consumers; Directive 2002/65/EC on distance marketing of financial services; Regulation 861/2007 establishing a small claims procedure; Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters; Recommendation 98/257/EC on the principles applicable to out-of-court settlement bodies of consumer disputes; Recommendation 2001/310/EC on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes; Directive 98/27 on injunctions; and Directive 2005/29/EC on unfair commercial practices.

There are strong indications that the Commission Proposal for a Directive on consumer rights (COM (2008) 614/3) is taken into consideration in the course of drafting the proposal for the new consumer protection act.(I shall refer to this developing proposal for the new act on consumer protection as the *Draft Proposal)*.

The legal basis for redefining the system of consumer protection in Serbia and drafting new legislation may be found in Article 78 of *Law on Ratification of the Stabilization and Association Agreement between European Communities and their Member States on the one hand, and the Republic of Serbia on the other*[61], which states the following:

"Contracting parties shall cooperate in order to harmonize the standards of the consumer protection in Serbia with the standards of the Community. Effective consumer protection is necessary in order to ensure proper functioning of the market economy, and this protection shall depend on the development of the administrative infrastructure to ensure surveillance over the market and enforcement of the legislation in this area. For this purpose, and in their common interest, the parties shall provide: [...] harmonization of the legislation on consumer protection in Serbia with the protection in force in the Community [...]."

III. Use of minimum harmonization.

It is quite hard to assess CPA of 2005 from this perspective, as the Act falls short of going into details of practically all the substantive law issues of the consumer protection acquis. CPA attempts to transpose only few of the pertinent directives. It contains some rules on guarantees, consumer credit, distance selling, consumer information, time-sharing, injunctions, but these rules are very general and they only roughly outline the main principles of the acquis.

IV. Other extensions.

The notion of consumer is extended to include also a legal person acting outside its trade or profession. More precisely, under Art. 2, para. 2 CPA of 2005, a consumer shall also be a company, enterprise, other legal entity or entrepreneur, when they are purchasing products or services for their personal needs.

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[61] OJ RS No. 83/2008.

CPA of 2005 addresses issues of consumer protection in relation to both sale of goods and supply of services.

V. Possible infringements of EC law.

CPA of 2005 does not even try to transpose Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises.

To the extent that CPA attempts to transpose Directive 99/44/EC on sale of consumer goods and associated guarantees, Directive 93/13/EEC on unfair contract terms and Directive 97/7/EC on distance selling, detailed information on the infringements shall be provided in the individual reports on transposition of each of these directives.

VI. Court practice.

There are no court decisions based on the existing Consumer Protection Act. In most of the cases that could be classified as consumer disputes, the courts apply Law of Obligations and sector specific legislation.

VII. Summary.

The first framework law on consumer protection in Serbia was enacted in 2002. It was repealed by the existing Consumer Protection Act of 2005. There were at least two attempts to draft the amendments to the existing CPA, but none of them were successful; and the Act was never improved. There are no indications of any intentions to amend the Law on Obligations in order to transpose any of the European Consumer Protection Directives.

The CPA of 2005 was intended to serve as an umbrella law on consumer protection. The Act considers the protection of economic interests of consumers and, to a certain extent, the protection of their health and safety, in a very broad and sketchy manner, without expanding on the issues covered by the European Consumer Protection Directives.

CPA of 2005 indicates some feeble attempts to transpose the following directives: Directive 93/13/EEC; Directive 97/7/EC; Directive 98/6/EC; Directive 99/44/EC; Directive 87/102/EEC; Directive 84/450/EEC; and Directive 94/47/EC. The CPA contains only one article (Art. 27) relating to e-commerce. It should be expressly stated that CPA of 2005 only touches upon these areas, which in no way suggests that it is in compliance with the relevant directives. When it comes to the civil law aspects of CPA of 2005, it only roughly indicates the main principles of the acquis.

At the time of this writing (June 2010), Serbian Ministry of Trade and Services, as the line ministry for the area of consumer protection, finds itself at the final stages of drafting a proposal for the new act on consumer protection, which should enter the parliamentary procedure during the fall 2010, and which aims to fully transpose abovementioned directives, regulations and recommendations, or at least their provisions relevant to the issues of consumer protection.

Part 2:
TRANSPOSITION OF THE INDIVIDUAL DIRECTIVES[62]

A. DOORSTEP SELLING DIRECTIVE (85/577)

Coordinators: *Emilia Čikara, Zlatan Meškić*

I. Legislation in the Participating States before transposition of the Doorstep Selling Directive

Before transposition of the Directive 85/577 into their relevant consumer protection acts the participating states had no coherent legislation concerning consumer protection in the case of door-to-door sales. The level of protection was very low in some (e.g. Croatia, Serbia, Montenegro and Albania) and non-existent in other countries (e.g. Bosnia and Herzegovina, Macedonia). For instance, door–to–door sales were mentioned in Art. 16 of the old Croatian Trade Act[63] which prescribed that only legal person registered for provision of such services can conclude doorstep selling contracts. The Yugoslavian federal Law on Consumer Protection[64] provided in its Art. 21[65] and the Albanian Civil Code in its Art. 672, 2nd indent[66] for a right of withdrawal. Thus, in most of the participating states only the general provisions concerning contracts and contractual liability applied.

The transposition of the Directive 85/577 was in most of the countries followed by adoption of new laws. Croatia regulated the Doorstep Selling for the first time in a special chapter of the Consumer Protection Act from 2003,[67] which was afterwards slightly improved and is now regulated in the new Consumer Protection Act from 2007.[68] The same

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[62] The following presentations are based on six national reports which were prepared by Nada Dollani (Albania), Zlatan Meškić (Bosnia and Herzegovina), Emilia Čikara (Croatia), Jadranka Dabović-Anastasovska, Nenad Gavrilović, Neda Zdraveva (Macedonia), Zvezdan Čađenović (Montenegro) and Marija Karanikić-Mirić (Serbia). Due to the lack of space, these national reports cannot be published in this volume.

[63] Trade Act, OG RH No. 11/96, 30/99, 75/99, 76/99, 62/01, 109/01.

[64] Federal Law on Consumer Protection, OG FRY No. 37/02.

[65] It dedicated three paragraphs to doorstep (and distance) selling situation and gave seven days to renounce the effect of undertaking, without costs and justification; time limit for renunciation for goods was from the day of receiving them, and for services from the day of concluding the contract, and finally, consumer was obliged to pay the costs of returning goods.

[66] This Article regulated the right to withdraw from contracts concluded at the work place or home of one of the parties, during an excursion or in circumstances unusual for a normal situation of negotiations, within a period of seven days from its conclusion. See Civil Code, OG RAl No. 11/1994.

[67] Chapter 6 (Art. 29–34) "Contracts Concluded Away from the Trader's Business Premises" of the Consumer Protection Act, OG RH No. 96/03.

[68] Chapter VI (Art. 30–35) of the Consumer Protection Act, OG RH No. 79/07, 125/07, 79/09, 89/09, 133/09.

happened in Bosnia and Herzegovina, where the Directive 85/577 was firstly transposed in a separate chapter of the Consumer Protection Act from 2002;[69] and then later on, a new Consumer Protection Act was adopted in 2006.[70] The scenario repeated itself in Albanian law, where the Directive was transposed in the special chapter of the Consumer Protection Act from 2003,[71] which was replaced by the new Consumers Protection Act[72] in 2008. The Macedonian Law on Consumer Protection from 2000[73] regulated the contracts concluded away from business premises and improved the regulation in its new Law on Consumer Protection from 2004.[74] The Montenegrin Consumer Protection Law from 2007[75] contains a separate chapter transposing the Directive 85/77, while there is no corresponding transposition of the Directive in Serbian law.[76] However, the Serbian legislator is currently preparing the Draft of the Proposal for the new act on consumer protection (Draft Proposal),[77] which transposes Directive 85/577 in its Chapter III on distance contract and off-premises contracts.

II. Scope

The following text will present a brief overview of the transposition into national laws of the participating states of Art. 1 and 3 of the Directive 85/577 (general scope of application and exemptions), as well as of Art. 2 of the Directive (personal field of application). Some of the participating states like Croatia followed the structure offered in the Directive, by prescribing first the general scope of the provisions on doorstep selling (Art. 30 of the Croatian Consumer Protection Act) and then regulating exemptions separately in another provision (Art. 31 of the Croatian Consumer Protection Act).

1. Persons covered under the Directive

In its Art. 1 (1) the Directive 85/577 regulates the application to "contracts under which a trader supplies goods or services to a consumer". The consumer protection laws of most of the participating states contain a common definition of "consumer" and "trader" in general provisions which define the personal scope of application for the whole act (e.g. Art. 1(3) and (5) of the Bosnian Consumer Protection Act and Art. 3 (1) of the Croatian Consumer Protection Act).

a. Consumer

While Art. 2 of Directive 85/577 defines the "consumer" as "a natural person who (…) is acting for purposes which can be regarded as outside his trade or profession", Art. 3 (1) 4th

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[69] Chapter XI (Art. 48-49) of the Consumer Protection Act, OG BA No. 17/02.

[70] Chapter IX (Art. 39-41) of the Consumer Protection Act, OG BA No. 25/06.

[71] Consumer Protection Act, OG RAl No. 84/03.

[72] Part VI, Chapter I (Art. 34-35) of the Consumer Protection Act, OG RAl No. 61/08.

[73] Law on Consumer Protection, OG RMac No. 63/2000.

[74] Law on Consumer Protection, OG RMac No. 38/2004.

[75] Law on Consumer Protection, OG MN No. 26/07.

[76] Art. 25 of the Serbian Consumer Protection Act (OG RS No. 79/05), under the heading "Sale by sample or model", only mentions by name the contracts concluded outside business premises of the seller. However, this Article attempts to restate the Art. 538 of the Code on Obligations (OG SFRY No. 29/78), relating to the liability of a seller for lack of conformity in case of sale by sample or model.

[77] Draft of the Proposal for the new Act on Consumer Protection (Draft Proposal), prepared by the Ministry of Trade and Services of Republic of Serbia.

indent of the Croatian Consumer Protection Act defines the consumer as "any natural person who concludes the contract or acts on the market for purposes that do not fall within the sphere of his or her business or professional activity". Narrower definition is prescribed in Art. 1 (3) of the Bosnian Consumer Protection Act, according to which a "consumer is any natural person who purchases, acquires or uses products or services for his personal needs and the needs of his household". By limiting the acting of the consumer to the purchase, acquisition or use of a service or product, and reducing it additionally to the purpose of his "personal needs and the needs of his household", as conditions which must be fulfilled cumulatively, the scope of this definition is very restricted.[78] A similar but not identical definition of the consumer exists in Art. 2 (1) and (2) of the Serbian Consumer Protection Act, which defines him as any natural persons who purchase products or services for their own needs or for the needs of their household.[79] A to some extent wider definition is regulated in Art. 1, 8th indent of the Montenegrin Law on Consumer Protection, which defines the consumer as a natural person who buys, orders, accepts, uses goods or services, including public services, for non-business, namely non-professional purposes, or to whom the offer for a product or service is targeted. Another quite narrow definition when compared with Art. 2 of Directive 85/577 was introduced in Art. 4 (1) of the Macedonian Law on Consumer Protection which considers as a consumer any natural person who purchases products or uses services for direct personal consumption, for purposes that are not intended for carrying out trade, business activities or profession. A very broad notion of consumer is to be found in Art. 3 (6) of the Albanian Consumer Protection Act, which defines the "consumer" as any natural person, who is acting for purposes not related to trade, business or exercise of its profession. In the meaning of this Act, the non-profitable organizations can also be considered as consumers. It can be concluded, while the personal element of the definition of the consumer (natural person) is common in consumer protection laws of all participating states, the functional element (acting for purposes which can be regarded as outside his trade or profession) differs significantly.

b. Trader

According to Art. 2 of the Directive 85/577 a "trader" is a natural or legal person who, "for the transaction in question, acts in his commercial or professional capacity, and anyone acting in the name or on behalf of a trader". The participating states transposed the Directive's definition with certain variations. Art. 3 (1) 8th indent of the Croatian Consumer Protection Act defines the "trader" as "any natural or legal person who concludes the contract or acts on the market within its business or professional activity". Pursuant to Art. 3 (2), for the purposes of Chapter VI of the Croatian Consumer Protection Act trader shall also mean a person acting in the name or on behalf of the trader. This definition encompasses natural or legal persons, whereby the last mentioned also includes legal persons of public law and non–profit organizations. Another broad definition of the "trader" is regulated in Art. 3 (14) of the Albanian Consumer Protection Act meaning any natural or legal person who is acting for

[78] However, Art. 15 of the new Draft Law of Obligations of Bosnia and Herzegovina from 2010 defines the consumer as "every subject who concludes a legal act for purposes which are outside his trade or profession". This in principle wide definition, insofar as it includes legal persons, excludes on the other hand pre-contractual situations, since it refers only to the "conclusion of a legal act".

[79] The Serbian Draft Proposal defines a consumer under Chapter I as any natural person who, in contracts covered by this Law, acts mainly for purposes which are outside his trade, business, craft or profession.

purposes relating to his economic activity, trade, business, craft or profession and anyone acting in the name or on behalf of a trader. The Bosnian Consumer Protection Act defines a trader in its Art. 1 (5) as "any person who is, directly or as an intermediator, selling products or providing services to the consumer". Because of the restriction to "selling products and providing services" the personal field of application is quite narrowed.[80] Under Art. 2 (3) of the Serbian Consumer Protection Act, trader is a company, enterprise, other legal entity or entrepreneur, when they are selling products or providing services to the consumer.[81] Art. 2, 11th indent of the Montenegrin Consumer Protection Law defines a "trader" as a person who sells goods or provides services to consumers. With regard to the Directive´s expansion of the definition also to those who are acting in the name or on behalf of a trader, the Montenegrin Consumer Protection Law is silent.[82] Under Art. 4 (1), 2nd indent of the Macedonian Law on Consumer Protection a trader is considered to be any legal or natural person who, in the course of carrying out his activity, directly satisfies the needs of the citizens, for products and services. Since the definition does not include agents, general rules on agency regulated in the Macedonian Law on Obligations[83] are applicable.

2. Situations falling within the scope of the Directive

The field of application *ratione materiae* is regulated in Art. 1 (1) of Directive 85/577, pursuant to which "the contracts under which a trader supplies goods or services to a consumer and which are concluded during an excursion organised by the trader away from his business premises, or during a visit by a trader (i) to the consumer's home or to that of another consumer (ii) to the consumer's place of work where the visit does not take place at the express request of the consumer".

a. General application

Most participating states have implemented the same type of contracts and situations as those falling within the scope of Directive 85/577. However, occasionally a slightly different wording has been used. Also, there are important variations in scope of the provisions on doorstep selling of some participating states. For instance, under Montenegrin law contracts concluded during an excursion are not protected by the transposition law. Furthermore, the Macedonian Law on Consumer Protection excludes contracts for provision of services from the field of application of the provisions on doorstep selling.[84] On the other side, in certain cases con-

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[80] Art. 14 of the new Draft Law of Obligations of Bosnia and Herzegovina from 2010 refers to the "business person", defining him as a "natural or a legal subject who is during the conclusion of the legal act acting in the performance of his trade or profession". While the "action in the performance" is an unsuccessful formulation in Bosnian language as well, this definition also excludes pre-contractual situations, contrary to the consumer protection directives.

[81] The Serbian Draft Proposal defines a trader as any natural or legal person who, in contracts covered by this Law, acts for purposes relating to his trade, business, craft or profession, and anyone acting in the name of or on behalf of a trader.

[82] Nevertheless, Art. 17 (2) of the Law on Internal Trade (OG RMN No. 49/08) which regulates "trade out of business premises", stipulates that distance selling can be performed either directly by the trader or via the persons to whom the trader issues authorization for selling goods to consumers. Art. 17 (3) further stipulates that sale out of business premises can be conducted by traders that are registered for this type of sale, and the Law obliges in addition the Montenegrin Ministry of Economy to adopt a bylaw on the type of goods and the manner of conducting doorstep type of sale.

[83] Law on Obligations, OG RMac No. 18/2001.

[84] Art. 104 of the Law on Consumer Protection, OG RMac No. 38/2004.

sumer legislation of participating states extends the scope of its doorstep selling provisions, thus going beyond the terms of the Directive. E.g. the provisions on doorstep selling of the Croatian Consumer Protection Act are applicable also if the consumer offered the conclusion of the contract within the covered situations. Finally, although they are still not member states of the EU, beside the Directive, the national courts of the participating states should also observe the ECJ rulings in cases *Travel VAC*, C-423/97 and *Crailsheimer Volksbank*, C-229/04.[85]

aa. Expanding the list of doorstep situations

While some of the participating states expand the list of situations in which consumers are protected, some of them narrow it down. The list of doorstep situations covered by Art. 30 (1) of the Croatian Consumer Protection Act corresponds to the Directive´s provisions by regulating the application of the doorstep selling provisions "to contracts concluded during excursions organized by the trader away from his business premises, during the trader's visits to the consumer's home, the home of another consumer, or the consumer's place of work". Art. 39 (1) of Bosnian Consumer Protection Act transposes Art. 1 (1) of the Directive 85/577 with almost the exact wording, with a slight difference regarding the Directives formulation "during an excursion organised by a trader away from his business premises", that is in Art. 39 (1) of the Bosnian Consumer Protection Act reproduced as: "during a business trip of a trader away from his business premises". However, a significant expansion of consumer protection happened through the inclusion of "contracts concluded as a result of a sudden approach by the trader on public transport or any other public place". The Macedonian Law on Consumer Protection encompasses in its Art. 104 sales contracts concluded: in the home of the consumer; in the home of another consumer or in the office of the consumer, when the visit of the trader is not based on explicit invitation of the consumer; during travels or excursions organised by the trader or on his behalf; and in selling premises, on fairs and exhibitions, unless the total price of the product or service is charged on the spot, or if the price exceeds 2.500 EUR in denar counter value. The last sentence expands the list of the Directive´s doorstep situations. Art. 34 (1) lit. a) and b) of the Albanian Consumer Protection Act corresponds to Art. 1 (1) of the Directive 85/577 and includes contracts concluded during an excursion organized by the trader away from his business premises, or during a visit by a trader to the consumer's home or to the consumer's place of work, where the visit does not take place at the express request of the consumer. The Montenegrin Consumer Protection Law widens the range of doorstep selling situations by encompassing contracts concluded at public places, meaning places available for access to anyone like streets, squares, parks, beaches, marinas or public areas.[86] Although the Serbian Consumer Protection Act does not transpose the Directive 85/577, provisions of the Draft of the Proposal for the new act on consumer protection include contracts concluded away from business premises with the simultaneous physical presence of the trader and the consumer, or any sales or service contract for which an offer was made by the consumer in the same circumstances (lit. a), or any sales or service contract concluded on business premises but negotiated away from business premises, with the simultaneous physical presence of the trader and the consumer (lit. b).

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[85] ECJ judgment of 22 April 1999, C-423/97 – *Travel Vac SL v. Manuel José Antelm Sanchi* [1999] ECR I-02195; ECJ judgment of 25. November 2005, C-229/04 - *Crailsheimer Volksbank eG v Klaus Conrads, Frank Schulzke and Petra Schulzke-Lösche, Joachim Nitschke* [2005] ECR I-9273.

[86] However, it does not cover special ways of regular selling at "other selling places" (e.g. stands, moveable stores, open or closed markets, fair, exhibitions etc.) in accordance with Art. 15 of the Law on Internal Trade (OG RMN No. 49/08).

bb. Goods and services

Some participating states refer in their transposition laws to goods and services without further explanation. For instance, Art. 39 (1) of the Bosnian Consumer Protection Act transposes literally the formulation of Art. 1 (1) of the Directive 85/577, which refers to "contracts under which a trader supplies goods or services". The Serbian Draft of the Proposal for the new act on consumer protection speaks about sales or service contracts. However, there are some exceptions like in Art. 30 (1) of the Croatian Consumer Protection Act, that goes beyond the Directive´s level of consumer protection by prescribing that the „provisions of this Chapter shall apply to contracts". Some of relevant doorstep selling provisions use the notion "product", which is in Art. 3 (1) 4th indent defined as each good or services, including immovable, rights and obligations. Also the Montenegrin Consumer Protection Law, besides referring to goods and services, uses the term "product", which is defined as "goods or service that may be circulated, including also public services". Similarly, the Albanian Consumer Protection Act, which refers only to "contracts", but offers definitions of "consumer good" and of "service" in its general provisions. According to its Art 3. (7), "consumer good", hereinafter: good (including a good used in the context of providing a service) shall mean any movable or immovable item which is intended for consumers or likely to be used by consumers, under reasonably foreseeable conditions, to be used by consumers even if not intended for them, and is supplied or made available, whether for consideration or not, in the course of an economic activity, whether new, used or reconditioned. "Service" is the service determined to be offered to the consumers, by any manner foreseen in the Albanian Civil Code.[87] The Macedonian Law on Consumer Protection speaks in its Art. 104 only about sale contracts, thus possibly excluding contracts for provision of services from its field of application. However, in some other relevant provisions on doorstep selling, it refers both to products and services, as well as in its Art.105. The Law also defines goods or products as any good or object regardless of the stage of their finalization, intended to be offered to the consumers; while service is any kind of activity that is intended to be offered to the consumers.

cc. Offers and/or unilateral legal acts

Art. 1 (3) and (4) of the Directive 85/577 which give the possibility to the consumer to withdraw from an offer made in a doorstep situation, irrespective of whether the offer is binding or not, are transposed almost literally into Art. 30 (2) of the Croatian Consumer Protection Act. The same is valid for the Albanian Consumer Protection Act, pursuant to whose Art. 34 (1) the doorstep selling provisions apply also in the situation when an offer is made by the consumer, regardless whether the consumer is bound by his offer. The transposition laws of Bosnia and Herzegovina, of Montenegro and of Macedonia do not know such a provision. Thus, only general rules on the binding effect of the offer provided in their respective Laws on Obligations apply.

dd. Contracts negotiated in a doorstep situation, but concluded subsequently

None of the transposition laws of any participating state contains any specific provision on contracts negotiated in a doorstep situation, but concluded subsequently.

ee. Visits requested by the Consumer

With regard to Art. 1 (2) of the Directive 85/577 dealing with visits requested by the consumer, varying provisions of transposition laws can be found. For instance, Art. 39 (1) of

[87] Art. 3 (13) of the Consumer Protection Act, OG RAl No. 61/08.

the Bosnian Consumer Protection Act applies only to unsolicited visits and does not transpose Art. 1 (2) of the Directive. The level of consumer protection is higher in the Croatian Consumer Protection Act, which does not transpose Art. 1 (2) of the Directive 85/577, but also does not implement the condition from Art. 1 (1) of the Directive 85/577, according to which the visit does not take place at the express request of the consumer. In accordance with Art. 106 (1), 1st indent of the Macedonian Law on Consumer Protection, the contracts concluded away from the business premises upon a visit by the consumer are excluded from the field of application. However, the rules on doorstep selling are applicable if the consumer requests the visit upon an offer made by the trader via telephone. Art. 48 (3) of the Montenegrin Consumer Protection Law transposes the specific Directive provision almost literally, regulating the application of protective provisions to visits taking place at the express request of the consumer, if the contract was concluded for products for which the consumer did not or could not know that they were included in the offer of the trader within his business activity. The doorstep selling provisions of Albanian Consumer Protection Act do not apply in the situation when the visit is requested by the consumer, with the exception of contracts for the supply of goods or services other than those, for which the consumer requested the visit of the trader, provided that when he requested the visit the consumer did not know, or could not reasonably have known, that the supply of those other goods or services formed part of the trader's commercial or professional activities.

b. Exemptions provided for in the Doorstep Selling Directive

aa. Art. 3 para. 1 (contracts under 60 ECU)

The Croatian, Macedonian and Bosnian legislator have not transposed the option laid down in Art. 3 (1) of the Directive 85/577 pursuant to which the provisions on contracts negotiated away from business premises do not apply to contracts under 60 ECU. Montenegro exercised this option and sets the limit exactly on 60 euros. Art. 34 (1) of Albanian Consumer Protection Act regulates that the provisions on doorstep selling do not apply on the contracts with a value less than 7000 lek.

bb. Art. 3 para. 2

The participating states have not consistently exercised the options to limit the scope as regulated in Art. 3 (2) of Directive 85/577. For instance, under the Croatian transposition law the situations as provided for under Art. 3 (2) of Directive 85/577 are exempt from protection.[88] However, Art. 31 (2) of the Croatian Consumer Protection Act prescribes the application of its provisions on doorstep selling to contracts for the sale of a product intended to be installed in immovable property and to construction contracts for repair or renewal of immovable property. In contrast, the Bosnian Consumer Protection Act does not transpose this provision of the Directive. The Montenegrin Consumer Protection Law implements the provision, with one variation regarding the supply of foodstuffs, beverages or other goods intended for current consumption in the household where Art. 54 (3) does not require that the goods were supplied by "regular roundsmen". Art. 34 (2) lit. a) and b) of the Albanian Consumer Protection Act exclude only of contracts for the construction, sale and rental of immovable property or contracts concerning other rights relating to immovable property, and contracts for the supply of foodstuffs or beverages or other goods intended for current consumption in the household and supplied by regular roundsmen. Using a slightly different wording, the Macedonian Law on Consumer

[88] Art. 31 (1) of the Consumer Protection Act, OG RH No. 79/07, 125/07, 79/09, 89/09, 133/09.

Protection excludes the same catalogue of contracts as Art. 3 (2) of Directive 85/577 does, adds however one further exemption of sales resulting from presentations of products under conditions laid down by a law not having commercial character, as well as for charity-humanitarian purposes, unless the price exceeds an amount in denar equivalent to 500 euro. The Serbian Draft of the Proposal for the new act on consumer protection foresees the transposition of only two exemptions from Art. 3 (2) of Directive 85/577, namely of insurance contracts and of contracts for the supply of foodstuffs or beverages by a trader on frequent and regular rounds in the neighbourhood of his business premises. However, it goes beyond the Directive´s requirements by regulating an exemption also for financial services whose price depends on fluctuations in the financial market outside the trader's control, which may occur during the withdrawal period, of consumer credit agreements, of contracts concluded by means of automatic vending machines or automated commercial premises and of contracts concluded with telecommunications operators through the use of public payphones.

c. Burden of proof

Most of the transposition laws of the participating states do not contain a special provision on the burden of proof regarding doorstep selling contracts. However, they often prescribe general rules on the burden of proof, like Art. 5 (3) of Montenegrin Consumer Protection Law pursuant to which in case of any disputes about the consumer's eligibility to exercise the rights pertaining to meeting of a deadline to exercise the right, it shall be deemed that the consumer is eligible in this respect. The Serbian Draft of the Proposal for the new act on consumer protection regulates a general rule under which the burden of proof concerning fulfilment of the general pre-contractual information duties shall be borne by the trader. The Croatian Consumer Protection Act contains one single provision concerning the burden of proof, which is contained in the chapter on doorstep selling contracts, namely Art. 32 (4) which stipulates that in the event of a dispute the trader shall be required to prove that he has delivered the information on the right to rescind the contract in good time. Special rules on burden of proof are regulated in Art. 41 (3) and (4) of the Bosnian Consumer Protection Act. According to its Art. 41 (4) the "burden of proof will be the obligation of the trader from the start of the period for the rescission of the contract".[89] In addition, pursuant to Art. 40 (3) "in case of a dispute the trader is obliged to prove that the notification referred to in this Article", meaning the notification on the right to rescind the contract, "is delivered to the consumer on time".[90]

III. Consumer protection instruments

1. Information requirements

The participating states, except for Serbia, transposed the obligation of the trader under Art. 4 of the Directive 85/577 to give consumers written notice of their right to cancellation.

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[89] Thereby, on the one hand in accordance with Art. 41 (1) consumers have the right to terminate the contract within 15 days from the conclusion of the contract, and on the other hand the trader is obliged to give consumers written notice on their right to terminate the contract within 15 days from the conclusion of the contract. As a result the period for submission of information and the period for termination of the contract begin at the same time, namely at the moment of conclusion of the contract. Therefore, the burden of proof is on the trader from the moment of conclusion of the contract.

[90] The burden of proof is more successfully regulated by the Art. 146 (5) of the new Draft Law of Obligations of Bosnia and Herzegovina of 2010, which belongs to the Chapter under the title "Right of withdrawal and return (of the goods) in the consumer contracts". This Article provides that "the burden of proof regarding the start of the withdrawal period is on the business person".

Art. 32 (3) of the Croatian Consumer Protection Act additionally provides for the case that this information is an integral part of the contract; then it has to be specifically indicated and written in the same format as the other provisions of the contract. This notification must be delivered to the consumer at the latest at the moment of the conclusion of the contract. Albanian law requires that the consumer is given notice with a particular document, which contains only this notification and is separated from the general conditions of contract, if any. Such notice must be given before the conclusion of the contract or at the time when the offer is made by the consumer.[91] Art. 50 (1) of the Montenegrin Consumer Protection Law stipulates that the written notice should be given prior to the conclusion of the contract and can be optionally provided in electronic form as well. Chapter II, Section 2 of the Serbian Draft of the Proposal for the new act on consumer protection foresees a pre-contractual duty to inform the consumer on the existence of a right of withdrawal, or the non-existence of such right. In case of conclusion of the contract, this information shall form an integral part of the contract.

Transposition laws of the participating states differ with regards to the content of the information required. According to Art. 34 of the Croatian Consumer Protection Act as well as Art. 40 of the Bosnian Consumer Protection Act[92], the notice shall contain the name or firm name of the trader, his address, the date of dispatch, data required for contract identification, especially the indication of the contractual parties, the subject of the contract and its price, and the period for the rescission of the contract. Under the Montenegrin Consumer Protection Law, besides the information of the right of withdrawal, the trader is obliged to provide data about himself, the product that is the subject of the contract, its price, date of delivery to the consumer,[93] and on other important elements of the contract. The Albanian Consumer Protection Act requires the trader to give in an intelligible and clear manner written notice of the consumer`s right of withdrawal, together with any other relevant information,[94] including the name and address of the person against whom that right may be exercised. Such notice shall be dated and shall state particular data enabling the contract to be identified. The content of the information required is determined by Art. 107 of the Macedonian Law on Consumer Protection, providing that in case of conclusion of a contract the trader is obliged to notify the consumer in writing about his right to unilaterally terminate the contract with a simple statement, in a period of time that cannot be shorter than seven days from the day when the contract was concluded. The notice must contain the information on to what address the statement for unilateral termination of the contract should be sent.[95]

The Serbian Draft of the Proposal for the new act on consumer protection differentiates between the trader's general pre-contractual duty to inform, listing the information that the trader is obliged to provide to the consumer prior to the conclusion of any sales or service contract[96],

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[91] Decision of Council of Ministers No. 63 "On contracts negotiated away from business premises", of 21.01.2009, OG RAl No. 8/09 (point 3, a, b).

[92] According to Art. 146 (3) of the new Draft Law of Obligations of Bosnia and Herzegovina the withdrawal period starts when the business person gives to the consumer a notification providing "full information" about his right to withdraw from the contract.

[93] Art. 50 (2) of the Law on Consumer Protection, OG MN No. 26/07.

[94] Art 35 (3) of the Consumer Protection Act, OG RAl No. 61/08.

[95] In addition to Art. 105 (3) of the Macedonian Law on Consumer Protection, in case of any contract concluded away from business premises, the trader should identify himself with identification card.

[96] Prior to the conclusion of any sales or service contract, the trader shall provide the consumer with the following information, if not already apparent from the context: (1) the main characteristics of the goods or services; (2) the geographical address and the identity of the trader, such as his trading

including special information duties of intermediaries[97], and additional information that the trader shall provide in case of off-premises contracts. Under the provisions of Chapter III of the Draft Proposal, in case of off-premises contracts the trader shall provide the following information, which shall form an integral part of the contract: (1) the conditions and procedures for exercising the right of withdrawal; (2) if different from his geographical address, the geographical address of the place of business of the trader, and where applicable that of the trader on whose behalf he is acting, where the consumer can address any complaints; (3) the existence of codes of conduct to which the trader subscribes, and how they can be retrieved; (4) the cost of using the means of distance communication, where it is calculated other than at the basic rate; (5) that the contract will be concluded with a trader and, as a result, that the consumer will benefit from the protection afforded by the law; (6) that the right of withdrawal shall not apply as to services where performance has begun, with the consumer's prior express consent, before the end of the withdrawal period; (7) the possibility of having recourse to an out-of-court dispute resolution, where applicable. With a view to facilitate the exercise of the right of withdrawal, the trader shall provide the consumer with the withdrawal form.[98]

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name and, where applicable, the geographical address and the identity of the trader on whose behalf he is acting [in case of a public auction, this information may be replaced by the geographical address and the identity of the auctioneer]; (3) the price inclusive of taxes; or where the nature of the good means that the price cannot reasonably be calculated in advance, the manner in which the price is calculated; as well as, where appropriate, all additional freight, delivery or postal charges; or, where these charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable; (4) the arrangements for payment, delivery, performance and the complaint handling policy; (5) the existence of a right of withdrawal, or the non-existence of such right; (6) the existence and the conditions of after-sales services and commercial guarantees where applicable; (7) the duration of the contract where applicable; or, if the contract is open-ended, the conditions for terminating the contract; (8) the minimum duration of the consumer's obligations under the contract, where applicable; (9) the existence and the conditions of deposits or other financial guarantees to be paid or provided by the consumer at the request of the trader. In case of conclusion of the contract, this information shall form an integral part of the contract. The trader shall fulfil the duty to provide consumer with the abovementioned information in good faith and in clear and comprehensible manner.

[97] Prior to the conclusion of the contract, the intermediary shall disclose to the consumer, that he is acting in the name of or on behalf of another consumer, and that the contract concluded shall not be regarded as a contract between the consumer and the trader, but rather as a contract between two consumers, and as such shall fall outside the scope of the prospective act on consumer protection. The intermediary, who does not fulfil such obligation, shall be deemed to have concluded the contract in his own name. This rule shall not apply to public auctions.

[98] Together with it, the trader shall provide the following information to the consumer: (1) The name, geographical address and the email address of the trader to whom the withdrawal form must be sent; (2) a statement that the consumer has a right to withdraw from the contract and that this right can be exercised by sending the withdrawal form on a durable medium to the trader within a period of 14 days following the consumer's signature of the order form (this applies to the off-premises contracts, there are separate provisions for distance sale and services contracts); (3) for all off-premises and distance contracts, a statement informing the consumer about the time-limits and modalities to send back the goods to the trader; (4) a statement that the consumer can use the abovementioned withdrawal form; (5) a statement that a dispatch of the received goods back to the trader within the period, in which the consumer has the right of withdrawal, shall be considered as a statement of withdrawal. With respect to off-premises contracts, the abovementioned information shall be given in the order form, in plain and intelligible language, and be legible. An off-premises contract shall only be valid if the consumer signs an order form; and, in cases where order form is not on paper, if the consumer receives a copy of the order form on paper. The consumer may opt for receiving a copy of the order form on a durable medium. The order form shall include the withdrawal form.

The withdrawal form shall be regulated by the Government of the Republic of Serbia, following the proposal of the ministry in charge of consumer protection, within three months from the enactment of the new consumer protection act.

With regard to the sanctions for an infringement of the obligation to inform the consumer of his right of withdrawal, the consumer protection provisions of the participating states range from providing no sanctions (Serbia and Bosnia and Herzegovina) to a timely unlimited right of the consumer to rescind the contract[99] and fines up to cca. 13700 EUR (Croatia). In Croatia the responsible inspector shall issue a decision ordering a trader to eliminate established irregularities by determining a period within which that irregularity must be eliminated (Art. 143 (3) 8th indent Consumer Protection Act). For violation of the described provision Croatian law imposes fines between HRK 5000 to 100000 (cca. EUR 685 to 13700)[100] and offers the possibility to initiate the proceedings for the protection of the collective interests of consumers against a person who acts contrary to the described provisions.[101] The Montenegrin Consumer Protection Law provides that the time limit for the right of cancellation is valid for three months from the date of concluding the contract if the notice was not given at all, that is seven days from meeting this obligation if notice was not given immediately, but within three months from the date of concluding the contract[102]. If the trader does not comply with these provisions, pecuniary fine for offence may be imposed on him, as well as separate one on the responsible person if the trader is legal person[103]. According to Art. 57 (2) of the Albanian Consumer Protection Act, if the trader does not comply with the above mentioned provisions on information duties, the Commission on Consumers Protection can impose fines up to 70.000 lek[104]. The Macedonian law defines fines, to be imposed in a misdemeanour procedure, for failure to uphold to the information requirements. A specific, fine of 3.500 to 5.000 EUR in denar counter value shall be imposed to a legal entity, or 500 to 800 EUR to a natural person, that concludes a contract and does not provide to the consumer his or her identification card.

None of the participating states determines the voidness or nullity of the contract as a sanction in case when the trader does not provide the consumer with the necessary information. In all participating states the annulment of the contract and damages can be required according to the generally applicable provisions of their Civil Code or Law on Obligations.

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[99] Art. 34 of the of the Consumer Protection Act, OG RH No. 79/07, 125/07, 79/09, 89/09, 133/09.

[100] Also, a fine in the amount of HRK 10000 to 100000 (cca. EUR 1370 to 13700) will be imposed on a legal person which fails to deliver to the consumer, not later than at the moment of the conclusion of the contract, a written information regarding his or her right to terminate a contract concluded away from the trader's business premises (Art. 144 (1) 22nd indent Consumer Protection Act). For the same infringements, a fine in the amount of HRK 5000 to 15000 (cca. EUR 685 to 13700) shall be imposed on the natural person (Art. 144 (3) of the Consumer Protection Act). A fine in the amount of HRK 15000 to 100000 (cca. EUR 1370 to 13700) shall be imposed on a legal person who fails to furnish or furnishes incomplete information to the consumer on the right to rescind the contract (Art. 145 (1) 19th indent Consumer Protection Act). According to Art. 145 (3) of the Consumer Protection Act, for the same infringements a fine in the amount of HRK 5000 to 15000 (cca. EUR 685 to 13700) shall be imposed on the natural person.

[101] Art. 131 et seq. of the Consumer Protection Act, OG RH No. 79/07, 125/07, 79/09, 89/09, 133/09.

[102] Art. 51 (2) and (3) of the Law on Consumer Protection, OG RMN No. 26/07.

[103] Art. 129 (1) 16th indent and (2) of the Law on Consumer Protection, OG RMN No. 26/07.

[104] 70.000 lek = aprx. 600 €.

2. Right of withdrawal

The Consumer Protection Act of Bosnia and Herzegovina makes reference to the "rescission of the contract" while the Art. 172 (1) of the Draft Law of Obligations of Bosnia and Herzegovina of 2006[105] and Art. 146 (1) Draft Law of Obligations of Bosnia and Herzegovina 2010 under the Chapter "Right of withdrawal and return (of the goods) in the consumer contracts" refer to the right of the consumer to withdraw "the expression of will to conclude the contract". However, according to Art. 148 (1) of the latest Draft Law of Obligations of 2010 (as well as Art. 174 (1) Draft Law of Obligations of 2006), when executing the right to withdraw and return the goods, the (general) provisions regarding the rescission of the contract shall apply. Consequently, the legislator of Bosnia and Herzegovina recognized the right of withdrawal as one of the forms of the right to rescind the contract.[106] The Croatian Consumer Protection Act also makes reference to 'rescission' and not to 'withdrawal'.[107]

a. Length of withdrawal period

The use of minimum harmonization with regards to the length of the withdrawal period guarantees a higher level of protection than the Directive 85/577 in Albania, Bosnia and Herzegovina and Croatia. According to Art. 35 (1) of the Albanian Consumer Protection Act the consumer may renounce the effects of his undertaking within a period of 14 calendar days. The Consumer Protection Act of Bosnia and Herzegovina determines in its Art. 41(1) that the consumer has the right not to accept the consequences of the contract by sending the trader written notice within 15 days from the conclusion of the contract. Pursuant to Art. 33 (1) of the Croatian Consumer Protection Act consumer shall be entitled, without stating any reason, to rescind the doorstep selling contract within 14 working days of the receipt of the notification referred to in Art. 32 Consumer Protection Act. While in Macedonia the withdrawal period may not be shorter than seven days, the Montenegrin Consumer Protection Law provides the same period but explicitly refers to seven working days. Serbian Law does not contain any provisions transposing the Doorstep Selling Directive. Serbian Draft of the Proposal for the new act on consumer protection determines a withdrawal period of 14 days.

b. Start of the withdrawal period

Although the Art. 5 of Directive 85/577 states that the consumer shall have the right to renounce the effects of his undertaking by sending notice within not less than seven days from the receipt of the information about the right to withdraw, in Croatia the withdrawal period starts upon receipt of the written notification regarding the right to rescind the contract, e.g. at the latest at the moment of the conclusion of the contract (Art. 33 (1) of the Croatian Consumer Protection Act). If the trader failed to provide information on the right to rescind the contract, the consumers' right to rescind the contract shall not be subject to any time limit (Art. 34 of the Croatian Consumer Protection Act). The latter provision is in accordance

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[105] The Draft Law of Obligations of 2006 was never adopted because of the lack of will of the political representatives of the Republic of Srpska to enact a Law of Obligations on the state level. It is doubtful whether there will be more political will to support the Draft Law of Obligations of 2010.

[106] B. Morait, A. Bikić, *Objašnjenja uz Nacrt Zakona o obligacionim odnosima*, in Cooperation with GTZ, Sarajevo 2006, p. 30.

[107] To this special problem consult the following: S. Šarčević, E. Čikara, "European vs National Terminology in Croatian Legislation Transposing EU Directives", in S. Šarčević (ed.), *Legal Language in Action: Translation, Terminology, Drafting and Procedural Issues,* Globus, Zagreb 2009, 209.

with the latest ECJ ruling in *Heininger* and *Hamilton* case.[108] The Montenegrin Consumer Protection Law also postpones the start of the withdrawal period when the information was not given, by providing in Art. 51 (2) and (3) that the time-limit for the right of cancellation is valid for three months from the date of concluding the contract if the notice was not given at all, that is seven days from meeting this obligation if notice was not given immediately but within three months from the date of concluding the contract. However, neither the above-mentioned provisions of the Montenegrin Consumer Protection Act, nor the transposition laws of Albania[109], Bosnia and Herzegovina and Macedonia, which do not postpone the start of the withdrawal period in case when the information was not provided, are in accordance with the ECJ jurisprudence in *Heininger* and *Hamilton*. In Albania, Bosnia and Herzegovina and Macedonia the withdrawal period starts from the day when the contract was concluded, irrespective of a possible breach of the trader's obligation to send the written notice. Consequently, these laws violate Art. 5 (1) of the Directive 85/577. According to Art. 40 (1) of the Consumer Protection Act of Bosnia and Herzegovina the period for submission of information and the period for rescission of the contract begin at the same time, namely at the moment of conclusion of the contract, and as a result the written notification is not a precondition for the start of the rescission period.[110] The Serbian Law does not contain provisions that may be regarded as intended to transpose the Doorstep Selling Directive. The Serbian Draft of the Proposal for the new act on consumer protection provides that the withdrawal period of 14 days shall start at the beginning of the first hour of the first day and shall end with the expiry of the last hour of the last day of the period. In the case of an off-premises contract, the withdrawal period shall begin from the day when the consumer signs the order form, or in cases where the order form is not on paper, when the consumer receives a copy of the order form on another durable medium. If the trader belatedly informs the consumer on the existence of a right of withdrawal, in accordance with the Serbian Proposal for the new act on consumer protection the withdrawal period of 14 days shall commence when the consumer finally receives such information on a durable medium. The consumer may withdraw from the contract at any time, including the time before the belated information on the existence of a right of withdrawal reaches him. The withdrawal period does not begin before the consumer has been duly informed about his right of withdrawal.

c. Postal Rule / Dispatching Rule

The consumer protection provisions on doorstep selling of Bosnia and Herzegovina, Macedonia and Serbia contain no corresponding postal or dispatching rule. Albanian provisions contain just a dispatching rule without specifying any means of such dispatching, as

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[108] ECJ judgment of 13. December 2001, C–481/99 – *Georg Heininger and Helga Heininger v. Bayerische HypoundVereinsbank AG* [2001] ECR I-09945; ECJ judgment of 10. April 2008, C–412/06 –*Hamilton v Volksbank Filder eG* [2008] ECR I-02383.

[109] According to Art. 35 (1) and (2) of the Albanian Consumer Protection Act the consumer shall notify the trader about his decision to renounce from contract before the end of the period of 14 calendar days.

[110] This legislative mistake would be corrected with the adoption of the Draft Law of Obligations of Bosnia and Herzegovina of 2010, which in its Art. 146 (3) determines that the withdrawal period starts from the moment when the business person gives to the consumer a notification providing "full information" about his right to withdraw from the contract. This provision of the Draft Law of Obligations of 2010 pursuant to its Art. 146 (1) applies every time when the Draft Law of Obligations of 2010 or "any other law" give to the consumer the right to withdraw from the contract, and therefore also covers the consumers right to rescind the contract under Art. 40 of the Consumer Protection Act of Bosnia and Herzegovina (OG BA No. 17/02).

follows: "Evidence of dispatching notice is sufficient proof not only that proper notification is made, but also the date when it is made".[111] The Montenegrin Consumer Protection Law stipulates that the contract shall be considered terminated on the day on which the trader receives the notification about the termination of the contract[112]. From the wording of other Articles of the Montenegrin Consumer Protection Law governing the effects of renunciation (Art. 53 referring to the Chapter on Distance selling and Art. 44 (1), which in turn indirectly refers to Art. 43) it seems that for respecting the time limit it should be sufficient if the notice is dispatched before the end of such period. The Croatian Consumer Protection Act provides in its Art. 33 (3) that the contract shall be considered rescinded when the trader receives the notice of rescission. If the notice of rescission was sent within the period for rescission referred to in Art. 33 (1) of the Croatian Consumer Protection Act a contract shall be considered rescinded in a timely manner. According to the Serbian Proposal for the new act on consumer protection the statement of withdrawal shall be considered prompt if it is dispatched within the stated period. The dispatch of the received goods back to the trader within the period, in which the consumer has the right of withdrawal, shall be considered as a statement of withdrawal. It shall be deemed that the consumer executed his right of withdrawal at the moment the statement of withdrawal was dispatched to the trader.

d. Formal requirements

The transposition laws of Bosnia and Herzegovina,[113] Croatia[114] and Montenegro require that the consumer's notice of withdrawal (rescission or termination) is sent to the trader in written form. The Macedonian Law on Consumer Protection requires the consumer to send the statement for unilateral termination to the address provided by the trader. In accordance with the Albanian transposition provisions, the notice of withdrawal from contract made by the consumer shall not only be in written form but also dated.[115] The consumer shall make the notice in written form and shall write the date on it, otherwise the consumer cannot prove his notification of withdrawal. This is a rule required *ad probationem*. The Serbian Proposal for the new act on consumer protection contains two provisions which regulate the formal requirements of the notice of withdrawal. Either, the dispatch of the received goods back to the trader within the period, in which the consumer has the right of withdrawal, shall be considered as a statement of withdrawal. Or the consumer shall inform the trader of his decision to withdraw on a durable medium, either in a statement addressed to the trader drafted in his own words, or using the model withdrawal form explained above.

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[111] Decision of Council of Ministers No. 63 "On contracts negotiated away from business premises" of 21.01.2009, OG RAl No. 8/09, (point 5).

[112] Art. 51 (5) of the Law on Consumer Protection, OG RMN No. 26/07.

[113] According to Art. 41 (1) of the Consumer Protection Act of Bosnia and Herzegovina (OG BA No. 17/02) consumers have the right to terminate the contract within 15 days from the conclusion of the contract by sending a written notice to the trader. Pursuant to Art. 146 (1) of the new Draft Law of Obligations of Bosnia and Herzegovina the withdrawal of the consumer, which requires no further explanation, needs to be expressed in a durable medium or a document. The return of goods has the same effect as the withdrawal.

[114] In accordance with Art. 33 (2) of the Croatian Consumer Protection Act (OG RH No. 79/07, 125/07, 79/09, 89/09, 133/09) a contract shall be rescinded by giving a written notice.

[115] Decision of Council of Ministers No. 63 "On contracts negotiated away from business premises" of 21.01.2009, OG RAl No. 8/09, (point 4).

e. Effects of withdrawal

The transposition laws of the participating states regulate the question of the effects of withdrawal in an extensive manner. Art. 35 (1) of the Croatian Consumer Protection Act provides that in case of the rescission of the contract, the consumer shall be required to return the delivered product to the trader at his or her own expense. He will not be liable for damage sustained by the trader as a result of rescission (see Art. 35 (2) Consumer Protection Act). On the contrary, not later than 30 days from the receipt of the written notification of the rescission the trader shall reimburse all the sums received from the consumer up to that moment on the basis of the contract, increased by the interest rate granted for three–month time deposits by the trader's commercial bank for the whole period from the date of receipt of the written notification of rescission to the date of payment, Art. 35 (3) Consumer Protection Act.

The Montenegrin consumer protection provisions determine that rules governing the effect of withdrawal prescribed for distance selling contracts, will apply accordingly to the doorstep selling contracts. Thus, Art. 44 (1) of the Montenegrin Consumer Protection Law prescribes the duty of the consumer to return the goods within 30 days after dispatching the notice; in that case he will not be liable for damages (costs, interests, penalty, and like) because of cancellation[116], except direct cost of returning the goods[117]. On the other side, in accordance with Art. 44 (2) Consumer Protection Act it is the duty of the seller to return the payment within 30 days after the receipt of cancellation notice. Special effects are pursuant to Art. 45 Consumer Protection Act prescribed in case when a third party acts as creditor, namely, same as those found in Directive 97/7.

Art 35 (2) of the Albanian Consumer Protection Act provides that the giving of the notice shall have the effect of releasing the consumer from obligations of the contract.[118] If the consumer exercises the right of withdrawal, the goods, which are subject to the contract, shall be returned to the trader within five days, starting from the date on which the consumer has notified the trader about his decision of withdrawal. Any amount paid by the customer for goods or services shall be compensated by the trader within 15 days, starting from the same date. If the price of goods or services is fully or partly covered by a credit granted by the trader, or by a third party on the basis of an agreement between the third party and the supplier, the credit agreement shall be cancelled without any cost and penalty, if the consumer exercises his right to withdraw from the contract.[119]

Under Macedonian law the withdrawal has the general effects of the termination of the contract as provided by the Law on Obligations. The Law on Consumer Protection specifically provides that in case of termination of the contract, the consumer is obliged to return the goods to the trader at his own costs. The trader is obliged to return to the consumer the full amount that the consumer has paid on the basis of the contract till the moment of termination. Before the elapse of the withdrawal period the trader does not have any right to require from the consumer, directly or indirectly, any kind of acceptance or delivery of services.

The submission of the notice on rescission of the contract pursuant to Art. 41 (3) of the Consumer Protection Act of Bosnia and Herzegovina has the consequence of releasing the consumer of any obligation under the contract or covering any expenses other than costs of

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[116] Art. 51 (3) of the Law on Consumer Protection, OG RMN No. 26/07.

[117] Art. 44 (3) of the Law on Consumer Protection, OG RMN No. 26/07.

[118] Art 35 (2) of the Consumer Protection Act, OG RAl No. 61/08.

[119] Decision of Council of Ministers No. 63 "On contracts negotiated away from business premises" of 21.01.2009, OG RAl No. 8/09, (points 6, 7).

returning the delivered goods. In case that the consumer uses his right to rescind the contract, the trader is also required, in accordance with Art. 41 (5) Consumer Protection Act, to return the money paid for the product, without delay, within 15 days of receiving notice on rescission.[120]

Serbian law does not contain provisions that may be regarded as intended to transpose the Doorstep Selling Directive. The Serbian Proposal for the new act on consumer protection provides that the exercise of the right of withdrawal shall terminate the obligations of the parties to perform under the distance or off-premises contract. The trader shall reimburse any payment received from the consumer within 30 days from the day on which he receives the communication of withdrawal. Should the trader fall behind in reimbursing the sum paid by the consumer, he shall, on top of the interest on arrears, pay additional ten percents of the sum paid by the consumer for each 30 days of delay. If the consumer exercises his right of withdrawal from a distance or an off-premises contract, any ancillary contracts shall be automatically terminated, without any costs for the consumer. The same applies to the credit agreements linked to the consumer contracts, regardless of whether the credit was granted by the trader or by a third party. In case the credit is granted by a third party, the trader is obliged to inform the creditor that the consumer has withdrawn from the distance contract. The creditor shall reimburse to the consumer the sum of money, together with interest, that has been paid for the goods or services up to the moment of withdrawal, without delay and not later than 30 days from the day he was informed about the withdrawal.

3. Other consumer protection instruments in the field of doorstep selling

Serbian law does not contain any provisions on doorstep selling, while Albania, Bosnia and Herzegovina and Macedonia provide protection by their regulations described above. In Croatian and Montenegrin law additional provisions exist in their Trade Acts. Art. 4 (1) of the Croatian Trade Act[121] requires that the trader must be registered for selling and buying of goods and/or providing services in trade.[122] Montenegrin law requires registering of the traders who want to conduct sales in doorstep situations. As indicated above, Art. 31 (4) of the Law on Internal Trade provides legal ground for the Ministry of Economy to adopt a by-law on the type of goods and the manner of conducting doorstep type of sale, which will contain more detailed rules on this subject matter.

IV. Summary

Before transposition of the Directive 85/577 into their relevant consumer protection laws, Albania, Bosnia and Herzegovina, Croatia, Macedonia and Montenegro had no coherent legislation concerning consumer protection in case of door-to-door sales. Serbia still does not have one but is currently working on it. The transposition itself followed in all participating states (except Serbia) the same scenario: Directive 85/577 was transposed within a separate chapter of the special consumer protection act of the relevant country. Besides various

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[120] Pursuant to Art. 148 (1) of the Draft Law of Obligations of Bosnia and Herzegovina the effects of the withdrawal are the same as the effects of the termination of the contract, provided by the generally applicable provisions of the Draft Law of Obligations. The only difference is that the business person is in default, if he does not return the paid amount of money within 30 days from the expression of the will to withdraw.

[121] Trade Act, OG RH No. 87/08, 96/08, 116/08.

[122] Regulation on minimum technical requirements for business premises in which the trade and intermediation in trade are performed and on conditions for sale of goods outside the premises, OG RH No. 37/98, 73/02, 153/02, 12/06.

deviations in terms of wording, there are some transposition deficiencies of major significance like exclusion of contracts concluded during an excursion in Montenegrin Consumer Protection Law, and possible exclusion of contracts for provision of services under Macedonian Law on Consumer Protection. Another important limitation represents the definition of consumer in the Bosnian Consumer Protection Act that restricts the action of a consumer to purchase, acquisition or use of services or products for his personal needs "and" the needs of his household. The non-inclusion of intermediaries within the notion of trader in Serbian, Montenegrin and Macedonian laws on consumer protection represents a further deficiency. However, some of participating states have enhanced protection of consumers by inclusion of situations other than those covered by Art. 3 of Directive 85/577, for instance of contracts concluded on public transport or any other public place (e.g. Bosnia and Herzegovina, Montenegro), or contracts concluded in selling premises, on fairs and exhibitions (e.g. Macedonia). The level of consumer protection was also increased by not making use of restrictions and exemptions provided for by Directive 85/577, e.g. by not exercising the option to exclude contracts under 60 ECU granted in its Art. 3 (1) (e.g. Croatia, Macedonia and Bosnia and Herzegovina), and by not exempting all (e.g. Bosnia and Herzegovina) or some of contracts included in Art. 3 (2) of Directive 85/577 (e.g. Albania, Serbia). While the transposition laws of the participating states, except for Serbia, regulate the form and the content of the information requirements in an explicit manner, sanctions in case of violation of these requirements range from providing no sanctions (Bosnia and Herzegovina) to a timely unlimited right of the consumer to rescind the contract and fines up to cca. 13700 EUR (Croatia). The Consumer Protection Acts of Bosnia and Herzegovina and of Croatia do not refer to the right of withdrawal but to "rescission". Albania, Croatia and Serbia (in its Draft of the Proposal for the new consumer act) used the minimum harmonization clause to provide a withdrawal (rescission) period of 14 days, whereas in Bosnia and Herzegovina the legislator granted 15 days. However, only the Montenegrin and Croatian legislator decided to postpone the start of the withdrawal period in case when the trader did not meet the information requirements. Thereby, only the Croatian Consumer Protection Act stays in accordance with the ECJ decisions *Heininger* and *Hamilton,* prescribing that in such situation the consumers' right to rescind the contract shall not be subject to any time limit, while the Montenegrin Consumer Protection Law sets a time limit of three months and seven days from the conclusion of the contract. In Albania, Bosnia and Herzegovina and Macedonia the withdrawal period starts from the day when the contract was concluded, irrespective of a possible breach of the trader's obligation to send the written notice, and consequently, these laws directly violate Art. 5 (1) of the Directive 85/577. The written form as a requirement of the withdrawal is accepted in every participating state. The Serbian Draft of the proposal for a new Consumer Protection Act offers a possibility of withdrawal in a "withdrawal form" provided by the trader and regulated by the Government of the Republic of Serbia. The withdrawal shall have the effect for the consumer to be obliged to return the received goods at his own cost (all the participating states) and for the trader to return the paid amount of money within 15 days (Bosnia and Herzegovina and Albania) or 30 days (Montenegro and Croatia). Under Macedonian law as well as the Draft Law of Obligations of Bosnia and Herzegovina the effects of the withdrawal are the same as the effects of the termination of the contract as provided by the Law of Obligations.

B. UNFAIR CONTRACT TERMS DIRECTIVE (93/13)

Coordinators*: Marija Karanikić Mirić (I-IV), Zvezdan Čađenović (V-VII)*

I. Introduction: Policy reasons for monitoring pre-formulated terms

1. The law in the Participating States prior to transposition of the Unfair Contract Terms Directive

Before the transposition of Directive 93/13/EEC[123] there were no special legal rules in the Participating States dealing with the use of unfair terms in consumer contracts.

In the former Socialist Federal Republic of Yugoslavia, the Yugoslav Law on Obligations of March 30, 1978[124] contained some general provisions on unfair terms in Art. 142-144. These provisions applied to contractual relations involving either natural or legal persons as parties to the contract, or both. Originally, the law contained certain provisions relating to the 'commercial' contracts (B2B transactions), but no special provisions regarding consumer contracts, or natural persons as consumers. Also, the laws did not cover procedural issues.

After dissolution of SFRY in 1992, the Yugoslav Law on Obligations was received into the newly formed Federal Republic of Yugoslavia (FRY) and was amended in 1993. The Law was subsequently received into the laws of the member states of the State Union of Serbia and Montenegro in 2003. Following the ending of the State Union in 2006, the Law on Obligations remained the main formal source of the Law on Obligations in the Republic of Serbia.[125]

The Yugoslav Law on Obligations was also received into the newly formed Republic of Croatia as its national Law on Obligations, and was amended several times.[126] The existing Civil Obligations Act of the Republic of Croatia was enacted in 2005 and amended in 2008.[127]

Macedonia and Montenegro also retained the Yugoslav Law on Obligations for a period of time after dissolution of the federal state. The Macedonian legislator enacted the new Law on Obligations in 2001 and amended it several times.[128] Similarly, the Montenegrin legislator passed the new Law on Obligations in 2008.[129]

The former Yugoslav Law on Obligations was also received into the law of newly formed Republic of Bosnia and Herzegovina as its national Law on Obligations, on 11. April 1992. The reception of former Yugoslav Law on Obligations went on separately in the two presently existing administrative divisions of Bosnia and Herzegovina: (1) the Federation of Bosnia and Herzegovina[130]; and (2) the Republic of Srpska[131].

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[123] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 095, 21/04/1993 P. 0029 - 0034.

[124] Yugoslav Law on Obligations was published in the Official Gazette of SFRY No. 29/78, and came into force six months later, on October 1, 1978. It was amended several times before dissolution of the SFRY, see OG SFRY No. 39/85, 45/89 and 57/89.

[125] For subsequent amendments in Serbia see OG FRY No. 31/93, 31/93, 22/99, 23/99, 35/99, 44/99.

[126] Law on Reception of Law on Obligations, *OG RH* No. 53/1991, 73/1991 as amended (*OG RH* No. 03/1994, 07/1996, 112/1999).

[127] Civil Obligations Act, *OG RH* No. 35/2005, 41/2008.

[128] Law on Obligations, *OG RMac 20001 No. 18.*

[129] Law on Obligations, *OG RMN* No. 47/2008.

[130] Art. 1 of the Law on reception of Law on Obligations served as the legal basis for this reception in Federation of Bosnia and Herzegovina; *OG Republic of Bosnia and Herzegowina* No. 2/92, 13/93 and 13/94.

[131] Art. 12 of Constitutional Law on the application of the Constitution of Serbian Republic of Bosnia and Herzegovina served as the legal basis for the reception of the former Yugoslav Law on Obligations in what is now called Republic of Srpska; OG of the Republic of Srpska No. 3/92.

To sum up: After dissolution of the Socialist Federal Republic of Yugoslavia, the newly formed states retained for a period of time, in one form or another, the existing rules of the former Yugoslav Law on Obligations. Prior to the first attempts to transpose the Unfair Contract Terms Directive, the articles 142-144 LoO were the closest to what the Directive 93/13 relates to, and they were the same in all the abovementioned states.

The laws originating from the former Yugoslav Law on Obligations contain some provisions on general terms and conditions (as a part of an adhesion contract). Neither of these articles includes a description or definition of an unfair term. The provisions of general terms and conditions that are contrary to the very purpose of a contract, or that are against good business practices shall be null and void, even if these general terms and conditions have been approved by the authorities. Furthermore, the court may deny application of a particular provision of general terms and conditions which precludes the party from filing demurrers. The court may also reject application of a particular provision of general terms and conditions if, on account of this provision, the party is deprived of her contractual rights, time limits, or if the provision is unfair or harsh.

General terms and conditions stipulated by one party to the contract, either as a part of a standard form contract, or being referred to by the contract, shall complement the individually negotiated clauses in the same contract, and shall be as binding as those. General terms and conditions must be made public in a usual way. A party to the contract is bound by general terms and conditions if she was aware, or must have been aware of them at the time when the contract was formed; and in case of discord between general terms and conditions and individually negotiated terms, the latter shall apply. An unclear provision of the contract of adhesion shall be construed to the benefit of the other party – that is: against the interests of the party who imposed it.

Under the laws originating from the former Yugoslav Law on Obligations, a contract which is contrary to the mandatory provisions, public policy (*ordre public*) or good usages (*boni mores*) is null and void. Nullity of a contractual provision shall not render the contract void in its entirety, if the contract can stand without the null provision. The court shall declare nullity of a void contract by virtue of its office (*ex officio*), and every (legally) interested party may claim nullity of a void contract before the court, including the public prosecutor. The right to claim nullity of a void contract shall not expire (no time-limits to this right).

The Albanian Civil Code of 1994 provides the basic rules for monitoring standard terms in contracts in general.[132] All transactions containing terms not individually negotiated are subject to a fairness test under Art. 686 of the Civil Code. Contract terms that were pre-formulated by one of the parties are void if they were unknown to the other party; if they violate the principle of equality of the parties and cause imbalance in their interests; or if they limit liability of the party who has formulated the terms. Moreover, standard terms should be interpreted to the advantage of the party that has not formulated them.

2. Model of the Unfair Contract Terms Directive

The Unfair Contract Terms Directive sets up the possibility to control the fairness of standard contract terms, where a term shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. The control of fairness should also apply to the pre-formulated individual contracts for a single use. The open question is wheth-

[132] Civil Code, *OG RAl* No. 11/1994.

er this may also apply to the individually negotiated terms. Standard contract terms are also subject to a transparency test.

The Directive contains an indicative list of terms which may be considered unfair. The courts should have power to determine unfairness of a contract term *ex officio*.[133] In case of ambiguous pre-formulated terms, the interpretation most favourable to the consumer applies.

The Unfair Contract Terms Directive contains a so-called minimal clause, meaning that the states are free to adopt or retain more stringent provisions then those of the Directive, in order to ensure a higher degree of protection for the consumer.[134] The ECJ case law on the Unfair Contract Terms Directive predominantly refers to the need of protection from the abuse of powers:[135] "The consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of the terms."

3. The law in the Member States following transposition of the Unfair Contract Terms Directive

Albania transposed the main Consumer Protection Directives by passing the separate transposition acts. The legislative acts used for the implementation of the Directives were either the laws enacted by the Albanian Parliament, or the decisions of the Council of Ministers, enacted by the Albanian Government to complement the full implementation of the Directives. The Unfair Contract Terms Directive was transposed by means of the Albanian Consumer Protection Act of 2008.[136]

In Croatia, the Consumer Protection Act of 2003 represents the first comprehensive attempt of the legislator to transpose most of the Consumer Protection Directives in a single piece of legislation.[137] This Act was replaced by the new Consumer Protection Act of the Republic of Croatia in 2007.[138]

The first try to regulate the sphere of consumer protection in Bosnia and Herzegovina occurred in 2002.[139] Later on, Bosnia and Herzegovina transposed most of the Consumer Protection Directives, including the Directive 93/13, in the Consumer Protection Act of 2006.[140]

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[133] ECJ judgment of 27 June 2000, Joined Cases C-240/98 to C-244/98 - *Océano Grupo Editorial SA v. Murciano Quintero* [2000] ECR I-04941; ECJ judgment of 21 November 2002, C-473/00 - *Cofidis v. Fredout* [2002] ECR I-10875; ECJ judgment of 26 October 2006, C-168/05 – *Elisa María Mostaza Claro v. Centro Móvil Milenium SL* [2006] ECR I-10421.

[134] S. Weatherill, *Law And Integration in the European Union*, Oxford University Press, Oxford 1995, 151-157; C. Barnard, *The Substantive Law of the EU: The Four Freedoms*, Oxford University Press, Oxford 2007, 600; F. De Cecco, "Room to Move? Minimum Harmonization and Fundamental Rights", *Common Market Law Review*, Vol 43, 1/2006, 9-30.

[135] ECJ judgment of 27 June 2000, Joined Cases C-240/98 to C-244/98 - *Océano Grupo Editorial SA v. Murciano Quintero* [2000] ECR I-04941.

[136] Consumer Protection Act, *Official Gazette of the Republic of Albania,* No. 9902/08.

[137] Consumer Protection Act, *OG RH* No. 96/03.

[138] Consumer Protection Act, *OG RH* No. 79/07, 125/07, 79/09, 89/09.

[139] Consumer Protection Act, *OG BA* No. 17/02.

[140] Consumer Protection Act, *OG BA* No. 25/06.

In Macedonia, the first Law on the matters of consumer protection was enacted in 2000 and amended in 2002.[141] The existing Law on Consumer Protection was passed by the Macedonian legislator in 2004 and was amended on two occasions – in 2007 and 2008.[142]

The first framework law on consumer protection in Serbia and Montenegro was enacted in 2002. This was, in fact, a piece of federal legislation, and it applied in both states, which were the constituents of the Federal Republic of Yugoslavia, and later the parties to the State Union of Serbia and Montenegro.[143]

In Serbia, the law of 2002 was repealed by the existing Consumer Protection Act of 2005.[144] The Serbian Government tried on several occasions and finally abandoned the idea of improving the deeply flawed existing Consumer Protection Act of 2005 and decided to draft a new piece of legislation (hereinafter: *Serbian Draft Proposal*, which has recently entered the public debate, and will be regularly cited in this Report, as there are fair chances for it to be enacted in the second half of the year 2010).

In Montenegro, the law of 2002 was repealed by the new Law on Consumer Protection of 2007.[145]

As has been stated above (I 1), the states formed after dissolution of the Socialist Federal Republic of Yugoslavia, have – in their laws of Obligations – some general rules on validity of the general terms and conditions. The aforesaid laws apply to contractual relations involving natural and/or legal persons as parties to the contract. As an addition to these regimes, most of the states by means of enacting the separate pieces of legislation made an effort to transpose the Directive 93/13.

In Bosnia and Herzegovina, the provisions of the Consumer Protection Act of 2006 are restricted to B2C contracts. The provisions regarding the interpretation of unclear clauses are under certain conditions applicable to individually negotiated contracts. The fairness test is restricted to contracts which are not "personally" negotiated, which probably derives from a wrong translation of the term "individually" as used the Directive.

In Croatia, the provisions of the Consumer Protection Act of 2007 restrict the content review to B2C contracts. In addition, only the terms which were not individually negotiated with the consumer may fall under review.

The same goes for the Macedonian Law on Consumer Protection of 2004, and the Montenegrin Law on Consumer Protection of 2007.

Under Art. 2 (2) of the Croatian Consumer Protection Act, in the absence of specific provisions of the Consumer Protection Act, the Croatian Civil Obligations Act shall apply in relation to B2C transactions. For instance, the consequences of nullity of an unfair contract term shall fall under the scope the Civil Obligations Act. The same applies to other Participating States.

In Serbia, the Consumer Protection Act of 2005 does not reflect any serious effort to transpose the Unfair Contract Terms Directive.[146] On the contrary, the Consumer Protection Act solely takes over few already known articles of the Law on Obligations of 1978, relating to the contracts of adhesion. Moreover, Consumer Protection Act does not receive all the

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[141] Law on Consumer Protection, *OG RMac* No. 63/00, 4/02.

[142] Law on Consumer Protection, *OG RMac* No. 38/04, 77/07, 103/08.

[143] Federal Law on Consumer Protection, *OG FRY* No. 37/02.

[144] Consumer Protection Act, *OG RS* No. 79/05.

[145] Law on Consumer Protection, *OG RMN* No. 26/07.

[146] Consumer Protection Act, *OG RS* No. 79/05

rules on adhesion contracts contained in the Law of Obligations, but only some of them. The Draft Proposal allows for the review of both standard and individually negotiated terms in consumer contracts.

II. Scope of application

1. Consumer, seller and supplier, public-sector undertakings

a. B2C, B2B and P2P contracts

Directive 93/13 is applicable to terms in contracts concluded between a seller or supplier and a consumer (B2C transactions). Almost all Participating States have, in the course of transposition of the Directive, introduced special B2C rules to review pre-formulated clauses. Namely, the provisions of the Albanian Consumers Protection Act on unfair contract terms apply only to B2C transactions.[147] The same goes for Bosnia and Herzegovina, Croatia, Macedonia and Montenegro.

In Serbia, the Consumer Protection Act of 2005 applies to B2C transactions, but has a distorted notion of a consumer. The Draft Proposal applies solely to the B2C transactions.

In addition to this, the provisions of the national laws of obligations in the states formed following the dissolution of the SFRY, and relating to the general terms and conditions, contracts of adhesion, nullity of the contracts, etc., apply also to the B2B and P2P transactions.

b. Definition of consumer

The Unfair Contract Terms Directive defines the consumer as any natural person who is acting for purposes which are outside his trade, business or profession. Some of the Participating States have only partially followed this definition.

Under the Albanian law, the consumer is any natural person acting for the purposes not related to her trade, business or exercise of her profession. The Albanian legislator broadened the notion of consumer to include the non-profit organizations.[148]

Under the Macedonian Law on Consumer Protection of 2007, the consumer is defined as a natural person who purchases products or uses services for direct personal consumption, for purposes outside of his trade, business or profession."[149]

In Montenegro, the consumer is a natural person who buys, orders, accepts, uses goods or services, including public services, for non-business, non-professional purposes, or who was offered to enter such a contract. The Montenegrin Law on Consumer Protection defines the group of consumers, i.e. the group set up by the consumers with the purpose that members of the group acquire ownership rights over particular products with the support from that group.

Under the Croatian Consumer Protection Act, the consumer is any natural person who concludes the contract or acts on the market for purposes that do not fall within the sphere of her business or professional activity.[150]

Under the Serbian Consumer Protection Act of 2005, the consumer is any natural person who purchases products or services for their own needs or for the needs of their household. Consumer is also a company, enterprise, other legal entity or entrepreneur, when they

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[147] *Cf.* Art.s 2 and 27 (1), Albanian Consumer Protection Act of 2008.

[148] Art. 3 (6), Albanian Consumer Protection Act of 2008.

[149] Art. 4 (1), Macedonian Law on Consumer Protection of 2004.

[150] Art. 3 (1) 4th indent, Croatian Consumer Protection Act of 2007.

are purchasing products or services for their own needs. In the Serbian Draft Proposal, the consumer is defined as any natural person who is acting mainly (predominantly) for the purposes which are outside his trade, business, craft or profession.

Finally, the Consumer Protection Act of Bosnia and Herzegovina defines the consumer as a natural person who purchases, acquires or uses products or services for his personal needs and the needs of his household. Here, the notion of the consumer is narrowed down to the natural persons who are acting not only outside the scope of their trade, business or profession, but in pursuance of their personal needs and, cumulatively, the needs of their household.

c. Definition of seller or supplier

According to Art. 2 (c) of the Directive 93/13, seller or supplier means any natural or legal person who is acting for purposes relating to his trade, business or profession, whether publicly or privately owned. This notion is to be interpreted widely, as to include farmers and freelancers.

Under the Albanian law, trader means any natural or legal person who is acting for purposes relating to his economic activity, trade, business, craft or profession, including anyone who is acting in the name or on behalf of a trader.[151]

Under Art. 1 (5) of the Consumer Protection Act of Bosnia and Herzegovina, trader is defined as any person who is, directly or as an intermediary, selling products or providing services to the consumer. In other words, the definition is narrowed down from a person who is "acting" for certain purposes to the one "selling products and providing services."

Under the Montenegrin Law on Consumer Protection, trader is a person who sells goods or provides services to consumers. As in the Consumer Protection Act of Bosnia and Herzegovina, here the notion of the trader is reduced to those who sell goods or provide services, which at least prima facie excludes the pre-contractual stage.

In Croatia, trader means any natural or legal person who concludes the contract or acts on the market within his business or professional activity, which corresponds to the wording of the Directive 93/13.[152]

In Macedonia, the trader is any legal or natural person who, in the course of carrying out his activity, directly satisfies the needs of the citizens, for products and services. The Law does not specifically define the type of the ownership so it could be concluded that both privately and publicly owned establishments that provide goods and services that satisfy the needs of the citizens qualify as traders.

Under the Serbian Consumer Protection Act of 2005, trader is a company, enterprise, other legal entity or entrepreneur, when they are selling products or providing services to a consumer. In the Draft Proposal, trader is any natural or legal person who is acting for purposes relating to his trade, business, craft or profession, and anyone acting in the name of or on behalf of a trader.

d. Public sector undertakings

The Albanian Consumer Protection Act of 2008 makes no reference to the public sector undertakings. The same goes for the Serbian Consumer Protection Act of 2005.

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[151] Art. 3 (14), Albanian Consumer Protection Act of 2008.

[152] The Croatian Consumer Protection Act employs the term *trader*, and not *seller* or *supplier*. See S. Šarčević, E. Čikara, "European vs. National Terminology in Croatian Legislation Transposing EU Directives", in S. Šarčević (ed.), *Legal Language in Action: Translation, Terminology, Drafting and Procedural Issues,* Globus, Zagreb 2009, 205 etc.

It should be mentioned that Serbian Draft Proposal contains a separate Chapter on Services of General Economic Interest, with the intention to transpose Directives: 2002/22/EC on Universal Service (Telecommunications), 2003/54/EC on Electricity, and 2003/55/EC on Natural Gas; as far as they are relevant for the matters of consumer protection. The Draft Proposal prescribes special information duties of the trader who provides services of general economic interest (including pre-contractual information duties), but no special rules on unfairness of the terms in contracts to which one party is a public sector undertaking. The absence of any special rules regarding the unfair terms contracted between such undertakings and the consumers should merit application of the general rules on unfair terms in consumer contracts.

The Macedonian Law on Consumer Protection contains three articles relating to the provision of the public services to the consumer (Art. 118-120), but none of them relates specifically to the unfairness of a term contracted with the consumer.

Under the Consumer Protection Act of Bosnia and Herzegovina, a public sector undertaking shall conclude pre-formulated contracts with the consumers. These contracts contain standard terms, fall under the rules of private contract law and are within the scope of application of the provisions of the Consumer Protection Act with regards to the unfair contract terms.

Under Croatian law, the legal persons of public law are considered traders when they are entering the private law transactions. This concerns primarily public sector undertakings, which provide public services defined in Art. 24 (1) of the Croatian Consumer Protection Act. The same applies to Montenegro.

2. Exclusion of specific contracts

a. Contracts in the area of succession rights, family, employment and company law

Under the Recital 10 of the Unfair Contract Terms Directive, contracts relating to employment, succession rights, rights under family law and contracts relating to the incorporation and organization of companies or partnership agreements are excluded from the Directive. Without doubt, contracts relating to employment, succession rights and rights under family law hardly qualify as consumer contracts. When it comes to contracts relating to the incorporation and organization of companies or partnership, this is not so undisputable. Contracts for acquisition of company rights as a capital investment may qualify as consumer contract.

The provisions of the Albanian Consumer Protection Act relating to the unfair contract terms do not explicitly exclude any of the abovementioned types of contracts. Likewise, the Consumer Protection Act of Bosnia and Herzegovina does not explicitly exclude any of these contracts from the scope of application of its provisions regarding unfair contract terms. Nevertheless, the definitions of consumer and trader are such that they keep these contracts out of the scope of consumer protection. In other words, the way in which the parties to the consumer contracts are defined exclude the contracts relating to employment, succession rights and rights under family law and contracts relating to the incorporation and organization of companies or partnership agreements from the application of the rules on unfair terms in consumer contracts. The same goes for the consumer protection legislation of Serbia, Croatia,[153] Montenegro and Macedonia.[154] On the contrary, a contract for sale of company shares may

[153] See: M. Baretić, "Nepoštene odredbe u potrošačkim ugovorima" (Unfair Terms in Consumer Contracts), in M. Dika, Z. Pogarčić (ed.), *Obveze trgovca u sustavu zaštite potrošača* (Trader Obligation in the System of Consumer Protection), Narodne novine, Zagreb 2003, 67.

[154] It is undisputed among the Macedonian legal scholars that these types of contracts should not qualify as consumer contracts.

qualify as a consumer contract and fall under the scope of the national rules on unfair terms in consumer contracts.

b. Real property contracts

Real property contracts are not explicitly mentioned in the Albanian Law on Consumer Protection.

It is well settled in Macedonian legal theory that real property contracts should not be considered as consumer contracts.

Under the Consumer Protection Act of Bosnia and Herzegovina, consumer means a person who purchases, acquires or uses products or services, while goods are defined so as to include products and immovable property. There is a slight inconsistency in the manner in which the terms goods and product are employed in a single piece of legislation. Sometimes these terms are used as synonyms, which directs to the conclusion that the real property contracts fall under the scope of application of the Consumer Protection Act of Bosnia and Herzegovina.

The Croatian Consumer Protection Act allows for such interpretation that it applies to both movables and immovables when it comes to the unfairness of the consumer contract terms. The same goes for Montenegro, as the Montenegrin legislator did not specify whether the term "goods" includes immovables.

In the Serbian Consumer Protection Act of 2005, there are no explicit exclusions of this kind. However, the Draft Proposal defines goods as any tangible movable item, with the exception of: (a) goods sold by way of execution or otherwise by authority of law; (b) water and gas where they are not put up for sale in a limited volume or set quantity; and (c) electricity. This means that the contract for sale of real property would not be qualified as a consumer sales contract. Still, the Draft Proposal defines product as any good or service including immovable property, rights and obligations, but this definition serves for the purposes of transposition of the Unfair Commercial Practices Directive.

3. Exclusion of specific contractual terms

a. Contractual terms based on mandatory provisions

Under Art. 1 (2) of the Unfair Contract Terms Directive, the terms which reflect mandatory statutory or regulatory provisions and provisions or principles of international conventions, particularly in the transport area, are excluded from the scope of the Directive.

The Albanian legislation does not provide for this type of exclusion. The same goes for the Consumer Protection Act of Bosnia and Herzegovina, and for the Consumer Protection Act of Montenegro.[155]

The Croatian legislator has transposed Art. 2 (1) of Directive 93/13 in Art. 96 (5) of the Consumer Protection Act, which prescribes that the provisions of the Act do not apply to the contract terms in accordance with mandatory statutory provisions, or with provisions or principles of international conventions binding upon the Republic of Croatia. The same rule was transposed into the Macedonian national legal system.[156]

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[155] For Montenegro one can refer to Article 9 of the Montenegrin Constitution, under which the ratified and published international agreements and generally accepted rules of international law represent a constituent part of the Montenegrin national legal order, have primacy over the national legislation, and are directly applicable if different from the national rules.

[156] *Cf.* Art. 53 (4), Macedonian Law on Consumer Protection of 2004.

The existing Serbian Consumer Protection Act says nothing on mandatory provisions, but under Art. 143 of the Serbian Law on Obligations, the general terms and conditions that are contrary to the very purpose of a contract, or that are against good business practices, shall be null and void, even if they have been approved by the authorities. Comparable provisions may be found in the national laws of obligations of the states formed after the dissolution of the SFRY. The Serbian Draft Proposal prescribes that the provisions of the chapter on unfair contract terms shall not apply to contract terms reflecting mandatory statutory or regulatory provisions.

b. Individually negotiated terms

Under Art. 3 of the Unfair Contract Terms Directive, contractual terms which have been individually negotiated by the consumer are excluded from the scope of application of the Directive.

According to Art. 27 (2) of the Albanian Consumers Protection Act, individually negotiated terms are excluded from the application of the rules on unfair terms. When the trader claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him. The same rules may be found in the Montenegrin Law on Consumer Protection.

The exclusion of the individually negotiated terms is also prescribed in Art. 51 (1) of the Macedonian Law on Consumer Protection. Still, the general rules on nullity contained in the Macedonian Law on Obligations may apply to both individually negotiated and pre-formulated contractual terms.

The Consumer Protection Act of Bosnia and Herzegovina cuts down the review of standard terms to contract clauses which were not personally negotiated. This kind of transposition seemingly mistakes the terms which were individually negotiated, for the terms which were personally negotiated, *i.e.* negotiated without an intermediary.

Under Art. 96 of the Croatian Consumer Protection Act, individually negotiated terms are excluded from the scope of the Act. The burden of proof to the contrary lies with the trader. Under Art. 296 (3) of the new Croatian Civil Obligations Act, individually negotiated terms are excluded even from the scope of application of Art. 296 (1) of the Law.[157] Under the latter, general terms and conditions that, in contradiction to the principle of good faith, are contrary to the equivalence of mutual obligations, or to the very purpose of the contract, or that are against good business practices, shall be null and void, even if they have been approved by the authorities.

As has been stated previously, the existing Serbian Consumer Protection Act of 2005 does not reflect any serious effort to transpose the Unfair Contract Terms Directive. On the contrary, the Consumer Protection Act solely takes over some of the already known articles of the Law on Obligations of 1978, relating to the contracts of adhesion. The rules on the conditions of nullity, contained in the Law on Obligations, make no distinction between the pre-

[157] The criterion of individual negotiation is mentioned also in Art. 296 (3) COA, which regulates that the provision on nullity of unfair standard terms (Art. 296 (1) COA) shall not apply to those provisions of the general contract conditions, the content of which was taken over from applicable regulations or which were subject to individual negotiations before conclusion of the contract in the course of which the other party could have affected the content of such provision, or to provisions on the subject and price of the contract if these are clear, understandable and highly visible. However, the limitation of the criterion of individual negotiation on provision on nullity is considered as too narrow. See: S. Petrić, „Opći uvjeti ugovora prema novom ZOO," in Z. Slakoper (ed.), *Bankovni i financijski ugovori*, Pravni fakultet Rijeka, Rijeka 2007, 37.

formulated and individually negotiated terms. In the end, under the Serbian Draft Proposal, an unfair contract term is null and void regardless of the fact that it was individually negotiated. In other words, the rules on nullity of the unfair terms apply to both standard and individually negotiated terms.

III. Assessing the fairness of contract terms according to Art. 3

1. Concept of the Unfair Contract Terms Directive

Under Art. 3 (1) of the Unfair Contract Terms Directive, a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties rights and obligations arising under the contract, to the detriment of the consumer.

This is a general clause defining the standards of unfairness. First of all, it prescribes that, in order to be unfair, a pre-formulated term must cause significant imbalance in the parties´ rights and obligations under the contract to the detriment of the consumer. This does not entail imbalance of the core of mutual contractual duties, as under Art. 4 (2) of the same Directive; unfairness of the term may not derive from the definition of the main subject of the contract, nor from the equivalence of mutual obligations, *i.e.* adequacy of the price against the goods or services. This means that a significant imbalance must be detrimental to the consumer, and may only arise from the remaining contractual rights and duties. The position of the consumer shall be compared to the position in which he or she would have been in absence of the term under consideration.

Secondly, the general clause requires the term to deviate from the principle of good faith. There are several readings of this precondition. It may be that each and every contractual term which causes a significant imbalance in the parties´ rights and obligations to the detriment of the consumer, does so against the principle of good faith. On the other hand, it may be that there are two cumulatively required prongs of the test: that the term is against the principle of good faith and that it causes a significant imbalance in the interests of the parties, and that the term needs to satisfy both in order to be qualified as unfair. In the end, it may be that the two prongs are required alternatively: (1) Deviation from any of the preconditions of fairness makes the term unfair. (2) The term is unfair either if it is contrary to the good faith principle, or if it causes significant imbalance.

Under Art. 4 (2) of the Directive, the assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand as against the services or goods supplies in exchange, on the other in so far as these terms are in plain intelligible language.

Under Art. 4 (1) of the Directive, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.

The Annex to the Unfair Contract Terms Directive contains the indicative list of the terms that shall be considered unfair.

2. The form which the general clause has taken in the Member States

Under Art. 3 of the Directive on Unfair Contract Terms, and in conjunction with recital 15, the state has an obligation to set up the general criteria for assessing the unfairness of pre-formulated terms in consumer contracts. Thus, it is wrong if the general clause relates solely

to standard terms in consumer contracts. On the other hand, the fact that Directive 93/13 contains a minimal clause allows the states to broaden the scope of protection and to provide for the control of the unfairness of individually negotiated clauses.

Under Art. 94 of the Consumer Protection Act of Bosnia and Herzegovina, the trader may not require contractual terms that are unfair or would cause damage to the consumer. Such contractual clauses are void. The pre-formulated term[158] shall be regarded as unfair if it causes a significant inequality in rights and obligations of the parties to the detriment of the consumer, if the fulfilment of the contractual obligations would cause significant breach of consumers´ legitimate expectation, or if the term goes contrary to the principles of good faith and fair dealing. This means that deviation from any of the preconditions of fairness makes the term unfair. The term is unfair either if it is contrary to the good faith principle, or if it causes significant imbalance. Under Art. 93, contractual provisions must be understandable and in conjunction with other provisions of the same or any other contract between the same parties, taking into account the nature of products or services and any other participants in connection with the conclusion of the contract. The unclear clauses are to be interpreted in favour of the consumer. Art. 4 (2) of the Directive 93/13, stating that unfairness of the term may derive neither from the definition of the main subject of the contract nor from the equivalence of mutual obligations, is not transposed in the Consumer Protection Act of Bosnia and Herzegovina.

The Croatian legislator has literally transposed Art. 3 (1) of the Unfair Contract Terms Directive in Art. 96 (1) of the Croatian Consumer Protection Act, prescribing that a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the contractual parties' rights and obligations, to the detriment of the consumer. Under Art. 99, it is not permitted to assess whether the contractual terms relating to the subject of the contract and the price are fair, in so far as these terms are clear, easily understandable and noticeable. Thus, the main performance duties are excluded from the fairness test. Under Art. 98 of the Croatian Consumer Protection Act, in assessing whether a specific contractual term is fair, the nature of the goods or service for which the contract was concluded, all circumstances before and during the conclusion of the contract, other terms of the contract as well as some other contract which represent the main contract in relation to the contract being assessed shall be taken into account. The Croatian Civil Obligations Act regulates the nullity of unfair standard terms in Art. 296. Any provision of the general contract conditions shall be void if it, contrary to the principle of good faith and fair dealing, causes evident inequality in rights and obligations of the parties to the detriment of the contracting party of the drafter or if it compromises the achievement of the purpose of the contract concluded, even if the general contract conditions including such provisions are approved by an authority. However, this rule is not applicable to contractual clauses relating to the subject matter and price, if these are clear, understandable and highly visible. In evaluating whether a provision in general contract conditions is void, it is necessary to take into account all circumstances before and at the time of conclusion of the contract, the legal nature of a contract, the type of goods or services that constitute the performance, other provisions of the contract and the provisions of another contract such provision of the general contract conditions is linked with.

Under Art. 143 of the Serbian Law on Obligations, the provisions of general terms and conditions that are contrary to the very purpose of the contract or against the good business

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[158] N.B. The wording of the Art. 95 of the Consumer Protection Act of Bosnia and Herzegovina is "the terms that are not personally negotiated," instead of the phrasing of the Directive 93/13, *i.e.* "the terms which are not individually negotiated."

practices shall be null and void, even if these general terms and conditions have been approved by the authorities. Furthermore, the court may deny application of a particular provision of general terms and conditions which precludes the party from filing demurrers. The court may also reject to apply a particular provision of general terms and conditions, if it deprives the party of her contractual rights, time limits, or if the provision is unfair or harsh. However, these rules are not among those that were restated. The Serbian Consumer Protection Act represents a feeble attempt of the Serbian legislator to lay down the rules of consumer protection in a single piece of legislation. With regards to the unfair terms in consumer contracts, this Act solely restates some of the provisions of the Law on Obligations relating to the contracts of adhesion. However, Art. 143 of the Law on Obligations was not restated in the Consumer Protection Act of 2005. Under the Serbian Draft Proposal, a contract term shall be considered unfair: if it results in a significant disproportion in contractual obligations of the parties to the detriment of the consumer; or if it causes execution of the contract to be disadvantageous to the consumer without justifiable explanation; or if it causes execution of the contract to be substantially different from what the consumer legitimately expected; or if it violates transparency requirements; or if it defies the principle of good faith. The unfairness of a term shall be assessed taking into account: the nature of the goods or services to which the contract relates; the circumstances as of the time of the contract formation; other terms of the same consumer contract or of another contract on which the former is dependent; and the manner in which the contract was drafted and communicated to the consumer by the trader in accordance with the transparency requirements. The Draft Proposal opts not to transpose Art. 4 (2) of the Directive 93/13, which prescribes that unfairness of the term may not derive from the definition of the main subject of the contract, nor from the equivalence of mutual obligations.

The Albanian legislator has literally taken on the wording of the general clause from the Unfair Contract Terms Directive. According to the Albanian Law on Consumer Protection, a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract. The fact that certain aspects of a term, or one specific term, have been individually negotiated shall not exclude the application of the unfair terms provisions to the rest of a contract, if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract. Where any seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him. The unfairness of a contractual term shall be assessed, taking into account: the nature of the goods or services for which the contract was concluded; the time of conclusion of the contract; all the circumstances attending the conclusion of the contract; all the other terms of the contract or of another contract on which it is dependent.

The Macedonian legislator also transposed the general clause from the Directive 93/13, word by word.

In Montenegro, a provision of the consumer contract shall be regarded as unfair if it was not negotiated individually and if, contrary to the principles of good faith and fair practice, it distorts the balance between rights and obligations of the parties to the detriment of the consumer. The Montenegrin Consumer Protection Act does not rely on the idea of a significant imbalance in the parties´ rights and obligations to the detriment of the consumer. Instead, the core notion is a distorted balance (not necessarily significantly distorted!), between rights

and obligations of the parties to the detriment of the consumer. This means that the scope of consumer protection is somewhat widened in comparison to the Directive 93/13, as the mere imbalance (and not just some significant imbalance) is enough for the term to be qualified as unfair under the Montenegrin Law on Consumer Protection.

3. Transposition of the Annex in the Participating States

a. Legal nature of the Annex

Under Art. 3 (3) of Directive 93/13, the Annex contains an indicative and non-exhaustive list of the terms which may be regarded as unfair. Such list is commonly described as a grey list. The terms defined in the Annex are not unfair as such (on their own). The terms listed in the illustrative catalogue should not necessarily and mechanically be considered unfair. The competent national authority must be free to evaluate their character, *i.e.* their fairness, in light of the general criteria.[159]

b. Transposition of the Annex in the Participating States

1st Table: Transposition of the Annex No 1 lit. a-q of the Unfair Contract Terms Directive

Albania transposed the list of terms contained in the Annex I as a whole (a-q), but as a black list, meaning as a list of terms which are automatically unfair, *i.e.* unfair *per se*.[160] If any of the unfair terms listed in the legal provisions is contained in any standard term contract provided by any trader, it will be considered as an administrative violation and penalized, despite the fact that such a term is null from the time of the conclusion of contract.

The Consumer Protection Act of Bosnia and Herzegovina contains a black list of 22 contractual terms which are considered unfair as such.[161] It somewhat overlaps with the grey list of the Directive 93/13, but the phrasing is different, which brings in the need for interpretation of the legislator´s intentions. Consequently, the grey list contained in the Unfair Contract Terms Directive is only partially transposed into the legal system of Bosnia and Herzegovina.

The situation in Montenegro is similar, as the Montenegrin legislator only partially transposed the list enclosed in the Annex of the Directive 93/13 (and added one contractual term which is not in the Annex).[162] To the extent that the list is transposed, it is regarded as a black list, *i.e.* the catalogue of terms that are unfair by themselves.

The Croatian legislator has transposed the grey list of the Directive 93/13 as a whole (a-q), as an indicative and non–exhaustive (grey) list of those terms which may be regarded as unfair. Such list is contained in Art. 97 of the Croatian Consumer Protection Act.

In Macedonia, the list contained in the Directive 93/13 is only partially transposed, and to the extent it is transposed, it is regarded as a black list, *i.e.* as a catalogue of the terms which are unfair *per se*. Also, the Macedonian legislator has added to this catalogue certain contractual terms that are not included in the Annex to the Directive.[163]

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[159] *Cf.* ECJ judgment of 7 May 2002, C-478/99, *Commission of the European Communities v. Kingdom of Sweden* [2002] ECR I-04147.

[160] *Cf.* Art. 27 (3), Albanian Consumer Protection Act of 2008.

[161] *Cf.* Art. 96, Consumer Protection Act of Bosnia and Herzegovina of 2006.

[162] Art. 64 (1)(19), Montenegrin Law on Consumer Protection of 2007. The additional term is the one which excludes or restricts the right of the consumer to a pro rata decrease of the total cost of a credit in case of an early repayment of the credit.

[163] These terms are: the right of the trader unilaterally to determine or alter the period for delivery of the product or the service; limitation of the right of the consumer to terminate the contract when the trader does not fulfil his obligations under guarantee; limiting the right to terminate the contract in events

In Serbia, the grey list contained in the Annex I to the Unfair Contract Terms Directive is not transposed either in the Law on Obligations or in the Consumer Protection Act of 2005. The Serbian Draft Proposal plans for transposition of: Annex II (Contract terms considered unfair in all circumstances) and Annex III (Contract terms presumed to be unfair) of the Commission Proposal for a Directive on consumer rights (COM (2008) 614/3).

Art. of Unfair Contract Terms Directive	Black letter rule	Grey letter rule	Annex not transposed
ANNEX No. 1a Death or personal injury	AL (Art. 27), MAC (Art. 73), MN[164].	CRO (Art. 97 1st indent)	BA, SER
ANNEX No. 1b Total or partial non-performance or inadequate performance	AL (Art. 27), MAC (Art. 61), MN	CRO (Art. 97 2nd indent)	BA, SER
ANNEX No. 1c Condition whose realization depends on the seller's own will alone	AL (Art. 27), MAC (Art. 54), MN	CRO (Art. 97 3rd indent)	BA, SER
ANNEX No. 1d Permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract;	AL (Art. 27), MN	CRO (Art. 97 4th indent)	BA, SER, MAC
ANNEX No. 1e Disproportionately high sum in compensation	AL (Art. 27), BA (Art. 96 (g)), MAC (Art. 72) MN	CRO (Art. 97 5th indent)	SER

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of *force majeure*; exclusion of the traders' liability for damage in cases of fault or non-performance of an obligation that is an essential element of the contract; exclusion of liability for legal and hidden material deficiencies of the product; prohibiting the offsetting of the mutual obligations when conditions set by law are met; imposing an unreasonable period in which the consumer should notify the trader of the deficiencies of the product; in advance fixing the amount the consumer should pay to the trader in case of non-performance of his obligation, while there is no such obligation for the trader; setting an indefinite period for the performance of the obligation by the trader, without providing a reasonable period for the termination of the contract; inappropriate exclusion or limitation of the rights and duties of the consumer set by Law, with regards to the trader or third parties in cases of non-performance or partial performance by the trader; exclusion of the review of the unfairness of the contractual term.

[164] The wording of the black list of the Montenegrin Law on Consumer Protection slightly deviates from the phrasing of the Annex to the Directive 93/11. For instance, transposition of Annex No. 1b misses the word *inappropriately*, with respect to excluding or limiting the legal rights of the consumer; and fails to mention an option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him. Transposition of Annex No. 1c focuses on the case when provision of services by the seller or supplier is an optional right of the trader, instead of it being subject to a condition whose realization depends on his own will alone. Transposition of Annex No. 1i misses the word irrevocably. It also fails to qualify consumer's opportunity to become acquainted with a contract term as *real*. Transposition of Annex No. 1l mentions high and not too high final prices. In transposition of Annex No. 1p, instead of saying "where this may serve to reduce the guarantees for the consumer," the legislator mentions the possibility which "bring(s) the consumer to a less favourable position."

ANNEX No. 1f Right to dissolve the contract on a discretionary basis and retain the sums paid for services not yet supplied in case of dissolving the contract by the seller	AL (Art. 27), MAC (Art. 74), MN	CRO (Art. 97 6th and 7th indents)	BA, SER
ANNEX No. 1g Termination of a contract of indeterminate duration without reasonable notice	AL (Art. 27), MN	CRO (Art. 97 8th indent)	BA, SER, MAC
ANNEX No. 1h Automatically extending a contract of fixed duration	AL (Art. 27), MAC (Art. 70), MN	CRO (Art. 97 9th indent)	BA, SER
ANNEX No. 1i Irrevocably binding the consumer to terms which he had no real opportunity of becoming acquainted with	AL (Art. 27), MN	CRO (Art. 97 10th indent)	BA, SER, MAC
ANNEX No. 1j Unilateral alteration of the terms of the contract	AL (Art. 27), MAC (Art. 62), MN	CRO (Art. 97 11th indent)	BA, SER
ANNEX No. 1k Unilateral alteration of characteristics of the product or service to be provided	AL (Art. 27), BA (Art. 96 (d)), MAC (Art. 56), MN	CRO (Art. 97 12th indent)	SER
ANNEX No. 1l Determination or increase of price	AL (Art. 27), MAC (Art. 55 (1)), MN	CRO (Art. 97 13th indent)	BA, SER
ANNEX No. 1m Right to determine whether the goods or services supplied are in conformity with the contract, or right to interpret any term of the contract;	AL (Art. 27), MAC (Art. 58), MN	CRO (Art. 97 14th and 15th indents)	BA, SER
ANNEX No. 1n Limiting of commitments undertaken by agents	AL (Art. 27), MAC (Art. 75), MN	CRO (Art. 97 16th indent)	BA, SER
ANNEX No. 1o Obliging the consumer to fulfil all his obligations where the seller or supplier does not perform his	AL (Art. 27), MAC (Art. 59), MN	CRO (Art. 97 17th indent)	BA, SER
ANNEX No. 1p Possibility of transferring his rights and obligations under the contract	AL (Art. 27), BA (Art. 96 (t)), MAC (Art. 77), MN	CRO (Art. 97 18th indent)	SER
ANNEX No. 1q Excluding or hindering the consumer's right to take legal action; restricting the evidence available or imposing a burden of proof.	AL (Art. 27), MAC (Art. 71), MN	CRO (Art. 97 19th indent)	BA, SER

2nd Table: Transposition of Annex No 2 of the Unfair Contract Terms Directive

The second Annex to the Unfair Contract Terms Directive allows the states to make certain exceptions from clauses used by suppliers of financial services. If the state opts out from these clauses, the level of consumer protection under its national rules decreases. Conversely, the state provides a higher level of consumer protection by having not transposed the Annex 2.

The Law on Consumer Protections of Albania, Serbia and Croatia do not regulate exceptions prescribed in Annex 2 of the Directive 93/13.

The legislators of Macedonia and Montenegro only partially transposed the exceptions prescribed in Annex 2 of the Directive 93/13.

In Bosnia and Herzegovina, the exceptions prescribed in Annex 2 of the Directive 93/13 are not transposed. However, the contractual terms to which these exceptions should relate were not transposed as well (they are not copied from the grey list of the Annex 1 to the black list of the Law on Consumer Protection). Consequently, there is no increase of the level of consumer protection in Bosnia and Herzegovina, by the mere fact that the exceptions prescribed in Annex 2 of the Directive 93/13 are not transposed.

Art. of Unfair Contract Terms Directive	Annex transposed	Annex not transposed
ANNEX No. 2a Exception from No. 1g for suppliers of financial services		CRO, SER, AL, MAC, MN
ANNEX No. 2b sent. 1 Exception from No. 1j for suppliers of financial services	MAC (Art.55 (2), items (2) and (3))	CRO, SER, AL, MN
ANNEX No. 2b, sent. 2 Exception from No.1j where the consumer is free to dissolve the contract		CRO, SER, AL, MAC, MN
ANNEX No. 2c Exception from No. 1g, No. 1j and No. 1l in case of products or services where the price is linked to fluctuations in a stock exchange and in case of contracts for the purchase or sale of foreign currency		CRO, SER, AL, MAC, MN
ANNEX No. 2d Exception from No. 1l in case of price–indexation clauses	MAC (Art.55 (2), item (1)), MN[165]	CRO, SER, AL

4. Legal consequences of unfairness

a. Concept of the Unfair Contract Terms Directive

Under Art. 6 (1) of the Unfair Contract Terms Directive, the state shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall not be binding for the consumer, and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms. The Directive allows for fractional ineffectuality, *i.e.* preserving the remainder of the contract, if it may outlive the non-binding clause.

[165] The wording of the Montenegrin transposition is somewhat vague. While Annex No. 2d of the Directive refers to the lawful price-indexation clauses, provided that the method by which prices vary is explicitly described; Montenegrin legislator brings up the prices determined by a prescribed method, when such method is explicitly described.

The ECJ held in *Mostaza Claro* that Art. 6 (1) is a mandatory provision. It takes into account the weaker position of one of the parties to the contract and sets as a goal an effective balance between the parties which re-establishes equality between them. To that end, the formal balance between the rights and obligations of the parties is not enough.[166]

aa. Non-binding nature of unfair terms

The way in which Art. 6 (1) of the Directive 93/13 is phrased opens up the question of the proper concept of nullity of an unfair term, which is required in order to correctly transpose the Directive.

It is now well-established that the concept of absolute nullity is in accordance with the requirements of the ECJ. The concept of relative nullity (*i.e.* the idea that the unfair term remains valid unless annulled by the contractual party, who alone can unilaterally do so) does not meet the terms of *Océano, Cofidis* and *Mostaza Claro*.[167]

The national courts must have the power to review the fairness of a clause *ex officio*, on their own initiative. Moreover, the national court must be empowered to take evidence on its own initiative, based on the alleged facts. Any national provision which prohibits the national court, on expiry of a limitation period, from finding that a term of the contract is unfair is prohibited.[168]

bb. Consequences for the contractual term and the contract as a whole

The remainder of the contract continues to be binding on both parties, if this is possible without the ineffective unfair term. This means that the nullity is fractional; if possible having in mind the purpose and the legal nature of the contract, nullity sanctions solely the unfair term and not the contract as a whole.

The idea that the unfair term may be changed, *i.e.* that it could be upheld, but with the altered, acceptable content, is not brought up in the Directive. Such possibility would open up the question of existence and quality of the consumer's and trader's consent.

b. Transposition in the Participating States

aa. Absolute nullity

In accordance with the ECJ jurisprudence[169] and the requirements of Art. 6 (1) of the Unfair Contract Terms Directive, the legislators of Bosnia, Croatia, Macedonia and Montenegro have prescribed absolute nullity as a civil law sanction for using an unfair term in consumer contract. All of them have also laid down the rule that the contract continues to bind the parties if it is capable of existing without the unfair – and thus non-binding – term.

The Croatian national courts are empowered to asses the unfairness of a term on their own initiative, that is *ex officio*. Under Art. 296, 323 and 327 of the Croatian Civil Obliga-

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[166] ECJ judgment of 26. October 2006, C–168/05 – *Elisa María Mostaza Claro v. Centro Móvil Milenium SL* [2006] ECR I–10421.

[167] ECJ judgment of 27. June 2000, Joined Cases C–240/98 to C–244/98 – *Océano Grupo Editorial SA v. Murciano Quintero* [2000] ECR I–04941; ECJ judgment of 21. November 2002, C–473/00 – *Cofidis v. Fredout*, [2002] ECR I–10875; ECJ judgment of 26. October 2006, C–168/05 – *Elisa María Mostaza Claro v. Centro Móvil Milenium SL* [2006] ECR I–10421.

[168] ECJ judgment of 21. November 2002, C–473/00 – *Cofidis v. Fredout*, [2002] ECR I–10875.

[169] ECJ judgment of 27. June 2000, Joined Cases C–240/98 to C–244/98 – *Océano Grupo Editorial SA v. Murciano Quintero* [2000] ECR I–04941; ECJ judgment of 21. November 2002, C–473/00 – *Cofidis v. Fredout*, [2002] ECR I–10875; ECJ judgment of 26. October 2006, C–168/05 – *Elisa María Mostaza Claro v. Centro Móvil Milenium SL* [2006] ECR I–10421.

tions Act, any legally interested party, the court, as well as the state attorney are entitled to invoke nullity of a contract or a contractual term. Provisions of the Croatian Consumer Protection Act do not allow for partial retention, *i.e.* preservation of the unfair clause with content which is still permissible. Similar provisions may be found in the laws deriving from the Yugoslav Law on Obligations of 1978. This holds true for the laws of obligations of Serbia, Bosnia, Montenegro and Macedonia.

Under Art. 102 of the Croatian Consumer Protection Act, nullity of a term does not entail nullity of the contract as a whole, if the contract can subsist without the term which is null and void.

A similar rule is imposed by Art. 324 (1) of the Croatian Civil Obligations Act, which prescribes that, if one clause of a contract is void, it shall not result in rendering the contract void, provided that the contract may survive without such void clause and that the clause was neither a condition nor a decisive motive for entering into the contract. Furthermore, under Art. 324 (2), where nullity is established in order to eliminate a void clause from a contract and to maintain the validity of the contract, the contract shall remain valid even if the void clause was a condition or a decisive motive for the contract.

The same rules [as in Art. 324 (1) and (2) of the Croatian Civil Obligations Act] may be found in all laws of obligations deriving from the Yugoslav Law on Obligations of 1978. This applies for Serbia, Bosnia, Montenegro and Macedonia. This additional condition – that the clause was neither a condition nor a decisive motive for entering into the contract – makes it harder for a consumer contract to survive the fact that one of its terms is null and void. This boils down to the question of whether the nullity of an unfair term was established in order to eliminate a void clause from a contract with the idea to maintain the validity of the contract; and even this may be further reduced to the issue of relationship between the national Consumer Protection Act and the national Law on Obligations, *i.e.* the problem of applicability – instead of the problem of interpretation – of this extra requirement.

Under Art. 94 and 96 of the Consumer Protection Act of Bosnia and Herzegovina, in conjunction with Art. 105 (2) of the Law on Obligations, the rules of absolute nullity apply to unfair terms in consumer contracts. A partial retention is not provided by the Law on Consumer Protection, meaning that it is not possible to preserve an unfair term with an altered content. The same can be said for splitting the term into a binding and non-binding parts.

The Consumer Protection Act of Bosnia and Herzegovina does not explicitly state that the remainder of the contract continues to be binding on both parties, if this is possible without the ineffective unfair term. However, Art. 94 speaks of a null and void contractual clause, and not of a null and void contract. In conjunction with Art. 105 (2) of the Law on Obligations of Bosnia and Herzegovina (stating that, where nullity is established in order to eliminate a void clause from a contract and to maintain the validity of the contract, the contract shall remain valid even if the void clause was a condition or a decisive motive for the contract), this should be interpreted in a way that the contract remains binding if it can outlive the very clause which is null and void. Art. 105 (2) of the Law also considers the readiness of the trader to conclude the contract without the unfair clause as irrelevant, which is in accordance with Art. 6 (1) of the Directive 93/13.

Art. 66 of the Montenegrin Law on Consumer Protection prescribes absolute nullity of an unfair term in consumer contracts. Nullity of a term does not render the consumer contract void in its entirety, if the contract is such that it can stand without the null provision.

The Macedonian legislator introduced the rule on absolute nullity of the unfair terms in consumer contracts in Art. 83 of the Law on Consumer Protection. Such term is non-binding for the parties. Under Art. 84 of the same Act, any interested party, as well as the consumer

organizations, may invoke the unfairness of a contractual term before the national court, which shall declare it null and void *ex tunc*. Under Art. 82 (2), nullity of a term does not render the consumer contract void in its entirety, if the contract is such that it can stand without the null provision. There are no rules in the national legislation on the matters of alteration, amendment and adjustments of terms and contracts, and of splitting terms into a valid and void part.

The Serbian Law on Obligations contains the abovementioned rules on nullity and fractional nullity. Namely, Art. 103 (1) of the Law contains a general rule on nullity of a contract which is contrary to the mandatory provisions, public policy (*ordre public*), or good usages (*boni mores*). Under Art. 105, nullity of a contractual provision shall not render the contract void in its entirety, if the contract can stand without the null provision. Where nullity is established in order to eliminate a void clause from a contract and to maintain the validity of the contract, the contract shall remain valid even if the void clause was a condition or a decisive motive for the contract. The court shall declare nullity of a void contract by virtue of its office (*ex officio*), and every (legally) interested party may claim nullity of a void contract before the court, including the public prosecutor. The right to claim nullity of a void contract shall not expire (no time-limits to this right). However – and this has been stated already – the existing Serbian Consumer Protection Act of 2005 does not reflect any serious effort to transpose the Unfair Contract Terms Directive.

Under the Serbian Draft Proposal, unfair terms of consumer contract shall be null and void; and nullity of the term shall not render the contract void in its entirety, if the contract can stand without the null provision. It defines a contract term as any term of consumer contract, either individually negotiated or drafted in advance by the trader or a third party. Furthermore, it is silent on the issues of alteration, amendment and adjustments of terms and contracts, and of splitting terms into a valid and void part. In the end, attention should be drawn to the fact that the Serbian Draft Proposal defines a contract term as any term of a consumer contract, either individually negotiated or drafted in advance by the trader or a third party.

bb. Relative nullity

Legislators of the Participating States opted for the concept of absolute nullity, with the exception of wording of the Albanian Law on Consumer Protection, which remained rather vague on that matter.

cc. Unclear legal situation

Under Art. 28 of the Albanian Law on Consumer Protection, if the term is considered unfair, it is considered as being null from the time of contract formation. This wording is considered somewhat controversial and inconclusive on the issue of whether the Albanian legislator prescribes absolute or relative nullity of the unfair terms in consumer contracts. Both Art. 28 of the Consumer Protection Act and Art. 111 of the Albanian Civil Law maintain that nullity of a term does not render the consumer contract void in its entirety, if it the contract is such that it can stand without the null provision.

dd. Alteration, amendment and adjustments of terms and contracts

The consumer protection acts of the Participating States are silent on the possibility of altering, amending or adjusting the unfair terms in consumer contracts. However, the laws originating from the former Yugoslav Law on Obligations contain the rules on usury contracts, under which the damaged party may request his or her contractual obligation to be reduced to a just amount within five years from contract formation. In such case, the court shall meet this

request if possible, and the contract with the corresponding alteration shall be valid. Such rule exists in Art. 141 of Serbian LoO, Art. 135 of Montenegrin LoO and Art. 129 of Macedonian LoO, Art. 329 of Croatian LoO and Art. 141 of the LoO of Bosnia and Herzegovina.

ee. Splitting terms into a valid and non-valid parts

There are no special rules on this issue in the Participating States.

ff. Consequences for the contract as a whole

The laws originating from the former Yugoslav Law on Obligations contain the rules on so-called partial nullity, as a type of absolute nullity of a specific contractual provision. Nullity of a contractual provision shall not render the contract void in its entirety, if the contract can stand without the null provision, and if such provision was neither a requirement nor the decisive motive for conclusion of the contract. Such rule exists in Art. 105 of Serbian LoO, Art. 103 of Montenegrin LoO and Art. 82 of Macedonian LoO, Art. 102 of Croatian LoO and Art. 105 of the LoO of Bosnia and Herzegovina.

c. Compensation and/or punitive damages

The legislators of all Participating States leave the matters of compensation to the general rules of national tort law.

V. Requirement of transparency according to Art. 5

Art. 5 of the Directive stipulates that in case of written contracts, terms offered to the consumer must always be drafted in plain, intelligible language. Furthermore, the same Article sets the rule that if there is a doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail.

By formulating Art. 5 in the above given manner, very important requirements of transparency were set, which go along with other consumer-protecting information requirements prescribed by EU law.

1. Drafting of terms in plain and intelligible language

a. Requirements of the Unfair Contract Terms Directive

Art. 5, 1st sentence of the Directive 93/13 stipulates that terms must always be drafted in plain, intelligible language. As observed by some authors, these criteria complement each other. Consequently they imply that there are no ambiguities, misunderstandings, doubts and that the consumer can easily understand the substance of the terms.

b. Transposition of Art. 5, sent. 1 in the Participating States

Almost all Participating States have transposed the said requirement, some of them faithfully word by word like Albania, while others used some variations in the wording and even added some new elements. The Albanian Consumer Protection Act stipulates that in case of contracts where all or certain terms offered to the consumer are in writing, those terms must always be drafted in "plain, intelligible language"[170]. The situation is the same in the Macedonian Art. 80 of the Law on Consumer Protection ("clear and intelligible"); Montenegrin Art.65 para. 1 of the Consumer Protection Law ("clear and comprehensible"); Art. 100 of the Croatian Consumer Protection Act ("clear and understandable"). It is important to note

[170] Art. 28 (1) of the Consumer Protection Act, *OG RAl* No. 61/08.

that in case of Croatia an additional element is that written contractual terms "must be easily noticeable", which demonstrates the Croatian legislator´s understanding of the requirement of transparency (for more details see infra). In Bosnia, "plain and intelligible language" is transposed with the term "understandable language". Namely, Art. 93(2) Consumer Protection Act states that "contractual provisions should be understandable and in conjunction with other provisions of the same or any other contract between the same parties, taking into account the nature of products or services and any other participants in connection with the conclusion of the contract". To this extent, Art. 142 (2) of the Law of Obligations only determines that "general contract conditions must be published in a usual manner". Finally, in Serbia, while Art. 44, para. 5 of the present Consumer Protection Act does not refer to the requirement of "plain and intelligible" language, the Serbian Draft Proposal stipulates that contract terms are to be "expressed in plain, intelligible language," and in addition addresses the very important element of being "understandable to a reasonable person as educated and informed as the particular consumer at the time of contract formation". In addition, the Serbian Draft Proposal requires that contract terms shall be made available to the consumer in a manner which gives him a real opportunity of becoming acquainted with them before entering into the contract, with due regard to the means of communication used. In relation to additional elements not already mentioned above, both current legislative acts of Montenegro and Serbia require the official language of the respective country to be used, which for example in case of non observance in Montenegro is sanctioned as misdemeanour offence[171].

c. Interpretation of the requirement of transparency in the Participating States

While in certain countries there are no specific rules on the interpretation of the requirement of transparency (Albania, Macedonia), or these are straight and clear only in terms of the mandatory requirement of the official language to be used (Serbia and Montenegro), or the initially extensively formulated term ("understandable language") inevitably requires further clarification by the national jurisprudence (Bosnia and Herzegovina), the Croatian legislator offers a more advanced solution. Namely, by the additional formulation that the contractual terms must be "easily noticeable", the legislator has expressed his understanding of the requirement of transparency. From this point of view, the requirement of transparency should cover different trader techniques like clauses in small print etc. However, the higher level of protection in Art. 100 of the Croatian Consumer Protection Act also shows an understanding (benchmark) of the consumer which, on the other side differs from those developed in the ECJ's case law. In this context it is also worth observing that the Serbian Draft Proposal requires that contract terms shall be made available to the consumer in a manner which gives him a real opportunity of becoming acquainted with them before entering into the contract, with due regard to the means of communication used.

2. Consequences of lack of transparency

a. Requirements of the Unfair Contract Terms Directive

Art. 5 of the Directive 93/13 specifies the legal consequences that apply only in cases where the transparency requirement has been breached in the individual case. In such a case the consequence is to be found in the interpretation rule given in Art. 5, 2nd sentence of the Directive. According to the wording of the recital 20 of the preamble of the Directive, which reflects the general opinion of the European legislator, the interpretation rule applies only to

[171] Art. 129 para. 1 point 19 of the Law on Consumer Protection, *OG RMN* No. 26/07.

clauses that have not been drafted in plain language, that is: not to unintelligible clauses. This further implies that for plain, but unintelligible clauses there are no legal consequences[172]. Furthermore, and what is even more important the question poses itself whether the lack of transparency can lead to unfairness of certain term and non binding-effect of the same.

b. Transposition of the contra proferentem *rule in the Participating State*

All countries went toward the transposition of Art. 5 2nd sentence of the Directive 93/13, but all except Albania have allowed for possible infringement of the Directive. Namely, what seems problematic is that the Directive requires not only an interpretation "in favour of the consumer" (Bosnia and Herzegovina, Macedonia) or "to the benefit of the party which did not draft the contract" (Serbia), or "more favourable" (Montenegro, Croatia), but very precisely the interpretation which is "most favourable" to the consumer. In this context only Albania stayed faithful as the Albanian Consumer Protection Act stipulates that "where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail"[173]. The awaited Serbian Draft Proposal also stipulates that in case of a doubt about the meaning of a term, the interpretation "most favourable" to the consumer shall prevail. The latter applies both for the standard and the individually negotiated terms. On the other side, in all countries that have firmly formulated in their law the requirement of "plain and intelligible" language, the *contra proferentem* rule seems to apply not only to clauses that have not been drafted in plain language ("clear"), but to unintelligible clauses as well ("comprehensible/ understandable to the consumer"), which represents an advantage in contrast to the Directive and can be seen as mean for achieving a higher level of protection of consumers.

c. Further legal consequences according to Participating State´s law

As already noted above, the Montenegrin legislator added one more element to the required transparency which corresponds to the general language requirement stipulated by the Consumer Protection Law. A breach of this additional element of transparency requirement is sanctioned as misdemeanour offence for which a pecuniary fine is prescribed to be imposed on a trader.

aa. Non-incorporation of terms which lack transparency

In five Participating States deriving common rules from the former SFRY Law on Obligations which are now enshrined in national versions of this same law (Croatia, Bosnia and Herzegovina, Macedonia, Montenegro and Serbia), a general observation can be made with respect to articles which regulate that general contract conditions must be made public in a usual manner, and that the latter are binding for a contracting party if it was acquainted or ought to have been acquainted with them at the time the contract was formed. Common conclusion is that in certain cases these provisions can serve for fulfilment of the requirement of transparency (e.g. Art. 295 (4) and (5) of the Croatian Civil Obligation Act, 142 (1) and (2) of the Law on obligations of Bosnia and Herzegovina).

bb. Assessment of transparency within a content review

There is no equivalent regulation on this subject matter in any of the Participating States.

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[172] A theoretical example given in Consumer Law Compendium on page 415 is „where, due to legal terminology or insufficient command of the language in which the terms are drafted, the clause is unintelligible to the consumer".

[173] Art. 28 (1) of the Consumer Protection Act, *OG RAl* No. 61/08.

cc. Unclear legal situations

The situation remains unclear about what are further sanctions if the contract terms do not meet the rules of transparency. In Macedonia the following observation has been put forward: The general rule of the Law on Obligations states that the contract is concluded upon coordination of wills of the parties. The question that could rise here is if there is an adequate formation of the will in cases when the consumer is not certain on the meaning of the contractual terms and as a result there is an error about the essential elements of the contract. In such instances the contract could be declared void. By Art. 55 of the Macedonian Law on Obligations, when the parties believe that there is consent while in fact there is misunderstanding on the nature of the contract or on the cause or the subject of the obligation, the contract does not exist.

3. Conclusions

Further efforts should be made to provide for adequate sanctioning of the lack of transparency in individual cases, where EU legislation should give more detailed guidelines on this matter.

VI. Collective proceedings according to Art. 7(2)

1. Overview

Art. 7(1) of Directive 93/13 requires member states to ensure adequate and effective means to prevent the continued use of unfair contracts terms, leaving the choice of means to the member states. In this manner, Art. 7(2) of Directive 93/13 stipulates that the means referred to in Art. 7 para. 1 shall include provisions whereby "persons or organizations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms."

Almost all Participating States in their respective pieces of legislation provided for collective court procedures. However, in Serbia, in the absence of transposition of Art. 7 of the Directive in the current legislation, this is a subject of the provisions of the Serbian Draft Proposal. In this manner, almost all Participating States allow injunctions against those who use or/and recommend unfair contract clauses.

2. Administrative control of unfair terms

a. The role of public bodies in the Participating States

A different approach to the role of public bodies exists among the Participating States. Bosnia and Herzegovina and Croatia transposed Art. 7 (2) of the Directive in a manner that there is a wide list of public bodies (and civil organizations) entitled to initiate proceedings before the court. In Bosnia[174] this would be: Ministry of foreign affairs and economic relations, Ombudsman for consumer protection, Council for consumer protection, Council for competition, the competent institutions of the entities and the District of Brčko, Office for competition and consumer protection of the Federation of Bosnia and Herzegovina and the Republic of Srpska, Consumer associations and Institutions for inspection[175]; while in Croa-

[174] Art. 98, in conjunction with Art. 121 of the Consumer Protection Act, OG BA No. 25/06.

[175] Art. 98 in conjunction with Art. 121 of the Consumer Protection Act, OG BA No. 25/06.

tia[176] these would be: Ministry of Economy, Labour and Entrepreneurship, Ministry of Health and Social Welfare, State Inspectorate, Agency for Electronic Media (in case of violation of Electronic Media Act), Ombudsman for Children (in case of violation of Consumer Protection Act provision on unfair business practice), „Consumer" – Croatian Union of the Consumer Protection Associations, and Union of the Consumer Protection Associations.[177] This is how also Serbian Draft Proposal intends to entitle consumer organizations or associations of consumer organizations registered under the consumer protection legislation, chambers of commerce, professions and crafts, and the line Ministry, to take action for injunction. In Albania, the responsible body for consumer protection and the consumer associations which are declared to be representative of the collective interests of consumers may initiate proceedings not only before the court, but also before the Consumer Protection Commission. In contrast to that, in Montenegro and Macedonia there are no possibilities for such public bodies to bring an action to the court, whereas other interested persons or consumer protection organizations are entitled to do so. However, for example in Montenegro, public bodies are in position to notify the consumer about the possibilities to protect own rights in court proceedings. This general scheme of power of public bodies[178] is more in line with the powers of the relevant ministries exercised through inspections (e.g. Market Inspection) to react on the complaint of any consumer in case of use of unfair terms by a trader. Finally, in certain areas there are explicit powers of public bodies, albeit ranging from their active role in pre-control of possible unfair terms[179], to one of more of advisory nature[180]. In Macedonia, even though generally one can state that there is no true administrative control over the unfair contract terms, action can be brought before the court, not only based on consumer legislation, also in accordance with Art. 95 of the Law on Obligations, where the public prosecutor is entitled too.

b. Investigatory powers of public bodies

In certain Participating States, the competence of the public bodies embraces also investigatory powers. Thus, for example, in case of Albania, the body responsible for market surveillance has investigatory power, while in Montenegro the competence at issue is mirrored

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[176] Art. 132 (2) Consumer Protection Act, OG RH No. 79/07, 125/07, 79/09, 89/09, 133/09.

[177] Regulation on determining of persons authorized to initiate the proceeding for the protection of the collective interests of consumers (OG RH No.124/09). Before the last amendments of the Consumer Protection Act (OG RH No.79/09) the following bodies had standing to apply for injunctions in court: Croatian Chamber of Economy, Croatian Insurance Bureau, Croatian Chamber of Craftsmen, Croatian Banking Association, Croatian Employers' Association and Croatian Union of the Consumer Protection Associations. At the proposal of the minister responsible for consumer protection issues, the Government of the Republic of Croatia adopted a new Ordinance and designated the entities qualified to seek injunctions for the protection of the collective interests of the consumers before the competent court. Until then the Regulation on determining the legal persons authorized to bring an action regarding prohibition of use of unfair contract terms in consumer contracts (OG RH No. 41/08) was applicable.

[178] Art. 124 of the Law on Consumer Protection, OG RMN No. 26/07.

[179] Law on Electronic Communications, Art. 102 para. 6 and 7 define unfair contract terms and prior obligation of operator to obtain approval of standard contracts by the Council of the Agency for Electronic Communications.

[180] In certain areas, such as banking, there is a means of monitoring which is matching the public body criteria. The banking Ombudsman acting as out-of-court dispute settlement body can propose settlement in a dispute and in addition give official recommendations to banks and other financial institutions how to improve conditions for doing business with the clients (e.g. consumers), even without initiated procedure. The latter, in case of Art. 92 para. 4 point 2 of the Law on Banks could also be applied to unfair contract terms.

through preventive measures of inspection bodies to receive and react on each complaint submitted by consumers in regard to unfair terms, and to eliminate the cause in accordance with the law. This includes the power to demand from the trader's submission of the relevant documents and information. In Bosnia and Herzegovina, a special legal provision[181] obliges the Ombudsman for consumer protection *inter alia* to investigate activities on the market directed towards the consumer, ex officio or on the basis of complaints, and to recommend the use of certain general terms in the agreements that are used in specific business sectors.

c. Negotiation and guidelines

In line with the powers of public bodies, one should also address the merit of negotiations and guidelines. This is most visible in Bosnia and Herzegovina where, as stated above, the Ombudsman for consumer protection is obliged to recommend the use of certain general terms in the agreements that are used in specific business sectors. In addition he issues guidelines or recommendations on specific activities or standard conditions which apply in special sectors of business, or are applied by specific economic operators, and are negotiated with representatives of trade associations on certain models of contracts that apply to specific business sectors. On the other side, while in Albania the Ministry of Economy, Trade and Energy has the competence to define a code of conduct or standard contracts in cooperation with relevant economic operators[182], in Montenegro, the ministry in charge for consumer protection under Art. 118 point 4 and 5 of the Consumer Protection Law is authorised to analyse and extend proposals with regard to consumer protection policy and consumer related issues, which could encompass unfair contract terms as well. In addition to that, in the Montenegrin case, when discussing negotiations, observance can be made toward out-of-court system which through Arbitration Board can lead to the consensual settlement of disputes between the trader and the consumer. In parallel, as mentioned above, in the area of financial services (banks, MFI`s and credit unions) under Art. 92 of the Law on Banks, the Banking Ombudsman acts as out-of-court dispute settlement body, and is empowered to propose a settlement in a dispute with clients (consumers) and is authorised to give official recommendations to the mentioned institutions on how to improve conditions when doing business with consumers. In both cases, unfair contract terms can be subject to consideration of these bodies.

d. Power of public bodies to issue orders

A power of the public bodies to issue orders is explicitly provided for in some of the Participating States. Thus, in Albania beside the court, the Consumer Protection Commission as a public body has the power to issue orders.[183] The Ombudsman for consumer protection of Bosnia and Herzegovina is according to Art. 101 Consumer Protection Act entitled to make decisions and take other measures in cases of consumer complaints or violations of good business practices. Furthermore, in accordance with Art. 103 of the same law he possesses the competence to issue instructions to stop conducting activities that are contrary to consumer legislation. In Serbia, while the present Code of Obligations and the Consumer Protection Act do not transpose Art. 7 of the Directive, the Serbian Draft Proposal regulates that where the line Ministry finds a repeated use or recommendation of a term considered to be unfair, it can implement a variety of actions, among which: to order the immediate discon-

[181] Art. 101 Consumer Protection Act, OG BA No. 25/06.

[182] Art 49 (2, dh) Consumer Protection Act, OG RAl No. 61/08.

[183] Art 55, Consumer Protection Act, OG RAl No. 61/08.

tinuation of the practice of using, recommending or supporting the use of this unfair term; order reimbursement of any advantages which result from such practice; prohibit any future repetition of the practice using, recommending or supporting the use or recommendation of this unfair term; direct this injunction to be published at the expense of the person who was ordered immediate discontinuation; impose a coercive penalty payment on the trader who does not comply with the injunction order. Apparently, in other states there are no such provisions. However, it is interesting to note that in Croatia pursuant to Art. 132a of the Consumer Protection Act, qualified entities before bringing an action for the protection of the consumers collective interests shall give the trader prior warning that an injunction will be sought, unless the contested infringement is brought to an end within the period of 14 days[184].

3. Judicial review of unfair terms

a. Types of actions in the Participating States

Almost all Participating States allow injunctions against those who use or/and recommend unfair contract clauses. In Serbia, in the absence of transposition of Art. 7 of the Directive in the current legislation, this can at least be encountered in the Serbian Draft Proposal, where at the request of any of the qualified bodies the court can: declare null and void any unfair term; order the trader to immediately discontinue the practice of using such unfair terms in dealings with the consumers; order reimbursement of any advantages which result from such practice, as the case may be; prohibit any future repetition of the practice of using or recommending this unfair term; direct this injunction to be published at the expense of the person who has used or recommended this unfair term; impose a coercive penalty payment on the trader who does not comply with the injunction order. It is worth saying that Draft Proposal also contains a rule on summary proceedings.

In Albania, the rules provided by the Civil Procedure Code apply, and consequently the court can order cessation or prohibition of the infringement and publication of the decision taken, in full or partially, in such form as deemed adequate and/or the publication of a corrective statement with a view to eliminating the continuing effects of the infringement. In contrast to this, in Macedonia, the only type of action that could be brought is one that requires from the court to declare the contract term null[185].

Bosnia and Herzegovina transposed Art. 7 (2) of the Directive in Art. 120, 122 (2) and (4) of the Consumer Protection Act, empowering the competent court to order the termination of any act or practice that is contrary to the provisions of this law or other regulations and which harms the common interests of consumers. Pursuant to Art. 122 (2) court has the jurisdiction to order the publication of the judgment, in whole or in part in the media, or to request a corrective announcement by the respondent, whereas Art. 122 (4) gives qualified bodies the possibility to initiate proceedings before the competent court jointly or individually against the traders of the same economic sector or their associations which use or recommend the same practice or setting of similar unfair conditions. In the same procedure, the competent institution or association has the authority to require compensation for damage caused to col-

[184] Before last amendment of the CPA (OG RH 79/09) the competent inspectors of the ministries and of the State Inspectorate were entitled to impose a fine in the amount of HRK 10000 to 100000 (cca. EUR 1370 to 13700) on a legal person which imposes contractual terms which are unfair within the meaning of a Consumer Protection Act provision. The last amendment (OG RH No. 79/09) abolished this possibility.

[185] Art. 83 of the Law on Consumer Protection, OG RMac No. 38/04.

lective interests of the consumer[186]. Compensation for damages may also be requested under the general provisions of civil law due to the Law on Obligations.

The Croatian Consumer Protection Act, in Chapter II of the Part V, regulates injunctions for the protection of the collective interests of consumers. Pursuant to Art. 131 (1) any qualified entity is entitled to initiate the proceedings for the protection of the collective interests of consumers against a person who acts contrary to provisions on unfair contract terms. The procedure can be sought against an individual trader or a group of traders from the same economic sector who act contrary to the mentioned provisions, against traders' chambers and interest associations promoting unlawful conduct or against the drafter of a code of traders conduct promoting the use of unfair business practices. It is important to note that before the final decision the court is empowered to pass a provisional measure ordering a cessation of a conduct or practice contrary to the legal provisions on unfair contract terms. In accordance with Art. 136, in its decision the court shall: 1) determine the infringement of consumers protection regulations and precisely define it; 2) order to a defendant to interrupt the activities contrary to consumer protection regulations; 3) and order to him to adopt, if possible, measures necessary for removal of detrimental consequences created due to his unlawful behaviour and prohibit him such or similar behaviour in the future. This decision binds the defendant to refrain in the future from the same of similar illegitimate practices in respect of all consumers (Art. 138). The court may order the defendant to publish the whole or the part of the decision at his expense if the publication may contribute to alleviate or completely exclude harmful consequences of the violation of consumer protection rights (Art. 136a). The described procedure does not prevent a person to whom the damage was caused to initiate before the competent court proceedings for compensation against the person who has caused damage through unlawful conduct, or to initiate proceedings before the competent court for the nullification or determination of the nullity of the contract concluded under the influence of unlawful conduct, or to initiate any other proceedings before the court to realize rights based on provisions of Consumer Protection Act or other laws (Art. 140). Moreover, a court decision passed in a proceeding involving an injunction sought for the protection of the collective interests of consumers shall be binding upon other courts in the proceeding which the consumer personally initiates in order to compensate the damage caused by the defendant's conduct. Thus, it is possible to obtain damages under the rules of general civil law.

Finally, Montenegro explicitly allows injunctions against persons who use unfair clauses[187]. This is, however, not so clearly stated in relation to those parties who merely "recommend" the use of unfair tem, which is in contrast to the Directive[188]. In this regard, the Consumer Protection Law provision quoted above makes possible interim injunctions where urgent action is required, and para. 2 of the Art. 114 stipulates that until the decision is made in the proceedings, the court may ban the use of contractual provisions for which it has been credibly shown that they are unfair. Finally, individual consumers, as well as consumer organizations, may submit a request for compensation of damage before a competent court, in accordance with the general rules[189].

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[186] Art. 123 of the Consumer Protection Act*, OG BA* No. 25/06.

[187] Art. 114 of the Law on Consumer Protection, OG RMN No. 26/07.

[188] Montenegro did not transpose the case when terms are recommended, albeit it could be argued that this situation could be interpreted in the same manner, since "association of undertakings", who usually act as proposers of such conduct, fall under the provision of the Law.

[189] Art. 112 of the Law on Consumer Protection, OG RMN No. 26/07.

b. Standing to apply for an injunction

Beside the public bodies given above, all Participating States provide for consumer organizations´ standing to apply for an injunction, whether individually as organizations (Macedonia, Montenegro), through their associations (Albania, Bosnia and Herzegovina, Croatia) or both organizations and associations (Serbia; under the Draft Proposal both "organizations or their associations"). The Serbian Draft Proposal plans to extend this right to trade and professional organizations ("chambers of commerce, professions and crafts"). Finally, in Montenegro standing to apply for an injunction is given also to the individual consumer; the latter can submit a complaint with a competent court against an individual trader, two or more traders involved in the same economic sector, or against traders' associations, in order to abate the provisions of the contract referring to unfair terms or "black listed" terms.

c. Effects of collective actions: Relativity of res judicata

In the majority of Participating States the general principle and practical implication is that the decision is binding only on the trader who is party to the case and has no direct effect on other traders who use identical terms. However, some national laws (Bosnia and Herzegovina, Croatia, Montenegro, Macedonia, Serbian Draft Proposal), allow initiating proceedings before the competent court against the "traders of the same economic sector or their associations" and thus achieving a judgment with a binding effect for more traders. In the same manner in those states where the national law so stipulates (Bosnia and Herzegovina and Croatia) an additional improvement can be achieved through publication of the judgment, in whole or in part in the media, or by requesting a corrective announcement by the respondent. It is interesting to observe also that apart from the general rule that a decision is binding on the party of the proceedings, the Montenegrin Consumer Protection Law introduces a novelty in its Art. 114 para. 3 stipulating that "a pre-formulated provision of the consumer's contract may be disputed before the court in respect of its legal effect in the respective case as well as in respect of similar provisions of future contracts." It is worth noticing that this Montenegrin provision also takes into account possible circumventions of judgements by traders who may use a different wording in their contract terms, in so far as the provision embraces "similar provisions" of future contracts as well.

4. Conclusions

The general conclusion can be made that all Participating States to a certain extent invested in transposition of the Unfair Contract Terms Directive. However, since the period of implementation and enforcement in practice of such national implementing provisions has been rather short, it may be too early yet for a deeper elaboration of the practical implications. Also, the relevant institutions although equipped with the necessary powers for protecting the consumer interests are still young and also require more time for development, before they can be assessed. In case of Serbia, should the Draft Proposal of the Ministry of Trade and Services enter the parliamentary proceedings in the form in which it stands at this point (June 2010), it seems that the abovementioned requirements would be satisfied.

VII. Practical impact of the Unfair Contract Terms Directive

1. Impact on the level of consumer protection

All Participating States even before transposition of the Directive had their national rules on unfair terms enshrined in their national civil codes or general trade laws. However,

it can be stated that the transposition of the Directive 93/13 raised the legislative level of consumer protection. This holds true at least in theory, as there is no substantive case law that would lead us to a conclusion other than that the impact of consumer legislation on unfair terms in practice is weak.[190] It might also be argued that many traders do not comply with the consumer legislation provision on unfair terms. For example, many credit institution and insurance companies use general contract terms which contain prohibited clauses. This also demonstrates consumers' ignorance and a lack of pro–active enforcement.

2. Additional burdens or costs for traders

As has been stated above on the general importance, the Directive 93/13 still has to prove its significance and practical implications, in terms of whether these will produce additional burdens on traders on the cost side of their business. As the general observation is low pro–active enforcement from the part of consumers themselves, it seems that there are no grounds for identification of additional burdens to traders.

3. Particular difficulties with transposing the Unfair Contract Terms Directive

No particular difficulty was observed when transposing Directive 93/13.

[190] However, in Croatia there are numerous rulings of national courts regarding the provisions of the Civil Obligations Act on general contract terms and conditions.

C. DISTANCE SELLING DIRECTIVE (97/7)

Coordinators: *Nada Dollani* and *Neda Zdraveva/Jadranka Dabović-Anastasovska/Nenad Gavrilović*

I. Participating States´ legislation prior to the adoption of the Distance Selling Directive

Prior to the transposition of the Directive 97/7, consumer protection in the field of Distance Selling was rather insignificant. Before the adoption of the respective first acts on consumer protection, none of the participating states' legislation contained any express provision and nor had they any comparable protection in the field of Distance Selling, except Croatia that regulated distance selling by Art. 16 of the old Trade Act[191] as a contract between the trader and the consumer, whereby one or more means of distance communication are used until the conclusion of contract.

Efforts to transpose the Distance Selling Directive started when the first acts on consumer protection came into force. While in Croatia and Bosnia, distance contracts were regulated in their entirety by Consumer Protection Act from 2003[192] and Consumer Protection Act from 2002[193] respectively, the Albanian Consumer Protection Act from 2003[194] and the Macedonian Consumer Protection Law from 2000[195] achieved only partial implementation and not all aspects of Distance Selling were covered by them. On the other hand, Serbia and Montenegro, despite the adoption of the Federal Law on Consumer Protection from 2002[196], hardly made any efforts to transpose the Distance Selling Directive; and instead the general rules of contract law (namely, the Code of Obligations) applied to the distance sales and services contracts.

A much better harmonization was achieved by the new acts on consumer protection adopted by Participating States. Albania has made almost a full transposition of the Distance Selling Directive by Consumer Protection Act of 2008[197], complemented by implementation rules. Bosnia has regulated the Distance Contracts by Consumer Protection Act of 2006[198], which retained many similarities to the earlier version, with minor modifications. By adoption of the new Consumer Protection Act from 2007[199] Croatia fully regulates this subject matter. Macedonia with the adoption of new Consumer Protection Law from 2004[200] raised

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[191] Trade Act, *OG RH* No. 11/96, 30/99, 75/99, 76/99, 62/01, 109/01

[192] Consumer Protection Act - Chapter VII of Part II, Art. 35 – 55; *OG RH* No. 96/03.

[193] Consumer Protection Act, *OG BA* No. 17/02.

[194] Consumer Protection Act, *OG RAl* No. 9135/03

[195] Law on Consumer Protection, *OG RMac* No. 63/2000.

[196] Federal Law on Consumer Protection, *OG FRY* No. 37/02. It dedicated three paragraphs to distance (and doorstep) selling situation – seven days to renounce the effect of undertaking, without costs and justification; time limit for renunciation for goods was from the day of receiving them, and for services from the day of concluding the contract, and finally, the consumer was obliged to pay the costs of returning goods.

[197] Part VI, Chapter II (Art. 36-39) of the Consumer Protection Act, *OG RAl* No. 61/08, and Decision of Council of Ministers "On Distance Contracts", *OG RAl* No. 64/2009.

[198] Art. 42-51 of the Consumer Protection Act, *OG BA* No. 25/06.

[199] Chapter VII of Part II (Art. 36 – 55 of the Consumer Protection Act, *OG RH* No. 79/07, 125/07, 79/09, 89/09, 133/09

[200] Law on Consumer Protection, *OG RMac* No. 38/04.

the harmonization of internal legislation with the Distance Selling Directive on a much higher level. The same can be said of the Montenegrin Consumer Protection Law from 2007.[201] In addition, the new Law on Internal Trade of Montenegro also contains a few provisions that relate to distance selling[202]. On the other hand, Serbia, in its Consumer Protection Act of 2005[203] provides a very basic attempt to transpose the Distance Selling Directive, which actually boils down to restating the rules of the Serbian Law of Obligations[204] (LoO) relating to the legal consequences of lack of conformity, and asserting that these rules also apply to the cases of catalogue sale and trial purchase. However, the Draft of the Proposal for the new Act on Consumer Protection (Draft Proposal)[205] intends to transpose in its Chapter III the Distance Selling Directive.

II. Scope of application

1. Consumer

In Art. 2(2) of the Directive, a consumer is defined as a "natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession".

a. Legislative techniques

All participating states' legislators have chosen to adopt a general definition of the consumer. All of them have a separate legal act on consumer protection, and the definition of the consumer is provided right in the beginning of the respective acts. In all Participating States, the notion of consumer is provided for the purpose of the whole act. None of the states has transposed the definition of consumer just for the purposes of the Distance Contracts, as the provisions of the Distance Selling Directive are transposed within the respective Consumer Protection Acts under separate chapters; therefore, it was not deemed necessary to give different definitions of consumer relating to different Directives that are transposed by that single act.

New developments may be expected in a couple of countries. Namely, under the Serbian Draft Proposal the notion of consumer is expanded for the purposes of the chapter dealing with package travel and time-sharing. And the new Draft Law of Obligation in Bosnia and Herzegovina provides a new definition for the notion of consumer, which is on the one hand

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[201] Law on Consumer Protection, *OG RMN* No. 26/07, which contains a separate chapter, however, still with certain variations and/or extension of the scope of the Directive.

[202] Law on Internal Trade (*OG RMN* No. 49/08) which in its Art 17 (2) regulates "trade out of business premises", stipulating that distance selling can be performed either directly by the trader or via the persons to whom trader issues authorization for selling goods to consumers.

[203] Consumer Protection Act, *OG RS* No. 79/05. Chapter VIII, under the heading *Distance purchase*, includes Art. 24 on catalogue sale, Art. 25 on sale by sample or model, Art. 26 on trial purchase, Art. 27 on offer made via means of electronic communication, and Art. 28 on inertia selling. These rules may be rather understood as an attempt to restate the existing provisions of the LoO (for whatever reasons), than as an attempt to transpose the Distance Selling Directive. The fact that these Articles touch upon the issues usually connected to distance selling, does by no means imply that they actually transpose the Distance Selling Directive into Serbian law.

[204] Law of Obligations, OG SFRY No. 29/78, 39/85, 45/89 and 57/89, OG FRY No. 31/93, 22/99, 35/99, 44/99.

[205] Draft of the Proposal for the new Act on Consumer Protection (Draft Proposal), prepared by the Ministry of Trade and Services of Republic of Serbia.

wider than the actual notion, but on the other hand limited in scope to the "conclusion of legal acts"[206].

b. Content of the definitions

In the legal definition of the consumer de lege lata, a number of variations are noticeable. Compared to the definition of the Directive 97/7, a broader definition is given by the Albanian Consumer Protection Act, which in its Art. 3 (6) provides that "Consumer is every person, who buys or uses goods or services for the fulfilment of personal needs, for purposes that are not related to trade activity or exercise of profession. In the meaning of this act, also not-for-profit organisations are considered as consumer"[207]. By this, the notion of consumer is extended also to not-for-profit organisations. In Bosnia and Herzegovina, legal persons are entirely excluded by Art. 1 (3) of the Consumer Protection Act, according to which a "consumer is any natural person who purchases, acquires or uses products or services for his personal needs and the needs of his household". By limiting the scope to the acting of a consumer to the purchase, acquisition or use of a service or product, and reducing it additionally to the purpose of his "personal needs and the needs of his household", as conditions which must be fulfilled cumulatively, the scope of definition is very restricted[208]. A definition which is closer to that of the Directive 97/7 is given by the Croatian Consumer Protection Act, which in its Art. 3 (1) 4th indent, defines the consumer as "any natural person who concludes the contract or acts on the market for purposes that do not fall within the sphere of his or her business or professional activity". A quite narrow definition is provided by Art. 4 (1) of the Macedonian Law on Consumer Protection, which states that "a consumer is any natural person who purchases products or uses services for direct personal consumption, for purposes that are not intended for carrying out trade, business activities or profession". A to some extent wider definition is regulated in Art. 1, 8th indent of the Montenegrin Consumer Protection Law, which defines the consumer as a natural person who buys, orders, accepts, uses goods or services, including public services, for non-business, namely non-professional purposes, or to whom the offer for a product or service is targeted. A very narrow definition as compared to the definition of the Directive 97/7 is given by the Serbian Consumer Protection Act, which in Art. 2, para. 1-2, defines the consumer "as any natural person who purchases products or services for their own needs or for the needs of their household". On the one hand, this definition is too narrow ("purchase for the consumers' needs or the needs of their households). On the other hand, it is also too broad, since the scope is extended also to a company, enterprise, other legal entity or entrepreneur, when they are purchasing products or services for their own needs. A much better definition of the consumer, which is compatible with the Directive 97/7 is provided under Chapter I of the Serbian Draft Proposal, where the consumer is defined as any natural person who is acting *mainly* for purposes which are outside his trade, business, craft or profession.

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[206] Art. 15 of the Draft Law of Obligations of Bosnia and Herzegovina from 2010 defines the consumer as "every subject who concludes a legal act for purposes which are outside his trade or profession". This on principle wide definition (because it includes legal persons) excludes pre-contractual situations, since it refers only to the "conclusion of a legal act".

[207] This is a word by word translation of the author from the Albanian Consumer Protection Act. The official translation reads: "Consumer" is any natural person, who is acting for purposes not related to trade, business or exercise of its profession. In the meaning of this law, the not-for-profitable organizations are also considered as consumers." See Art. 3(6) of the Consumer Protection Act, *OG RAl* No. 61/08

[208] See supra fn. 17.

aa. Inclusion of certain legal persons

As in the Directive 97/7, the Croatian, Macedonian, and Montenegrin legislation on Distance Selling applies only to natural persons. Also, in the Bosnian Consumer Protection Act, the definition of the consumer is limited to natural persons. However, with the adoption of the Bosnian Draft Law of Obligation 2010, the definition of consumer in the DLoO would include legal persons as well. In case of a collision of these two laws, according to Art. 1(2) of the Bosnian Consumer Protection Act, the law which provides a higher level of protection would apply.[209] In Serbia, the definition of consumer comprises not only any natural person, but is extended to a company, enterprise, other legal entity or entrepreneur, when they are purchasing products or services for their own needs. Albania is the sole country where the law *expressis verbis* includes some (not all) legal persons. Namely, according to Art. 3 (6) second sentence of Albanian Consumer Protection Act, also not-for-profit organisations are considered as consumers.

Overview: Inclusion of legal persons

Limitation to natural persons	BA, CRO, MAC, MN
Inclusion of certain legal persons	AL, SER

bb. Clarification of 'mixed' purpose cases

The definition of consumer in Art. 2(2) of the Directive 97/7 does not clarify expressly whether a person who concludes a contract intended for a 'mixed' purpose (e.g. a purpose which is in part within and in part outside his trade or profession, for example, the purchase of a car for both private and professional use) falls under the notion of consumer. None of the participating states' legislation contains any provision on clarification of the mixed purpose cases. Regarding the variation in wording of definition of consumer, the following can be noticed.

In the Croatian Consumer Protection Act there is no express clarification whether a person concluding a contract for a 'mixed' purpose is a consumer. Also, until now there is no judicial practice which could be helpful in this matter. However, in accordance with the ECJ jurisprudence[210] the Croatian legal theory considers that the assessment of whether a party is a consumer or not should be given on the basis of all facts known at the time of the conclusion of the contract. Thus, if a natural person at the time of contract conclusion acts for purposes that fall within the sphere of his or her business or professional activity, this person shall not be considered consumer.[211]

The Bosnian Consumer Protection Act, instead of defining the consumer as a natural person "acting" for certain purposes as in the Directive 97/7, limits itself to the purchase, ac-

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[209] Consequently, legal persons could gain the consumer protection provided by the Bosnian Draft Law of Obligation 2010. This would be contrary to the ECJ jurisprudence, for example ECJ 14 March 1991 C-361/89 *Patrice di Pinto* [1991] ECR I-01189; See also Z. Meškić, „*Harmonizacija Evropskog potrošačkog prava – Zelena knjiga 2007. godine i Nacrt Zajedničkog referentnog okvira*", Zbornik radova Pravnog fakulteta u Splitu 3/2009, p.559; N. Misita, *Osnove prava zaštite potrošača Evropske zajednice*, Pravni centar, Fond otvoreno društvo Bosne i Hercegovine, Sarajevo 1997.

[210] ECJ judgment of 3. July 1997, C–269/95 – *Francesco Benincasa/Dentalkit Srl* [1997], ECR I–3767.

[211] M. Dika, Z. Pogarčić (ed.), *Obveze trgovca u sustavu zaštite potrošača* (Trader Obligation in the System of Consumer Protection), Narodne novine, Zagreb 2003.

quisition or use of a product or service by a natural person. Even of greater importance is the reduction to "personal needs and the needs of his household", which due to the conjunction "and" should be understood cumulatively, while the negatively worded definition in the Directive includes every purpose which is not related to consumers trade, business or profession. Therefore, according to the Bosnian Consumer Protection Act, the "mixed purpose" cases should be rather rare so that there is still no national jurisdiction[212] on this matter. "Mixed purpose" cases would rather be possible within the sphere of the Bosnian Draft Law of Obligation 2010, which defines the consumer with almost the exact wording as the Directive 97/7. Nevertheless, the Bosnian Draft Law of Obligation 2010 also does not contain any provision on the clarification of mixed purpose cases.

In Macedonia and Montenegro a natural person is considered a consumer only if he or she has concluded the contract for a purely private purposes. The same situation exists under Serbian legislation. In these countries, there are no provisions on the mixed purpose cases.

Likewise, in the Albanian Consumer Protection Act, there is no clear provision which can cover the mixed purpose transactions. Under Albanian law, the consumer can act for the fulfilment of personal needs, for purposes not related to trade activity or exercise of profession. Also, not-organizations are considered consumers when they act for the above mentioned purposes. The "fulfilment of personal needs" purpose and the "purpose outside the trade activity or exercise of profession" are divided by a comma and do not have any conjunctive to be linked with each other. So they can be understood in the sense that either the one or the other purpose should be pursued when concluding a contract. This situation is not clarified either by the court jurisprudence or theory in this field.

Overview: 'mixed' purpose transactions as consumer contract

Purely private purpose	MAC, MN
Also 'mixed' purpose, preponderant purpose prevails	
Also 'mixed' purpose – unclear whether private purpose must preponderate	
No clear rule on 'mixed' purpose transactions discernible	AL, CRO, BA, SER

cc. Extension to certain professionals

Albanian legislation extends the definition of consumer also to not-for-profit organisations in the meaning of the Consumer Protection Act, thus offering the broadest protection compared to the other participating states. The Bosnian Consumer Protection Act narrows the definition of the consumer in comparison to the Directive 97/7 and contains no extensions to certain professionals. In Croatia, although Art. 3 (1) 4th indent of the Consumer Protection Act does not protect professionals as consumers, exceptions can be found in some *lex specialissima*.[213] In Macedonia, there are not extensions of application to certain professionals.

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[212] The latest clarification regarding the consumer definition in the EU Law brings the ECJ judgment *Gruber*; ECJ judgment of 20 January 2005, C-464/01 – *Johann Gruber v Bay Wa AG* [2005] ECR I-00439; See for further information Z. Meškić, „*Harmonizacija Evropskog potrošačkog prava – Zelena knjiga 2007. godine i Nacrt Zajedničkog referentnog okvira*", Zbornik radova Pravnog fakulteta u Splitu 3/2009, p.559.

[213] For instance in Art. 304 of the Croatian Credit Institutions Act before the last amendment published in *OG RH* No. 153/09. This provision defined consumer as a natural person, who is client of a credit institution. According to this definition a consumer was also a natural person acting within his commercial activity.

In Montenegro, Art. 2 (8) of the Consumer Protection Law refers only to natural persons and thus does not provide protection of legal persons. This was also the approach and intention of the legislator when regulating the subject matter (however, the expression "…or to whom the offer for a product or service is targeted", leaves some room for interpretation). Other variations of extension (e.g. legal persons, employees) have not been taken under consideration. In Serbia, Art. 2, para. 1-2 of the Consumer Protection Act of 2005 defines the consumer as any natural person. As the function of this provision is limited only to purchases for "their own needs or for the needs of their household", the consumer can also be a company, enterprise, other legal entity or entrepreneur, when they are purchasing products or services for their own needs. However, under Chapter I of the Serbian Draft Proposal of Consumer Protection Act, the consumer is defined as any natural person who is acting *mainly* for purposes which are outside his trade, business, craft or profession, which might be interpreted as extending the definition also to professionals, because it uses the word "mainly", and does not state "only".

Overview: extension to certain professionals

Extension to certain professionals	AL: not-for-profit organisations. SER: other legal persons MN: to whom the offer for a product or service is targeted.
Clarification that employees are consumers	-

dd. Examples for variations in wording

All participation states' legislation differs in wording while defining the consumer. The Croatian definition is the most closely related to the wording of the Directive 97/7, in so far as it comprises "any natural person who concludes the contract or acts on the market for purposes that do not fall within the sphere of his or her business or professional activity". On the other hand, according to Montenegrin legislation, the consumer is a natural person who buys, orders, accepts, uses goods or services, including public services, for non-business, namely non-professional purposes, or to whom the offer for a product or service is targeted. The Macedonian definition of consumer denominates any natural person who purchases products or uses services for direct personal consumption, for purposes that are not intended for carrying out trade, business activities or profession. The Albanian definition is broader as regards the category of persons included, but not very clear on the actions and purposes, as it comprises every person, who buys or uses goods or services for the fulfilment of personal needs, for purposes that are not related to trade activity or exercise of profession. In the meaning of this act, also a not-for-profit organisation is considered as consumer. Although different in wording, such definitions seem to transpose the Directive properly, or can be interpreted in accordance with the Directive.

Only Bosnia Herzegovina and Serbia have quite narrow definitions which are quite similar to each other. The Bosnian legislator has narrowed the definition of consumer to any natural person who purchases, acquires or uses products or services for his personal needs and the needs of his household. The Serbian definition is a little broader as it includes also legal persons. According to Serbian legislation, consumer is any natural person who purchases products or services for their own needs or for the needs of their household. Consumer is also a company, enterprise, other legal entity or entrepreneur, when they are purchasing prod-

ucts or services for their own needs. However, both Bosnia and Serbia have a different wording in their draft laws[214].

2. Supplier

Under the terms of the Directive 97/7, the other party to the distance contract is called the supplier, who is defined as "any natural or legal person who, in contracts covered by this Directive, is acting in his commercial or professional capacity". The wording of this definition slightly varies from the respective definitions of the notion of trader which is used in the other consumer protection directives. The main purpose of the definition of the supplier is simply to clarify that the Directive is only applicable for B2C situations, but not in C2C relations.

All participating states' legislations have transposed the notion of trader instead of the supplier for the entire scope and all purposes of their consumer protections acts. The Albanian Consumer Protection Act contains the broader definition which includes also the persons who act in the name or on behalf of the trader. According to Art. 3 (14) of the Albanian Consumer Protection Act, "Trader" means any natural or legal person who is acting for purposes relating to his economic activity, trade, business, craft or profession and anyone acting in the name or on behalf of a trader. A different definition is given by the Bosnian Consumer Protection Act, which in its Art. 1 (5) defines the trader as "any person who is, directly or as an intermediator, selling products or providing services to the consumer". Because of the restriction to "selling products and providing services", the personal field of application of this provision is quite narrow.[215] A broader definition, close to the definition given by Albanian legislation, is provided by the Croatian Consumer Protection Act, which in its Art. 3 (1) 8th indent defines "trader" as "any natural or legal person who concludes the contract or acts on the market within its business or professional activity". The latter include also legal persons of public law and not-for–profit organizations. The Macedonian Law on Consumer Protection, in Art. 4 (1) 2nd indent, defines the trader as any legal or natural person who, in the course of carrying out his activity, directly satisfies the needs of the citizens for products and services. At the same time, it should be taken into consideration that the activity of trading is regulated by the law on Trade[216]. Since the definition does not include agents, the general rules on agency regulated in the Macedonian Law on Obligations[217] are applied. Art. 2, 11th indent of the Montenegrin Consumer Protection Law defines the "trader" as a person who sells goods or provides services to consumers. With regard to the Directive´s expansion of the definition also to those who are acting in the name or on behalf of a trader, the Montenegrin Consumer Protection Law remains silent.[218] Under Art. 2 (3) of the Serbian Consumer Pro-

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[214] See *supra.*, under the heading "b. Content of the definitions".

[215] Art. 14 of the Draft Law of Obligations of Bosnia and Herzegovina from 2010 refers to the "business person", defining him as a "natural or a legal subject who is during the conclusion of the legal act acting in the performance of its trade or profession". Being an unsuccessful formulation in Bosnian language as well, the expression "acting in the performance" also excludes pre-contractual situations, contrary to consumer protection directives.

[216] Law on Trade, OG RMac No. 16/04.

[217] Law of Obligations, *OG RMac* No. 18/2001.

[218] Nevertheless, Art. 17 (2) of the Law on Internal Trade (*OG RMN* No. 49/08) which regulates "trade out of business premises", stipulates that distance selling can be performed either directly by the trader or via the persons to whom the trader issues authorization for selling goods to consumers. Art. 17 (3) further stipulates that sale out of business premises can be conducted by traders that are registered for this type of sale, and the Law obligates in addition the Montenegrin Ministry of Economy to adopt a bylaw on the type of goods and manner of conducting doorstep type of sale.

tection Act, the trader is a company, enterprise, other legal entity or entrepreneur, when they are selling products or providing services to the consumer.[219] The definition in the Draft Serbian Consumer Protection Act is very similar to the Albanian definition of trader.

3. Contracts falling within the scope of the Directive

a. Definition of "distance contract"

According to Art. 2 (1) of the Directive, the term 'distance contract` means any contract concerning goods or services, under an organised distance sales or service-provision scheme run by the supplier, that, for the purpose of the contract, makes exclusive use of one or more means of distance communication up to and including the moment at which the contract is concluded.

All participating states' legislations, except Serbia, have verbatim or almost verbatim, transposed this definition. The Albanian Consumer Protection Act, in its Art. 36 (1) provides that "Distance contract means any contract concerning goods or services concluded between a supplier and a consumer under an organized distance sales or service-provision scheme run by the supplier, who, for the purpose of the contract, m akes exclusive use of one or more means of distance communication up to and including the moment at which the contract is concluded". The Bosnian Consumer Protection Act also gives a definition of distance contracts equivalent to that of the Directive, determining that: "A distance contract is any contract that relates to the sale of products or services, organized by the trader through means of distance selling, and concluded between the trader and consumer. One or more means of distance selling is used until the final conclusion of the contract." The Croatian Consumer Protection Act in its Art. 36 defines that distance contract means "any contract concerning goods or services concluded between a trader and a consumer under an organised distance sales or service–provision scheme run by the trader, who, for the purpose of that contract, makes exclusive use of one or more means of distance communication". Thus, the Croatian legislator transposed the definition from Art. 2 (1) of the Directive 97/7 almost verbatim. However, the part of the definition which prescribes that the contract is concluded by the use of one or more means of distance communication "up to and including the moment at which the contract is concluded", was not transposed. The same situation can be found under the Macedonian Law on Consumer Protection, which defines in its Art. 84 that "Distance contract is a contract concluded between the trader and the consumer in the scope of organised sale of products or organised provision of services by the trader who, at the time of conclusion of the contract, uses exclusively one or more means of distant communication". The Montenegrin Consumer Protection Law in its Art. 37 uses very similar terms which have the same meaning as the definition in the Directive 97/7: "Distance contract shall mean the contract negotiated and concluded through the means of distance communication within the sales network set up by the trader". Differently from this, in the Serbian Consumer Protection Act of 2005 there are no corresponding provisions. But under the Serbian Draft Proposal, *distance contract* means any sales or service contract where the trader, for the conclusion of the contract, makes *predominant* use of one or more means of distance communication.

[219] The Serbian Draft Proposal defines the trader as any natural or legal person who, in contracts covered by this Law, acts for purposes relating to his trade, business, craft or profession, and anyone acting in the name of or on behalf of a trader.

b. Definition of "means of distance communication"

Art. 2(4), sent. 1 of the Directive 97/7 defines "means of distance communication", being one of the elements of the distance contract, as "any means which, without the simultaneous physical presence of the supplier and the consumer, may be used for the conclusion of a contract between those parties".

Art. 2(4), sent. 2 of the Directive refers to Annex I which contains a rather detailed indicative list of examples of means of distance communication. Most of the participating states have included such a list into their Consumer Protections Act.

Most of them have transposed this definition literally or with only some deviations in the wording. An example for literal transposition is the Albanian Consumer Protection Act, whose Art. 36 (2) reads: "Means of distance communication are all means which, without the simultaneous physical presence of the supplier and the consumer, may be used for the conclusion of a contract". The Bosnian Consumer Protection Act in its Art. 42 (2) defines means of distance communication as any means that, without actual physical presence of the trader and the consumer, can be used to conclude a contract between those parties. The Croatian Consumer Protection Act in its Art. 37 (1) defines means of distance communication as any means which, without the simultaneous physical presence of the trader and the consumer at the same place, may be used for the conclusion of a contract between those parties. Macedonia transposed the definition with only some variations in the wording. Art. 85 (1) of Macedonian Law on Consumer Protection stipulates the following: "Means of distant communication are those means that are suitable for concluding contracts between the trader and the consumer without simultaneous physical presence of the trader and the consumer". Similarly, Montenegro transposed definition with only some variations in the wording. Art. 2 (19) of Montenegrin Consumer Protection Law reads as follows: "Means of Distance Communication shall mean any means of communication that enable conclusion of contracts between the consumer and the trader, without their immediate physical presence". Only in the Serbian legislation there are no corresponding provisions. But under the Serbian Draft Proposal, *means of distance communication* means any means which, without the simultaneous physical presence of the trader and the consumer, may be used for the conclusion of a contract between those parties.

All participating states' legislations, except Serbia, have included a list similar to that in Annex I in their Consumer Protection Acts. Such lists are only indicative and not exhaustive. The Albanian Consumer Protection Act in Art. 36 (2) includes: "standard letter, printed material, printed material with order form, catalogue, electronic mail, electronic trade, fax, telephone and television". Another list of means of communication is provided by bylaw[220], which includes the remaining means of communication from Annex I and provides for an extension to internet and computer. This also remains a non exhaustive list, as it includes any means which might be used to conclude a distance selling contract. The indicative list of examples of means of distance communication as defined in Annex I of Directive 97/7 was taken over in Art 37 (2) of the Croatian Consumer Protection Act and improved by adding "Internet" to the list. Art. 85 (2) of the Macedonian Law on Consumer Protection provides that means of communications shall include, among others: addressed or non-addressed printed materials, standardised letters, printed advertisement with an order form, catalogue, telephone with person or automatic machine intervention, radio, videophone, videotext, fax, television, e-mail. Most of the means presented in Annex I of the Directive are included in

[220] Albanian Decision of Council of Ministers No. 64 of 21.01.2009, *OG RAl* No. 8/09.

the Croatian definition; for the others it could be understood that they fall into some broader category, or it could be understood that the list is only descriptive and non exhaustive. In Montenegro, although most of the means listed in Annex I of the Directive are mentioned in the Consumer Protection Law, not all of them are transposed *ad literam*. Some of them (e.g. telephone with human voice; telephone without human voice; videophone; videotext; undressed written material; addressed written material, written forms) can be found under the terms of "...telephone, written materials, television...." expanded to different variations of the same by the add-on " and similar means". The Serbian Consumer Protection Act of 2005 does not include such a list, but under the Serbian Draft Proposal are included means of distance communication such as: addressed or unaddressed printed matter, standard letter, press advertising with order form, catalogue, telephone, including telephone without human intervention (automatic calling machine, audiotext), radio, videophone (telephone with screen), videotext (microcomputer and television screen) with keyboard or touch screen, electronic mail, facsimile machine (fax), television (teleshopping), internet.

c. Definition of "operator of a means of communication"

Art. 2(5) of Directive 97/7 defines the 'operator of a means of communication' as "any public or private natural or legal person whose trade, business or profession involves making one or more means of distance communication available to suppliers". It should be noted that the term 'operator of a means of communication' is rather self-explanatory and is used in the Directive only in two cases, namely in Art. 5(2) and in Art. 11(3)(b), the first being a small exception from a general rule, the second containing a rather general task assigned to the member states which can be implemented in many ways. Therefore, it is easily possible to transpose these two Articles of the Directive without an explicit definition of the term 'operator of a means of communication' or even without using it at all.

Only Croatia and Macedonia have transposed into their Consumer Protection Acts the definition of "operator of a means of communication". Art. 38 (1) of Croatian Consumer Protection Act defines an operator of a means of distance communication as "any person whose trade, business or profession involves making one or more means of distance communication available to traders". In contrast to Art. 2 (5) of Directive 97/7, this provision does not distinguish between natural and legal or public and private persons since the broad term 'person' encompasses all. According to Art. 86 of the Macedonian Law on Consumer Protection, operator of a means of distant communication is any public or private natural or legal person whose job, profession and activity offers the provider the use of one or more means of distant communication. This definition, although not exact in wording, at least in its scope and meaning provides for grounds compatible with the Directive 97/7. There is no definition of the term "operator of a means of communication" in the Montenegrin Consumer Protection Law. Nevertheless, the notion is used by this Law in same context[221] as stipulated by Art. 5 (2) of the Directive. This does not infringe the Directive 97/7, because one single use of the notion does not give rise to the need of a legal definition of "operator of a means of communication". However, separate laws which regulate different policy areas do contain pertinent definitions of the *operators* in respective fields (e.g. provider of information society services[222], operators of public electronic communication networks[223]). Albania has transposed this def-

[221] Art. 40 paragraph 2 of the Law on Consumer Protection, *OG RMN* No. 26/07.

[222] Law on Electronic Trade, *OG RMN* No. 84/04.

[223] Law on Electronic Communications, *OG RMN* No. 50/08.

inition by copy and paste technique, identical to the wording of the Directive 97/7, by sublegal act[224]. Bosnia and Serbia have not transposed this definition at all.

d. Exemptions provided by Art. 3 of the Distance Selling Directive

aa. Contracts concluded by means of automatic vending machines or automated commercial premises

Exemption (Art. 3(1) 2nd indent)	Participating States
As in the Directive	AL, BA
Variations	CRO, MN, MAC
Not transposed	SER

The exemption concerning contracts concluded by means of automatic vending machines or automated commercial premises has been adopted by Albania[225] and Bosnia[226]. Also, the Serbian Draft Proposal has transposed this exemption as in the Directive. Croatia[227], Macedonia[228] and Montenegro[229] have transposed the exemption concerning contracts concluded by means of automatic vending machines, but did not implement the exemption for "automated commercial premises".

bb. Contracts concluded with telecommunications operators through the use of public payphones, Art. 3(1) 3rd indent

Exemption (Art. 3(1) 3rd indent)	Participating States
As in the Directive	AL, CRO, MAC, MN
Variations	
Not transposed	BA, SER

This exemption is transposed by the majority of participating states, like Albania[230], Croatia[231], Macedonia[232] and Montenegro[233], while Bosnia and Serbia have not done so. However, the Serbian Draft Proposal transposes it.

cc. Contracts concluded for the construction and sale of immovable property, Art. 3(1) 4th indent

Exemption (Art. 3(1) 4th indent)	Participating States
As in the Directive	AL, CRO, MAC
Variations	BA, MN
Not transposed	SER

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[224] Albanian Decision of Council of Ministers No. 64 of 21.01.2009, *OG RAl* No. 8/09.

[225] Art. 36, 3 (a) of Consumer Protection Act, *OG RAl* No. 61/08.

[226] Art. 43 of Consumer Protection Act, *OG BA* No. 17/02.

[227] Art. 39 3rd indent of the Consumer Protection Act, *OG RH* No. 79/07, 125/07, 79/09, 89/09, 133/09.

[228] Art. 87(1), 2nd indent, Law on Consumer Protection, *OG RMac,* No. 38/04, 77/2007 and 103/2008.

[229] Art. 47 (1) (1) of Law on Consumer Protection, *OG RMN* No. 26/07.

[230] Art. 36, 3 (b) of Consumer Protection Act, *OG RAl* No.61/08.

[231] Art. 39, 3rd indent of the Consumer Protection Act, *OG RH* No. 79/07, 125/07, 79/09, 89/09, 133/09.

[232] Art. 87(1), 3rd indent, Law on Consumer Protection, *OG RMac,* No. 38/04, 77/2007 and 103/2008.

[233] Art. 47 (1) (2) of Law on Consumer Protection, *OG RMN* No. 26/07.

Albania[234], Croatia[235] and Macedonia[236] have transposed this exemption as in the Directive 97/7. Thus from the provisions on distance selling are excluded contracts concluded for the construction and sale of immovable property or relating to other immovable property rights, except for rental. Bosnia has transposed this exemption with a variation in wording. Namely, the provisions on distance selling contracts shall not apply to contracts which refer to immovables, except the lease contract. This provision ensures a higher level of consumer protection[237]. The exemption has been transposed also in the Montenegrin Consumer Protection Law, but without the part relating to "or other immovable property rights"[238]. Serbia has not transposed at all this exemption.

dd. Contracts concluded at an auction, Art. 3(1) 5th indent

Exemption (Art. 3(1) 5th indent)	Participating States
As in the Directive	AL, BA
Variations	CRO, MAC, MN
Not transposed	SER

Albania[239] and Bosnia[240] have transposed this exemption as in the Directive 97/7. In Croatia the provisions of the Consumer Protection Act on distance selling contracts do not apply to contracts concluded at a "public" auction[241]. In Macedonia it is unclear if the exception is implemented in the national legislation or not. The Macedonian Consumer Protection Law uses the term "contracts concluded via public procurements". As the public procurement contracts per se, do not fall under the application of the Consumer Protection Law, it should be understood that this term refers to any contracts concluded by public bidding process. In Montenegro contracts concluded at an auction are transposed by the Consumer Protection Law as an exemption, but with slight variation in wording. It formally refers to "contracts concluded after the sale by method of public tendering"[242]. However, this term when used for the voluntary sale of certain goods, means "auction sale", as the neighbouring Law on Internal Trade in Art. 18 regulates "public and auction type of sales", where the latter means "sale by method of public tendering at specific place and in specific time"[243]. It is worth mentioning that this exemption would also cover the compulsory auction sale, which is as public tendering sale of certain seized movables regulated by the Law on Execution Proceedings[244]. Serbian legislation has not transposed at all such an exemption.

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[234] Art. 36, 3 (c) of Consumer Protection Act *OG RAl* No.61/08.

[235]Art. 39 3rd and 4th indent of the Consumer Protection Act, *OG RH* No. 79/07, 125/07, 79/09, 89/09, 133/09.

[236] Art. 87(3), 4th indent, Law on Consumer Protection, *OG RMac,* No. 38/04, 77/2007 and 103/2008.

[237] Art. 43 of Consumer Protection Act, *OG BA* No. 17/02.

[238] Art. 47 (1) (3) (4) of Law on Consumer Protection, *OG RMN* No. 26/07.

[239] Art. 36, 3 (ç) of Consumer Protection Act*, OG RAl* No.61/08.

[240] Art. 43 of Consumer Protection Act, *OG BA* No. 17/02.

[241] Art. 39 5th indent of the Consumer Protection Act, *OG RH* No. 79/07, 125/07, 79/09, 89/09, 133/09.

[242] Art. 47 (1) (5) of Law on Consumer Protection, *OG RMN* No. 26/07.

[243] The Government of Montenegro, pursuant to Art. 19 of the Law on Internal Trade is currently preparing a Decree which will regulate conditions for the organization of public and auction sales, the type of goods that can be sold in this manner, as well as the manner and proceedings of these kinds of sale.

[244] The Law on Execution Proceedings, in Art. 87 regulates the sale by method of public tendering (public auction) in case of movable goods of higher value and when the court is expecting that they might be sold for a higher price than the estimated value is.

ee. Partial exemption of contracts for the supply of foodstuffs etc. supplied by regular roundsmen, Art. 3(2) 1st indent

Exemption (Art. 3(2) 1st indent)	Participating States
As in the Directive	AL, CRO, MAC
Variations	MN
Not transposed	BA, SER

According to Art. 3(2) 1st indent of the Directive 97/7, Articles 4 (prior information), 5 (confirmation), 6 (right of withdrawal) and 7(1) (obligation to execute the order within a maximum of 30 days) do not apply to contracts "for the supply of foodstuffs, beverages or other goods intended for everyday consumption supplied to the home of the consumer, to his residence or to his workplace by regular roundsmen".

Albania[245], Croatia[246] and Macedonia[247] have transposed this partial exemption just like in the Directive 97/7. This partial exemption has been transposed in Montenegrin Consumer Protection Law, but with no reference to the supply by "regular roundsmen"[248]. In relation to the place of supply the provision does not use exact words "home" and "residence" of the consumer, but states "everyday use in the household" which in practice would embrace both terms from the Directive 97/7. "Work place" is transposed as required. Bosnia and Serbia has not transposed at all this partial exemption.

ff. Partial exemption of contracts for the provision of accommodation, transport, catering or leisure services, Art. 3(2) 2nd indent

Exemption (Art. 3(2) 2nd indent)	Participating States
As in the Directive	MAC
Variations	AL, CRO, MN
Not transposed	BA, SER

Art. 3(2) 2nd indent provides that Articles 4, 5, 6 and 7(1) shall not apply to contracts for the provision of accommodation, transport, catering or leisure services, where the supplier undertakes, when the contract is concluded, to provide these services on a specific date or within a specific period.

Exceptionally, in case of outdoor leisure events, the supplier can reserve the right not to apply Art. 7(2) in specific circumstances.

This Article of Directive 97/7 has been applied by the European Court of Justice on (C-336/03 – *Easycar*[249]).The Court held that Art. 3(2) of the Directive is to be interpreted as meaning that 'contracts for the provision of transport services' includes contracts for the provision of car hire services. The reasoning offers some guidance for the future application of this provision. The Court stated that the exemption has the purpose of protecting the interests of suppliers of certain services in order that they should not suffer disproportionate conse-

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[245] Art. 36, 3 (d) of Consumer Protection Act, *OG RAl* No.61/08.

[246] Art. 40 (1) 1st indent of the Consumer Protection Act, *OG RH* No. 79/07, 125/07, 79/09, 89/09, 133/09.

[247] Art. 100 (1), 1st indent, Law on Consumer Protection, *OG RMac,* No. 38/04, 77/2007 and 103/2008.

[248] Art. 47 paragraph 2 point 1 of the Law on Consumer Protection, *OG RMN* No. 26/07.

[249] ECJ judgment of 10. March 2005, C-336/03 - *EasyCar (UK) Ltd v Office of Fair Trading* [2005] ECR I-1947.

quences arising from the cancellation at no expense and with no explanation of services. An example of this would be a booking which is made and then cancelled by the consumer at short notice before the date specified for the provision of that service. In the view of the ECJ, car hire undertakings carry out an activity which, against such consequences, the legislature intended to protect by means of the exemption. The reason is that those undertakings must make arrangements for the performance on the date fixed at the time of booking of the agreed service and, therefore, suffer the same consequences in the event of cancellation as other undertakings operating in the transport sector or in the other sectors listed in the exemption.[250]

Only Macedonia[251] has transposed Art. 3(2) 2nd indent of the Directive 97/7 faithfully. Albania[252] has left out, or "forgotten" during the drafting, the second part of the sentence (according to which exceptionally, in case of outdoor leisure events, the supplier can reserve the right not to apply Art. 7(2) in specific circumstances). The Croatian Consumer Protection Act in Art. 40 (1) 2nd indent regulates that the provisions of Art. 43 – 51 and Art. 52 (1) CPA (on prior information and right of rescission) shall not apply to "contracts for accommodation, transportation and supply of prepared food (catering), and leisure services by which the trader commits himself to fulfil his commitment in a precisely defined period or precisely established deadline". Pursuant to Art. 40 (2) of the Consumer Protection Act exceptionally, in case of outdoor leisure events, the trader can reserve the right not to apply Art. 52 (2) CPA (regarding traders´ failure to perform) in specific circumstances determined by the contract. The core element of this partial exemption, namely the part of the provision regulating that the date of execution must be fixed at the time of the conclusion of the contract, was not explicitly transposed. The situation is similar in Montenegro. The partial exemption has been transposed in the Montenegrin Consumer Protection Law with only slight variations, thus almost full transposition of the Directive into national law is unquestionable. The variations are the following: a) although Directive 97/7 requires that the date of execution must be fixed "when the contract is concluded", Montenegrin legislation left these words out, but the end result is the same because the wording of the paragraph suggests that that date should be "in the contract"; b) although Montenegro has transposed the second part of the exemption (outdoor leisure events), it does not refer to "in specific circumstances", but instead to "cases specified by the contract".[253]

III. Consumer protection instruments

1. Information duties

a. Pre-contractual information

Art. 4 (1) of the Directive 97/7 obliges the States to provide in their legislation obligation for the supplier to provide to the consumer, in good time prior to the conclusion of any distance contract, the following information:

a) the identity of the supplier and, in case of contracts requiring payment in advance, his address;

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[250] Judgment of 10 March 2005 C-336/03 *EasyCar (UK) Ltd v Office of Fair Trading*. The whole comment of this case is provided by Consumer Law Compendium, February 2008, p. 527.

[251] Art. 100(1), 2nd indent, Law on Consumer Protection, *OG RMac,* No. 38/04, 77/2007 and 103/2008.

[252] Art. 36, 3 (dh) of Consumer Protection Act, *OG RAl* No.61/08.

[253] Art. 47 paragraph 2 point 2 of the Law on Consumer Protection, *OG RMN* No. 26/07.

b) the main characteristics of the goods or services;
c) the price of the goods or services including all taxes;
d) delivery costs, where appropriate;
e) the arrangements for payment, delivery or performance;
f) the existence of a right of withdrawal, except in cases referred to in Article 6 (3);
g) the cost of using the means of distance communication, where it is calculated other than at the basic rate;
h) the period for which the offer or the price remains valid;
i) where appropriate, the minimum duration of the contract in case of contracts for the supply of products or services to be performed permanently or recurrently

In accordance with Art. 4(2), the information must be provided in a clear and comprehensible manner in any way appropriate to the means of distance communication used, whereas Art. 4(3) additionally clarifies that in case of telephone communications, the identity of the supplier and the commercial purpose of the call must be made explicitly clear at the beginning of any conversation with the consumer.

All of the States, except Serbia, included such obligation and created an exact or very similar list of information to be provided. For the purpose of this study, the following aspects shall be pointed out:

aa. "In good time" prior to the conclusion of the contract

There are certain discrepancies in the transposition of this requirement. The exact wording was used in Albania (Art 37 (1) Consumer Protection Act) and Croatia (Art. 43 (1) CPA). Variation in wording exists in Macedonia, where the legislator used the term *specified time prior to conclusion,* without defining how it should be determined (Art. 89 (1) CPA). In Montenegro the term *prior to the conclusion is used.* The requirement is not transposed in the legislation of Bosnia and Herzegovina and Serbia[254].

bb. Additional pre-contractual information obligations

All of the states, except for Serbia, have added further information to the list. In Albania they are set by Art 37 (1) CPA. Article 44 of the CPA of Bosnia prescribes provision of further information on the location and contacts with the trader and the supplier in any case not just for "contracts requiring payment in advance", on the identification of the goods or services, information about guarantees and after sales services and the jurisdiction and the application of certain substantive rights in the case of a dispute. The same is set in the Art. 43(1) of the Croatian CPA, which additionally requires the supplier/trader to provide information concerning the right of rescission and where it may be excluded, as well. Finally, Art. 43 (4) CPA regulates one more additional pre–contractual information which contains a warning "that a contract in the name and on behalf of a minor or a person deprived of legal capacity may be concluded only by their legal guardians, or a warning that persons with partial legal capacity may conclude a contract only with the approval of their legal guardian". The extensions existing in the Macedonian LCP (Art.89 (2)) relate to provision of detailed information regarding the identity of the trader/supplier in any case, identity of the product or service and the right of withdrawal. Extended information on the identity of the trader/sup-

[254] Chapter II, Section 2 of the Draft Proposal contains two articles dealing with the trader's general pre-contractual duty to inform, listing the information trader is obliged to provide to consumer prior to the conclusion of any sales or service contract, including special information duties of intermediaries.

plier and the right of withdrawal is to be provided by the Montenegrin legislation as well. In addition the Law on Electronic Trade sets sector specific information duties[255].

In Serbia, currently there are no corresponding provisions in the LoO or the CPA of 2005[256].

b. Written Confirmation, Art. 5

Art. 5(1), sent. 1 of the Directive obliges the supplier to provide, in good time during the performance of the contract, written confirmation (or confirmation in another durable medium) of some of the information to be given prior to the contract, unless the information has already been given to the consumer in such form.

In the Albanian legislation the requirement is transposed verbatim (Art. 37 (2 a,b,c, ç) CPA). The Consumer Protection Acts of Bosnia and Herzegovina (Art. 45(1))[257] and Croatia (Art. 44(1,2)), Macedonia (Art. 91) and Montenegro (Art. 40(1)) require written confirmation to be provided at latest upon delivery of the good/service. The written confirmation should contain all of the information the trader/supplier is required to provide, whereas the Directive requires only some of them to be provided.

aa. Formal requirements

Art. 5(1) of the Directive regulates that the consumer has to receive written confirmation, or confirmation in another durable medium available and accessible to him, of some of the information laid down in Art.4 of the Directive.

Formal requirements	Participating States
As in the Directive	AL, BA, CRO, MAC,
Not transposed	SER
Variations	MN

The requirement regarding the medium for provision of the confirmation (in writing or other durable, available and accessible medium) has been transposed literary in Albania (Art. 37 (2 a,b,c, ç) CPA), Bosnia and Herzegovina (Art. 45(1) CPA), Croatia (Art. 44(1) CPA) and Macedonia (Art. 91 CPA). The Montenegrin law provided only for the option of written confirmation (Art. 40(1) of CPA). The provision has not been transposed in Serbia.

bb. Time of the confirmation

In accordance with Art. 5(1) of the Directive, the consumer must receive written confirmation or confirmation in another durable medium available and accessible to him of the information referred to in Art. 4 (1) (a) to (f), in good time during the performance of the con-

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[255] Art. 14 of the Law on Electronic Trade, OG RMN No. 84/04.

[256] The Draft Proposal specifies the information to be provided and the manner in which they are to be provided.

[257] According to Art. 146 (3) of the BDLO 2010 the consumer has to receive full information about his right of withdrawal in a durable medium. This information needs to contain the name and the address of the recipient of the withdrawal, as well as the start of the withdrawal period. Art. 146 (4) BDLO further provides, that if the consumer contract is not notarised the information about the right of withdrawal needs to be specially signed or contain a qualified electronic signature. If the contract has to be concluded in written form, the consumer has to receive the original or the copy of contract's certificate or the written offer of the consumer to conclude the contract.

tract, and at the latest at the time of delivery (not applicable when the goods are for delivery to third parties).

There are variations in the transposition of this requirement. In Albania it has been transposed to the letter. In Bosnia there are variations as Art. 45 (1) CPA that regulates this issue does not include the term *'in good time'*. By Art. 44 (1) of the Croatian CPA the confirmation of prior information must be given „as soon as possible, and at the latest at the time of product delivery i.e. at the latest on the day when the service provision begins". The Macedonian CPA (Art.91, para.1, second part of sentence) defines that the confirmation should be provided in a timely manner in the course of performance of the contract, and at the latest at the moment of delivery of the product or the day of provision of the services, and does not distinguish between delivery of the products to the consumer for her/his own use or for a third party. Art. 39 of the Montenegrin CPA omits the reference "to goods not for delivery to third parties" and "at the latest at the time of delivery". The requirement is not transposed in the Serbian Law.

Time of the confirmation	Participating States
As in the Directive	AL
Not transposed	SER
Variations	BA,CRO, MAC, MN

cc. Information to be provided in any event, Art. 5(1), sent. 2

The supplier, according to Art. 5(1), sent. 2 of the Directive, must provide certain information in any event, namely:

- written information on the conditions and procedures for exercising the right of withdrawal;
- the geographical address of the place of business of the supplier to which the consumer may address any complaints;
- information on after-sales services and guarantees which exist; and
- the conclusion for cancelling the contract, where it is of unspecified duration or a duration exceeding one year.

The requirement has been transposed to the letter in Albania. In Bosnia this is considered as prior information (Art.44 CPA) which must to be confirmed prior to the conclusion of the contract. The same is the case with the legislation in Croatia (Art. 43 (1) and Art. 44 (2) CPA), Macedonia (Art. 90 CPA) and Montenegro (Art. 39(1) points 6, 7, 8 and 9 and Art. 40(1) CPA). The requirement is not transposed in the Serbian legislation.

dd. Exception from Art. 5(1) for services performed through the use of a means of distance communication

Art. 5(2) of Directive 97/7 allows for the exemption that the supplier does not have to provide confirmation for services which are performed through the use of a means of distance communication, where they are supplied on only one occasion and are invoiced by the operator of the means of distance communication. Nevertheless, the consumer must in all cases be able to obtain the geographical address of the place of business of the supplier to which he may address any complaints.

Corresponding provisions exist in the legislation in Albania, Croatia, Macedonia and Montenegro. Serbia and Bosnia and Herzegovina did not transpose this exception into their national legislation.

c. Sanctions for breach of information duties

Most of the provisions of the Directive on sanctions for any breach of information duties are rather general and thereby leave great discretion to the national legislators. The following types of sanctions can be observed:

- Prolongation of withdrawal period along Art. 6(1);
- Injunctions;
- Right of competitors to claim for damages;
- Fines under criminal or administrative law;
- Other private law consequences.

All of the countries, except for Serbia[258], provide for some form of sanction for breach of the information duties.

aa. Prolongation of withdrawal period along Art. 6(1)

Prolongation of withdrawal period	Participating States
As in the Directive	AL, CRO, MAC, MN
Variations	BA
Not transposed	SER

The sanctions for the prolongation of the withdrawal period along Art. 6(1) have been implemented as in the Directive in the national legislation of Albania[259]. In Bosnia and Herzegovina this rule has been transposed (Art. 47(4 and 5) CPA); however, the period to have the contract reclined by the consumer is extended to 15 days. It is to be noted that contrary to the ECJ judgment *Heininger*[260], in Bosnia and Herzegovina the withdrawal period may start even before the information notice has been given to the consumer. It expires within three months from the receipt of the goods by the consumer, or conclusion of the contract in case of the provision of services, and therefore follows the critics of the *Heininger* judgment, that the withdrawal period may not be postponed forever because of the lack of information notice.[261]

The Croatian legislator transposed Art. 6(1) of the Directive 97/7 literally in Art. 46 (1-4) CPA, so as the Macedonian (Art. 93 CPA) and the Montenegrin legislation (Art. 41 (2) CPA). As stated above, the Serbian legislation currently does not prescribe this sanction.

bb. Injunctions

Compliance with information obligations can be enforced by injunction proceedings according to Art 55 of Consumer Protection Law of Albania, Articles 120-124 CPA of Bosnia and Herzegovina, Art.131 et seq. of CPA of Croatia and Art.103 of the CPA of Macedonia. In

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[258] The Draft Proposal includes sanctions for belated information on the right of withdrawal (Chapter III of the Draft Proposal) as well as the effect of inducing the consumer to enter into contract failing to comply with the information requirements (Chapter II, Section 2 of Draft Proposal). By the Draft Proposal the burden of proof concerning the fulfilment of the information duties rests with the trader. It is also expected that the draft proposal will include a chapter on administrative penalties.

[259] Point 11 and 12 of Decision of Council of Ministers No. 64 of 21.01.2009 No. 08/09.

[260] ECJ judgment of 13 December 2001, C-481/99 - *Georg Heininger and Helga Heininger v. Bayerische Hypound Vereinsbank AG* [2001] ECR I-09945.

[261] See Z. Meškić, *Europäisches Verbraucherrecht – Gemeinschaftsrechtliche Vorgaben und europäische Perspektiven*, Band 18 der Schriftenreihe des Ludwig Boltzmann Institutes für Europarecht, Wien 2008, p. 84; it is to be noted that it is expected this problem to be resolved with the adoption of the BDLO 2010, given that the withdrawal period of 15 days, according to Art. 146 (3) BDLO, starts when the information about the right of withdrawal is provided to the consumer.

Montenegro this is partially transposed by the Consumer Protection Law[262]. There has not been transposition of this possibility in the Serbian legislation.

cc. Right of competitors to claim for damages

The legal provision existing in some of the EU countries, by which the competitors may also claim for damages against suppliers who breach information obligations and thereby achieve an unlawful advantage over the law-abiding market participants, is not provided in the national legislation of the studied states.

dd. Fines under criminal or administrative law

Most of the EU member states have stated administrative sanctions, by which suppliers who fail to provide the information are guilty of an offence and can be sanctioned with a fine.

The same exist in the studied SEE countries except in Serbia. Namely, Art 57 (2,a) of the Albanian CPA prescribes fines of up to 70.000 leke (cca. 520 EUR). In Bosnia and Herzegovina the fines vary between 2.500 EUR to 8.000 EUR depending on the breach (Art. 126 CPA). In Croatia, in accordance with Art.145 (1) indent 23rd and 24th, trader who fails to provide information will be sanctioned with a fine in the amount of HRK 15000 to 100000 (cca. EUR 1370 to 13700), while according to Art.145 (3) to a natural person for the same infringements a fine in the amount of HRK 5000 to 15000 (cca. EUR 685 to 13700) shall be imposed. By Art.136 (1) line 30 of the CPA of Macedonia the breach of the traders´ duty for provision of written confirmation may result with a fine in amount from 3500 to 5000 EURs. In Montenegro, misdemeanour sanctions by prescribing pecuniary fine are to be imposed on a trader for offence realized through breach of duties corresponding to prior information, written confirmation of information and restrictions on the use of certain means of distance communication (Art. 129(1) items 13, 14 and 15 CPA), as well as a separate fine on the responsible person if the trader is a legal entity (Art. 129(2) CPA).

ee. Other private law consequences

By application of the rules of the civil law, in particular contract law, other private law consequences, in all of the studied countries include claim of damages in case of rescission of the contract.

2. Right of withdrawal

a. Exceptions to the right of withdrawal

aa. Exception to the right of withdrawal if performance of services has begun before the end of the seven working days period (Art. 6(3) 1st indent)

Most states have transposed the exception to the right of withdrawal if performance of services has begun before the end of the seven working days period, as stated in Art. 6(3) 1st indent of Directive 97/7, except for Serbia[263].

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[262] Nevertheless, in case of distance sale the scope of application of instruments prescribed by the "Penalty provisions" Chapter is more than efficient and provides adequate protection of consumer interest. Namely, it is not necessary that some act of the trader harms the collective interests of consumers, but it is enough that there has been a mere breach of duties with respect to the prior information, written confirmation of information or restrictions on the use of certain means of distance communication (Art. 129 para 1 items 13, 14, 15 and para 2 CPA).

[263] Under the Draft Proposal for new Consumer protection Act in Serbia, in respect of distance contracts, the right of withdrawal shall not apply as regards the following (unless the parties to the contract agree otherwise): (1) services where performance has begun, with the consumer's prior express consent, before the

In Albania, the Law provides for 14 calendar days for beginning of the performance. Art. 6(3) 1st indent of the Directive 97/7 is literally transposed in Art. 48 (1a) of the CPA of Bosnia and Herzegovina, but it is to be noted that the aforementioned Article contains a linguistic mistake stating that "the consumer cannot give up the right of rescinding the contract", which can only be interpreted as a mistake in translation. Croatia transposed the exception by prescribing in Art. 49, 1st indent of CPA that unless otherwise agreed between the parties, the consumer shall not have the right to rescind the contract in respect of contracts for the provision of services if performance has begun with the consumer's agreement, before the end of the period within which the consumer had the right to rescind the contract. The similar wording is used in the Macedonian legislation (Art. 96, 1st indent CPA) and in Montenegro (Art. 42(1) point 1 CPA). Such wording to a certain extend varies from the wording of the Directive, as by omitting the words "before the end of the seven working days period" the national provision seems to go beyond the Directive and expands this period further, especially in cases when the confirmation of information is not provided at all. It has to be repeated that this shall be applicable, only if the consumer gave explicit consent the provision of services to begin before the end of the period within which the consumer had the right to rescind the contract.

Exemption (Art. 6(3) 1st indent)	Participating States
As in the Directive	BA,
Not transposed	SER
Variations	AL, CRO, MAC, MN

bb. Exception to the right of withdrawal in the case of goods or services, the price of which is dependent on fluctuations in the financial market (Art. 6(3) 2nd indent)

The exception has been ad verbatim transposed in the legislation of Bosnia and Herzegovina (Article 48 (1c) CPA), in Croatia (Art. 49 2nd indent CPA), Macedonia (Art. 96, 2nd indent CPA) and Montenegro (Art. 42 paragraph 1 point 2 CPA).

Exemption (Art. 6(3) 2nd indent)	Participating States
As in the Directive	BA, CRO, MAC, MN
Not transposed	AL, SER,
Variations	

cc. Exception to the right of withdrawal in the case of goods made to the consumer's specifications etc. (Art. 6(3) 3rd indent)

The exception has been implemented in the national legislation of Bosnia and Herzegovina (Art. 48(1) line d) and e CPA), Croatia (Art. 49 3rd indent, CPA), Macedonia (Art. 96, 3rd indent CPA) and in Montenegro (Art. 42(1) point 3 CPA) where it should be understood that the omitting of the words "or expires rapidly" should not be considered as an impediment for proper implementation of the said exception[264].

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end of the withdrawal period; (2) the supply of goods or services for which the price is dependent on fluctuations in the financial market which cannot be controlled by the trader; (3) the supply of sealed audio or video recordings or computer software which were unsealed by the consumer; (4) gaming and lottery services.

[264] Art. 42 para. 1 point 3 of the CPA.

Exemption (Art. 6(3) 3rd indent)	Participating States
As in the Directive	BA, CRO, MAC, MN
Not transposed	AL, SER
Variations	

dd. Exception to the right of withdrawal with respect to audio or video recordings, or computer software (Art. 6(3) 4th indent)

In accordance with Art. 48 (1d) CPA of Bosnia and Herzegovina, unless otherwise agreed between the parties, the consumer will not have the right to rescind the contract in respect of contracts for the sale of audio or video recordings or computer software which were used by the consumer**.** Accordingly, the term "which were unsealed by the consumer" was replaced with the term "which were used by the consumer". Similarly, in Art. 49 4th indent of the CPA of Croatia, the same exception is provided, while the term used is "which were unpacked by the consumer". By Art. 96 4th indent of the Macedonian CPA, the consumer will not have the right to rescind the contract in respect of contracts for the sale of audio or video recordings or computer software which were unpacked (opened) by the consumer. Literary transposition was provided in Art. 42 (1) point 4 of the CPA of Montenegro. Albania and Serbia did not transpose this exception.

Exemption (Art. 6(3) 4th indent)	Participating States
As in the Directive	MN
Not transposed	AL, SER
Variations	CRO, BA, MAC

ee. Exception to the right of withdrawal with respect to newspapers, periodicals and magazines (Art. 6(3) 5th indent)

The provision of Art.6 (3) 5th indent of the Directive is transposed, to the word, in the legislation of Bosnia and Herzegovina (Article 48(1g) CPA), Croatia (Art. 49 5th indent CPA), Macedonia (Art. 96 5th indent CPA), and Montenegro (Art. 42 para. 1 point 5 CPA). In Albania and Serbia it is not transposed,

Exemption (Art. 6(3) 5th indent)	Participating States
As in the Directive	BA, CRO, MAC, MN
Not transposed	AL, SER
Variations	

ff. Exception to the right of withdrawal with respect to gaming and lottery services (Art. 6(3) 6th indent)

Exemption (Art. 6(3) 6th indent)	Participating States
As in the Directive	
Not transposed	AL, MAC, SER
Variations	BA, CRO, MN

The exception provided in Article 6(3) 6th indent (exclusion of the contracts related to for gaming and lottery services) has been transposed in Bosnia and Herzegovina, Croatia and

Montenegro with minor variations. Namely, Art. 48 (1b) of the CPA of Bosnia and Herzegovina uses the broad term 'service games of chance'. In Art. 49 6th indent CPA of Croatia the term „games of chance" is used, as in Art. 42(1) point 6 of the CPA of Montenegro, where it should be noted that this wording is in compliance with the national legislation[265]

b. Formal requirements for the exercise of the right of withdrawal

The Directive does not contain an explicit provision allowing the member states to regulate formal requirements for the exercise of the withdrawal right by the consumer. But as Art. 5(1) 1st indent of the Directive provides that the consumer is informed about "the conditions and procedures for exercising the right of withdrawal", it is generally assumed that the member states are free to regulate formal requirements.

The Albanian legislation does not foresee any formal procedure for the exercise of the right of withdrawal. In Bosnia and Herzegovina, by Art. 47(6) CPA the consumer is required to provide the notification on the withdrawal in written form, however, no explanation on the reasons is needed[266]. The procedure for the termination of the contract in Croatia is set by Art. 47 CPA, according to which the consumer should dispatch a written notice of rescission to the trader. The contract is rescinded at the moment when the trader receives the notice of rescission (Art. 47 (2) CPA), provided that the written notice of rescission has been dispatched within the time–limits referred (Art. 47 (3) CPA). The similar rule exist in Macedonia (Art.94 CPA) and Montenegro (Art. 43(1, 2) CPA). The question is not regulated in Serbia.

c. Withdrawal period

aa. Length of period

The Directive provides a period of seven working days. The participating states that regulate the issue (that is: all of them except Serbia[267]) have different rules in regard to the length of the period that abide to the minimum provided by the Directive.

The Albanian Law provides for a period of 14 calendar days (Art 37 (3) CPA), Art. 47(1) CPA of Bosnia and Herzegovina prescribes that the consumer has the right, without

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[265] See the Montenegrin Law on Games of Chance, OG RMN No. 52/04 and OG MN No. 13/07.

[266] Pursuant to Art. 146 (1) BDLO 2010 the withdrawal does not need to contain any explanation, but it has to be given in a durable medium or a document. The return of the goods has the same effect as the withdrawal.

[267] There are no corresponding provisions of LoO and CPA of 2005.Under Draft Proposal: With regard to distance and off-premises contracts, the consumer shall have a period of 14 days to withdraw from a distance or off-premises contract, without giving any reason. The exercise of his right to withdraw from the contract shall fully release the consumer from any obligation arising from the contract he had withdrawn from. The sole charge that may be made to the consumer on the basis of his exercise of the right of withdrawal may be the direct cost of returning the goods. Under Draft Proposal for new Consumer Protection Law of Serbia the withdrawal period of 14 days shall start at the beginning of the first hour of the first day and shall end with the expiry of the last hour of the last day of the period. The statement of withdrawal shall be considered prompt if it is dispatched within the stated period. The dispatch of the received goods back to the trader within the period, in which the consumer has the right of withdrawal, shall be considered as a statement of withdrawal. It shall be deemed that the consumer executed his right of withdrawal at the moment the statement of withdrawal was dispatched to the trader.

In case of a distance contract for the sale of goods, the withdrawal period shall begin from the day on which the consumer or a third party other than the carrier and indicated by the consumer acquires the material possession of each of the goods ordered. In case of a distance contract for the provision of services, the withdrawal period shall begin from the day of the conclusion of the contract.

costs and or any explanation, to cancel the contract of distance selling within 15 days[268]. The seven working days period is adopted in Croatia (Art. 45 (1) CPA) and Montenegro (Art. 41 (1) CPA). In Macedonia the period is set to eight working days (Art. 92(1) CPA).

bb. Start of period

(1) Start of period in case of delivery of goods

Begin in case of delivery of goods (Art. 6(1), sent. 3, 1st indent)	Participating States
As in the Directive	BA, CRO, MAC, MN
Not transposed	AL, SER
Variations	

Art. 6(1), sent. 3, 1st indent of Directive 97/7 stipulates the start of the withdrawal period in case of delivery of goods as the day of receipt of goods by the consumer.

It has been transposed, as provided in the national legislation of Bosnia and Herzegovina (Art. 47(1, 2, 4 and 5) of CPA), Croatia (Art. 45 (2) CPA), Macedonia (Art.92 (2) CPA) and Montenegro (Art. 41(1) CPA).

The issue is not regulated in Albania and Serbia.

(2) Start of period in case of provision of services

Begin in case of delivery of goods (Art. 6(1), sent. 3, 2nd indent)	Participating States
As in the Directive	BA, CRO, MAC, MN
Not transposed	AL, SER
Variations	

Art. 6(1), sent. 3, 2nd indent of Directive 97/7 stipulates the start of the withdrawal period in case of services as "from the day of conclusion of the contract or from the day on which the obligations laid down in Article 5 were fulfilled if they are fulfilled after conclusion of the contract".

This provision has been transposed in the legislation of Bosnia and Herzegovina (Art. 47(3, 4, 5) CPA[269]), Croatia (Art. 45 (3) CPA), Macedonia (Art.92 (3) CPA) and in Montenegro (Art. 41(1) CPA).

The issue is not regulated in the legislation of Albania and Serbia.

cc. Postal rule / dispatching rule

Directive 97/7 does not contain any provision specifying how the consumer can exercise the right of withdrawal on time; however, it contains rule on how the notice should be delivered to the trader.

In Albania, Bosnia and Herzegovina, Croatia, Macedonia and Serbia[270] there is no regulation on this subject matter. Montenegro regulated this in a manner that the consumer can

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[268] The same period is provided by Art. 146 (3) BDLO 2010.

[269] Art. 146 BDLO 2010 does not differentiate between the delivery of goods and provision of services. The withdrawal period of 15 days starts with the expression of will to withdraw or the return of the goods, but not before the consumer has received full information about his right of withdrawal.

[270] The consumer shall inform the trader of his decision to withdraw on a durable medium, either in a statement addressed to the trader drafted in his own words, or using the model withdrawal. For distance contracts concluded on the Internet, the trader may additionally give the option to the consumer to electronically fill in and submit the standard withdrawal form on the trader's website. In that case, the trader shall communicate to the consumer an acknowledgement of receipt of such a withdrawal by email without delay.

terminate the distance contract by forwarding a written notification to the trader (Art. 43(1) CPA), whereby the contract shall be terminated at the time when the trader receives the notification about termination.

In a possible case that notification is not received by the trader the general rule of Art. 5 para. 3 CPA should apply which further strengthens the position of the consumer as it provides that "in case of any disputes about the consumer's eligibility to exercise the rights set out in this Law pertaining to meeting of a deadline to exercise the right, it shall be deemed that the consumer is eligible in this respect."

d. Effects of withdrawal

With regard to the effects of withdrawal, the Directive provides at least some basic principles in Art. 6(1) and (2):

- The consumer must be able to withdraw without any penalty.
- The supplier shall be obliged to reimburse the sums paid by the consumer free of charge; reimbursement must be carried out as soon as possible and in any case within 30 days.
- The only charge that may be made to the consumer because of the exercise of his right of withdrawal is the direct cost of returning the goods.

Under the Albanian legislation, the withdrawal has effect that contract is not anymore in force between the parties. In Bosnia and Herzegovina, pursuant to Art. 47 (1) CPA the consumer has the right, without costs or any explanation, to cancel the contract of distance selling. In this case, the trader is obliged to return the paid amount of money without delay, not later than 15 days from the day of receiving the consumer's written notification (Art. 47 (6) CPA), and to pay, in addition to the legal interest on arrears, an additional 10% of the total value for every 30 days of delay with reimbursement (Art. 47 (7 CPA)[271]. Under the Croatian legislation (Art. 48 CPA), the consumer shall return the product to the trader at his or her own expense (Art. 48 (1) CPA) and shall not be liable for damage sustained by the trader as a result of the rescission of the contract (Art. 48 (2) CPA). Furthermore, the trader is obliged as soon as possible and at the latest within 30 days of receiving a written notification of rescission to reimburse all the sums received from the consumer up to that moment on the basis of the contract, increased by interest on arrears at the rate of the trader's bank for 3–month time deposits for the whole period from the receipt of the written notification of rescission to the date of payment (Art. 48 (3) CPA). By Art.95 of the CPA of Macedonia, in case of cancellation of the contract, the consumer is obliged to return the product to the trader at his own expense and is not liable for the damage suffered by the trader as a result of cancellation of the contract. The trader is obliged, within 30 days from the day of receiving the written notice of cancellation, to return to the consumer the total amount paid by the consumer, on the basis of the contract, until the moment of cancellation of the contract, except for the direct expenses for return of the products. The general obligation for payment of interest remains, as arising from the Law on Obligations. The Consumer Protection Law of Montenegro (Art. 44(4)) provides that the consumer in case of withdrawal shall bear the costs of returning the goods, however he shall not be liable to compensate the trader for the damage (costs, interest, pen-

[271] Pursuant to Art. 147 BDLO 2010, the withdrawal has the same effects as the cancellation of the contract, determined by the generally applicable rules of the BDLO. The business person is in default, if he does not return the paid amount of money within 30 days from the expression of the will to withdraw or the return of the goods by the consumer. The consumer returns the goods at the expense and the risk of the business person.

alty, and a like) in case of cancellation of the contract. The trader is obliged to reimburse, free of charge, the sums already paid by the consumer; however, the provision omitted the words "as soon as possible" and sets a time limit of 30 days that runs from the day of receiving written notification about contract termination. Under the general contract rules a party which pays back money shall be obliged to pay interest on arrears from the day of receiving the payment[272]. Finally, with regard to the obligation of the consumer to return the goods received, Montenegro has specified a time limit of 30 days from the day of dispatching the notice.

In Serbia there are no corresponding provisions of LoO and CPA of 2005[273].

e. Cancellation of credit agreement

Under Art. 6(4) of the Directive the cancellation of the consumer contract shall entail cancelation of any credit agreements granted for the purpose of the specific purchase, without any penalty, charges or interests against the consumer. Equivalent provisions exist in the legislation of Albania (Art 37 (4) CPA), Bosnia and Herzegovina (Art. 48 (2) CPA), Croatia (Art. 50 and 51 CPA), Macedonia (Art. 97 and 98 CPA) and Montenegro (Art. 45 CPA) who all replace the term "without any penalty" by a clarification that trader shall not be entitled to any "cost compensation, interest or penalties". There are no corresponding provisions of LoO and CPA of 2005 of Serbia[274].

3. Performance

a. Obligation to execute the order within a maximum of 30 days (Art. 7 (1))

The trader must execute the order for delivery of product or service received from the consumer within a maximum of 30 days from the day following that on which the consumer forwarded his order to the supplier, unless otherwise agreed by the parties, under the Albanian (Art 37 (5) CPA), Croatian (art. 52 (1) CPA), Macedonian (Art.99 (1) CPA) and Montenegrin law (Article 46 (1) CPA). In Bosnia and Herzegovina the legislator has adopted stricter rules than those provided by Article 7 (1) of the Directive deciding to shorten the maximum period to 15 days (Art. 49(1) CPA). There are no corresponding provisions of LoO and CPA of 2005 of Serbia[275].

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[272] Art. 127 para. 5 of the Law on Obligations.

[273] Under Draft Proposal: The exercise of the right of withdrawal shall terminate the obligations of the parties to perform under the distance or off-premises contract. The trader shall reimburse any payment received from the consumer within 30 days from the day on which he receives the communication of withdrawal. Should the trader fall behind in reimbursing the sum paid by the consumer, he shall, on top of the interest on arrears, pay the additional 10 percents of the sum paid by the consumer for each 30 days of delay.

[274] Under Draft Proposal: If the consumer exercises his right of withdrawal from a distance or an off-premises contract, any ancillary contracts shall be automatically terminated, without any costs for the consumer. The same applies to the credit agreements linked to the consumer contracts, regardless of whether the credit was granted by the trader or by a third party. In case the credit is granted by a third party, the trader is obliged to inform the creditor that the consumer has withdrawn from the distance contract. The creditor shall reimburse to the consumer the sum of money, together with interest, that has been paid for the goods or services up to the moment of withdrawal, without delay and not later than 30 days from the day he was informed about the withdrawal.

[275] Under Draft Proposal: With respect to off-premises and distance contracts, the trader is obliged to execute the order of the consumer within a maximum of thirty days from the day of the conclusion of the contract, unless the parties have agreed otherwise. The trader may not ask for any advance payment from the consumer on the basis of off-premises and distance contracts. If the ordered goods or services cannot be delivered because they are not available, the trader is obliged to promptly inform the consumer on their unavailability.

b. Obligation of supplier to inform and refund in case of unavailability of the goods or services ordered (Art. 7 (2))

According to Art.7(2) of Directive 97/7, in case that the ordered goods or services cannot be delivered because they are not available, the supplier is obliged to inform the consumer and must refund any sums already paid by the consumer as soon as possible, and in any case within 30 days.

Article 7(2) has been transposed as stated in the Directive in Albania (Point 20 of the Decision of the Council of Ministers No. 64 of 21.01.2009). In Bosnia and Herzegovina there are stringent provision related to the duration of the period in which the refund should be done, namely the stated period is 15 days (Article 49 (2) CPA). The laws of Croatia, Macedonia and Montenegro have expended the options for the consumers in case when the trader does not have the ordered goods available and so informs the consumer. Namely, the consumer is given an option to decide if he should keep the contract valid, or withdraw from it. If the consumer decides to cancel the contract, the trader is obliged to make the refund as soon as possible and not later than 30 days. In Macedonia this is regulated by Art. 99 (2 and 3) CPA. The laws of Croatia (Art.52 (2 and 3) CPA) and Montenegro (Art.46(2) CPA) expend even further explicitly stating that the trader will be liable for payment of interest. There are no corresponding provisions of LoO and CPA of 2005 of Serbia.

c. Use of option granted in Art. 7(3) of the Distance Selling Directive

The granted option is used in the consumer protection legislation only in Albania (Point 21 of the Decision of the Council of Ministers No. 64 of 21.01.2009). In Bosnia and Herzegovina, Croatia, Macedonia, Montenegro and Serbia, although not provided in the consumer protection legislation per se, the option can be exercised in practice by application of the general contract law principles on facultative obligations and impossibility for performance.

4. Payment by card

By Art.8 of the Directive, Member States should ensure that appropriate measures exist to allow a consumer:

- to request cancellation of a payment where fraudulent use has been made of his payment card in connection with distance contracts covered by this Directive,
- in the event of fraudulent use, to be recredited with the sums paid or have them returned.

Payment per Card	Participating States
As in the Directive	AL
Not transposed	MN, Ser
Variations	BA, CRO
Transposition not entirely clear	

This requirement has been transposed as in the Directive in the Albanian law (Art 37 (6) CPA). There are variations in the transposition in Bosnia and Herzegovina where pursuant to Art. 48 (3) the consumer has the right of return of overall funding in cash or payment card, while the right to request cancellation of a payment where fraudulent use has been made of his payment card in connection with distance contracts is omitted. In Croatia, by Art.53 CPA the injured consumer is entitled to request payment cancellation to be recredited, but in addition the sum is increased by interest on arrears at the rate of the trader's bank for three months

time deposits for the whole period beginning with the date of payment. The same rule (cancellation and recredit with interest due) exist in Macedonia (Art. 101 CPA), where the paid amount is increased with the default interest rate.

This provision of the Directive is not transposed in the legislation in Montenegro and Serbia[276].

5. Inertia selling

Article 9 of Directive 97/7, as amended by Directive 2005/29, obliges the member states to "take the measures necessary to exempt the consumer from the provision of any consideration in cases of unsolicited supply, the absence of a response not constituting consent, given the prohibition of inertia selling laid down in Directive 2005/29". The inertia selling prohibition exists in all countries, except in Serbia, with the difference that it is treated either under the distance selling contracts (Albania, Bosnia and Herzegovina, Croatia and Macedonia) or as unfair commercial practice (Montenegro) or out of business premises sales (Serbia)[277].

a. Prohibition of the supply of goods or services to a consumer without their being ordered

Inertia Selling (Art. 9, 1st indent)	Participating States
As in the Directive	AL, BA, CRO, MAC, MN
Not transposed	
Variations	SER

The prohibition of the supply of goods or services to a consumer without their being ordered by the consumer beforehand, where such supply involves a demand for payment is transposed as in Art. 9, 1st indent of the Directive in the legislation of Albania (Art. Art 38 (1) CPA), Bosnia and Herzegovina (Art. 50 (1) CPA)[278], Macedonia (Art.102, para.1 CPA), and Montenegro (Art. 67(3) point 5 CPA) where there is slight variation of the wording used but the meaning of the Directive is maintained. Croatia (Art. 54 (1) CPA) also follows the Directive but goes even one step further as Art. 54 (2) provides that such products will be consid-

[276] Under Chapter II, Section 4 of Draft Proposal which deals with the payment modalities, if payment is made by the consumer or in the name or on behalf of the consumer through the bank or the post, it shall be deemed effected on the date on which the bank or the post accepted the proper payment order.

[277] The rule on inertia selling contained in the Draft proposal prohibits to supply goods or services to the consumer without their being ordered by the consumer beforehand, where such supply involves a demand for payment. The absence of a response from the consumer following such an unsolicited supply shall not constitute consent. No claims against the consumer may be grounded on a delivery of unsolicited goods and services. The consumer is entitled to consider the supply of unsolicited goods and services an unconditional promotional gift. If the unsolicited goods reach the consumer by mistake, and if the consumer knew about the mistake or could have known about it had he observed the relevant standard of care, then the consumer must notify the trader of the mistake within the reasonable time, or ship the goods back at the expense of the trader. The performance is not to be qualified as unsolicited if, instead of the performance which was ordered by the consumer, the trader offers the performance that is equivalent in quality and price, and if it is drawn to the consumer's attention that he is not obliged to accept it and that he does not have to pay for sending the good back to the trader.

[278] Art. 28 (1) BDLO 2010 additionally provides that no obligation may arise from the supply of goods or services to a consumer without being ordered. The supplier may only request the return of goods (Art. 28 (2)). The consumer can return the goods by himself or notify the business person to pick up the goods at his own expense within reasonable time.

ered gifts. In Serbia, by Art.28, CPA of 2005 it is provided that (1) offering products or services to a consumer outside business premises of the supplier (using catalogue, sample or model presentation, displaying the product in order to impart information about its characteristics) as well as (2) placing an offer at the address of the consumer (by electronic means or in other ways), shall be permitted only if the consumer gave his consent beforehand – that is if the consumer gave the go-ahead for the offer to be placed.

b. Exemption of the consumer from the provision of any consideration in cases of unsolicited supply; absence of a response shall not constitute consent

The consumer shall not be required to any consideration about the product received via unsolicited supply and an absence of his response shall not constitute consent, as required in Art. 9, 2nd indent of the Directive, by the legislation of Albania (Art 38 (2) CPA) and Bosnia and Herzegovina (Art. 50 (2) CPA that even authorizes the consumer to keep and maintain in his/her possession the unsolicited product or service). The laws of Macedonia and Croatia maintain the aim of the Directive; however the manner of regulation varies insofar as they stipulate that a provision in a trader's general terms of contract or in his offer sent without a previous order placed by the consumer, according to which the absence of a reply would constitute consent, shall be null and void (Art. 54 (3) CPA of Croatia and Art.102 (2) CPA of Macedonia). Montenegro did not transpose the said provision per se; however, the effects of the provision of the Directive could be observed by the general rules of the contract law (Law on Obligations, Art. 37 (1, 2)).

6. Restrictions on the use of certain means of distance communication

Art. 10 of Directive 97/7 states that the use of automatic calling machines and fax machines requires prior consent from the consumer. All member states have transposed this provision. In Albania (Art.39 CPA) prior consent from the consumer is needed for the supplier to use telephone, fax and electronic mail. Similarly, in Bosnia and Herzegovina (Art. 51 CPA), without the prior consent of the consumer, the trader may not use individual means of distance communication (telephone, fax machines, e-mail etc.). In Croatia there is a variation increasing the level of protection, by regulating the manner of the use of the means. Namely, according to Art.42 (1) CPA "the use of automated calling systems without human intervention (automatic calling machines), electronic mail and fax machines for the conclusion of contracts shall require the consumer's prior consent". The use of other means of distance communication with the purpose of concluding a contract may only be allowed if the consumer does not explicitly object (Art. 42 (2) CPA). The use of the means of distance communication in the mentioned situations shall not be charged to the consumer (Art. 42 (3) CPA). Art. 10 of the Directive has been fully transposed in the Macedonian Law on Consumer Protection (Art. 89) and the Montenegrin Consumer Protection law (Article 38 (1, 2)). In Serbia there are no rules for this matter[279].

[279] Under the Draft Proposal, the use of telephone marketing, automated calling systems without human intervention (automatic calling machines), facsimile machines (fax) or electronic mail for the purposes of direct marketing is allowed solely in respect of the consumer who has given his prior consent. Other means of distance communication that allow individual communications may be used only if there is no clear objection from the consumer. If the consumer explicitly agrees to the use of telephone marketing, automated calling systems without human intervention (automatic calling machines), facsimile machines (fax), or his electronic contact details for electronic mail, he shall be informed on the commercial nature of the communication in clear and unambiguous manner, as soon as the communication commences.

IV. Use of options provided in the Directive

1. Option of member states to allow the supplier to provide the consumer with goods or services of equivalent quality and price

Article 7(3) of Directive 97/7 contains an option for the member states to stipulate that the supplier can provide the consumer with goods of equivalent quality and price, if this possibility was provided before the conclusion of the contract, or in the contract.

Option transposed	AL
Option not transposed	
No express transposition, but general contract law with similar effect	BA, CRO, MAC, MN, SER
Only for goods, not for services	
Information must be given in writing	
Possibility must be provided prior to the conclusion of the contract	

In Albania, this option exists under Point 21 of the Decision of the Council of Ministers No. 64 of 21.01.2009. In Bosnia and Herzegovina, there is no corresponding provision to this option in the CPA, but only in the general contract law provisions of the BLO. In Croatia, reference to this option could be found in Art. 52 CPA which deals with the timely performance of the contract, where under para. 2 the possibility is given to the consumer to choose whether he or she will rescind the contract or give the trader a "reasonable additional period of time for compliance with the contract". The right of replacement is regulated in Croatian general contract law, i.e. in the Civil Obligations Act. The issue is regulated in the same manner in Macedonia (the possibility for extension of the time of performance exists in Art. 99(2) CPA; other issues covered by general contract law) and in Montenegro (the possibility for extension of the time of performance exists in Art. 46(2) CPA; other issues covered by general contract law). In Serbia in general the issues of the modification of the performance are regulated by the Law of Obligations[280].

2. Option of member states to place burden of proof on the supplier

Art. 11(3)(a) of the Directive enables the member states to stipulate that the burden of proof concerning the existence of prior information, written confirmation, compliance with time-limits or consumer consent can be placed on the supplier.

Use of Option	Participating States
Yes	AL, CRO, MAC, MN (partly)
No	BA, SER

In Albania this is provided by Point 23 of the Decision of the Council of Ministers No. 64 of 21.01.2009, in Croatia it is stipulated in Art. 55 CPA and in Macedonia by Art.105 CPA. The option is partially transposed in Montenegro and it is done only concerning the existence

[280] Under the Draft Proposal, the performance is not to be qualified as unsolicited if, instead of the performance which was ordered by the consumer, the trader offers the performance that is equivalent in quality and price, and if it is drawn to the consumer's attention that he is not obliged to accept it nor does he have to pay for its sending back to the trader.

of compliance with time-limits, as by Art. Article 5(3) CPA in case of any disputes about the consumer's eligibility to exercise the rights pertaining to meeting of a deadline to exercise the right, it shall be deemed that the consumer is eligible in this respect. The option does not exist under the laws of Bosnia and Herzegovina[281] and Serbia[282]

3. Option of member states to provide for voluntary supervision by self-regulatory bodies

Art. 11(4) of Directive 97/7 grants the member states the option to provide for voluntary supervision by self-regulatory bodies.

Use of Option	Participating States
Yes	CRO, MAC
No	AL, BA, MN, SER

Such option is provided only in Croatia and Macedonia. The Croatian Art. 141 CPA is wider than the Directive as it prescribes not only the possibility of a voluntary control of the traders' conduct by certain independent organisations, but also gives certain bodies and organisations the possibility to initiative proceedings before these independent organizations against those members of such organisations who act contrary to provisions on consumer protection. In Macedonia this option is not explicitly transposed. However, by Art.103 CPA, any person having justified interest may request from the court to order to a particular trader or operator of the means of distant communication to terminate the business practice which is contrary to the provisions laid down for distance contracts. By this, the self-regulatory bodies are entitled for such actions.

4. Option of member states to ban the marketing of certain goods or services, particularly medicinal products, within their territory by means of distance contracts

Art. 14, sent. 2 of Directive 97/7 provides the option to ban the marketing of certain goods or services, particularly medicinal products, within their territory by means of distance contracts.

Use of Option	Participating States
Yes	CRO, MAC,
No	AL, BA, SER
Transposition not entirely clear	MN

This option is provided and extended under the consumer protection legislation of Croatia and Macedonia. Art. 41 of the CPA of Croatia regulates the prohibition of conclusion of

[281] According to Art. 146 (5) BDLO the burden of proof regarding the start of the withdrawal period is on the business person.

[282] The rule applicable at the moment is contrary to the requirement of the Directive. Namely, there is a general procedural rule that a party claiming to have a right, or that the conditions for execution of a certain tight are fulfilled, has to prove her claims (Art. 223 (2) Civil Procedure Act of 2004). However, under Chapter II, Section 2 of Draft Proposal dealing with the general information duties of the trader, the burden of proof concerning the fulfilment of the information duties rests with the trader.

contracts through distance communication means in respect of the sale of drugs, medicine and veterinary–medicine products, explosives, tobacco products, weapons and other products, the distance selling prohibition of which is regulated by special regulations. By Art.88 CPA, it is not allowed to conclude contracts on the sale of medicines, medical and veterinary products, and explosives using the means of distant communication[283].

In Montenegro there is no option to market medicinal products by distance contracts as the Law on Medicines[284] stipulates that retail sales of medicines is only performed in a pharmacies.

[283] It should be noted that in Macedonia the trade of medicinal and veterinary products as well as explosives is regulated by separate laws.

[284] Art. 69 para. 1 of the Law on Medicines (OG RMN No. 80/04 and 18/08).

D. CONSUMER SALES DIRECTIVE (99/44)

Coordinator(s): *Zlatan Meškić* and *Neda Zdraveva/Jadranka Dabović-Anastasovska/Nenad Gavrilović*

I. Member state legislation prior to the adoption of the Consumer Sales Directive

Prior to transposition of the Directive 99/44 the national laws of the participating states contained provisions within their Law of Obligations/Civil Code which regulate the sale of goods, applicable to all types of contracts and not specifically related to consumer contracts. All of the participating states at least partly transposed the provisions of the Directive 99/44 in their consumer protection regulations, while only some of them additionally or mainly transposed the Directive in their generally applicable Law of Obligations (Macedonia, Croatia and Montenegro).

In the successor states of former Yugoslavia a common Law of Obligations[285] was valid and contained elaborate rules on seller's liability for conformity of the goods with the sales contract (Arts. 478-500 LoO), on conformity of the provided services with the services contract (Arts. 614-621 LoO), and on commercial guarantees of seller and producer for the proper functioning of technical goods (Arts. 501-507 LoO). This Law has been replaced by new Acts in Croatia[286], Montenegro[287] and Macedonia[288].

In Albania the valid Civil Code of 1994 contains generally applicable rules on sale of goods[289], while the Consumer Protection Act of 2003[290] was the first Act in Albania to determine certain aspects of consumer sales; the latter was replaced by the new Consumers Protection Act[291] in 2008. A similar development happened in Bosnia and Herzegovina, which by enacting the Consumer Protection Act in 2002[292] got its first consumer specific provisions within chapter II on the "Sale of products and provision of services", which were replaced by the new Consumer Protection Act of 2006[293], chapter III of which contains slightly changed provisions under the same title. The Serbian Consumer Protection Act of 2005[294] contains certain provisions that seem relevant for this set of issues. Still, provisions of the Serbian Consumer Protection Act may be better understood as an attempt to restate the exist-

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[285] Yugoslav Law of Obligations, *OG SRFY* No. 29/78, 39/85, 46/85, 45/89, 57/89; Civil Obligation Act, *OG RH* No. 53/91, 73/91, 111/93, 3/94, 107/95, 7/96, 91/96, 112/99, 88/01; *OG FRY* No. 31/93, 31/93, 22/99, 23/99, 35/99, 44/99. Since the split of Yugoslavia this Act by virtue of succession remained applicable in two slightly different versions of each entity of Bosnia and Herzegovina, namely the Law of Obligations of the Republic of Srpska (*OG of the Republic of Srpska*, No. 17/93, 57/98, 39/03, 74/04) and the Law of Obligations of the Federation of Bosnia and Herzegovina (*OG of the Republic of Bosnia and Herzegovina*, No. 2/92, 13/93, 13/94 and *OG of the Federation of Bosnia and Herzegovina*, No. 29/03). Since provisions relevant for this analysis do not differ, in order to ensure more clarity this text will only refer to "Bosnia-Herzegovina's Law of Obligations".

[286] Civil Obligation Act, *OG RH* No. 35/05, 41/08.

[287] Law on Obligations, *OG RMN* No. 47/08.

[288] Law on Obligations, *OG RMac* No. 18/2001.

[289] Civil Code, *OG RAl* No. 11/94.

[290] Consumer Protection Act, *OG RAl* No. 84/03.

[291] Part VI, Chapter I (Art. 34-35) of the Consumer Protection Act, *OG RAl* No. 61/08.

[292] Consumer Protection Act, *OG BA* No. 17/02.

[293] Consumer Protection Act, *OG BA* No. 25/06.

[294] Consumer Protection Act, *OG RS* No. 79/05.

ing provisions of the Law of Obligations, than as an attempt to transpose the Consumer Sales Directive.

Croatia, Montenegro and Macedonia transposed the Directive 99/44 by amending their Law of Obligations as well as introducing consumer specific provisions on sale of goods into their Consumer Protection Act. Transposition of the Directive 99/44 into the new Croatian Civil Obligation Act from 2005[295] was also used to widen the application of some of its rules to all onerous contracts (Art. 400 et seq. COA)[296] However, as a central act for consumer protection the Croatian Consumer Protection Act[297] contains Art. 5 on trader's obligations on fulfilment of consumer contracts. Para. (1) of this provision prescribes that the trader shall fulfil a consumer contract in accordance with the provisions of the Consumer Protection Act and the Civil Obligations Act. Furthermore, in accordance with para. (2), in case of material defects of the product relations between consumers and traders shall be regulated by the relevant provisions of the Civil Obligation Act.

In Montenegro, apart from the already described Yugoslav law of Obligations, special rules existed within the Federal Yugoslav Law on Trade[298] and afterwards within the Federal Yugoslav Law on Consumer Protection[299]. Finally, Directive 99/44 has been transposed in the Montenegrin Law on Consumer Protection of 2007[300] and the new Montenegrin Law on Obligations of 2008, which are now being applied in parallel. The Macedonian Law on Consumer Protection of 2000[301] only contained rules on liability for deficient products. These rules were replaced in 2004[302] by the valid Macedonian Law on Consumer Protection which transposed provisions set by the Directive on protection of consumers in cases of non-conformity of the products with their specification as well as by the Law of Obligations of 2001, which was last amended in 2008.

II. Scope of application

1. General scope

Provisions of the Acts on Obligations/Civil Code of the participating states, including those relating to the liability for conformity to the contract, apply to B2B, B2C and P2P transactions. Furthermore, they contain separate provisions on the supplier's liability for conformity of the rendered services to the services contract.

Transposition of the Directive 99/44 in the Croatian Civil Obligations Act also resulted in the creation of some separate rules which are only applicable to consumer transactions. The consumer protection regulations of the participating states apply only to B2C transactions. Attention must be called to the fact that in accordance with the Serbian Consumer Protection Act the notion of consumer is expanded to include legal persons acting outside their

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[295] Civil Obligations Act, *OG RH* No. 35/05.

[296] S. Petrić, "Odgovornost za materijalne nedostatke stvari prema novom Zakonu o obveznim odnosima" (Liability for Material Defects According to the new Law on Obligations), *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, Vol. 27, 1/2006, 87– 128.

[297] Consumer Protection Act, *OG RH* No. 79/07, 125/07, 79/09, 89/09, 133/09.

[298] Federal Law on Trade, *OG FRY* No. 46/90, 32/93, 50/93, 41/94, 29/96.

[299] Federal Law on Consumer Protection, *OG FRY* No. 37/02.

[300] Law on Consumer Protection, *OG RMN*, No. 26/07.

[301] Law on Consumer Protection, *OG RMac* No. 63/00.

[302] Law on Consumer Protection, *OG RMac* No. 38/04.

trade, business, craft or profession. However, the Serbian legislator is currently preparing the Draft of the Proposal for the new act on consumer protection (Draft Proposal),[303] which is intended to apply to B2C transactions and to cover traders' liability for both conformity of the goods to the sales contract, and conformity of the services to the services contract.

2. Definition of 'consumer'

The participating states, except for Serbia, limit the notion of consumer to "natural persons". Under Art. 2 (1) of the Serbian Consumer Protection Act of 2005, consumer is any natural person who purchases products or services for their own needs or for the needs of their household. Due to para. (2), consumer is also a company, enterprise, other legal entity or entrepreneur, when they are purchasing products or services for their own needs. This means that the notion of consumer under the Serbian Consumer Protection Act of 2005 is unacceptably broad, as it includes legal persons acting outside their trade, business, craft or profession. Under Chapter I of the Serbian Draft Proposal, the consumer is defined as any natural person who is acting mainly for purposes which are outside his trade, business, craft or profession. Art. 1 (3) of the Bosnian Consumer Protection Act contains the same definition as the Art. 2 (1) of the Serbian Consumer Protection Act, but requires the criteria of consumer's "personal needs *and* the needs of his household". This definition is very restricted in comparison to the definition of consumer in the Directive 99/44. Instead of the "acting for purposes which are not related to his trade, business or profession", which is used in the definition of consumer in the Directive, the Bosnian Consumer Protection Act limits the acting of a consumer to the purchase, acquisition or use of a service or product, and reduces it additionally to the purpose of his "personal needs and the needs of his household", which due to the conjunction "and" should be understood cumulatively.[304]

In Albania consumer is any natural person, who is acting for purposes not related to trade, business or exercise of his profession. In the meaning of this law, the non-profit organizations are also considered as consumers.[305] The Macedonian law on Consumer Protection defines the consumer as "any natural person who purchases products or uses services for direct personal consumption, for purposes that are not intended for carrying out his trades, business or profession".[306] Although different in wording, the definition covers all aspects of the definition provided in the Directive. According to the Montenegrin Law on Consumer Protection consumer is a natural person who buys, orders, accepts, uses goods or services, including public services, for non-business, namely non-professional purposes, or to whom the offer for a product or service is targeted. This Law also determines the term "group of consumers" defined as a group set up by the consumers with the purpose that members of the group acquire ownership rights over particular products with the aid of that group.

Croatia is the only participating state that with regards to the sale of goods determined a consumer definition in its Civil Obligations Act. In Croatia the definition of 'consumer' can

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[303] Draft of the Proposal for the new Act on Consumer Protection (Draft Proposal), prepared by the Ministry of Trade and Services of Republic of Serbia.

[304] Art. 15 of the Draft Law of Obligations of Bosnia and Herzegovina defines a consumer as "every subject who concludes a legal act for purposes which are outside his trade or profession". This definition is wider not only than the one in the Consumer Protection Act but also than the definition of the Directive 99/44, because it seems to generally include legal persons. On the other hand, it refers to the conclusion of a legal act and thereby excludes pre-contractual situations, contrary to the Directive 99/44.

[305] Art. 3 (6) of the Consumer Protection Act, *OG RAl* No. 61/08.

[306] Art. 4 line 1 of the Law on Consumer Protection, *OG RMAC* No. 38/04.

be derived from the specific Civil Obligation Act provision regarding the sale of consumer goods, which defines consumer contracts. Art. 402 (3) of the Croatian Civil Obligation Act defines consumer contracts as contracts entered into by a natural person as the buyer, outside his economic and professional activity, with the natural or legal person as the seller, within the framework of his economic or professional activity (consumer contracts). By its content the definition corresponds to the definition of consumer as regulated in Art. 1(2)(a) of the Directive 99/44.

3. Definition of 'seller'/'trader'

Only Croatian Law refers to the term 'seller' and derives it with regards to consumer sales from the second part of the definition of consumer contracts as regulated in Art. 402 (3) of the Civil Obligations Act, where there is a reference to "the natural or legal person as the seller", who acts "within the framework of his economic or professional activity". Beside slight alteration in the wording, this definition corresponds to the definition of seller as regulated in Art. 1(2)(c) of the Directive 99/44.

The transposition laws of the other participating states use the term "trader". In accordance with Art. 3 (14) of the Albanian Consumer Protection Act, "trader" means any natural or legal person who is acting for purposes relating to his economic activity, trade, business, craft or profession and anyone acting in the name or on behalf of a trader. The trader is defined in Art. 1 (5) of the Consumer Protection Act of Bosnia and Herzegovina as "any person who is, directly or as an intermediator, selling products or providing services to the consumer". As well as in case of the notion of the consumer, the definition is narrowed to "selling products and providing services", which reduces the scope of application of the Consumer Protection Act in general. Art. 14 of the Draft Law of Obligations of Bosnia and Herzegovina refers to the "business person", defining him as a "natural or a legal subject who is during the conclusion of the legal act acting in the performance[307] of his trade or profession"[308]. This definition excludes pre-contractual situations from its scope of application. Under Art. 2. (3) of the Serbian Consumer Protection Act, trader is a company, enterprise, other legal entity or entrepreneur, when they are selling products or providing services to a consumer.[309] The Macedonian Law on Consumer Protection defines trader as "any legal or natural person who, in the course of carrying out his activity, directly satisfies the needs of the citizens, for products and services".[310]

According to the Montenegrin Consumer Protection Law trader is "a person who sells goods or provides services to consumers". This definition implies legal or natural persons and indirectly suggests that the contract does not have to be concluded in the course of his trade, business or profession. Furthermore, transposition of consumer provisions in Montenegrin Law relies on provisions of Montenegrin Law on Internal Trade, where a cross reference to this legal act would expand the scope of application of the term trader[311].

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[307] The "action in the performance" is an unsuccessful formulation in Bosnian as well.

[308] Art. 15 of the Draft Law of Obligations of Bosnia and Herzegovina of 2006 contained the same provision, but referred to the "entrepreneur".

[309] Chapter I of the Serbian Draft Proposal for the new act on consumer protection defines trader as any natural or legal person who, in contracts covered by this Law, is acting for purposes relating to his trade, business, craft or profession, and anyone acting in the name of or on behalf of a trader.

[310] A similar definition is provided by Art.2 of the Law on Trade, *OG RMac* No. 16/04, 128/06, 63/07, 88/08, 159/08, 20/09 and 105/09.

[311] Art. 6 of the Law on Internal Trade, *OG RMN* No. 49/08.

4. Definition of 'consumer goods'

None of the consumer provisions of the participating states contains a definition of consumer goods which corresponds to Art. 1 (2) b of the Directive 99/44. The current situation would be changed with the adoption of the Serbian Draft Proposal for the new act on consumer protection, which defines goods as any tangible movable item, with the exception of: (a) goods sold by way of execution or otherwise by authority of law; (b) water and gas where they are not put up for sale in a limited volume or set quantity; and (c) electricity.

Consumer goods, including goods used in the context of providing a service, shall in accordance with Art. 3 (7) and Art 29 (1) of the Albanian Consumer Protection Act mean any movable item which is intend for consumers or likely to be used by consumers, under reasonably foreseeable conditions, to be used by consumers even if not intend for them, and is supplied or made available, whether for consideration or not, in the course of an economic activity, whether new, used or reconditioned.

In Bosnia and Herzegovina the consumer is defined as a person "who purchases, acquires or uses products or services", while goods pursuant to Art. 1 (9) of the Consumer Protection Act include "products and immovable property". Consequently, products could be understood as comprising only movables, what would lead to a reduction of the scope of application of the whole Consumer Protection Act. Nevertheless, even Chapters of the Consumer Protection Act of Bosnia and Herzegovina which are explicitly limited to "products and services" in their title, contain provisions regarding "goods and services". Terms "goods and services" and "products and services" are used as synonyms on several occasions[312]. Chapter III on sale of products refers only to products, while Chapter VI regarding "guaranties for products" contrary to its title refers to goods. It is doubtable whether the use of a particular term "goods" or "products" in the provisions of the Consumer Protection Act of Bosnia and Herzegovina is based on the will of the legislator to exclude immovables from the scope of application of the provision using the term "products".

The rules of the Croatian Civil Obligations Act on seller's liability for material defects are applicable on sale contracts and all the other onerous contracts. This is why the Croatian legislator considered that there is no need for explicit transposition of the Directive´s definition of consumer goods, since the same provisions are applicable not only on consumer goods but on all the other objects of sale (e.g. services and real estates). According to the Civil Obligation Act provision, objects of sale can be things, rights and property.

The Montenegrin Consumer Protection Law defines only "goods" as a general term. These are defined as "tangible things that may be placed on the market, including also the facilities that may be used in accordance with this Law". A separate term "consumer goods" is not defined, albeit it was proposed in the initial draft, but was somehow left out during a long period of final drafting. There is also no reduction to "movable" goods, what suggests the inclusion of immovables.

The Macedonian Law on Consumer Protection does not define 'consumer goods'. The Law contains a definition of 'product' that reads: "Product" is any object regardless of the level of its processing, intended to be offered to consumers"[313]. Art. 165 (b) of the Macedo-

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[312] See the example of Art. 49 of the Consumer Protection Act regarding distance selling contracts. Art. 49 (1) defines the obligation of the trader to deliver the „product or service" within 15 days from the consumers order. The next paragraph, however, defines the consequences of the non-delivery of „goods or services".

[313] Art. 4 5th indent of the Law on Consumer Protection, *OG RMac* No. 38/04.

nian Law on Obligations, for the meaning of that Law, defines "product" as a movable item, as well as an independent item built-in any movable or immovable item, including electricity and other sorts of energy. Consequently, the existing definition represents a significant variation from the definition provided in the Directive.

The specific exclusions listed in Art. 1(2)(b) of the Directive 99/44 regarding goods sold by way of execution or otherwise by authority of law and water and gas where they are not put up for sale in a limited volume or set quantity are not transposed in any of the participating states. However, Art. 409 of the Croatian Civil Obligations Act regulates that a liability for material defects shall be excluded as regards a mandatory public sale. Furthermore, a general provision on "thing" regulates that a thing must be in circulation and the contract of sale of a thing *extra commercium* shall be void and that special rules shall apply to the sale of a thing with limited circulation (Art. 380 (1) and (2) of the Croatian Civil Obligations Act).

a. Exclusion of goods sold at public auction from the meaning of "consumer goods" (Art. 1 para. (3)).

None of the participating states has explicitly excluded "second-hand goods sold at public auction where consumers have the opportunity of attending the sale in person" from the definition of "consumer goods".

In Macedonia notion on goods sold on public auctions is related to the obligations of seller for price indication where by the law it is stipulated that the seller is not obliged to abide by the indicated retail prices and selling conditions, in cases of public and auction sale, sale of artistic works and antiquities, or to the products purchased in the course of offering certain services. Goods sold on public auctions are excluded from the application of the provisions related to the distance sales contracts as well. It is to be concluded that the goods sold on public auctions are to be considered as excluded from the consumer goods in accordance with Macedonian law.

The Montenegrin provisions on selling goods during compulsory public sale, regulated by Law on Obligations[314] are also of importance to this subject matter. Namely, in contrast to the general rule of conformity, an owner whose goods are sold at a compulsory public sale would not be held liable for defects of the same. Still, this provision does not cover the situation of voluntary sale on auctions.

5. Definition of 'sale'

The participating states provide a definition of sale only in their generally applicable Law of Obligations. With almost the same wording Art. 376 (1) of the Croatian Civil Obligation Act, Art. 454 of the Law of Obligations of Bosnia and Herzegovina and of Serbia, Art. 705 of the Civil Code of Albania and Art. 442 (1) of the Macedonian Law on Obligations provide that by the sales contract the seller is obliged to deliver to the buyer the item that he is selling to the buyer so that the buyer acquires the right of ownership, while the buyer is obliged to pay to the seller the price.

None of the participating states explicitly transposed Art. 1 (4) of the Directive 99/44. However, in Croatia this provision finds its equivalent in Art. 357 (1) of the Civil Obligation Act. This provision regulates that each contracting party is liable for material defects in its performance. This implies not only the seller but also the contractor by contract for work. In Bosnia and Herzegovina the liability for material defects is regulated in two consecutive Articles with almost the same wording (Arts. 18 and 19 CPA), one of them related to products

[314] Art. 495 of the Law on Obligations, *OG RMN* No. 47/08.

in the sale contracts and the other to provision of services. Additionally, in Bosnia and Herzegovina and in Serbia, Art. 600 of their respective Law of Obligations states that by a contract for the supply of services the supplier assumes the obligation to perform a particular job, such as to manufacture or repair an object, or execute some physical or intellectual work and the like, while the purchaser of the services assumes the obligation to pay him monetary consideration in return. The Montenegrin Consumer Protection Law uses "circulation to consumers" as term for the sale of goods or provision of services to the consumers as the end users, and provision of the samples of goods. In addition, the already given notion of trader and further cases of expansion under the Montenegrin Law on Internal Trade raise effects that these additional transactions would be covered in practice as well.

III. Consumer protection instruments

1. Conformity with the contract

a. "Conformity with the contract" requirement in general (Art. 2)

aa. Requirement to deliver conforming goods

Albania literally transposed Art. 2 (1) of the Directive 99/44, stating that the seller must deliver goods to consumers which are in conformity with the contract of sale.[315] According to Art. 15 of the Serbian Consumer Protection Act, the vendor or service provider shall be under obligation to provide to the consumer a product or service of the quality that is prescribed or specified in the contract.

In the other participating states, the requirement to deliver conforming goods arises out of trader's liability for material defects (Bosnia and Herzegovina[316], Croatia[317]) or a general provision on performance of the obligation as agreed (Macedonia[318], Montenegro[319]).

bb. Presumption of conformity

Albania is the only participating state which in its Consumer Protection Act positively defines criteria for the presumption of conformity.[320] The Acts on Obligations of all the other participating states contain a list of cases when material defects exist[321] (Bosnia and Herzegovina, Croatia, Macedonia, Montenegro and Serbia), contrary to the model of Art. 2 (2) of the Directive 99/44, which defines criteria for conformity of the goods with the contract. The abovementioned provisions are not framed as legal presumptions.

The Macedonian Law on Consumer Protection additionally defines when it is to be considered that a product has a deficiency and when conformity it is to be presumed. By Art.42

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[315] Art 29 (2) of the Consumer Protection Act, *OG RAl* No. 61/08.

[316] Art. 18 of the Consumer Protection Act, *OG BA* No. 25/06; See also Arts. 478 and 456 of the Law of Obligations of the Federation of Bosnia and Herzegovina and the Republic of Srpska, *OG SFRY* No. 29/78, 39/85, 46/85, 45/89, 57/89, *OG of the Republic of Bosnia and Herzegovina*, 2/29, 13/93, 13/94 *OG of the Federation of Bosnia and Herzegovina*, No. 29/03, *OG of the Republic of Srpska*, No. 17/93, 57/98, 39/03, 74/04.

[317] Arts. 357 and 400 of the Civil Obligations Act, *OG RH* No. 35/05, 41/08.

[318] Arts. 10 and 11 of the Law on Obligations, *OG RMac* No. 18/01.

[319] Art. 12 of the Law on Consumer Protection, *OG RMN* No. 26/07.

[320] Art. 29 (3) of the Consumer Protection Act, *OG RAl* No. 61/08.

[321] Art. 467 of the Law on Obligations, *OG RMac* No 18/01.; Art. 401 of the Civil Obligations Act, *OG RH* No. 35/05, 41/08; Art. 479 of the Law of Obligations of Bosnia and Herzegovina and Serbia, *OG SFRY* No. 29/78, 39/85, 46/85, 45/89, 57/89; Art. 487 of the Law on Obligations, *OG RMN* No. 47/08.

(1) of the Macedonian Law on Consumer Protection, the product has deficiency when it does not meet the general obligation of safety and does not provide the safety which a person is entitled to expect, taking all circumstances into account, such as: on the basis of the product presentation; the use for which it is reasonably expected that the product will be used; the time when the product was placed on the market; and when it does not meet the general obligation of conformity or the contractual obligations.

cc. Criteria for presuming conformity (Art. 2 para. (2) lit. (a)-(d) generally)

In the successor states of former Yugoslavia the criteria for material defects set in Art. 479 of the Yugoslav Law of Obligations remained the same in Bosnia and Herzegovina, Serbia and Macedonia[322], while Croatia[323] and Montenegro[324] have amended it using exactly the same formulation.

According to Art. 479 of the Yugoslav Law of Obligations (still valid in Bosnia and Herzegovina and Serbia[325], now Art. 467 of the Macedonian Law on Obligations) a material defects exist: 1) if a thing lacks the qualities required for its regular use or circulation; 2) if a thing lacks the qualities required for the specific purpose the buyer intends to use it for, and where it was known or should have been known to the seller; 3) if a thing lacks qualities and characteristics which were agreed or stipulated expressly or by implication; 4) where the seller has delivered a thing not equal to the sample or model, unless the sample or model have been shown for information only. As a comparison of Art. 479 Yugoslav Law of Obligations with Art. 2 (2) of the Directive 99/44 shows, these provisions slightly differ: Art. 479 (4) Yugoslav Law of Obligations excludes samples shown for information only, which are not excluded by Art. 2 (2) (a) of the Directive 99/44; Art. 2 (2) (b) of the Directive only includes specific purposes of goods the consumer and seller agreed on, while Art. 479 (2) of the Yugoslav Law of Obligations additionally provides protection in cases when the seller should have known about the

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[322] Art. 467 of the Law on Obligations, *OG RMac* No. 18/01.

[323] Art. 401 of the Civil Obligations Act, *OG RH* No. 35/05, 41/08.

[324] Art. 487 of the Law on Obligations, *OG RMN* No. 47/08.

[325] Under the Serbian Draft Proposal for the new act on consumer protection, the delivered goods shall be presumed to be in conformity with the contract if they satisfy the following conditions: (a) they comply with the description given by the trader and possess the qualities of the goods which the trader has presented to the consumer as a sample or model; (b) they are fit for any particular purpose for which the consumer requires them and which was known or must have been known to the trader at the time of the conclusion of the contract; (c) they are fit for the purposes for which goods of the same type are normally used; or (d) they show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the trader, the producer or his representative, particularly in advertising or on labelling.

Under the Serbian Draft Proposal, there is a lack of conformity of the rendered service with the contract if: (1) the service contradicts the information the trader has given when advertising the service, or otherwise before the conclusion of the contract; on the contents of the service, or on his performance, or on other circumstances relating to the quality or use of the service; (2) the service contradicts the information the trader has given during the provision of the service, if such information may be deemed to have had an effect on the consumer's decisions; (3) the service is not fit for a particular purpose for which the consumer required it, and which he has known or which must have been known to the trader at the time of the conclusion of the contract; (4) the service is not fit for the purposes for which services of the same type are normally required; or (5) the service does not correspond to reasonable expectations, given the nature of the services and taking into account any public statements of the trader on the specific characteristics of the service, particularly in advertising.

specific purpose the buyer intends to use the good for; finally, the Yugoslav Law of Obligations does not provide protection in cases described in Art. 2 (2) (d) of the Directive 99/44.[326]

In accordance with Art. 401 (1) of the Croatian Civil Obligations Act and Art. 487 (1) of the Montenegrin Law of Obligations which have the same wording, a defect shall exist: 1) if a thing lacks the qualities required for its regular use or circulation; 2) if a thing lacks the qualities required for the specific purpose the buyer intends to use it for, and where it was known or should have been known to the seller; 3) if a thing lacks qualities and characteristics which were agreed or stipulated expressly or by implication; 4) where the seller has delivered a thing not equal to the sample or model, unless the sample or model have been shown for information only; 5) if the thing lacks qualities otherwise inherent to other things of the same kind and which the buyer could have reasonably expected in accordance with the nature of the thing, taking into consideration public statements of the seller, the manufacturer and their representatives on the qualities or characteristics of the thing (particularly in advertising or on labelling etc.); 6) if the thing has been badly assembled provided that the service of assembly is included in the performance of the contract of sale; 7) if bad assembly is a result of deficiencies in the instructions for assembly. Although the criteria from Art 2(2) of the Directive 99/44 on the one hand and from Art. 401 (1) of the Croatian Civil Obligations Act and Art. 487 of the Montenegrin Law on Obligations on the other hand correspond in general, there are some differences. For instance, under Art 2(2) (b) of the Directive 99/44 consumer goods are presumed to be in conformity with the contract if they are fit for any particular purpose for which the consumer requires them and which "he made known to the seller" at the time of conclusion of the contract and "which the seller has accepted". Art. 401 (1) point 2) of the Croatian Civil Obligations Act and Art. 487 (1) point 2) of the Montenegrin Law on Obligations offer a higher level of protection by prescribing that the specific purpose "was known or should have been known to the seller". Finally, there is a provision in Art. 5 (3) of the Croatian Consumer Protection Act which regulates that the "nonconformity of products or services, where necessary, shall be proven through expert opinion from an authorised institution or by a certified court expert, with the costs of expertise to be covered by the consumer or the trader, depending on the result of expertise". Montenegro has also through Consumer Protection Law determined additional factors for conformity like exact measure or quantity of goods, suitable packaging material in accordance with the type and properties of the goods, prescribed or agreed quality, and if the quality was not prescribed or agreed – usual quality of goods and services, way of determining or calculating price etc.[327]

In accordance with Art. 29 (3) of the Albanian Consumer Protection Act, as the only provision of the participating states which positively defines criteria for conformity, consumer goods are presumed to be in conformity with the contract if they: 1) comply with the description given by the seller and possess the qualities of the goods which the seller has held out to the consumer as a sample or model; 2) are fit for any particular purpose for which the consumer requires them and which he made known to the seller at the time of conclusion of

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[326] Art. 536 of the Draft Law of Obligations of Bosnia and Herzegovina of 2010, which mostly corresponds to the existing Art. 479 of the Law of Obligations of Bosnia and Herzegovina, transposed Art. 2 (2) of the Directive 99/44 in its para. 4. Thus, a material defect exists when the thing lacks qualities which consumers can expect due to the public statements of the seller or manufacturer, particularly in advertising or on labelling, unless the statement was not known nor should have been known to the seller, it was properly changed in the moment of the conclusion of the contract or could not have influenced the decision to conclude the contract.

[327] Arts. 12 and 16 of the Law on Consumer Protection, *OG RMN* No. 26/07.

the contract and which the seller has accepted; 3) are fit for the purposes for which goods of the same type are normally used; 4) show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling.

dd. Time at which conformity is assessed

In the successor states of former Yugoslavia the provisions of Yugoslav Law of Obligations, with regard to the time at which conformity is assessed, are still valid. Art. 478 of the Law of Obligations of Bosnia and Herzegovina and of Serbia, Art. 400 (1) of the Croatian Civil Obligations Act, Art. 486 of the Montenegrin Law on Obligations and Art. 466 of the Macedonian Law on Obligations provide that the seller shall be liable for material defects of a thing at the moment of the transfer of risk to the buyer. The moment of the transfer of the risk is determined by Art. 456 of the Law of Obligations of Bosnia and Herzegovina and of Serbia, Art. 444 of the Macedonian Law on Obligations, Art. 378 (1) of the Croatian Civil Obligations Act and Art. 464 of the Montenegrin Law on Obligations, as the moment of delivery of the item, and is thus in conformity with Art. 2 (1) of the Directive 99/44.[328] Albania did not transpose this provision in its Consumer Protection Act.

b. Public statements and exclusions (Art. 2 para. (2) lit. (d) and Art. 2 para. (4))

Under Art. 480 (3) of the Law of Obligations of Bosnia and Herzegovina[329] and of Serbia[330], as well as Art. 467 (3) of the Macedonian Law on Obligations a seller shall be responsible for defects which could have been noticed easily by the buyer, if the former declared that the goods were free of all defects or that they had specific proprieties or characteristics. These provisions are amended in the Art. 487 (1) point 5 and (2) of the Montenegrin Law on Obligations and Art. 401 (1) point 5 and Art. 401 (2) of the Croatian Civil Obligations Act, where Art. 2 (2) lit. d and Art. 2 (4) of the Directive 99/44 were literally transposed. The only exception is that Art. 2 (4) of the Directive 99/44 regulates that the seller shall not be bound by public statements if he shows that he was not, and "could not reasonably have been, aware of the statement in question", while Art. 401 (2) of the Croatian Civil Obligations Act and Art. 487 (2) of the Montenegrin Law on Obligations uses the term "should not have been aware of such statements".

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[328] According to Art. 513 (3) of the Draft Law of Obligations of Bosnia and Herzegovina of 2010, the provisions of this Article, which correspond to Art. 456 BLO, regarding the moment of the transfer of the risk may not be changed to the detriment of the consumer.

[329] As described above, Art. 536 (4) of the Draft Law of Obligations of Bosnia and Herzegovina would transpose the Art. 2 (2) d and Art. 2 (4) of the Directive 99/44.

[330] Under the Serbian Draft Proposal for the new act on consumer protection, the trader shall not be bound by public statements if he shows that one of the following situations existed: (a) he was not, and could not reasonably have been, aware of the statement in question; (b) by the time of conclusion of the contract the statement had been corrected; (c) the decision to buy the goods could not have been influenced by the statement.

Furthermore, under the Draft Proposal, the provided service is not in conformity to the contract, if it contradicts the information given when marketing the service, or otherwise before the conclusion of the contract, by a person other than the trader at a previous level of the supply chain, or on behalf of the trader. However, the trader shall not be liable for lack of conformity, if the information has been clearly corrected in good time, or if he neither knew nor should have known of the information given.

The Macedonian Law on Consumer Protection in Art 42 (2), 4th indent, specifically refers to public statements as one of the criteria by which the conformity is to be assessed, however it does not include the exceptions provided in Art.2(4) of the Directive. Albania did not transpose Art. 2 (2) lit. d and Art 2 (4) in its Consumer Protection Act.

c. Exclusion of matters of which consumer is aware (Art. 2 para. (3))

Art. 29 (5) of the Albanian Consumer Protection Act literally transposed Art. 2 (3) of the Directive 99/44, stating that it shall be deemed that no lack of conformity exists for the purposes of this article if, at the time the contract was concluded, the consumer was aware, or could not reasonably be unaware of, the lack of conformity, or if the lack of conformity has its origin in materials supplied by the consumer. In all the other participating states, the rules of the Yugoslav Law of Obligations of 1978 still apply[331], where a seller shall not be responsible for defects if they were known to the buyer at the moment of entering into contract or if it was impossible for them to remain unknown to him.[332] Defects shall be considered not to have remained unknown to a buyer if they could have been easily noticed by usual examination of the goods by a diligent person as a buyer, having average knowledge and experience characteristic for a person of the same professional and trade line.[333] However, a seller shall be responsible for defects, which could have been noticed easily by the buyer, if the former declared that the goods were free of all defects or that they had specific proprieties or characteristics.[334]

Consequently, with the exception of some terminological differences, laws of the participating states contain a provision which corresponds to Art 2 (3) of the Directive 99/44.

d. Provision on goods to be installed (Art. 2 para. (5))

Art. 2 (5) Directive 99/44 is transposed in Art. 401 (6) and (7) of the Croatian Civil Obligations Act and Art. 487 (6) and (7) of the Montenegrin Law on Obligations. The only difference which Croatia and Montenegro created when transposing this provision concerns the used terms "thing" instead of "consumer goods" and "buyer" instead of "consumer". This is however adequate since these provisions on seller's liability for material defects are applicable to all sale contracts. Art. 2 (5) of the Directive 99/44 is literally transposed in Art. 29 (4) of the Albanian Consumer Protection Act.

Bosnia and Herzegovina, Macedonia and Serbia did not transpose this provision on goods to be installed. Art. 56 of the Serbian Consumer Protection Act only prescribes that technical instructions, instructions for use and declaration must be in writing and in the lan-

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[331] Art. 468 of the Macedonian Law on Obligations; Art. 480 of the Law of Obligations of Bosnia and Herzegovina and of Serbia; Art. 488 of the Montenegrin Law on Obligations; Art. 402 of the Croatian Civil Obligations Act.

[332] In the former Yugoslav states, except for Croatia who has amended the following restriction, this provision only excludes the liability of the seller for defects the buyer was aware of or could not have been unaware of, in cases when a thing lacks the qualities required for its regular use or circulation or if a thing lacks qualities and characteristics which were agreed or stipulated expressly or by implication.

[333] In accordance with Art. 402 (3) of the Croatia Civil Obligations Act this provision referring to „average knowledge and experience" does not apply to B2C contracts.

[334] Under the Serbian Draft Proposal for the new act on consumer protection, there shall be no lack of conformity if, at the time the contract was concluded, the consumer was aware, or should reasonably have been aware of, the lack of conformity; or if the lack of conformity has its origin in materials supplied by the consumer. The trader shall be liable for the lack of conformity which could have been easily noticed by the consumer, if the trader declared that the goods are in conformity with the contract.

guage that is in official use in the Republic of Serbia. The Macedonian Law on Consumer Protection determines the obligation of the seller to provide to the consumer the prescribed documents and the documents prepared by the producer for the purpose of easier and safe use of the product (declaration, guarantee, technical manual, manual for assembly, manual for use, list of authorised services etc.), as defined in Art. 21 of this Law, truthful, clear, visible and readable, written in Macedonian language and Cyrillic letters, which does not exclude the possibility to additionally use other languages in the same time and signs easily readable for the consumer. Art 2 (5) of the Directive 99/44 is transposed in the Serbian Draft Proposal for the new act on consumer protection and the Draft Law of Obligations of Bosnia and Herzegovina.

2. Consumers' rights in cases of non-conformity

a. Consumers' rights in cases of non-conformity in general (Art.3)

Art. 3 of the Directive provides the remedies which are to be available to a consumer where there is a lack of conformity in the goods. The national legislation of all participating countries foresees remedies for the cases of non-conformity.

Under the Albanian law, in case of a lack of conformity, the consumer shall be entitled to have the goods brought into conformity free of charge by repair or replacement, or to have an appropriate reduction made in the price or the contract rescinded with regard to those goods (Art. 31(3) Consumer Protection Law)[335].

Under Art. 18 of the Bosnian CPA[336], a consumer has the right to repair, replacement and rescission, without the reduction to cases of non-minor lacks of conformity.

In Croatia the consumers' rights are transposed in Art. 410 of the COA[337], and also regulated in Art. 5 (2) CPA[338], which regulates the trader´s obligations when fulfilling consumer contracts. In Montenegro, the consumer's choice is between repair and replacement; however, where these are impossible, or cannot be provided within a reasonable time or without significant inconvenience to a consumer, it is possible to ask for price reduction or (in case of non-minor lacks of conformity) rescission of the contract.

In Macedonia, the issue is regulated both by the Law on Obligations[339] and the Law on Consumer Protection (Art. 43)[340]. According to the Law on Obligations of Macedonia, in general the buyer (as the rules are related to all sales contracts), in cases of deficiencies of the purchased goods has the right to: 1) request the seller to remove the deficiency or to deliver him another product without deficiency (performance of the contract); 2) to request decrease of the price; 3) to withdraw from the contract. In any of these cases the buyer has the right of compensation of damages. By the CPA (Art.43), the consumer to whom the product with deficiency has been sold has the right to request, according to his own choice: 1) free of charge removal of the defects of the product or reimbursement of the expenses for removal of the defect; 2) proportional reduction of the retail price; 3) replacement of the product with an appropriate product with the same trademark, type, industrial design or designation of origin and geographical designation of the product; 4) replacement of the product with an appropri-

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[335] Consumer Protection Act (CPA) of 17.04.2008 OG No. 61/08..

[336] Consumer Protection Act of Bosnia and Herzegovina, *OG BA No. 25/06*.

[337] Civil Obligation Act (COA), OG RH No. 35/05, 41/08.

[338] Consumer Protection Act , *OG RH* No. 79/07, 125/07, 79/09, 89/09, 133/09.

[339] Law on Obligations (LoO), *OG RMac No 18/01; 4/02; 5/03; 84/08; 81/09 and 161/09*.

[340] Law on Consumer Protection (LCP), *OG RMac No. 38/04, 77/07 and 103/08.*

ate product with a different trade mark, type, industrial design, or designation of origin and geographical designation of the product, with appropriate reduction or increase of the retail price; and 5) cancellation of the contract, return of the paid amount and compensation of the suffered damages. This request may be placed by the consumer, upon his own choice, to the competent inspection body or to the trader or the distributor, in the place where the product was purchased or in the place of the consumer's residence. In case when the consumer purchased foodstuffs with deficiency, the trader is obliged to make a replacement with products of adequate quality or to return the paid amount to the consumer, provided that the defects are discovered within the specified expiry date until which the product may be used.

Under Art. 34 of the Serbian CPA[341], the consumer has a right to file a complaint in case of non-conformity and following such complaint is entitled to remedies.

aa. Implementation of the remedies

The remedies provided in the Directive (Art. 3) have been transposed in the national legislation of the studied countries, in the Law on Consumer protection or Laws on Obligation, or both; with specific variations.

bb. Consumer choice between remedies

Under the Albanian Consumer Protection Act the consumer is entitled to: 1) repair, 2) replacement, 3) appropriate reduction in price and 4) have the contract rescinded.

In Bosnia and Herzegovina, Art. 18 CPA provides a free choice between the remedies, without the possibility of price reduction. The provisions of the BLO[342], which are not restricted to B2C contracts, require the buyer to ask for fulfilment first (repair or replacement), and in cases a seller has had a reasonable time to effect repair or replacement, they give the right to price reduction or rescission.

Art. 410 of the Croatian COA leaves the consumer the choice between invoking the following remedies: 1) request that the defect be eliminated by the seller; or 2) request from the seller delivery of another thing without defects; or 3) request a price reduction; or 4) declare the contract rescinded. Additionally, by the COA in each of the foregoing cases, the buyer shall be entitled to the repair of damage in accordance with the general rules on liability for damage, including the damage caused by such defect to his other property. The rules provided in 412 (1) and Art. 413 COA lead to the conclusion that a buyer can primarily and alternatively use first three remedies and the right to rescind the contract only when he fails with his claim for regular performance, with certain exceptions in Art. 412 (2, 3) COA. The fact that the consumer has a choice between invoking the remedies is however confirmed in Art. 5 (2) CPA, which regulates that pursuant to the provisions of the COA relating to responsibility for material defects of the product, the trader is liable, "in accordance with the consumer's choice", to remove defects on the product, deliver another product without defects, lower the

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[341] Consumer Protection Act of 2005, *OG RS No. 79/05.*

[342] Since the split of Yugoslavia the federal Law on Obligations by virtue of succession remained applicable in two slightly different versions applicable in each entity of Bosnia and Herzegovina, as the Law of Obligations of the Republic of Srpska and the Law of Obligations of the Federation of Bosnia and Herzegovina. Since the provisions relevant for this analysis do not differ, in order to ensure more clarity this text will only refer to "Bosnia-Herzegovina's Law of Obligations (BLO); OG SFRY No. 29/78, 39/85, 46/85, 45/89, 57/89 and the OG of the Republic of Srpska No. 17/93, 57/98, 39/03, 74/04, the OG of the Republic of Bosnia and Herzegovina 2/29, 13/93, 13/94 and the OG of the Federation of Bosnia and Herzegovina No. 29/03.

price or return the amount paid for the product and fulfil other obligations prescribed by these provisions.

In Macedonia, the Law on Obligations and the LCP set forth different rules as regards to the 'consumers' choice between the remedies. By the Law on Obligations (Articles 476-488) the party to the contract (not necessarily a consumer as it regulates all contracts) has the right first to request the contract to be performed (removal of the deficiency or delivery of another good without deficiency). If the contract is not performed in the additional period set for performance the buyer has the right to withdraw from the contract. The law does not specify when the buyer could request decrease of the price. The Law of Obligations specifies that the buyer could uphold the contract even if there are grounds for its termination; so it is to be considered that this is the case when decrease of the price it is to be requested. The protection afforded by the LCP, on the other hand, leaves free choice between the remedies to the consumer. The Law, however, provides a formal requirement for the exercise of these rights: by Art.45, para. 1, in order to exercise his/her rights the consumer is obliged to enclose a fiscal receipt for the product or a clearly visible and readable written receipt, and for the products having guarantee periods, also the guarantee certificate or any other document replacing the guarantee. In Montenegro, in accordance with Art. 25 LCP[343], the consumer has a free choice among all four remedies. This is opposite to the solutions provided in the general sale legislation, as there a hierarchy (that is: maintaining the contract) is an initial choice that has to be followed (Art. 497 and 498 of LoO)[344]. The situation is similar in Serbia, where the consumer shall be entitled to file a complaint with regard to the product or service for which a guarantee is issued, in respect of the flaws which arise within six months after the date of obtaining such product or service. Under Art. 35 CPA, if such complaint has been filed because of a flaw in the product, the consumer shall be entitled to: 1) have the product he has purchased replaced by a new product, namely by a product of suitable brand (model, type), or 2) have the amount paid for such product refunded to him, in the amount of the retail price of such product on the day of refund, or 3) have the flaws in the product remedied. If such complaint has been filed because of a flaw in the service, the consumer shall be entitled to: 1) have the flaws remedied, or 2) a refund of the amount that was paid, or to 3) reduction of price in proportion to the flaw in the service that was provided. If he suffers damage that was caused by the flawed product or failure to provide a service or provision of service with a flaw, the consumer may request compensation. The consumer may exercise the aforementioned rights provided the flaw was not caused by his own fault. The Law of Obligations sets a hierarchy of the available remedies (Art. 488-490 i.e. Art. 618 - 620) by which first the consumer has to ask for performance of the contract and if the seller/service provider fails to do so, to ask for a cancellation of the contract.

b. The "disproportionality" criterion (Art. 3 para. (3))

Art. 3(3) of the Directive 99/44 apply a proportionality element to consider whether a particular remedy is available.

The Albanian legislation (Art 31 (4) CPA) affords to the consumer to require the seller to repair the goods or he may require the seller to replace them, in either case free of charge, unless this is impossible or disproportionate. A remedy shall be deemed to be disproportionate if it imposes costs on the seller which, in comparison with the alternative remedy, are un-

[343] OG RMN No. 26/07.

[344] Law on Obligations of Montenegro, OG RMN No. 47/08.

reasonable, taking into account: i) the value the goods would have if there were no lack of conformity, ii) the significance of the lack of conformity, and iii) whether the alternative remedy could be completed without significant inconvenience to the consumer. The law sets that the repair or replacement should be completed within a reasonable time and without any significant inconvenience to the consumer, taking account of the nature of the goods and the purpose for which the consumer required the goods.

The disproportionality criterion, as set in Art. 3 (3) of the Directive 99/44 is not transposed in the legislation of Bosnia and Herzegovina, neither in CPA nor in BLO. However, the proportionality principle is a general principle arising out of the principles of good faith and fair dealing stated in Art. 12 BLO, which generally gives the possibility of interpretation of Article 18 CPA or 488 BLO in the light of the provisions of Art. 3 (3) of the Directive 99/44. The situation is similar in Croatia. The COA provision on seller's liability for material defects don't foresee a proportionality element to consider whether a particular remedy is available. However, the same result can be achieved through interpretation of rules on material defects in accordance with the principle of good faith and fair dealing. In accordance with Art. 4 COA "in creating obligations and exercising the rights and obligations resulting from such obligations, parties shall act in accordance with good faith and fair dealing". The same principle of good faith and fair dealing, as foreseen in the Macedonian Law on Obligation is to be applied when the proportionality criterion is to be considered. In Montenegro there is no transposition of proportionality test, which corresponds to the result of arranging the remedies without a hierarchical order[345].

In the moment there is no transposition of the proportionality test in the Serbian legislation. Under the Draft Proposal, where the services do not conform to the contract, the consumer is entitled to: (a) have the lack of conformity remedied by performance in compliance with the original mandate, (b) have the price reduced, and (c) have the contract rescinded. The consumer is entitled to choose among these options. If the trader disregards the consumer's request to remedy the lack of conformity by performance in compliance with the original mandate, the consumer is entitled to obtain the same performance elsewhere, at the trader's expense. The trader is obliged to reimburse the costs of the performance obtained elsewhere without delay. In all other aspects, the provisions of the prospective Serbian consumer protection act relating to liability of the trader for the lack of conformity of delivered goods to the contract of sales, shall apply accordingly to liability of the trader for the lack of conformity of provided services to the services contract.

aa. Impossibility

The rules on impossibility as set in the Directive 99/44 are not transposed in the Consumer Protection Act of Albania. In relevant cases the general rules of the Civil Code shall apply.

In Croatia, regarding the impossibility, the rules from Art. 269 and 270 COA are applicable. According to these rules "performance must be possible" for a contractual obligation to arise. This is also in accordance with Art. 8 (2) of the Directive 99/44, which regulates that more stringent provisions, compatible with the Treaty in the field covered by this Directive may be adopted or maintained in force, to ensure a higher level of consumer protection.

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[345] It is interesting to observe that regular practice of the courts in cases on nonconformity under the Law on Obligations was that if repair is impossible, or is not justified, the seller is obliged to provide the buyer with another thing with no defects, in other words the buyer can ask for other thing, if the defect cannot be repaired or its repair is economically unjustified.

Art. 18 of the CPA of Bosnia and Herzegovina makes no reference to impossibility of fulfilment. According to Art. 490(2) BLO a buyer may rescind a contract even without allowing for a subsequent time limit, which is in all other cases necessary, if the seller, after having been notified of the defects, informed the buyer of his intention not to perform the contract or if the circumstances of the particular case render it obvious that the seller will not be able to perform the contract even within the subsequent time limit.

In Macedonia, in case of impossibility the general rules on impossibility of performance, as defined by the Law on Obligations (Art. 126 – 127), are applied.

Considering the fact that in Montenegro a consumer has a free choice among all four remedies initially, none of them is restricted on the basis of impossibility.

It is interesting that in case that the consumer opts for repairing or replacement, and the trader accepts the objection (call for a remedy), subordinate application of the Law on Obligations would invoke application of "reasonable" time for fulfilling the contract (bringing the goods in conformity). At this moment the general sale legislation stipulates that when circumstances of the specific case indicate without doubt that the seller will not be able to fulfil the contract even in the subsequent time limit, the contract can be rescinded.

In Serbia there is no per se implantation of the rules on impossibility. It is to be noted that under the Draft Proposal, where the trader has proved that remedying the lack of conformity by repair or replacement is unlawful, impossible or would cause the trader a disproportionate effort, the consumer may choose to have the price reduced or the contract rescinded. A trader's effort is disproportionate if it imposes costs on him which, in comparison with the price reduction or the rescission of the contract, are excessive, taking into account the value of the goods if there was no lack of conformity and the significance of the lack of conformity.

c. "Free of charge" (Art. 3 para. (4))

In Art 31 (4, b) of the Albanian CPA the term 'free of charge' in item 3 and 4 refer to the necessary costs incurred to bring the goods into conformity, particularly the cost of postage, labour and materials.

Under Art. 410 (4) COA of Croatia "the costs of removing the defect and delivery of another thing without defect shall be borne by the seller".

In Bosnia and Herzegovina the "free of charge" requirement is not transposed in the national legislation.

The Macedonian Law on Obligations does not specify explicitly that the repair or replacement are "free of charge" for the buyer in the general rules on liability for material deficiencies. It states however, that the repair or replacement is an obligation of the seller which is to be understood that it is to be carried out at his cost. In addition, Art. 493 (within the chapter on guarantee for proper functioning of the good) makes clear that the trader i.e. the manufacturer is obliged at his own expense to expedite the good to the place where it should be repaired or replaced, as well as to return to the buyer the repaired i.e. the replaced good. During the period of repairing/replacing the seller bears the risk of damages or destruction of the product. In the LCP (Art.43, para.1, 1st indent) it is clearly stated that the consumer is entitled to free of charge repair or replacement of the good with deficiencies. Art. 45, para 4 LCP provides that delivery of products more spacious then 1m3 or heavier than ten kilos in case of repair, estimation, replacement or return to the consumer, shall be carried out by the trader free of charge. In case of non-fulfilment of this obligation and in cases where in the place of consumer's residence there is no trader or producer, the delivery and return of the product may be carried out by the consumer himself. In that case the trader is obliged to compensate the necessary expenses related to the delivery and return of the products. Similarly, Art.22,

para 5 LCP stipulates that the expenses for the material, spare parts, labour, transfer and transport of the product that arise while removing the deficiencies or replacing the product with a new product based on the guarantee, shall rest on the guarantor.

In Montenegro, the remedy to the consumer in cases of non-conformity has to be provided free of charge, and the seller has to bear the cost of postage, labour and materials, as well as other relevant costs. The Consumer Protection Law does not formulate the condition "free of charge", but the Law on Obligation does. Still, the latter does not contain a definition of the term "free of charge", but just stipulates that the costs of bringing the goods in conformity (repair or replacement) are born by seller[346] . There are no doubts that in practice this would imply all related costs – e.g. like those in the Directive.

In Serbia, the CPA of 2005 does not have explicit rule on the costs for the repair or replacement. The same goes for the LoO. In addition, under Art. 497 LoO, termination of contracts due to a defect in goods shall have the effect of termination of contracts due to non-performance of one of the parties. A buyer shall owe to a seller compensation for benefits from the goods he held for some time, even if he is unable to return the goods or a part of the goods, and the contract was terminated[347].

d. Time limits on seller's liability

aa. Two-year time period

Art. 5(1) of the Directive 99/44 specifies that a seller is liable for a lack of conformity which arises within two years of delivery.

Art. 30 (1), of the Consumer Protection Act of Albania stipulates that the seller shall be held liable where the lack of conformity becomes apparent within two years as from delivery of the goods.

The Bosnian Law of Obligations traditionally differentiates between visible and latent defects. On the same line, Art. 18 (2) CPA implemented Art. 5 (1) of the Directive by setting a period of eight days for the use of remedies provided in Art. 18 (1) CPA in case of visible defects, and two years from the delivery in case of a latent defect. According to the BLO, the remedies given in Art. 488 BLO may be used within the period of six months in case of latent defects.

In Croatia, Art. 5 (1) of the Directive 99/44 is transposed in Art. 404 (2) COA, which regulates that the seller shall not be liable for defects arising after the expiry of two years since the thing was delivered, or six months in respect to a commercial contract. However, Art. 404 (4) COA foresees that this time limit may be extended by contract. Furthermore, Art. 407 COA regulates that a buyer shall not lose the right to invoke a defect even where failing to perform his obligation of inspecting a thing without delay or notifying the seller of the existence of a defect within a set period of time, as well as where such defect appeared two years, or six months in case of a commercial contract after the thing has been delivered, if the

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[346] Art. 496 para 4 LoO.

[347] Under the Draft Proposal, the consumer shall be entitled to have the lack of conformity remedied free of any cost. In addition to his right to have the lack of conformity remedied by repair or replacement, or to have the price reduced, or to have the contract rescinded; the consumer shall be entitled to claim damages for any loss resulting from the lack of conformity, under the general rules on liability for damages. Under the Draft Proposal, in respect of the commercial guarantees, the trader or the producer shall bear the costs of transporting the goods with a view to repairing or replacing them, as well as the costs of sending the repaired or replaced goods back to the consumer. The trader or the producer shall bear the risk of loss or damage to the goods during the abovementioned time.

seller was aware or could not have been unaware of such defect. There is also a two–year limitation (prescription) period in Art. 422 (1) COA beyond which all rights of a buyer expire.[348]

In the Macedonian legislation there is no exact transposition of the "two-year time period" rule. By Art.488 of the Law on Obligations, the buyer, who timely notified the seller on the existence of the deficiency (non-conformity) loses his/her rights within one year, counted from the day when the notification has been sent, unless by fraud of the seller the buyer has been deterred from exercising his/her rights. A buyer that notified the seller timely may after the expiry of this deadline, state request for reduction of the price or compensation of damage as objection to the sellers' claim for price payment, given the buyer has not made the payment yet. By Art. 46 LCP, the consumer is entitled to place the requests regarding his/her rights in case of non-conformity if the defects of the product have been discovered within the guarantee period, or within the period when the product may be used, determined by the producer. For the products without determined guarantee periods, the consumer is entitled to place to the producer the requests, if they are discovered within six months from the delivery of the product, unless longer periods are stipulated by a contract or other law. The requests may not be placed in relation to products whose defects had been discovered after the expiration date, or after the period within which the product can be used. The time periods, provided by this Article, start to run from the day when the product has been delivered to the consumer, and if that day cannot be determined, from the day of production. It shall be obligatory to specify expiry dates for the products whose usage features may deteriorate after a certain period (non-durable products) and which may present danger for the life and health or the property of the consumer and the environment and nature (foodstuffs, perfume-cosmetic products, medicines, chemical products for satisfying the needs of the population etc.). The time periods for use shall start running from the day of production.

In Montenegro also, there is not exact transposition of the two years period. Instead, the general rule is that rights are available provided the consumer files the complaint immediately after becoming aware of the non-conformity (flaw) of the product and not later than six months after taking over the product. In the case of wrong price the final date is three days from the day of paying the invoice, while for public services the price deadline is eight days (Art. 23 (1, 3, 4) CPL). On the top of this, the Law on Obligations further regulates this subject and stipulates that the rights of a buyer (notifying a seller in due time of the existence of a defect) shall be forfeited after the expiration of a year, counting from the day of communicating the notification to the seller. This period can be expanded only in a case that the buyer was prevented from using its rights because of seller's deceit (Art. 508 (1) LoO).

In Serbia, under Art. 34 CPA, a consumer shall be entitled to file a complaint for non-conformity, within six months after the date of acquiring the product or service for which a guarantee is issued. The authorized person shall decide on the complaint the same day the complaint was filed, and not later than eight days from the day the complaint was filed.

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[348] Art. 422 (1) COA: "The rights of a buyer who has notified a seller of the existence of a defect in due time shall extinguish after two years, counting from the day the notice was sent to the seller, unless the seller deceived the buyer into failing to exercise his rights." But there is an exception regulated in Art. 422 (2) COA: "(2) However, a buyer who has notified a seller of the existence of a defect in due time may after the expiry of this term, if he has not paid the price, request that the price be reduced or that he be compensated for damage, as objection against the seller's request to be paid the price." The County Court in Varaždin, Gž. 1074/08–2 from 4. August 2008 decided that "the buyer is exceptionally entitled even after expiration of the two years period and if he hasn't paid the price, to request the reduction of agreed price or to request damages because of material defects, as objection against the seller's request to be paid the price (…)".

The time-limits prescribed by the Serbian LoO are unacceptably short from the perspective of the Consumer Sales Directive, especially bearing in mind the difference that is made between the visible and invisible flaws. A seller shall not be responsible for defects appearing six months after delivery of the goods, unless a longer time limit has been stipulated. When the defective goods are repaired, replaced, or partially replaced, then the time-limits begin to run from the delivery of the repaired or replaced or partially replaced goods. Buyer's notification about a defect in goods shall include a detailed description of the defect and an invitation addressed to the seller to inspect the object. Should notification about the defect, otherwise sent to the seller by the buyer on time by registered mail, telegram or in some other reliable way, be late or should it entirely fail to reach the seller, the buyer shall be considered to have fulfilled his duty to notify the seller. It is to be expected that the situation will improve after the enactment of the new Consumer Protection Act. Under the Draft Proposal, the trader shall be liable for the lack of conformity if the lack of conformity becomes apparent within two years as from the time the risk passed to the consumer. A longer time limit may be stipulated. In case of minor repair, the guarantee period shall be prolonged for the time the consumer was prevented from using the goods. In case of thorough repair or replacement, the guarantee period shall begin to run anew from the time the consumer or a third party other than the carrier and indicated by the consumer has acquired the material possession of the replaced goods.

bb Option: reduced period for second-hand goods

The option to reduce the set "two–year time period", provided by Art. 7(1) of the Directive is not transposed in the legislation of Albania, Bosnia and Herzegovina, Macedonia, Montenegro and Serbia.

In Croatia, Art. 404 (3) COA prescribes that "where used things are sold the contractual parties may agree a time limit of one year, or shorter in respect of commercial contracts". Again, Art. 404 (4) COA foresees that this time limit may be extended by contract.

PS using option in Art. 7(1)	PS not using option in Art. 7(1)
CRO	AL, BA, MAC, MN, SER

cc. Option: duty to notify lack of conformity within 2 months

Art. 5 para.(2) of the Directive grants member states the option to provide that a consumer must notify a seller of a lack of conformity within a period of two months from the date on which the consumer detected this.

This option is not transposed in the legislation of Albania.

In Bosnia and Herzegovina this is transposed in Art. 19 (3) CPA.

In Croatia it is transposed in Art. 403 (4) COA, according to which in case of consumer contracts, a buyer who deals as a consumer shall not be bound to inspect or have a thing inspected, but shall notify the seller of any visible defects within the period of two months from the day when he discovered the defect, and no later than within two years from the transfer of risk to the consumer. Similar provision which concerns all the other sale contracts is regulated in Art. 404 COA. Under this provision, when it becomes apparent after the buyer receives a thing that the thing has a defect that could not have been discovered by usual inspection when the delivery was taken, the buyer shall, under threat of losing the right, notify the seller thereof within the period of two months, not including the day when the defect was discovered, or without delay in respect of a commercial contract.

The duty to notify lack of conformity is differently regulated in the Macedonian legislation. The buyer is obliged to notify the seller of the noted deficiencies as soon as possible but not later than eight days. If the inspection is carried out in presence of both parties the notification should be done immediately (Art.469, par 1 and 2 LoO). In case the deficiencies were hidden the buyer should notify the seller within eight days from the day of when he/she becomes aware of the deficiency, but not later than six months form the day of the receipt of the product (Art.470 LoO). The regulation of this issue is similar in Montenegro. The period for notification starts immediately after becoming aware of the non-conformity (flaw) of the product and lasts not more than six months after taking over the product. It is sufficient to send a written statement[349] to this effect before this period expires. As indicated earlier, in case of wrong price the final date is three days from the day of paying the invoice, while for public services the price deadline is eight days following the receipt of the invoice[350].

Under Art. 481-485 of the Serbian LoO, a buyer shall be bound to inspect the goods in usual way, or to have them inspected as soon as possible under regular course of events, and to notify the seller of any visible defects, within the eight day time-limit, and in case of commercial contracts – without delay. Otherwise, the buyer shall lose his rights related to the visible defects. After the examination of goods in the presence of both parties, the buyer shall immediately report to the seller his remarks regarding visible defects. Otherwise, the buyer shall lose his rights related to the visible defects. In case of concealed defects (defects which could not be discovered by usual examination), the buyer is obliged to inform the seller of their existence within eight days from discovery, otherwise, the buyer shall lose his rights in relation to the concealed defects.

PS using option re notification	PS not using option re notification
BA, CRO MN, MAC, SER (with variation)	AL

dd. Recital option: suspension of two-year period

The option for suspension of the two–year period was not transposed in the legislation of Albania and of Bosnia and Herzegovina.

By the Laws of Obligation in Croatia (Art. 405 COA), Macedonia (Art. 471 LoO) Montenegro (Art. 491 LoO) and Serbia (Art. 483 LoO), when due to a deficiency there has been a repair of the good, delivery of another product (replacement), replacement of parts etc, the prescribed deadlines for notification start from the day of the delivery of the repaired good, the delivery of the other good, or the carried out replace of parts. In addition to this rule in the Macedonian LCP (Art.48, para 3 and 4) in case of removal of the deficiency of the product, the guarantee period shall be extended for the period in which the product was not used. This period shall be calculated from the day of the request of the consumer for removing the defect. In case of removal of the defect by replacement of the good which is assembled or which is a component part of the product that has a determined guarantee period, the guarantee period for the new good which is assembled or is component part of the good shall start running from the day when the good was delivered to the consumer.

[349] Art. 492 para 2 LoO.

[350] Art. 26 para 1, 3 and 4 LCP.

ee. Presumption of non-conformity during first 6 months

The presumption from Art. 5(3) of the Directive 99/44 is transposed in the Albanian Consumer Protection Act where Art. 30 (2) provides that unless otherwise proved, any lack of conformity that becomes apparent, within a period of six months from delivering of the goods, shall be presumed as it existed at the time of delivering, unless this presumption is incompatible with the nature of the goods or the nature of the lack of conformity. In the legislation of Bosnia and Herzegovina, Art. 5 (3) Directive 99/44 is not transposed[351].

In Croatia by Art. 400 (3) COA it is to be presumed that a defect arising within six months following the transfer of risk existed at the time of transfer of risk unless the seller provides evidence to the contrary or this arises from the nature of the thing or the nature of the defect.

By Art.470 of the Macedonian LoO, in case of hidden flows (deficiencies that could not have been noted in regular inspection during the delivery of the good), the buyer is obliged to notify the seller within eight days of the detection of the deficiency, given that this is within the first 6 months following the purchase of the good, unless longer period is agreed by the parties. The period does not depend on the nature of the good or the nature of the lack of conformity. It could be concluded that this rule is implemented in the Macedonian legislation.

Montenegro generally conforms to the requirement set in Art. 5(3) of the Directive 99/44. Here, the period to exercise remedies cannot be later than six months after taking over the product (delivery of the product). But Montenegro does not mention the restriction formulated in Art. 5(3) of the Directive that the presumption does not apply where this would be incompatible with the nature of the goods or the nature of the lack of conformity.

Under Art. 34 of the Serbian CPA of 2005, a consumer shall be entitled to file a complaint with regard to the product or service for which a guarantee is issued, in case of the flaws arising within six months after the date of acquiring such product or service. The Serbian LoO (Art. 481-485) provides time limits for notification of the seller and putting forward requests as provided by the law i.e. in case of detectable flaws within a period of 8 days and 6 months, unless otherwise agreed for concealed defects[352]

e. No rescission for 'minor' lack of conformity (Art. 3 para. (6))

The consumer shall not be entitled to have the contract reclined in case of minor lack of conformity in Albania (Art. 31 (7) CPA), Croatia (Art. 410 (3) COA), Macedonia (Art. 466(3) LoO and Art. 22(2) LCP), Montenegro (Art. 486 (3) LoO), Serbia and Bosnia and Herzegovina (Art. 478 and 620 LoO).

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[351] In Bosnia and Herzegovina this presumption is only transposed in the Art. 539 of the BDLO 2010.

[352] In Serbia, under Draft Proposal, the trader shall be liable to the consumer for any lack of conformity which exists at the time the risk passes to the consumer. The trader shall be liable to the consumer for any lack of conformity which occurs after the risk passes to the consumer, if the causes of the lack of conformity existed before the risk was passed. Unless otherwise proved, any lack of conformity which becomes apparent within six months of the time when the risk passed to the consumer, shall be presumed to have existed at that time unless this presumption is incompatible with the nature of the goods and the **nature of the lack of conformity**. Furthermore, under Draft Proposal, the risk of accidental loss of or damage to the goods shall pass to the consumer when he or a third party, other than the carrier and indicated by the consumer, has acquired the material possession of the goods. The risk shall not pass to the consumer if he has rescinded the contract due to lack of conformity in the goods delivered, or if he has requested replacement of the goods. If the consumer or a third party, other than the carrier and indicated by the consumer, has failed to take reasonable steps to acquire the material possession of the goods, the risk shall pass to the consumer at the time of delivery as agreed by the parties or, in case the parties have not agreed on the date of delivery, thirty days after the day of the conclusion of the contract.

The CPA of Bosnia and Herzegovina does not exclude rescission in case the lack of conformity is "minor" and therefore provides a higher level of consumer protection.

f. Rescission and period-of-use allowance

Recital 15 states that member states may provide that where a consumer is entitled to a reimbursement of the purchase price, a deduction may be made to take account of the use the consumer has had of the goods since delivery to him.

This option does not exist in the Albanian CPA. However, the Civil Code in Art. 742 contains a general obligation of the seller and buyer to return back what they have received during the performance of the contract, by stating: "*In case of dissolution of the contract, the seller must return the price paid and pay the buyer the expenses and payments required by law. The buyer must give back the thing if it is not lost or destroyed as result of its defects*", while Art. 744 specifically address the issue of deduction. In the first sentence it is emphasized that the seller must return back to the buyer the paid price even if the value of the thing is reduced or if the thing is damaged. In the second sentence, a criteria for deduction is set „*If the reduced value or damage come as the result of an action of the buyer, the above amount must be reduced by the profit the buyer has made, except as provided for in Article 640*"[353].

In Bosnia and Herzegovina, the existence of this option is drawn from the analysis of the effects of the termination of the contract. Namely, according to Art. 419 BLO the termination of a contract due to a defect of a thing shall have the same effect as the termination of bilateral contracts due to non-performance". The effects of termination due to non-performance are provided by Art. 132 (4) BLO which states that "each party owes the other party compensation for the benefits that it enjoyed in the meantime from whatever it is obliged to return or compensate". The same is the case in in Croatia (Art. 419 (1) in conjunction with Art. 368 COA), Macedonia (Art. 121 with conjunction to Art. 485 LoO), Montenegro (Art. 127(4) in conjunction with Art. 505 LoO), Serbia (Art. 497 LoO)

g. Calculation of price reduction

The Albanian law provides that the consumer may require an appropriate reduction of the price or have the contract rescinded if the consumer is entitled to neither repair nor replacement, or the seller has not completed the repair or replacement.

In Bosnia and Herzegovina, according to Art. 498 of BLO the price shall be reduced in accordance with the proportion of the value of a thing without defect to the value of the thing with a defect at the time the contract was entered into. According to this approach, the price will be reduced by the same ratio as the value of the goods as delivered is in relation to the value they would have had if they had been in conformity with the contract. The same principle is applied in Croatia (Art. 420 COA) where additionally to this amount the seller is obliged to pay interest for the time period from the moment of paying until refunding.[354]

A similar provision exists in the Macedonian Law on Obligations (Art. 486) which is in a way supplemented by Art.49 LCP, which provides rules to be applied in cases where there has been a change in the price from the time of the purchase to the time of the request. Namely, in cases of an increase in the price of the product the revision of the price shall be made, taking into account the price of the product at the time of placing the request, and in case if the price of the product has decreased in the meantime, then the price of the product at the time of the purchase shall be taken into consideration. Also, by the Montenegrin Law on Ob-

[353] Art. 640 of Albanian Civil Code provides for the compensation of damage.

[354] Supreme Court of the Republic of Croatia (VSRH) Rev 2458/90 from 13. February 1991.

ligation price reduction shall be effected according to a ratio between the value of goods without defects, and the value of the goods with defects, at the time of entering into contract. In Serbia, this is regulated both by the CPA and the LoO. The provisions of the LoO (Articles 498 and 621) are the same as in Bosnia and Herzegovina, Croatia, Macedonia and Montenegro, while under Art. 35 CPA, this should be the amount of the retail price of such product on the day of refund; and in case of services, a refund of the amount that was paid, or a reduction of price in proportion to the flaw in the service that was provided. There is no specific norm of CPA relating to the calculation of price reduction – as opposed to the refund of the retail price of the product.

3. Guarantees

The provisions on guarantees in Art. 6 of the Directive require that guarantees must be legally binding, that certain information is provided, and that guarantees remain binding even where the rules in this article have not been complied with.

By the Albanian legislation (Art 32 CPA) any contractual guarantee statement will not deprive the consumer from the rights that he is entitled to under Articles 30, 31 and 32 CPA. The Law provides several rules related to the guarantee such as that: the seller is obliged to fill in the guarantee statement and to give it to the consumer; the guarantee statement shall be given to the consumer in Albanian language, written in plain and intelligible language, as well as containing necessary data - name of goods and services, name and address of the guarantor, time limit and the territorial scope of the guarantee.

In Bosnia and Herzegovina, the CPA regulates "guarantees for products or services" in its Articles 25-27 without a direct reference to the content of the provisions of Art. 6 of Directive 99/44. Namely, under Art. 25 CPA the seller is obliged for material defects of the goods that exist at the time of delivery, regardless of his awareness of this fact. The following Articles 26 and 27 provide for consumer protection for "technically complex products", enabling a guarantee period of three years for home appliances and five years for other technically complex products and setting rules regarding the repair of such products, spare parts and licensed service. The BLO contains rules on guarantees for "technical goods", stating in Art. 501 (2) that "these rules shall not withstand the application of rules relating to the liability of the seller for defects of a thing". However, the BLO does not provide that the guarantee does not affect those rules, as prescribed in Art. 6 (2) Directive 99/44. The other provisions of Art. 6 of Directive 99/44 were also not implemented in the BLO. Articles 501 – 507 regulate the right of the consumer to a "free of charge" repair of a defect product, right to restitution, price reduction, replacement and termination of the contract during the guarantee period.

Art. 5 (5) of the Croatian CPA stipulates that if the trader or producer gives the warranty for the correctness of the product sold he is liable to fulfil the obligations prescribed by the COA on warranty for correctness of the product sold, as well as liabilities taken by the warranty. The requirement from Art. 6 of the Directive 99/44 have been correctly transposed in Art. 423 COA. The binding nature of a voluntary guarantee follows from Art. 423 (1) and (2) COA.[355]

[355] Art. 423 (1) COA: "If a manufacturer warrants the quality of a thing for a specified period of time, starting from its delivery to the buyer, the buyer may, if the thing is not of adequate quality or fitness, request from both the seller and the manufacturer that the thing be repaired within a reasonable period or, if he fails to do so, to deliver him a fit thing instead." Art. 423 (2) COA: "If a seller warrants the quality of a thing for a specified period of time, starting from its delivery to the buyer, the buyer may, if the thing is not of adequate quality or fitness, request from the seller that the thing be repaired within a reasonable period or, if he fails to do so, to deliver him a fit thing instead."

According to Art. 423 (3) COA a "warranty shall be binding under the conditions under which it has been given, regardless of the form in which it has been given (paper form, verbal statement, accompanying advertising, etc.), but the buyer shall be entitled to request that the warranty be given in a paper form or on another permanent medium, accessible to him". The provisions on warranty shall not withstand the application of rules relating to the liability of the seller for defects of a thing (Art. 423 (4) COA). The warranty shall contain the buyer's rights arising from it and it shall stipulate clearly that the warranty does not affect other rights belonging to the buyer as per other legal grounds (Art. 423 (5) COA). Under Art. 423 (6) COA "the warranty shall contain details required by the buyer to be able to exercise his rights, especially warranty period, regional scope of the warranty and the name and address of the person who issued the warranty". And finally, Art. 423 (7) COA regulates that the failure to perform the obligations referred to in Art. 423 (5) and (6) COA shall not have effect on the validity of warranty. The option prescribed in Art. 6 (4) of the Directive 99/44 has not been exercised.

In Macedonia, the existing provisions on the guarantee are very similar to those set by the Directive. The Law on Obligations regulates, in general, the issue for guarantees for proper functioning of so called technical goods, setting rules when the seller guarantees, what are the deadlines, what are the rights of the buyer (Art.489 – 495). In regard to the deadlines, the Law on Obligations specifies that the minimal period of guarantee is one year and the maximum period for repair of goods with deficiencies is 45 days. The Law on Consumer Protection, in Art.22, regulates in detail the issue of the guarantees. The trader shall be obliged, in accordance with the technical regulations specifying the products for which the producer, importer, or representative of the foreign company must issue a guarantee for quality or for the proper functioning of the product, a document for the manner of use of the product, to provide servicing for maintenance and repair and for supply of spare parts within the guarantee period. The trader is obliged at least within five years from the day of production of the product but not less than two years from the date of expiry of the product guarantee, to provide spare parts. In agreement with the consumer the product can be serviced the most three times within the guarantee period and if the product has not be fixed, the consumer has right to ask the trader to replace the product with another properly functioning product of the same kind and or to return the amount paid for the purchased product. As in the Law on Obligations (Art. 466 (3)), the consumer does not have the right to request a replacement of the product or refund of the paid amount if the deficiency that is serviced is minimal or does not affect the quality and performances of the basic function of the product. In regard to the provision of Art.6 (1) of the Directive, the LCP provides that the producer is obliged to abide by the obligations from the guarantee certificate. As to the requirements on the content and the effect of the guarantee defined in Art.6 (2) of the Directive, the LCP provides that the guarantee should include: firm or business name and head office of the guarantor; data about the product identifying the product; statement about the guarantee and guarantee terms; duration period of the guarantee; period in which the trader is obliged to act upon the request of the guarantee user and to remove the defects and deficiencies of the product; firm or business name and head office of the trade company or other legal or natural person which has retailed the product, date of selling, seal and signature of the authorised officer and statement that the consumer is entitled to the legal rights deriving from the national legislation regulating the sale of products, and that such rights shall not be affected by the guarantee. In regard to the requirement of Art.6 (3) and Art.6 (4) of the Directive, by the LCP it is provided that all the documentation related to the function of the product should be written clearly and readably, in Macedonian language and Cyrillic letters, which does not exclude the possibility to additionally use other languages in the same time, as well as signs easily understandable for the consumer. By Art.489 (5) of the

Law on Obligations, non-performance of the obligations related to the guarantee does not affect the validity of the guarantee which is in line with the Art.6 (5) of the Directive.

Provisions on the guarantee as provided by the Directive, generally have been implemented in Montenegro in very similar format. However, Montenegrin Consumer Protection Law also went beyond some of the requirements of the Directive especially in informative content of the guarantee as it has expanded the list (e.g. data for identification of the product and data about the purchase; date of delivery of the product to the consumer; rights of the consumer by virtue of the guarantee; other data in accordance with law as well as the statements from the advertising material). The requirement to include a reference to the consumer's legal rights is missing just on first sight, but interpretation of Art. 20, para 1, point 11) refers to the case of so called „technical goods" and Art. 509 para 3 of Law on Obligations contains a provision identical to the Directive. On the part of the requirement that guarantees must be legally binding, Consumer Protection Law contains same provision, albeit with different wording (Art. 19 (2)). Same law defines guarantee certificate as a document that accompanies the goods and contains the data prescribed by law which makes clear that it must be in writing, whether being mandatory or voluntary (Art. 19(1); to this extent Art. 82 of Consumer Protection Law is of importance as well. Language in official use in Montenegro is a must, while other forms of durable medium are not given as option. Furthermore, consumer shall have the rights that arise from the guarantee regardless whether the trader has delivered a guarantee certificate in writing, in which case the burden of proof that the guarantee was delivered is on trader (Art. 19(3)). In respect of the remedies under a guarantee, the hierarchy of consumer's remedies (Art. 21 LCP in conjunction with Art. 510 LoO) corresponds to that of the Directive. Maintenance of the contract is first option (repair of the goods), and only then when repair is not effected within reasonable time rescission of the contract is an option. However, consumer cannot exercise his rights if the non-conformity in product was caused by fault of the consumer or if it was remedied by a non-authorised person (Art. 22(2) LCP).

The guarantees are regulated by the CPA and the Law of Obligations in Serbia as well. Namely, Art. 21 CPA refers to the law of contracts in respect of the commercial guarantees ("Issuer of the guarantee shall be under obligation to provide servicing of the product to the consumer, in accordance with the law or the contract."). Under the LoO (Art. 501 et seq,) should a seller of the technical goods hand to a buyer a written guarantee issued by the producer for proper functioning within a specified period, counting from the moment of the delivery of the goods to the buyer, the buyer may, should the good fail to function properly, demand both from the seller and the producer to repair the goods within a reasonable time limit or, short of this, to replace it with the one which functions properly. These rules are, without prejudice to the liability of seller, for non-conformity of goods. The buyer may demand either from the seller or from the producer to repair or to replace the technical goods within the warranty period, regardless of the moment the defective functioning appears. He shall be entitled to compensation for the fact that he was not able to use the goods from the moment of demanding repair or replacement to their effecting. Should a seller fail to repair or replace the goods within a reasonable time limit, the buyer may rescind the contract or reduce the price and request damages. Buyer's rights in relation to producer expire one year after the day of his demand that the seller makes repair or replacement of the goods.

4. The Right of redress

By the Albanian CPA the duration of the legal guarantee would be extended automatically after the repair to cover the future re-emergence of the same defect. In this case, the consumer shall be entitled to claim for replacement instead of another repair (Art 31 (5) CPA). The period of time for complaint and repair is added to the period of guaranty (Art 31 (8) CPA).

In Bosnia and Herzegovina, Croatia, Macedonia, Montenegro and Serbia the requirements of Art. 4 of the Directive 99/44 are fulfilled under the provisions of the Laws of Obligation for contractual and non-contractual liability for damages.

5. Mandatory nature of the provisions

The Albanian Consumer Protection Law (Art. 31(1, 2)) provides that the seller is obliged to accept complaints for goods in every place where his activity is exercised or represented, unless when another person is authorized to repair goods. The seller shall immediately or within three working days decide on the acceptation of the complaint. The non-conformity with the provisions on contractual conformity is deemed as administrative violation and penalized by fine up to 100 000 Leke (approx. 730 EUR)[356].

Art. 7 (1) of the Directive 99/44 is implemented in very similar format in the Acts on Obligations in Bosnia and Herzegovina (Art. 486(2) BLO), Croatia (Art. 408 (2) COA), Macedonia (Art. 474 LoO) and Serbia (Art. 489 LoO) which stipulate that a provision of the contract on limiting or excluding liability for defects of things shall be void if the seller was aware of the defect and failed to notify the buyer thereof, and also where the seller imposed such a provision by making use of his monopolistic position, or with regard to a consumer contract. Provisions in this regard exist in the consumer protection acts of these countries as well. Namely, the specific legislation on the consumer protection provides that the consumer cannot waive, nor be deprived of the conferred rights (Art. 2 of the CPA of Bosnia and Herzegovina, Art 6 (1) of the Croatian CPA, Art. 65 of the Macedonian LCP and the draft Proposal in Serbia). The Montenegrin LCP provides, within the general clause enshrined under "general principles to exercise consumer rights" (Art. 5(1)), that a consumer may not waive the right set out in this Law, so any contract term excluding or restricting a consumer's rights would be null and void.

Art. 7 (2) of the Directive 99/44 concerning conflict of laws will be dealt with in Part 3 C (Private International Law in Consumer Contracts).

IV. Use of the minimum harmonisation clause (Art.8 para. (2))

1. Higher level of protection for consumers

When observing the provision of Art. 8 of the Directive and the national legislation of the observed states it could be concluded that all of them relied on it in order to provide a higher level of protection for consumers, either in their acts for consumer protection or in the conjunction of those acts with the acts on obligations.

a. Scope of application

The extensions of the scope protection afforded by the national legation could be seen in different aspects. The Albanian Consumers Protection Law (Art. 33) provides also after-sales obligations: "Producers and sellers must ensure spare parts necessary for maintenance and repair of products within the period of guarantee, whether legal or contractual". In Bosnia and Herzegovina, the CPA may allow the interpretation that immovables fall under the scope of application of its rules regarding material defects while the BLO provides a higher level of consumer protection regarding its scope of application, since it applies to B2C, B2B and P2P contracts. In addition the fact that the limited definition of "consumer goods" in Art.

[356] See Art. 57/2b CPA.

1(2)(b) of the Directive 99/44 has not been transposed, leads to the result that the relevant provisions will be applicable also to all the other objects of sale (e.g. services and real estates). The same counts for Croatia, Macedonia, Montenegro and Serbia as well. Further, in Croatia there is no explicit exclusion of specific exclusion listed in Art. 1(2)(b) of the Directive 99/44, namely regarding water and gas where they are not put up for sale in a limited volume or set quantity, while in Montenegro the Consumer Protection Law beside definition of "consumer" includes definition of consumer group.

aa. Liability of the producer

In Albania the liability of the producer is drawn from the provision of Art. 33 CPA which stipulates that the Producers and sellers must ensure spare parts necessary for maintenance and repair of products within the period of guarantee, whether legal or contractual.

The Legislation in Bosnia (Art. 26 and 27 of CPA, Art. 501-507 BLO), Croatia (Art 401(3) and Art. 423-424 COA) and Macedonia (Art. 489-490 LoO and Art.22 LCP) confers rights to the consumers against the sellers and producers in regard to warranty (issued as warranty list).

In Montenegro, under Consumer Protection Law, only the trader is liable for non-conformity of the goods, unless otherwise prescribed by law or consumer contract, while in respect of guarantee, the general rule of Consumer Protection Law is that "guarantee issuer" can be producer, distributor, or trader where the same will be obliged to, in accordance with law and technical regulations (mandatory guarantees), meet the obligations set forth under the guarantee. The situation is the same in Serbia (Art. 501 et seq. LoO, Art. 21 CPA).

b. Conformity requirement

Regarding the conformity requirement of the directive it is to be concluded that all of the countries have transposed it with specific variation.

The Consumer Protection Law of Albania (Art 29 (3)) provides definition of product conformity.

In Bosnia and Herzegovina, Art. 479 (4) BLO excludes samples shown for information only (which are not excluded by Art. 2 (2) (a) Directive 99/44), while Art. 479 (2) BLO additionally provides protection in cases when the seller should have known about the specific purpose the buyer intends to use the good for (Art. 2 (2) (b) of the Directive 99/44 only includes specific purposes of goods the consumer and seller agreed on). The CPA did not transpose the reduction to non-minor lack of conformity.

The Croatian Legislation gives higher level of protection to consumer by regulating in Art. 401 (1) point 2) COA that a defect shall exist if a thing lacks the qualities required for the specific purpose the buyer intends to use it for, and where it "was known or should have been known to the seller". Further protection is granted through transposition of the Directive´s provision on goods to be installed (Art. 2 (5) of the Directive 99/44) in the list of criteria in Art. 401 (5) and (6) COA.

In Macedonia a certain extension could be found by setting an obligation for the trader to sell or provide to the consumer products or services of such quality and quantity that is fully in compliance with the established technical requirements and regulations, with the prescribed standards, norms and conditions laid down in the contract, stated requirements, as well as information given by the trader regarding the product or service (Art.36 LCP) and the rights for replacement of foodstuff. In addition, the rule existing in the Law on Obligations that the seller shall be liable for the deficiencies that were obvious but the seller claimed that there are no deficiencies, represents higher level of protection. The obligation set for the trader to provide the consumer with certain documentation (manuals, instructions etc) as well as

rules on the content of the guarantee certificate, and the rules on their form (requirements on the manner they should be written and the language) present a certain extension.

The Montenegrin Consumer Protection Law, together with requirements found in the general sale legislation, added additional factors for the conformity requirement, such as: exact measure or quantity of goods; suitable packaging material in accordance with the type and properties of the goods; prescribed or agreed quality, and if the quality was not prescribed or agreed – usual quality of goods and services; way of determining or calculating price. Also, the trader must hand over to the consumer the prescribed documents (certificate, technical manual, user manual, etc.), as well as the documents provided by the producer, in accordance with technical and other regulations. In relation to what has been said previously, in case of a technical manual, it should be noticed that requirement of the Consumer Protection Law (Article 82 of the CPL) is that documents of the products must be written in the language in official use in Montenegro, which if not done might give rise to interpretation of non-conformity. The latter is especially true in case of installation manuals and incorrect installation resulting from this.

To the consumer rights belongs also a rule that trader shall be responsible for defects, which could have been noticed easily by the buyer, if the former declared that the goods were free of all defects or that they had specific properties or characteristics (Art. 488 (3) LoO).

The Serbian CPA does not contain the definition of conformity, while Art. 479 LoO defines the material flaw in the goods (and not the conformity of the goods to the contract) and in any case, the LoO does not take into account public statements[357].

c. Remedies

The national legislation of the studies countries provides for the same remedies as the Directive.

In Albania the consumer may choose between repair, replacement, appropriate reduction in price or to have the contract rescinded.

Article 18 of the CPA of Bosnia and Herzegovina provides a free choice of the consumer between the remedies.

In Croatia the COA provisions establish certain hierarchy of remedies, however, the CPA as *lex specialis* regulates that the consumer has a choice between invoking the remedies pursuant to the provisions of the COA relating to responsibility for material defects of the product. The COA goes again beyond the provision of the Directive 99/44 by regulating the possibility to claim damages under general rules on liability for damage including the damage caused by material defect to his other property (Art. 410 (2) COA). The situation is the same in Macedonia and Serbia[358].

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[357] The draft Proposal offers a higher degree of protection to a consumer, as it prescribes that the goods shall be in conformity to the contract if they are fit for any particular purpose for which the consumer requires them and which was known or must have been known to the trader at the time of contract formation. This rule is a bit broader then the Directive's requirement that the goods are fit for any particular purpose for which the consumer requires them and which he made known to the seller at the time of contract formation and which the seller has accepted. In addition, Draft Proposal contains the rule on incorrect installation of the goods.

[358] Draft Proposal gives the consumer full freedom to choose among the remedies. The consumer is entitled to request the trader to remedy the lack of conformity by either repair or replacement, according to the consumer's choice. If the trader disregards consumer's request to remedy the lack of conformity by either repair or replacement, according to the consumer's choice, the consumer is entitled to obtain the repair or to purchase the same good elsewhere, at the trader's expense. The trader is obliged to reimburse the costs of the repair or replacement purchases elsewhere without delay.

In Montenegro all four remedies are available at the own choice of the consumer and immediately as non-conformity arises. The consumer is entitled to claim damages as well, and in addition (and independently from the previous)

d. Time limits

In Albania the seller shall be held liable where the lack of conformity becomes apparent within two years as from delivery of the goods.

In Bosnia and Herzegovina the consumer has the right to invoke a defect within six month from the delivery, except where the seller was aware or could not have been unaware of such defect, when this right is doesn't elapse after 6 months.

In Croatia the two–year period has been implemented (Art. 404 (2) COA) and the starting point for the general limitation period (prescription) is the moment of notification of the non–conformity to the seller (Art. 422 (1) COA). However, the buyer doesn't lose the right to invoke a defect even where such defect appeared two years after the thing has been delivered, if the seller was aware or could not have been unaware of such defect (Art. 407 COA). COA suspends the two–year period whilst the goods are being repaired or replaced (Art. 405 COA).

By specifying the time limits for provision of the notification and the limits for repair and/or replacement of goods as an obligation of the trader the Macedonian legislation in certain way provides higher level of protection of the consumers.

In Montenegro, the general rule is that rights are available provided consumer files the complaint immediately after becoming aware of the non-conformity (flaw) of the product and not later than six months after taking over the product. Law on Obligations further regulates this subject and stipulates that rights of a buyer that notifies a seller in due time of the existence of a defect shall be forfeited after the expiration of a year, counting from the day of communicating the notification to the seller. This period can be expanded only in a case that the buyer was prevented from using its rights because of seller's deceit. In relation to suspension of time limits in case of repair, replacement, and the like the Law on Obligations (Art. 491) stipulates that subject time limits shall begin to run from the moment of delivery of the repaired goods, of delivery of other goods, of replacement of spare parts, and the like.

Similarly, in Serbia the CPA prescribes the time limit of six month from the day of purchase. The LoO contains a very short time limit of eight days from the discovery for the buyer to notify the seller on the discovered flaws; if not used the right is lost. If the buyer timely notifies the seller of the existing flaws in goods, his rights shall expire one year after the notification, except when the seller deceived the buyer into not using these rights[359].

e. Guarantees

The national legislation in respect of the guarantees in the participating states is approximated with the Directive and in certain cases goes beyond its requirements. The Croatian COA (Art. 425) provides for extension of the guarantee period for the duration of the repair i.e. its renewal in case of replacement or a major repair. The same situation exists in the Macedonian Law on Obligations (Art. 491), where in addition the guarantee period is set to a minimum of one year (Art. 490). The extension/renewal principle of the guarantee period ex-

[359] Draft Proposal sets down the two years' time limit starting from the passing of risk; and it does not prescribe that the consumer must inform the seller of the lack of conformity within a period of two months from the date on which he detected such lack of conformity in order to benefit from his rights.

ists also in Montenegro (Art. 511(2)) where in addition the consumer shall have the rights that arise from the guarantee regardless whether the trader has delivered a guarantee certificate in writing, in which case the burden of proof that the guarantee was delivered is on the trader (Art. 19 (3) LCP); the consumer shall be entitled to compensation of damage for the period during which he could not use the goods from the moment of demanding repair or replacement to their effecting; should, due to improper functioning the good be replaced or thoroughly repaired, the warranty period shall begin to run anew from the day of replacement, or restoring the repaired object (Art. 510(2) LoO).

Under Art. 483 of the Serbian LoO, should, due to a defect, goods be repaired, other goods delivered, parts replaced, and the like, the time limits shall begin to run from the moment of delivery of the repaired goods, of delivery of other goods, of replacement of spare parts, and the like[360].

V. General comments on adequacy of implementation of the Directive

1. Difficulties encountered during the transposition process

The analysis shows the following situation:

• The Albanian legislator has made a copy and paste transposition of the Directive, leaving out some provisions.

• In Bosnia and Herzegovina the main implementation of the Directive was planned for the reform of the Law of Obligation that has yet to be conducted. As described above, the CPA only partly implemented the provisions from the Directive 99/44, relying on the protection provided by the BLO. A reform of the already existing provisions of the BLO would be much easier than providing a whole new set of rules in the CPA. With the adoption of the BDLO 2010 most of the problems that occurred during the transposition process would be solved.

• In Croatia there were no specific difficulties when transposing the Directive 99/44 into COA. The main challenge was how to combine the already existing rules on sale with the specific rules introduced by the Directive 99/44. [361]

• The Macedonian legislator encountered difficulties in making the difference between labiality for products with deficiencies and liability for damages from defective products i.e. the transposition of the Directive 99/44 and Directive 85/374/EEC, as amended by Directive 1999/34/EC in the Law on Consumer protection, as both types of liabilities are regulated in the same chapter of the Law without clear distinction between the two types of liability. The Law on Consumer Protection does not follow the rule established by the Law on Obligations on the hierarchy of the remedies, and it does not include the proportionality test existing in the Directive.

• In Montenegro the legislator failed to transpose the proportionality test, which corresponds to the result of arranging the remedies without a hierarchical order.

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[360] Under Draft Proposal, in case of minor repair, the guarantee period shall be prolonged for the time the consumer was prevented from using the goods. In case of thorough repair or replacement, the guarantee period shall begin to run anew from the time the consumer or a third party other than the carrier and indicated by the consumer has acquired the material possession of the replaced goods.

[361] *Petrić Silvija,* Odgovornost za materijalne nedostatke stvari prema novom Zakonu o obveznim odnosima (Liability for Material Defects According to the new Law on Obligations), in Zbornik PFR, V. 27, Nr. 1, 2006, pp. 98.

• The Serbian legislator drafted completely new provisions and placed them in a separate consumer protection act; however, the relation between the provisions of the civil codification and the provisions of the separate consumer protection act need to be defined[362].

2. Gaps in the Directive

Analysing the Directive itself revealed that the Directive 99/44 left a number of question unanswered and any amendments thereof should regulate:

• Definition of 'goods', in particular status of software and other digital products in regard to definition;

• Clarification of the proportionality criterion in the Directive;

• The legal effects of exercising the right to rescind the contract;

• The inspection of the goods;

• The time periods for notification on visible and invisible deficiencies accordingly;

• The guarantee for provision of spare parts and services after the sale (both within the guarantee period and beyond) should be specified as well;

• The conditions under which the consumer may exercise the remedies;

• The subsidiary liability of producer;

• The question of mandatory producer guarantee.

VI. Summary

Prior to transposition of the Directive 99/44 the national laws of the participating states contained provisions within their Law of Obligations/Civil Code which regulate the sale of goods, applicable to all types of contracts and not specifically related to consumer contracts. All of the participating states at least partly transposed the provisions of the Directive 99/44 in their consumer protection regulations, while only some of them additionally or mainly transposed the Directive in their generally applicable Law of Obligations (Macedonia, Croatia and Montenegro). Provisions of the Acts on Obligations of the participating states, including those relating to the liability for conformity to the contract, apply to B2B, B2C and P2P transactions. Furthermore, they contain separate provisions on the supplier's liability for conformity of the rendered services to the services contract. The transposition of the Directive 99/44 in the Croatian Civil Obligations Act also resulted in the creation of some separate rules which are only applicable to consumer transactions. None of the provisions of the participating states contains a definition of consumer goods which corresponds to Art. 1 (2) b of the Directive 99/44. The participating states provide a definition of sale only within their generally applicable Law of Obligations, providing with almost the same wording that by the sales contract the seller is obliged to deliver to the buyer the item that he is selling to the buyer so that the buyer acquires the right of ownership, while the buyer is obliged to pay to the seller the price. Albania and Serbia transposed Art. 2 (1) of the Directive 99/44 stating that the seller must deliver goods to the consumer which are in conformity with the contract of sale. In the other participating states, the requirement to deliver conforming goods arises out of the trader's liability for material defects (Bosnia and Herzegovina, Croatia) or a general provision on performance of the obligation as agreed (Macedonia, Montenegro). Albania is the only of the participating states which in its Consumer Protection Act positively defines criteria for the presumption of conformity of delivered goods with the contract. The Acts on

[362] Draft Proposal contains the following norm: "In case of conflict of this Law with other laws, this Law [meaning: the prospective CPA] takes priority."

Obligations of all the other participating states contain a list of cases when material defects exist and these are not framed as legal presumptions (Bosnia and Herzegovina, Croatia, Macedonia, Montenegro and Serbia), contrary to the model of Art. 2 (2) of the Directive 99/44, which defines criteria for conformity of the goods with the contract. Albania literally transposed Art. 2 (3) of the Directive 99/44 in its Consumer Protection Act, stating that it shall be deemed no lack of conformity for the purposes of this article if, at the time the contract was concluded, the consumer was aware, or could not reasonably be unaware of, the lack of conformity, or if the lack of conformity has its origin in materials supplied by the consumer. In all the other participating states, unchanged rules with a common origin in the Yugoslav Law of Obligations of 1978 still apply, where a seller shall not be responsible for defects if they were known to the buyer at the moment of entering into contract or if it was impossible for them to remain unknown to him. The national legislation of all participating countries foresees remedies that are available to the consumers where there is a lack of conformity in the goods, as provided in Art. 3 of the Directive 99/44. They could be found in the Law on Consumer protection or Laws on Obligation, or both; with specific variations. As for the consumers' choice between the remedies, the national legislation in the field of consumer protection provides free choice between the remedies, with or without imposing formal conditions for its exercise in all countries except in Montenegro where there is clear hierarchical order. The laws on obligation in Bosnia and Herzegovina, Croatia, Serbia, and Macedonia, however, when regulating the remedies, which inter alia apply to all transactions, sets forth order by which they could be exercised. When considering the availability of particular remedy Art. 3(3) of the Directive 99/44 requires proportionality element to be considered. This provision is transposed to the letter of the Directive only in the legislation of Albania. However, the principle of good faith and fair dealing on which the obligations are to be based as provided in the laws of Bosnia and Herzegovina, Croatia, Serbia, Macedonia and Montenegro made lead to interpretation of the ruled on liability for non-conformity in the same meaning as those of the Directive 99/44. In the studied countries there is not similar pattern when it comes to the transposition of the rules on impossibility as set in as set in the Art.3 para. (3) Directive 99/44. There is no transposition in the Albanian legislation, while in Bosnia and Herzegovina, Croatia, Serbia, Macedonia and Montenegro by application of the rules of impossibility for performance, the same results as set in the Directive 99/44 could be achieved. National rules within the meaning "Free of charge" as set in Art.3 para. (4) of Directive 99/44, with some differences in wording exist in all studied countries' legislation. Art. 5(1) of the Directive 99/44 specifies that a seller is liable for a lack of conformity which arises within two years of delivery. The national legislation of the studied countries differs. In Albania, Bosnia and Herzegovina and Croatia the time limit is two years, while in Macedonia and Montenegro is set to one year. In Serbia this period is six months. It is to be noted that the national legislation of Bosnia and Herzegovina, Croatia, Serbia, Macedonia and Montenegro differentiates between visible and invisible flaws and sets different limits within the period of liability when the consumer may revoke remedies depending on the nature of the flaw. The option to reduce the set "two–year time period", provided by Art. 7(1) of Directive 99/44 is transposed only in the legislation of Croatia. The option to provide that a consumer must notify a seller of a lack of conformity within a period of two months from the date on which the consumer detected this as provided for by Art. 5 para.(2) of Directive 99/44 was not used only by Albania. The option for suspension of the two–year period was not transposed in the legislation of Albania and of Bosnia and Herzegovina. The option for suspension of the two–year period was not transposed in the legislation of Albania and of Bosnia and Herzegovina. All countries except for Bosnia and Herzegovina generally comply with the

rules on presumption of non-conformity on the first six months from Art. 5(3) of the Directive 99/44. The consumer shall not be entitled to have the contract reclined in case of minor lack of conformity as set in Art. 3 para. (6) of Directive 99/44 in all countries except for Bosnia and Herzegovina. The statement from Recital 15 that it may be provided that where a consumer is entitled to a reimbursement of the purchase price, a deduction may be made to take account of the use the consumer has had of the goods since delivery to him could be found in the rules of the effects of the termination of the contract provided by the general contract law of the countries. The studies countries although with some variation in general comply with the requirement of Art. 6 Directive 99/44. The requirements of Art. 4 of the Directive 99/44 are transposed in the consumer legislation of Albania, while in Bosnia and Herzegovina, Croatia, Serbia, Macedonia and Montenegro the issue is regulated under the provisions of the Laws of Obligation for contractual and non-contractual liability for damages. Art. 7 (1) of the Directive 99/44 is transposed within it meaning in all of the counties. The national legislation of all studied countries relied on the provision of Art. 8 of the Directive in order to provide a higher level of protection for consumers, either in their acts for consumer protection or in the conjunction of those acts with the acts on obligations.

Part 3:
THE FUTURE OF THE CONSUMER CONTRACT LAW IN THE EUROPEAN UNION AND PARTICIPATING STATES

A. OVERVIEW OF THE COMMISSION PROPOSAL FOR A "DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON CONSUMER RIGHTS"

By *Emilia Čikara*

I. Introduction

On 8 October 2008, the Commission published its proposal for a "Directive of the European Parliament and of the Council on consumer rights".[363] This horizontal directive, which is based on full targeted harmonization should change and unite the content of Directive 85/577, Directive 93/13, Directive 97/7 and Directive 99/44 and repeal these directives at the same time. The Proposal is justified in the explanatory memorandum by the fact that the minimum harmonization principle has led to a fragmented regulatory framework across the EU, "which causes significant compliance cost for business wishing to trade cross-border" on the one hand and results in a low level of consumer confidence in cross-border shopping on the other.[364] The proposed Directive shall apply to sales and service contracts concluded between the trader and the consumer,[365] while financial services contracts are excluded, except for certain off-premises contracts, certain unfair contract terms and certain general provisions.[366]

II. Structure

The Proposal is divided in seven Chapters. Chapter I provides common definitions of "consumer", "trader", "sales contract" and 17 other definitions (Art. 2). It also regulates the principle of full harmonisation (Art. 4). Chapter II concerns the pre-contractual information duties in all sales and service contracts between a consumer and a trader. Specific information duties and right of withdrawal for distance and off-premises contracts are regulated in Chapter III (Art. 8). For off-premises contracts there is a standard withdrawal form set out in Annex I (B) of Proposal which must be included in the traders´ order form. Chapter IV contains provisions that were prescribed by Directive 99/44 and Chapter V provisions that were regulated in Directive **93/13**. Chapter V is accompanied with Annex II, which contains the so

[363] COM(2008) 614 final.

[364] *Ibid.,* 2.

[365] Art. 3 of the Proposal

[366] Art. 3 (2) of the Proposal

called "black list" of unfair contract terms, and with Annex III, which regulates contract terms which are presumed to be unfair. Chapter VI contains *inter alia* provisions on transposition of the Directive and Chapter VII final provisions.

III. Targeted Full Harmonization

Pursuant to Art. 4 of the Proposal member states may not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection. Although the Proposal states that the horizontal Directive is based on full targeted harmonization,[367] the review of the Proposal demonstrates targeting of almost all measures for full harmonization.[368] Unlike previous consumer protection directives, which were based on minimum harmonization principle and allowed member states adopting or maintaining more favourable provisions to protect consumers in the field which they covered, the new Directive prohibits alterations in transposition.

IV. Definitions

Many of the common definitions regulated in Chapter I of the Proposal have been changed and broadened in order to cover a wide range of transactions. For instance, definitions of "sales contract",[369] "service contract",[370] and "distance contract" cover the majority of all consumer transactions.[371] Art. 2 (6) of the Proposal introduces a new and simplified definition for „distance contract" as any sales or service contract where the trader, for the conclusion of the contract, makes exclusive use of one or more means of distance communication. According to Art. 2 (8) of the Proposal an "off-premises contract" is any sales or service contract concluded away from business premises with the simultaneous physical presence of the trader and the consumer or any sales or service contract for which an offer was made by the consumer in the same circumstances. Off-premises contract exists even if the sales or service contract were concluded on business premises but negotiated away from business premises,[372] and the business premises include also market stalls and fair stands where the trader carries on his activity on a regular or temporary basis.[373] Art. 2 (18) of the Proposal replaces the term "guarantee" as used in the Directive 99/44 with the term "commercial guarantee". However, the definition remained similar, except for removal of one part of definition, namely "given without extra charge". This new formulation leads to the inclusion of guarantees which can be purchased ("extended warranties"). The notion of "consumer" has been changed and includes purposes which are outside his "craft" as well as the usual "trade,

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[367] COM(2008) 614 final*,* 4, 5.

[368] A general exception to the full harmonization is contained in Art. 3 (1) of the Proposal, which defines the scope of application, namely business to consumer sales and service contracts. Departure from this general rule is allowed in some other provisions which refer to member states law, for instance in Art. 6 (2) of the Proposal according to which the consequences of any breach of general information requirements (Art. 5) shall be determined in accordance with the applicable national law.

[369] Art. 2 (3) of the Proposal.

[370] Art. 2 (5) of the Proposal.

[371] C. Twigg–Flesner, D. Metcalfe, "The proposed Consumer Rights Directive – less haste, more thought?", *European Review of Contract Law* 2009, *http://ssrn.com/abstract=1345783*, last visited 19.2.2010, 2.

[372] Art. 2 (8) of the Proposal.

[373] Art. 2 (9) of the Proposal.

business or profession" in the current consumer protection directives.[374] The Proposal uses the term "trader" and replaces all different terms used in current directives, such as "supplier", "seller", "trader" and "seller or supplier". "Trader" is defined as a natural or legal person who is "acting for purposes relating to his trade, business, craft or profession", with the added reference to "anyone acting in the name of or on behalf of a trader".[375]

V. Information duties

Consumer information is dealt with in Chapter II (Art. 5 to 7 of the Proposal). Art. 5 (1) of the Proposal prescribes the general information requirements for the trader, except if they are already apparent from the context. This information concerns e.g. the main characteristics of the product, address and the identity of the trader, price and arrangements for payment, delivery, performance etc., and once provided they become part of the contract.[376] Art. 7 of the Proposal regulates specific information requirements for intermediaries. Alongside the general information duties in Chapter II, Chapter III regulates in its Art. 9 certain special information requirements for distance and off-premises contracts, like information on arrangements for payment, delivery and performance, on conditions and procedures for exercising the right of withdrawal, on address of the place of business of the trader to which the consumer can address complaints etc. With respect to off-premises contracts, this information shall be given in the order form (Art. 10 of the Proposal) while with respect to distance contracts, it shall be given or made available to the consumer prior to the conclusion of the contract (Art. 11 of the Proposal).

VI. Right of withdrawal

Art. 12 to 19 of the Proposal regulate the right of withdrawal for distance and off-premises contracts. Unlike the seven day period prescribed in the current directives, the withdrawal period is extended to fourteen days. With respect to off-premises contracts the withdrawal period begins once the consumer has signed the order form or, in appropriate circumstances, has received a copy thereof on another durable medium, and for distance contracts it begins once the consumer has acquired the material possession of the goods, or in case of provision of services from the day of the conclusion of the contract.[377] However, if the trader has not provided the consumer with the information on the right of withdrawal, the withdrawal period expires three months after the trader has fully performed his other contractual obligations.[378] When exercising his right of withdrawal the consumer should "inform the trader of his decision to withdraw on a durable medium", either in his own words, or using the standard withdrawal form as set out in Annex I (B).[379] No other formal requirements can be added to the standard withdrawal form. With regard to distance contracts concluded on the Internet, the trader may in addition allow the consumer to electronically fill in and submit the standard withdrawal form on the trader's website in which case the trader shall communicate to the consumer an acknowledgement of receipt of such a withdrawal. The exercise of the

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[374] Art. 2 (1) of the Proposal.

[375] Art. 2 (2) of the Proposal.

[376] Art. 5 (3) of the Proposal.

[377] Art. 12 (2) of the Proposal.

[378] Art. 13 of the Proposal.

[379] Art. 14 of the Proposal.

right of withdrawal shall have the effect of terminating the obligations of the parties.[380] Upon withdrawal, the trader must reimburse any payment received from the consumer within thirty days, but may wait until the consumer returns the goods.[381] In case of withdrawal the consumer is obliged to return goods to the trader within fourteen days from the day on which he communicated his withdrawal, unless the trader offers to collect them. The consumer can only be charged for the direct cost of returning the goods and can only be liable for any diminished value of the goods resulting from the handling other than what is necessary to ascertain the nature and functioning of the goods. If the trader has not properly informed the consumer on his right to withdrawal, the consumer shall not be liable at all. The consumer shall bear no cost for services performed, in full or in part, during the withdrawal period where the contract was subject to a right of withdrawal.[382] A number of exceptions from the right of withdrawal are regulated in Art. 19 of the Proposal and can be divided into exceptions regarding distance contracts (Art. 19 (1))[383] and exceptions regarding off-premises contracts (Art. 19 (2)). Art. 20 of the Proposal excludes the application of whole Chapter III with respect to certain distance and off-premises contracts.

VII. Sales contracts

Chapter IV regulates other consumer rights specific to sales contracts and encompasses, with important modifications, the provisions contained in Directive 99/44. While most significant provisions on conformity, on sellers' strict liability for non-conformity, on criteria for the assessment of non-conformity, on remedies and on commercial guarantees have been taken over, certain new provisions have been introduced.[384] According to Art. 21 of the Proposal this Chapter applies to sales contracts, whereby in case of mixed-purpose contracts for goods and services, this Chapter only applies to the goods. It also applies to contracts for the supply of goods to be manufactured or produced. However, it does not apply to spare parts replaced by the trader when remedying the lack of conformity of the goods by repair under Art. 26 of the Proposal. Also, member states may decide not to apply provisions of this Chapter to the sale of second-hand goods at public auctions. The Proposal introduces new provisions on delivery and the passing of risk in Articles 22 and 23. The trader delivers goods by transferring the material possession to the consumer or to a third party other than the carrier and indicated by the consumer, within maximum thirty days from the conclusion of the contract.[385] Where the trader fails to fulfil his obligations to deliver, the consumer is entitled to a refund of any sums paid within seven days from the delivery date.[386] According to Art. 23 (1) of the Proposal "the risk of loss of or damage to the goods shall pass to the consumer when he or a third party, other than the carrier and indicated by the consumer has acquired material possession of the goods". If the consumer or a third party, other than the carrier and indicated by the consumer has failed to take reasonable steps in taking the material possession of

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[380] Art. 15 of the Proposal.

[381] Art. 16 of the Proposal.

[382] Art. 17 of the Proposal.

[383] E.g. according to Art.19 (1) lit. a) of the Proposal where service provision commences during the withdrawal period with the consumer's consent, no right of withdrawal exists.

[384] H.-W. Micklitz, N. Reich, "Crónica de una muerte anunciada: The Commission proposal for a „directive on consumer rights"", *Common Market Law Review,* 46/2009, 501.

[385] Art. 22 (1) of the Proposal.

[386] Art. 22 (2) of the Proposal.

the goods, the risk shall pass to the consumer at the time of delivery as agreed by the parties.[387] Another novelty represents the different approach of the Proposal with regard to the consumer's remedies in case of a lack of conformity. Although the list of remedies remains essentially the same and includes repair or replacement, reduction in price and rescission, Art. 26 (2) of Proposal gives the "trader" the right to choose between repair and replacement. The consumer may choose remedies only under the limited conditions in Art. 26 (3) and (4) of the Proposal.[388] If the trader has proved that remedying the lack of conformity by repair or replacement is unlawful, impossible or disproportionate, the consumer may choose between price reduction and rescission of contract.[389] However, the consumer may only rescind the contract if the lack of conformity is not minor. Unlike Directive 99/44, the Proposal expressly regulates in its Art. 27 (2) that the consumer may claim damages for any loss not remedied in accordance with Art. 26 on the other remedies. An important change concerns time limits, where new Art. 28 (4) of the Proposal imposes a duty of the consumer to notify the trader of the lack of conformity within two months of detection.

VIII. Contract terms

Chapter V of the Proposal incorporates the provisions contained in Directive **93/13**.[390] According to Art. 30 (1) of the Proposal, Chapter V applies to contract terms drafted in advance by the trader or a third party, which the consumer agreed to without having the possibility of influencing their content, especially standard form contracts. If the consumer had the possibility of influencing some of the terms, Chapter V still applies to other contract terms which form part of the contract.[391] Art. 31 of the Proposal introduces new transparency requirements, under which contract terms must *inter alia* be "made available to the consumer in a manner which gives him a real opportunity of becoming acquainted with them before the conclusion of the contract".[392] Also, the trader needs consent of the consumer regarding any payment in addition to the remuneration foreseen for the trader's main contractual obligation. If the trader uses default options by requiring the consumer to reject in order to avoid the additional payment, the consumer is entitled to reimbursement of this payment.[393] Exclusions previously contained in Art. 4 (2) of the Directive 93/13 are now regulated in Art. 32 (3) of the Proposal, which excludes the main subject matter of the contract and the adequacy of the remuneration from the control of fairness. Under Art. 37 of the Proposal the consumer will not be bound by contract terms which are unfair, whereby contract terms, as set out in the „black list" in Annex II, are considered unfair in all circumstances (Art. 34) and contract terms, as set out in the „grey list" in Annex III, are considered unfair, unless the trader has proved that such contract terms are fair (Art. 35). The list in Annex III of the Proposal is very similar to the list in the Annex to the Directive 93/13. However, there are few minor changes and several of the terms previously presumed to be unfair entered the "black-list" in Annex II of the Proposal.

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[387] Art. 23 (2) of the Proposal.

[388] Art. 3 (5) of the Directive 99/44 has been replaced with Art. 26 (4) of the Proposal, according to which the consumer may resort to any remedy available under para. 1, where one of the special situations exists, e.g. when the trader has failed to remedy the lack of conformity within a reasonable time.

[389] Art. 26 (3) of the Proposal.

[390] Arts. 30 to 39 of the Proposal.

[391] Art. 30 (2) of the Proposal.

[392] Art. 31 (2) of the Proposal.

[393] Art. 31 (3) of the Proposal.

IX. Conclusions

The Commission Proposal for a Directive on consumer rights represents an important piece of legislation, which tries to develop a coherent set of rules in European consumer contract law. The introduction of unified common definitions, rules on information duties and of central regulation of right of withdrawal for distance and off-premises contracts should affect the current regulatory fragmentation in this field and thus contribute to legal certainty of consumers. However, with the exception of these improvements and certain additional rules, the Proposal largely replicates the content of the current consumer protection directives. The major difference represents the shift from the minimum to full harmonisation principle. The application of this principle will mean the achievement of comparably higher level of consumer protection on the one hand, and the reduction of the existing level of consumer protection in individual states on the other. While full harmonization is suitable for provisions on withdrawal and on specific information duties, it is not appropriate for provisions on remedies in sales contracts and provisions on black and grey list of unfair contract terms. In conclusion, although the Proposal should be improved and revised by the European legislator, it undoubtedly represents a good starting point for a discussion on the future of coherent European consumer contract law.[394]

[394] This discussion was recently continued by publication of Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses, COM(2010) published on 1 July 2010. The purpose of this Green Paper is to set out the options on how to strengthen the EU internal market by making progress in the area of European Contract Law, and launch a public consultation to gather orientations and views from relevant stakeholders. To this purpose the Commission has set up an Expert Group to study the feasibility of a user-friendly instrument of European Contract Law and which will assist the Commission in selecting certain parts of the Draft Common Frame of Reference (DCFR) which are directly or indirectly related to contract law. This instrument could range from non-binding to binding, depending on offered options, where Option 1. ends with mere publication of the results of the Expert Group, Option 2. foresees the adoption of an official „toolbox" for the EU legislator, Option 3. is based on attachment of the instrument of European Contract Law to a Commission Recommendation addressed to the Member States and Option 4. foresees adoption of a Regulation setting up an optional instrument of European Contract Law in each Member State. Furthermore, Option 5. recommends the adoption of Directive on European Contract Law, which would harmonize national contract law on the basis of minimum common standards. On the contrary Option 6. foresees the adoption of Regulation establishing a European Contract Law, while Option 7. suggests the adoption of Regulation establishing a European Civil Code. Depending on the results of the consultation, that will run form 1.7.2010 to 31.1.2011 the Commission could propose further action by 2012.

B. TRANSPOSITION OF PROPOSED DIRECTIVE ON CONSUMER RIGHTS INTO THE NATIONAL LAWS OF THE PARTICIPATING STATES

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I. Common Issues Regarding Transposition of Proposed Directive on Consumer Rights

There are numerous practical problems which could arise from the process of implementation of a proposed Directive into national laws both of member as well of participating states. Full harmonization will complicate the integration of Directives provisions into their general system of contract law. When transposing the current consumer protection directives many of the participating states used the minimal clause in order to enhance the level of consumer protection. As a consequence of the full harmonisation principle on which the proposed Directive is based, these countries will now be forced to lower their national level of consumer protection in certain aspects fully harmonized by the proposed Directive. At the end of the day this could lead to a paradox result, where the provisions of the national general contract law of a given country would be more favourable then the special consumer protection rules. For instance, when transposing information requirements from the proposed Directive, the national legislator will not be able to introduce, or uphold any additional information requirements for the trader with regards to a sale or service contract concluded with a consumer. Another important problem concerns the legislative technique, which is to be applied when transposing this horizontal directive. Although the participating states are not required to copy and paste the Directive, it will most probably be implemented verbatim in order to avoid unnecessary errors and omissions. Finally, the participating states will have to answer the question of major importance, namely how and where to implement the proposed Directive: within the existing national civil codes or consumer codes.[395] For some of the participating states the transposition of the proposed Directive could even represent a motive for the reform of their national civil law.

II. Transposition of Proposed Directive on Consumer Rights into the National Laws of the Participating States

1. Transposition of Proposed Directive on Consumer Rights into Albanian Law

The Albanian legislator by adopting a separate Act on Consumer Protection has already made the choice to leave consumer rights outside of the Civil Code. This approach might have been dictated by several reasons. One of the main reasons might have been the pressure of time. Being under the obligation of the Stabilization and Association Agreement to approximate and harmonize the legislation with the European *acquis* and aiming to ensure a

[395] H. Schulte–Nölke, "The transposition of European consumer directives into the national laws of the EU–Member States", *Tijdschrift voor Consumentenrecht en handelspraktijken*, 4/2009, 133.

policy of active consumer protection within a short time[396], without any doubt the Albanian legislator would have chosen the shortest and easiest way to approach consumer issues. On the other side, adopting a separate and single act is a model offered also by many Member States, and seems therefore an acceptable approach to address the issues of consumer protection while fulfilling European standards, which seems to be the main concern of the government and the legislator, as well. In addition, considering that the European consumer law is an ongoing process, amending a single and separate Act seems more appropriate and reasonable than amending the Civil Code.

Concerning the transposition of the proposed Directive, which requires horizontal full harmonization, it is quite predictable that the Albanian legislator will amend the existing Consumer Protection Act from 2008. The principle of maximum harmonization will facilitate enough the drafting work of the responsible Ministries, as they will adopt verbatim the transposition approach. But one could also come to the conclusion that the transposition of this proposed Directive will present the best opportunity to adopt the "big solution" of transposing the consumer rights into the Civil Code. This opportunity can even be used as a justification to revise and improve the systematization and harmonization of the whole Civil Code, by avoiding systematic inconsistencies and incoherencies faced so far. Another argument in favour of transposing the proposal Directive into the Civil Code is that there already exists such an experience in Albania. For example, the Directive **85/374 on** product liability is transposed in the Civil Code[397] since its adoption in 1994, the same holds true for the right to withdrawal in doorstep situation[398] or some unfair terms[399], which in fact are applicable to every party in a contract. This "big solution" would in any case require a very strong will from all interested parties.

However, the more probable approach seems to be the amendment of the Consumer Protection Act. The occasion still represents the opportunity to at least reach an internal harmonization of specific norms on consumer contracts with the general law of contracts provided by Civil Code, in order to make the Consumer Protection Act effective and applicable.

2. Transposition of Proposed Directive on Consumer Rights into Bosnian Law

In Bosnia and Herzegovina a horizontal consumer protection directive with a maximum harmonization approach could most probably only be transposed within a separate consumer protection act. The most important reasons are political in nature, considering that in a field of law which changes so rapidly as the European Consumer Protection Law, a directive which unifies most of the provisions of this field may not be transposed in an act where the political will for its adoption lacks for more than a decade. Namely, the Draft Law of Obligations of Bosnia and Herzegovina of 2006, which transposed not less than thirteen Consumer Directives, and the Draft Law of Obligations of 2010, which is adopted by the Council of

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[396] Stabilization and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part signed on 12 June 2006, entered into force on 1 April 2009, in its Art. 6, 5-th intend reads: "During the fifth year after the date of entry into force of this Agreement, the Stabilisation and Association Council shall evaluate the progress made by Albania, and shall decide whether this progress has been sufficient for the passage into the second stage in order to achieve full Association. …", http://ec.europa.eu/enlargement/pdf/albania/st08164.06_en.pdf, last visited 30 April 2010.

[397] Art. 628 et seq., Albanian Civil Code, *OG RAl* No.11/94.

[398] Article 672, Albanian Civil Code.

[399] Article 686, Albanian Civil Code.

Ministers as a Proposal for a Law of Obligations and transposed seven Consumer Directives, both failed to pass the legislative procedure because the political representatives of the entities could not agree on whether Bosnia and Herzegovina needs a Law of Obligations on the entity or state level. The Consumer Protection Act which was enacted on state level in 2002[400] and replaced by a new Consumer Protection Act in 2006[401] did not experience any problems of this kind. Hereby, only the question of politically possible transposition is answered. When searching for the best way of transposition, it must be taken into consideration that the Consumer Protection Act, although first adopted eight years ago, did not gain almost any importance in practice. The long tradition of provisions on obligations exclusively contained in the Law of Obligations prevails against the applicability of the Consumer Protections Act as *lex specialis* in case of consumer contracts. In accordance with Art. 1 (2) of the Consumer Protection Act in case of doubt or collision of provisions of this Act and another legal source as the Law of Obligations, the one which provides "higher level of consumer protection" shall apply. It is doubtful whether such provision would be in accordance with the maximum harmonization approach of the horizontal directive. Consequently, only a "copy and paste" transposition into a separate legal act seems possible, but would neither contribute to a closer connection between Law of Obligations and Consumer Protection, which is of great importance for the development of this field of law in general, nor to greater application in practice.

3. Transposition of Proposed Directive on Consumer Rights into Croatian Law

The answer to the question of where to transpose the proposed Directive on consumer rights is very complex and depends on more than one factor. At the beginning of the process of approximation of national contract law with the *acquis,* the Croatian legislator tried to preserve the traditional system and values of the Civil Obligations Act (COA) from frequent amendments by adopting a special and separate Consumer Protection Act (CPA). Most of the consumer protection directives, *inter alia* Directives 85/577, 93/13, and 97/7, were transposed in the CPA. Only if otherwise provided in CPA as *lex specialis,* the obligation-law relationships between the consumer and the trader shall be subject to the provisions of the COA as *lex generalis*.[402] After adopting a new COA in 2005, the Croatian legislator decided to use the transposition of three consumer protection directives, namely of Directives 85/374, 90/314 and 99/44 for the modernization of the existing provisions of the COA.[403] Finally, when implementing Directive 2008/48, the Croatian legislator decided to adopt a separate Consumer Credit Act[404] as *lex specialissima* in relation to CPA. The described legal situation complicates the prediction on possible ways of the transposition of the proposed Directive on consumer rights. Undertaking of the Croatian legislator would not only depend on questions of substantive but also on questions of political and practical nature. For instance, the transposition of a directive depends also on time period in which the preparing ministries have to meet the transposition duty. Since the consumer law is considered to be specific private law in relation to the general civil law, one can presume that the transposition will be made within the CPA. The main problem would be the transposition of the proposed Directive with regard to provisions of Directive 99/44, some of which were transposed supererogatory (über-

[400] Consumer Protection Act, *OG BA*, No. 17/02.

[401] Consumer Protection Act, *OG BA* No. 25/06.

[402] Art. 2 (2) of the Consumer Protection Act, OG RH No. 79/07, 125/07, 79/09, 89/09, 133/09.

[403] Civil Obligation Act, OG RH No. 35/05, 41/08.

[404] Consumer Credit Act, OG RH No. 75/09.

schießend) into the COA in order to cover not only B2C, but also B2B and C2C sales contracts. Since the Proposal is restricted to "business-to-consumer" contractual relationships, this way of transposition will not be possible. Finally, although the transposition of the proposed Directive should represent an opportunity to bring consumer law closer to general contract law, it seems that the transposition within the separate consumer code, e.g. Croatian Consumer Protection Act is more compatible with the objective of the proposed directive.

4. Transposition of Proposed Directive on Consumer Rights into Macedonian Law

The Macedonian Law on Obligations[405], adopted in 2001 on the basis of the fundamental principles of the Law on Obligations of SFR Yugoslavia, is legislative act that in a way serves as a Code of the obligation relations. The legislator within the Law on Obligations adopted traditional system and method of regulation of the obligation relations, so as the specificities of the consumer relations were regulated by a separate Law on Consumer Protection[406] as *lex specialis*[407].

The amendments made on the Law on Obligations in 2008 were made *inter alia* to provide for relevant transposition of Directive 85/374, Directive 93/13, Directive 99/34 and Directive 99/44. The Law on Consumer Protection as described in Part I of this Compendium is in general approximated to the existing directives in the field of consumer protection.

The National Program of Adoption of the *Acquis Communautaire*[408] provides, for the second half of 2010, amendments of the Law on Consumer protection, so as it full approximation with Directive 2005/29/EC and Directive 98/27/EC. By adoption of Law on distance marketing of consumer financial services transposition of the Directive 2002/65/EC in the national legislation is foreseen. Amendments of the relevant legislation in field of food safety is also planned, The NPAA also sets as one of the short term priorities adoption of Law on Market Surveillance, that should provide legal framework for establishment of Coordinative Body that shall monitor the fulfilment of the legal requirements for provision of high standards of *inter allia* consumer protection.

Although the relevant programs and plans for the adoption of the *Acquis Communitaire* do not foresee any other legislative activities in the field of consumer protection, eventual adoption of the Proposed Directive on Consumer Rights shall affect the national legislation due to the standing obligation of the country to approximate its legislation with the one of the European Union. However, how this process will be delivered is a question that will need serious consideration. Following the existing approach to regulate the specific issues on the consumer protection by *lex specialis,* it is to be expected that the main method of transposition will be by amendments of the Law on Consumer Protection or eventually adoption of new law. Nonetheless, it should be expected that it will be examined how the (Proposed) Directive on Consumer Rights affects in general the contractual relations so as to consider amendments to the Law on Obligations.

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[405] Law on Obligations, *OG RM* No. 18/2001, 4/2002, 5/2003, 84/2008, 81/2009 and 161/2009.

[406] Law on Consumer Protection, *OG RM* No. 38/2004, 77/2007 and 103/2008.

[407] By Art. 2, para. 2 of the Law on Consumer Protection, on the contractual and other obligation relations of the trade of goods and services the provisions of the Law on Obligations shall be applied, unless otherwise specified by the Law on Consumer Protection.

[408] National Program for the Adoption of the Acquis Communautaire, Revision 2009, chapter 3.28; http://www.sep.gov.mk/content/Dokumenti/EN/00%20NATIONAL%20PROGRAMME%20FOR%20ADOPTION%20OF%20THE%20ACQUIS%20COMMUNAUTAIRE%202009.pdf

5. Transposition of Proposed Directive on Consumer Rights into Montenegrin Law

Montenegro stays faithful to the approach that most of consumer protection directives should be transposed in a separate consumer protection piece of law, while some of them will be transposed with other general or sector specific legislation. This is the manner in which in year 2011 a large intervention will be launched and, instead of mere amendments, a whole new text of CPL is planned to be prepared and adopted.

In relation to the Proposed Directive on Consumer Rights**,** general opinion in Montenegro is that such a horizontal instrument can offer the possibility to tackle important consumer rights and secure their consistency, while at the same time can contribute to simplification of certain rules and raise awareness of consumers on their rights. However, in parallel, the impression is that being maximum harmonization tailored it can limit practical value that consumer are enjoying under old *acquis* regime and reduce the level of protection in situations where participating states were free to set stricter rules.

Among other things, in practice this means that it is still to be observed how the relation between consumer protection legislation and general contractual law will look like when the Proposed Directive on Consumer Rights becomes part of Montenegrin obligation stipulated by Title VI "Approximation of Laws, Law Enforcement and Competition Rules", and Art. 72 of the SAA. This among the others refers to concerns how to evade situation where the provisions of the Montenegrin general contract law would be more favourable to consumers then the special consumer protection rules, as the former beside B2B, C2C and P2P contracts is applicable also to B2C.

In any case Montenegro as a country that has already submitted official Responses to the Questionnaire for the preparation of the Opinion to the application on membership, is awaiting its candidate status, and harmonization of legislation in a priority area such as consumer protection will be challenging but is a must and achievable.

6. Transposition of Proposed Directive on Consumer Rights into Serbian Law

The existing Serbian Consumer Protection Act of 2005 contains some feeble attempts to transpose a number of consumer directives.[409]

It would be fair to say that the Consumer Protection Act of 2005 only touches upon these areas, which in no way suggests that it is in compliance with the relevant directives. As regards the civil law aspects of Consumer Protection Act of 2005, it only roughly indicates the main principles of the Acquis.

There are no indications of any intentions to amend the Law on Obligations of the Republic of Serbia,[410] in order to transpose any of the European Consumer Protection Directives.[411]

The ideas of reforming the Law of Obligations, as presented in the Report of the Government Commission (2009), are predominantly inspired by the *Skica za zakonik o obligacijama i ugovorima* (a 1969 Draft written by Professor Mihailo Konstantinović, founder of the

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[409] Consumer Protection Act, *OG RS* No. 79/2005.

[410] Law on Obligations of the Republic of Serbia, OG SFRY No. 29/78, 39/85, 45/89 and 57/89, OG FRY No. 31/93, 31/93, 22/99, 23/99, 35/99, 44/99.

[411] *Cf*. Report of Serbian Civil Law Drafting Commission (2007): Vlada Republike Srbije. Komisija za izradu Građanskog zakonika, Rad na izradi Građanskog zakonika. Izveštaj Komisije sa otvorenim pitanjima, Pravni život, Tom III, 11/2007, 5–407. Report of Serbian Civil Law Drafting Commission in respect of reform of the Law of Obligations (2009): Komisija za izradu Građanskog zakonika, *Prednacrt. Građanski zakonik Republike Srbije. Druga knjiga. Obligacioni odnosi*, Vlada Republike Srbije, Beograd 2009, 1-451.

Belgrade school of Civil Law), on which the existing Law of Obligations heavily relies. Namely, in the year 1978 the Legislator left out some of the proposals of *Skica*, and the Government Commission considers revisiting these proposals. Also, the Commission reflects on introducing certain changes based on national jurisprudence and on comparative perspective, *i.e.* the well-settled concepts of other European legal systems. However, there are no traces in the works of the Commission, of taking into account Consumer directives.

However, attention must be called to the fact that, at the time of this writing (June 2010), the Serbian Ministry of Trade and Services, as the line ministry for the area of consumer protection, finds itself at the final stages of drafting a proposal for the new Consumer Protection Act, which should enter the parliamentary procedure during the autumn 2010, and which aims to fully transpose the consumer Acquis. It is more than obvious that the Proposal for a Directive on consumer rights[412] was taken into consideration in the course of drafting the Proposal for the new Consumer Protection Act.

[412] *Commission Proposal for a Directive on consumer rights*, COM (2008) 614/3.

C. PRIVATE INTERNATIONAL LAW IN CONSUMER CONTRACTS

By *Zlatan Meškić*

Consumer protection in Private International Law of the European Union is mainly based on Art. 6 of the Rome I Regulation[413], Arts. 15-17 of the Brussels I Regulation[414] and the provisions on conflict of laws of the new generation of Consumer Directives[415]. On the one hand the inter-coordinated Rome I and Brussels I ensure consumer protection by providing jurisdiction of the courts of the member state in which the consumer is domiciled, irrespective of the fact whether the consumer is claimant or defendant, which then apply domestic law.[416] In order to provide cross-border protection for consumers, Art. 15 Brussels I and Art. 6 Rome I contain a common minimum requirement, that the professional directs his activities to the state of the consumer's domicile/habitual residence and the contract falls within the scope of such activities. On the other hand, the provisions on conflict of laws of consumer directives aim to secure the applicability of national provisions which transpose the directives when there is a „close connection" with the territory of (one or more) member states and the consumer contract contains a choice of law clause in favour of a non-member state. Since these provisions try to guarantee the level of consumer protection provided by the directives against the assumed lower level of protection in the non-member states, their transposition in the laws of the states participating in this project will make sense when the participating state becomes a member of the EU. Their obligation to transpose provisions on conflict of laws of the consumer directives also depends on the future of the "horizontal directive". In the "Directive of the European Parliament and of the Council on consumer rights"[417] there are no private international law provisions included and the new directive with the concept of "maximum harmonization" shall according to its Art. 47 repeal the four directives, which were subject of this analysis. This would solve the ongoing discussion on the hierarchy of laws between the transposed provisions on conflict of laws of the directives and the Rome I. At present, according to Art. 23 Rome I the

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[413] Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), *OJ L 177/6*, 04/07/2008, *p. 6-16*.

[414] Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ L 012*, 16/01/2001, *p. 1 –23.*

[415] Art. 6 (2) of the Council Directive 93/13/EEC of 5. April 1993 on unfair terms in consumer contracts, *OJ L 095*, 21/04/1993*, p. 29 –34*; Art 12 (2) of the 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, *OJ L 144*, 04/06/1997, *p. 19 –27*, as amended by Directive 2002/65/EC, Directive 2005/29/EC and Directive 2007/64/EC; Art. 7 (2) of the 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 L 171*, 07/07/1999, *p. 12 –16.*

[416] This statement is true in cases where the concept of "domicile" used by the Brussels I Regulation overlaps with the less demanding concept of "habitual residence" used in the Rome I Regulation. See M. Stanivuković, "Ugovori sa potrošačima sa inostranim elementom – merodavno pravo i nadležnost", *Zbornik radova Dvadeset godina Zakona o Međunarodnom privatnom pravu*, Pravni fakultet Univerziteta u Nišu, Niš 2004, 251.

[417] COM(2008) 614 final.

provisions on conflict of laws of the directives have priority over the provisions of the Rome I.[418]

Rome I and Brussels I do not need to be transposed, since they will become directly applicable as soon as the participating states become members of the EU. However, their application is already possible in these states. Brussels I may only establish jurisdiction of the courts of EU member states, otherwise it would violate Public International Law by interfering into third states sovereign rights.[419] Nevertheless, in cases when the defendant is domiciled in a member state, according to the *Owusu*[420] judgment, Brussels I applies even when the facts of the case are connected with only one member state and one or more non-member state(s). Consequently, according to Art. 16 of Brussels I, the consumer with the citizenship of one of the states participating in this analysis may start proceedings before the courts of the member state in which he is domiciled.[421] A *prorogatio fori* departing from the jurisdiction determined by Art. 16 of Brussels I may only be concluded *post litem natam*. In these cases pursuant to Art. 6 (1) Rome I, the law of the country of the consumer's habitual residence would apply, regardless of the fact whether it lies within the territory of a member or a non-member state of the EU. When having a habitual residence in one of the member states, according to Art. 6 (2) Rome I a choice of law clause in favour of one of the states participating in this analysis would only apply to the extent that it provides a higher level of consumer protection than the "internal" mandatory provisions of the country of the consumer's habitual residence. When the contract does not fall under the scope of application of Art. 6 Rome I, according to Art. 3 (3) and (4) Rome I in case when all elements of the situation lie within one (member) state, its "internal" mandatory rules apply regardless of a choice of law clause in favour of a law of another (member or non member) state[422]. The new development stated in the ECJ judgment *Ingmar* additionally suggests that some national consumer protection provisions which transpose the consumer directives may be regarded as "international" mandatory rules and apply regardless of the applicable law determined by Rome I.[423] The consumer protection provisions of most of the states participating in this project are explicit-

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[418] Such hierarchy has been sharply criticized in the legal science, because the private international law provisions of the directives only aim to secure the application of consumer law of one of the member states, without determining the applicable law. Additionally, most of the member states transposed these provisions differently and thereby endangered the legal certainty created by the Rome I Convention; See E. Jayme, "Zum Stand des IPR in Europa", *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)*, 1996, 65.

[419] S. Leible, "Internationales Vertragsrecht, die Arbeiten an einer Rom I-Verordnung und der Europäische Vertragsgerichtsstand", *IPRax*, 2006, 370.

[420] See ECJ, 1 March 2005, C-281/02 *–Andrew Owusu v N.B. Jackson, trading as 'Villa Holidays Bal-Inn Villas', Mammee Bay Resorts Ltd, Mammee Bay Club Ltd, The Enchanted Garden Resorts & Spa Ltd, Consulting Services Ltd, Town & Country Resorts Ltd* [2005] ECR I-01383, para. (26); This decision was brought on the scope of application of the Brussels Convention (Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters) which is replaced by Brussels I.

[421] K. Sajko, *Međunarodno privatno pravo*, Narodne novine, Zagreb 2009, 412.

[422] The formulation of Art. 3 (4) Rome I suggests that in harmonised areas of the Contract law of the EU, like the Consumer contract law, these provisions act like national mandatory rules of the state (in this case the EU) and are incorporated in the contract regardless of the choice of law. This provision aimed to replace the private international law provisions of the consumer protection directives.

[423] ECJ, 9 November 2001, C-381/98 – *Ingmar GB Ltd and Eaton Leonard Technologies Inc.* [2000] ECR I-09305; See Z. Meškić, "Kolizione norme za zaštitu potrošača u direktivama Evropske zajednice i Uredbi Rim I – novi izazov za ZRSZ, Zbornik Pravnog fakulteta Sveučilišta u Rijeci", 2/2009, 1017.

ly declared as (at least) "internal" mandatory rules.[424] Articles 6 (2) Rome I and 3 (3) and (4) Rome I only secure the application of mandatory provisions of EU member states.

The participating states have already put a lot of effort to reform their Private International Law Codifications, which for the most part are three decades old or older and contain no consumer protection provisions[425]. One of the most important motives for reform was to bring their private international law provisions in accordance with the EU Law described above. Macedonia is still the only one of the participating states who is able to present a result of its reform process, namely the Macedonian Private International Law Code of 2007.[426] Art. 25 of the Macedonian Private International Law Code regulates consumer contracts and mostly corresponds to Art. 5 of the Rome Convention[427], because the Rome I Regulation was not adopted at the time of its making. In other participating states revision is still in process and will therefore not be further discussed[428]. Bosnia and Herzegovina is the only state which does not consider a revision of its Private International Law Code because it might result in the adoption of two different Private International Law Codes, enacted on the entity level, and thereby cause additional conflicts of laws.

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[424] Art. 5 (1) of the Montenegrin Law on Consumer Protection, *OG RMN* No. 26/07; Art. 4 of the Croatian Consumer Protection Act, *OG RH* No. 79/07, 125/07, 79/09, 89/09, 133/09; Art. 2 of the Consumer Protection Act of Bosnia and Herzegovina, *OG BA* No. 17/02.

[425] Albanian Law on enjoyment of civil rights by foreigners and application of foreign law, *OG RAl* No. 3920/64; Most of the successor states of former Yugoslavia still apply an almost unchanged version of the Yugoslav Private International Law Code, namely the Act on Resolving Conflicts of Laws with Legal Provisions of other Countries in Certain Relations, *OJ SFRY* No. 43/82 and 72/82.

[426] Private International Law Code of the Republic of Macedonia, *OG RMac* No. 87; German translation by Ch. Jessel-Holst, IPRax 2008, 158.

[427] Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980, *OJ L 266*, 09/10/1980, *p. 1 –19*.

[428] For example in Croatia already in 2001 a group of professors created "Theses for the Private International Law" which should be used as a basis for the Draft of a new Private International Law of Croatia (see K. Sajko, H. Sikirić, V. Bouček, D. Babić, N. Tepeš, *Teze za Zakon o Međunarodnom privatnom pravu*, Izvori hrvatskog i europskog međunarodnog privatnog prava, Informator, Zagreb 2001, 255-340); See E. Čikara, *Gegenwart und Zukunft der Verbraucherkreditverträge in der EU und in Kroatien*, LIT Verlag, Wien (*et al.*) 2010.

Part 4:
LIST OF ABBREVIATIONS AND BIBLIOGRAPHY

Annex A: LIST OF ABBREVIATIONS

Art(s)	article(s)
Al	Albania
BA	Bosnia and Herzegovina
BDLO	Draft Law of Obligations of Bosnia and Herzegovina
BLO	Bosnia-Herzegovina's Law of Obligations
B2B	Business to Business
B2C	Business to Consumer
cca.	circa (approximately; about)
CIA	Credit Institutions Act
COA	Civil Obligations Act (of Croatia)
CPA	Consumer Protection Act/Consumer Protection Law
CPL	Consumer Protection Law
CRO	Croatia
DLO	Draft Law of Obligations (of Bosnia and Herzegovina)
EC	European Communities
ECJ	Court of Justice of the European Communities, renamed by the Lisbon Treaty into Court of Justice of the European Union
ECR	European Court Reports
ECU	European Currency Unit
ed.	editor(s)
e.g.	exempli gratia (for example)
et al.	et alia (and other)
etc.	et cetera (and so forth)
et. seq.	et sequentes (and the following one/ones)
EU	European Union
EUR	Euro
FN	Footnote
FRY	Federative Republic of Yugoslavia

GTZ	Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH
HRK	Croatian Kuna
IA	International Agreements
i.e.	id est (that is)
infra	below
IPRax	Praxis des Internationalen Privat- und Verfahrensrechts
LCP	Law on Consumer Protection
lit.	litera (letter)
LoO	Law of obligations
Mac	Macedonia
MFI`s	Micro Finance Institutions
MN	Montenegro
NGO`s	Nongovernmental organizations
No.	number
OJ	Official Journal
OG	Official Gazette
p./pp.	page(s)
para(s)	paragraph(s)
P2P	Public to Private
ref.	reference
RAl	Republic of Albania
RH	Republic of Croatia
RMac	Republic of Macedonia
RMN	Republic of Montenegro
RS	Republic of Serbia
SAA	Stabilization and Association Agreement
SER	Serbia
SEE	South East Europe
SFRY	Socialistic Federative Republic of Yugoslavia
supra	above
v.	versus
Vol.	Volume
VSRH	Supreme Court of the Republic of Croatia
VTSRH	High Commercial Court of the Republic of Croatia

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Law on Leasing, *OG RMac No.* 4/2002; 49/2003; 13/2006; 88/2008)

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Law on General Product Safety, *OG MN No. 48/08.*

Law on Technical Requirements for Products and Assessment of Products Conformity with the Prescribed Requirements, *OG MN No.14/08.*

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Law on Obligations, *OG SFRY* No. 29/78, 39/85, 57/89 and *OG FRY* No. 31/93.

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Law on Trade, *OG FRY* No. 46/90.

Law on Trade, *OG FRY* No. 32/93, 50/93, 41/94, 29/96.

Serbia:

The Law of Obligations of the Republic of Serbia, *OG SFRY* No. 29/78, 39/85, 45/89 and 57/89, *OG FRY* No. 31/93, 31/93, 22/99, 23/99, 35/99, 44/99.

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Act on Resolving Conflicts of Laws with the Legal Provisions of other Countries, *OG SFRY* No. 43/82 and 72/82, *OG FRY* No. 46/96.

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Tourism Act, *OG RS* No. 36/09.

Product Liability Act, *OG RS* No. 101/05

Electronic Signature Act, *OG RS* No. 135/04.

E-Commerce Act, *OG RS* No. 41/09.

General Product Safety Act, *OG RS* No. 41/09.

Telecommunications Act, *OG RS* No. 44/03, 36/06.

Personal Data Protection Act, *OG RS* No. 97/08.

4. National Courts Practice by Countries:

Albania:

There is not any court practice regarding consumers and CPA in Albania. The courts are more inclined to use general contract law in resolving the disputes, rather than CPA.

Bosnia and Herzegovina:

Constitutional Court of Bosnia and Herzegovina, AP-1385/06, 26.06.2007, *OG BA* No. 60/05 (consumer contracts).

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Croatia:

County Court in Varaždin, Gž. 1074/08–2 from 4. August 2008 (sale of goods).

County Court in Varaždin, Gž. 1052/08–2 from 12. June 2008 (consumer credit).

High Commercial Court of the Republic of Croatia (VTSRH), Pž 2222/92 from 27. April 1993 (unfair contract terms).

Decision of the Croatian Competition Agency, UP/I 030-02/2004-01/66, *OG RH* No. 135/05 (collective interest of consumers).

Supreme Court of the Republic of Croatia (VSRH) Rev 2458/90 from 13. February 1991 (sale of goods).

Macedonia:

There is no data on court decisions on the basis of the Law on Consumer Protection either at the Supreme Court or at the Administrative Court, based on the existing Consumer Protection Act. At the Supreme Court the civil disputes that could be classified as consumer disputes, the courts apply Law of Obligations and sector specific legislation.

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Serbia:

There are no court decisions based on the existing Consumer Protection Act. In most of the cases that could be classified as consumer disputes, the courts apply Law of Obligations and sector specific legislation.

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VII

POTROŠAČKO UGOVORNO PRAVO EVROPSKE UNIJE

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Sadržaj

Uvod
CHRISTA JESSEL-HOLST I GALE GALEV

Radnu grupu 7 Foruma za građansko pravo Jugoistočne Evrope koja se bavi potrošačkim pravom EU u Albaniji, Bosni i Hercegovini, Hrvatskoj, Makedoniji, Crnoj Gori i Srbiji čine sledeći članovi: Prof. Gale Galev (Skoplje), Dr. Nada Dollani (Tirana) and Dr. Christa Jessel-Holst (Hamburg).

Područje i struktura planiranog rada definisani su na pripremnom sastanku koji je održan u Skoplju. Tu je odlučeno da se ispitivanje ograniči na samo četiri direktive i da se generalno sledi struktura Zbornika evropskog potrošačkog prava koju je priredio prof. Schulte-Nölke[1].

Od samog početka je bilo jasno da će krajnji uspeh zavisiti od pravog izbora nacionalnih izvestioca. Za izbor su uglavnom korišćena dva kriterijuma, i to: a) prethodno izvrsno poznavanje oblasti evropskog potrošačkog prava i b) savršeno vladanje engleskim jezikom, jer je planirano da svi prilozi budu izvorno pisani na engleskom kao jedinom zajedničkom jeziku članova grupe.

Na tim osnovama su izabrani sledeći nacionalni izvestioci: Nada Dollani (Albanija), Zlatan Meškić (Bosna i Hercegovina), Emilia Čikara (Hrvatska), Neda Zdraveva, Jadranka Dabović Anastasovska, Nenad Gavrilović (Makedonija), Zvezdan Čadjenović (Crna Gora), Marija Karanikić Mirić (Srbija).

U 1. delu, ovaj tim daje prikaz zakonodavnih tehnika u pojedinačnim državama učesnicama koji su pripremili odgovarajući nacionalni izvestioci. Drugi deo prikazuje transponovanje pojedinih direktiva u ovih šest zemalja. Zbog ograničenog prostora, nažalost, nije bilo moguće da se objave odgovarajući nacionalni izveštaji. Umesto njih, ova publikacija sadrži uporednu analizu četiri direktive koja je, pak, bazirana na nacionalnim izveštajima i može se smatrati njihovom sintezom. Ovakav pristup ima i jednu veliku prednost jer čitalac pred sobom ima uporedni prikaz koji jasno pokazuje sličnosti i razlike u načinu na koji su četiri direktive transponovane u državama učesnicama. Isto tako, on je nacionalnim izvestiocima omogućio da rade ne samo na svom domaćem pravu, već i na ostalih pet pravnih sistema.

Nacionalni izvestioci su pozvani na radionicu koja je održana 31.01.2010. godine u Tirani, koja se pokazala ne samo kao veoma ugodna, već i kao izuzetno uspešna. U Tirani su međusobno raspodeljeni zadaci, i to na sledeći način: Direktiva o prodaji van poslovnih prostorija – koordinatori Emilia Čikara i Zlatan Meškić; Direktiva o nepravičnim ugovornim odredbama - Marija Karanikić Mirić i Zvezdan Čadjenović; Direktiva o prodaji na daljinu - Nada Dollani i Neda Zdraveva/Jadranka Dabović Anastasovska/Nenad Gavrilović; Direktiva o prodaji robe široke potrošnje - Zlatan Meškić i Neda Zdraveva/Jadranka Dabović Anastasov-

[1] H. Schulte-Nölke u saradnji sa Ch. Twigg-Flesner, M. Ebers (eds), EC Consumer Law Compendium – Comparative Analysis, Universität Bielefeld, februar 2008. godine. Za ažuriranu verziju iz januara 2010. videti: http://www.eu-consumer-law.org/index_en.cfm.

ska/Nenad Gavrilović. Takođe je odlučeno da se uključi i 3. deo o budućnost potrošačkog obligacionog prava u Evropskoj uniji i zemljama učesnicama , koji prikazuje Predlog Komisije za Direktivu o potrošačkim pravima i otvara pitanje implementacije u nacionalne zakone zemalja Zapadnog Balkana. Ovaj deo se završava prikazom međunarodnog privatnog prava u potrošačkim ugovorima.

Nacionalni izvestioci su se maksimalno potrudili da nađu objavljene odluke sudova u svojim zemljama koje se tiču potrošačkih ugovora, ali se za dobijeni rezultat može reći samo da je razočaravajući: u tri zemlje (Albanija, Makedonija i Srbija) nije nađen ni jedan jedini predmet; a rezultati za Bosnu i Hercegovinu, Hrvatsku i Crnu Goru su tek nešto bolji (za bliže informacije videti 4. deo, Dodatak B 4).

Četvrti deo, između ostalog, nudi spisak Izvora prava Evropske Unije, uključujući nedavno objavljenu Zelenu knjigu Komisije o opcionim politikama na putu ka Evropskom obligacionom pravu za potrošače i privredne subjekte, kao i prikaz sudske prakse Suda pravde iz Luksemburga u vezi ove četiri direktive

Treba pomenuti da je saradnja među članovima tima bila značajno olakšana korišćenjem *google* grupa gde je tim registrovan kao „*Civil Forum Consumer*". Na ovaj način internet je korišćen ne samo za diskusije (i prikazivanje fotografija sa radionice), već i za prikupljanje sveobuhvatne zbirke zakona koji su relevantni za potrošačke ugovore u ovih šest zemalja učesnica i koji su tako stavljeni na raspolaganje svima, na lokalnom i/ili engleskom jeziku.

Posebna zahvalnost pripada prof. Tatjani Josipović (Zagreb) koja je, i pored toga što je član radnih grupa 4 i 5, svojim vrednim savetima pomogla rad radne grupe 7.

Prevod svih priloga na srpski jezik je organizovao GTZ Beograd.

16. 07.2010. godine

1. deo:
PRIKAZ „ZAKONODAVNIH TEHNIKA“
U ZEMLJAMA UČESNICAMA

A. ALBANIJA – ZAKONODAVNE TEHNIKE *(Nada Dollani)*

Direktiva	**Transponovana u**	**Datum transponovanja**
Direktiva 85/577	Zakon o zaštiti potrošača (ZZP) iz 2008. g. Odluka Saveta ministara br. 63/2009	17.04.2008. 21.01.2009.
Direktiva 90/314	ZZP iz 2008. g. Odluka Saveta ministara br.65/2009	17. 04.2008. 21.01.2009.
Direktiva 93/13	ZZP iz 2008. g.	17 04.2008.
Direktiva 94/47 (od 23.02 2011: Direktiva 2008/122/EZ)	ZZP iz 2008. g. Odluka Saveta ministara br.833/2009	17 04.2008. 08.07.2009.
Direktiva 97/7	ZZP iz 2008. g. Odluka Saveta ministara br.64/2009	17.04.2008. 21.01.2009.
Direktiva 98/6	ZZP iz 2008. g.	17.04.2008.
Direktiva 98/27 (kodifikovana verzija: Direktiva 2009/22/EZ	ZZP iz 2008. g.	17.04.2008.
Direktiva 99/44	ZZP iz 2008.g.	17.04.2008.
Direktiva 87/102/EEZ (od 12.05.2010: Direktiva 2008/48/EZ)	ZZP iz 2008.g. Odluka Banke Albanije br. 5/2009	17.04.2008. 11.02.2009.
Direktiva 85/374	ZZP iz 2008.g. Građanski zakonik	17.04.2008. 29.07.1994.
Direktiva 86/653	nije transponovana	-
Direktiva 99/34	ZZP iz 2008.g. Građanski zakonik	17.04.2008. 29.07.1994.
Direktiva 99/93	Zakon o elektronskom potpisu	25.02.2008.
Direktiva 2000/35	nije transponovana	-
Direktiva 2000/31	Zakon o elektronskoj trgovini	11.05.2009.
Direktiva 84/450	ZZP iz 2008.g.	17.04.2008.
Direktiva 2002/65	Odluka Saveta ministara br.64/2009	21.01.2009.
Direktiva 2005/29	ZZP iz 2008. g.	17.04.2008.
Direktiva 87/357	nije transponovana	-
Direktiva 97/5	nije transponovana	-

Direktiva 98/26	nije transponovana	-
Direktiva 2000/46	nije transponovana	-
Direktiva 2001/95	Zakon o opštoj bezbednosti, materijalnim zahtevima i proceni usklađenosti neprehrambenih proizvoda br. 9779/2007	16.07.2007.
Direktiva 2002/22	Zakon o elektronskim komunikacijama br. 9918/2008	19.05.2008.
Direktiva 2002/58	Zakon o elektronskim komunikacijama br. 9918/2008	19.05.2008.

I. Stanje zaštite potrošača na planu Direktiva 99/44 (prodaja robe široke potrošnje), 93/13 (nepravične odredbe), 97/7 (ugovori na daljinu) i 85/577 (prodaja van poslovnih prostorija) pre transponovanja u nacionalno pravo

Pre transponovanja Direktiva u domaći pravni sistem, u albanskom pravu su od 1977. godine, postojale neke osnovne opšte norme u vezi zaštite potrošača. Te norme su bile definisane Zakonom o zaštiti potrošača, br. 8192 od 06.02.1997. Ovaj zakon je uređivao oblast bezbednosti potrošača i zaštite njihovog zdravlja i ekonomskih interesa. Pošto nikad nije zaživeo, i nije preuzeo gotovo nijednu od Direktiva, ovaj zakon je stavljen van snage donošenjem drugog, opet neefikasnog Zakona o zaštiti potrošača, br. 9135 od 11.09.2003. Zakon iz 2003. godine je načinio izvestan pokušaj usklađivanja sa pravnom tekovinom EU u oblasti zaštite potrošača, ali opet, i ovaj zakon su gotovo u potpunosti ignorisali kako potrošači, tako i nadležni državni organi i sudovi. Zakon o zaštiti potrošača, donet 2003. godine, pokrivao je širok spektar pitanja koja se tiču bezbednosti potrošača, potrošačkih ugovora i kontrole zaštite potrošača. Delovi II i III uređivali su posebne aspekte bezbednosti i obaveštavanja potrošača, pakovanja i obeležavanja, i obmanjujućeg oglašavanja. Delovi IV i V su se bavili posebnim aspektima pojedinih potrošačkih ugovora uključujući nepravične ugovorne odredbe i saobraznost sa ugovorom, prodaju na daljinu, prodaju potrošačke robe, ugovore o vremenski podeljenom korišćenju nekretnina, prodaju van poslovnih prostorija i elektronsko poslovanje. Delovi VI i VII su se bavili državnim institucijama nadležnim za zaštitu potrošača i posebnim pitanjima u vezi organizacija potrošača. Međutim, potrošački *acquis* nikad nije bio u potpunosti transponovan u nacionalno pravo. Isto tako, albanski Građanski zakonik, bez obzira na činjenicu što on ne sadrži nikakve izričite odredbe o određivanju i zaštiti potrošača, štiti potrošače jednako kao bilo koja druga lica. Što se tiče formulacija Građanskog zakonika, neke od odredbi Direktive 93/13 "transponovane" su članovima 686, 687, 688. Ovi članovi se odnose na opšte i nepravične ugovorne odredbe, a član 688 sadrži pravilo *contra proferentem*. Građanski zakonik, međutim, proširuje svoje važenje na sva fizička i pravna lica, tako da zaštita nije ograničena na potrošače. Takođe se može reći da pravo na jednostrano otkazivanje ugovora iz Direktive 85/577 predviđa i Građanski zakonik u svom članu 672. Isto tako, i Direktivu 85/374 u vezi sa odgovornošću za proizvode sa nedostatkom Građanski zakonik transponuje u članu 628 *et seq*.

Shodno Sporazumu o stabilizaciji i pridruživanju između Evropskih zajednica i njihovih država članica i Republike Albanije, potpisanog 12.06.2006[2], po članu 76; shodno Nacionalnom akcionom planu za sprovođenje Sporazuma o stabilizaciji i pridruživanju koji je donela albanska Vlada (Odluka Saveta ministara br. 463 od 05.07.2006); i shodno Odluci Saveta ministara o usvajanju međusektorske strategije za zaštitu potrošača i nadzor nad tržištem

[2] SSP je potvrđen Zakonom br. 9590 od 27.07.2006, Sl.list RAl br. 87/06.

za period 2007–2013, br. 797 od 14.11.2007., Albanija je obavezna da osigura, poštuje i štiti prava potrošača, i iz te obaveze je proisteklo donošenje Zakona o zaštiti potrošača, br. 9902 od 17.04.2008. godine.

II. Zakonodavne tehnike transponovanja

Albanija je preuzela sve četiri Direktive putem usvajanja različitih transpozicionih zakona. Zakonodavni akti korišćeni za sprovođenje Direktiva uključivali su ili zakone koje usvaja albanski parlament i kojima se utvrđuju norme usklađene sa Direktivom 99/44, Direktivom 93/13, Direktivom 97/7 i Direktivom 85/577, ili odluke Saveta ministara koje usvaja albanska vlada i kojima se dopunjava implementacija Direktiva, kao što je slučaj sa Direktivom 97/7 i Direktivom 85/577, čije je dalje transponovanje dopunjeno Odlukom Saveta ministara o ugovorima na daljinu, br. 64/2009 i Odlukom Saveta ministara o ugovorima izvan poslovnih prostorija, br. 63/2009 .

Albanski Zakon o zaštiti potrošača iz 2008. godine nastoji da štiti interese potrošača na tržištu, kao i da definiše norme i uspostavi relevantne institucije, radi zaštite prava potrošača. Zakon je struktuiran u 10 delova. I deo sadrži opšte odredbe o predmetu, području primene, značenju pojedinih pojmova, i potrošačkim pravima; II deo definiše određene zahteve u vezi bezbednosti potrošača; III deo je posvećen obavezama u pogledu obaveštavanja potrošača, obeležavanja, isticanja cena, izdavanja računa, pakovanja i jezika, i na taj način transponuje odredbe iz Direktive 98/6; IV deo se bavi nepoštenom trgovinskom praksom i oglašavanjem, implementirajući Direktivu 2005/29 i 84/450; V deo sadrži norme o nepravičnim ugovornim odredbama i saobraznosti sa ugovorom, i na taj način transponuje Direktivu 93/13 o nepravičnim ugovornim odredbama i Direktivu 99/44 o prodaji robe široke potrošnje; VI deo reguliše ugovore sklopljene van poslovnih prostorija kao i ugovore na daljinu, i na taj način transponuje Direktive 85/577 i 97/7; VII deo se odnosi na posebne ugovore, kao što su ugovori za snabdevanje vodom, energijom i pružanje telekomunikacionih usluga, ugovori o vremenski podeljenom korišćenju nekretnina, ugovori o potrošačkim kreditima i ugovori o putnim paket aranžmanima, i na taj način transponuje Direktive 94/47, 87/102 i 90/314; VIII deo se bavi institucijama za zaštitu potrošača, i time ugrađuje odredbe Direktive 98/27; IX deo pokriva administrativne prestupe i administrativne kazne, i konačno X deo sadrži prelazne i završne odredbe.

Albanski zakonski akti ne sadrže bilo kakva izričita upućivanja u pogledu sprovođenja određene direktive, ali pri tom faktički transponuju odredbe relevantnih direktiva. Može se reći da je albanski zakonodavac sledio pristup doslovnog prepisivanja.

III. Primena minimalne harmonizacije

Prilikom transponovanja direktiva, Albanija je na više mesta primenila minimalne klauzule o harmonizaciji. Tako, Zakon o zaštiti potrošača prilikom transponovanja Direktive 85/577 o prodaji van poslovnih prostorija i Direktive 97/7 o prodaji na daljinu predviđa da potrošač ima pravo na raskid ugovora bez objašnjenja u roku od 14 kalendarskih dana, umesto minimalnog roka od sedam radnih dana koji je predviđen u obe Direktive za korišćenje ovog prava.

IV. Ostala proširenja

Prema Zakonu o zaštiti potrošača pojam potrošač je širi u odnosu na način na koji je definisan u obe Direktive, utoliko što se i neprofitne organizacije smatraju potrošačima.

Odluka Saveta ministara ugovorima na daljinu, br. 64/2009., proširuje važenje i na finansijske usluge. Isto tako, Zakon o opštoj bezbednosti, materijalnim zahtevima i proceni usklađenosti neprehrambenih proizvoda, br. 9779 od 16.07.2007., na koji Zakon o zaštiti potrošača upućuje u vezi određivanja pojma proizvođač, sadrži nešto šire značenje pojma proizvođač u odnosu na definiciju datu u Direktivi 99/44.

V. Moguća kršenja prava EZ

U albanskom zakonodavstvu nisu ugrađene sve odredbe Direktiva. Nekoliko odredbi uopšte nije preneto. Pošto albanski zakonodavac koristi tehniku doslovnog prepisivanja, na nekim mestima su izostavljeni delovi rečenica Direktiva, kao u slučaju člana 3, stav 2, alineja 2 Direktive 97/7 o prodaji na daljinu. Osim toga, sprovođenje preuzetih odredbi za sada nailazi na poteškoće, između ostalog i zbog izvesnih nedoslednosti u unutrašnjoj harmonizaciji.

VI. Sudska praksa

Postoji značajan nedostatak sudske prakse. Sudovi radije primenjuju odredbe Građanskog zakonika i potrošače štite jednako kao bilo koja druga lica, ignorišući postojanje posebnih odredbi o zaštiti potrošača. Drugi razlog za neprimenjivanje zakonodavstva koje uređuje zaštitu potrošača nalazi se u sistemskoj nedoslednosti, jer ni jedna odredba Zakona o zaštiti potrošača ne reguliše prioritet normi u slučaju sukoba ili pravila "bolje zaštite".

Međutim, osim kroz redovne sudske postupke, potrošač može da ostvari pristup pravdi i kroz instrumente za alternativno rešavanje sporova i kroz upravni postupak.[3] Komisija za zaštitu potrošača[4] je već donela tri odluke, od kojih se dve odnose na nepoštenu trgovinsku praksu i obmanjujuće oglašavanje, a treća na zaštitu potrošača u predmetu kršenja člana 40 ZZP u vezi računa za pružanje telekomunikacionih usluga[5].

VII. Rezime

Usaglašavanje zakonodavstva sa *acquis communautaire* u oblasti zaštite potrošača počelo je potpisivanjem Sporazuma o stabilizaciji i pridruživanju između Republike Albanije, s jedne strane, i Evropskih zajednica i njihovih država članica, s druge strane (SSP), 12.06.2001. godine. Prvi Zakon o zaštiti potrošača donet je 2003. godine i njime je preuzeta većina evropskih direktiva u vezi zaštite potrošača. Kako je bilo neophodno dalje transponovanje i poboljšanje, 2008. godine je donet nov Zakon o zaštiti potrošača. Ovim Zakonom o zaštiti potrošača sprovode se Direktive 98/6, 2005/29, 84/450, 99/44, 93/13, 85/577, 97/7, 94/47, 87/102, 90/314, 98/27. Ugrađivanjem ovih Direktiva u nacionalno pravo, nivo zaštite potrošača je značajno poboljšan korišćenjem principa minimalne harmonizacije u brojnim prilikama. Međutim, trgovci, a čak i sudovi, u praksi retko poštuju posebna pravila za zaštitu potrošača, tako da nivo zaštite prava potrošača još uvek nije zadovoljavajući.

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[3] Član 56 ZZP, Sl. list RAl br. 61/08.

[4] Ovu Komisiju je 27.07.2009. godine osnovalo Ministarstvo privrede, trgovine i energetike.

[5] Komisija za zaštitu potrošača je koristila sankcije predviđene čl. 57 u svojoj Odluci br. 2 iz aprila 2010, http://www.mete.gov.al/doc/20100407113914_vendimi_nr_2_-_date_01_prill_2010_kmk.pdf, poslednji put posećen 30.04.2010.

B. BOSNA I HERCEGOVINA – ZAKONODAVNE TEHNIKE

(Zlatan Meškić)

Direktiva	**Transponovana u**	**Datum transponovanja**
Direktiva 85/577	Zakon o zaštiti potrošača (ZZP) (takođe u nacrtu Zakona o obligacionim odnosima iz 2006., izostavljeno u nacrtu Zakona o obligacionim odnosima iz 2010)	12.04.2006.
Direktiva 90/314	ZZP (takođe u nacrtu Zakona o obligacionim odnosima iz 2006., izostavljeno u nacrtu Zakona o obligacionim odnosima iz 2010)	12.04.2006.
Direktiva 93/13	ZZP (takođe u nacrtu Zakona o obligacionim odnosima iz 2006. i 2010.)	12.04.2006.
Direktiva 94/47 (od 23.02.2011: Direktiva 2008./122/EZ)	ZZP (takođe u nacrtu Zakona o obligacionim odnosima iz 2006., izostavljeno u nacrtu Zakona o obligacionim odnosima iz 2010)	12.04.2006.
Direktiva 97/7	ZZP (takođe u nacrtu Zakona o obligacionim odnosima iz 2006., delimično transponovano u nacrtu Zakona o obligacionim odnosima iz 2010.)	12.04.2006.
Direktiva 98/6	ZZP	12.04.2006.
Direktiva 98/27 (kodifikovana verzija: Direktiva 2009/22/EZ)	ZZP	12.04.2006.
Direktiva 99/44	ZZP (takođe u nacrtu Zakona o obligacionim odnosima iz 2006. i 2010.)	12.04.2006.
Direktiva 87/102/EEZ (od 12.05.2010: Direktiva 2008./48/EZ)	ZZP (takođe u nacrtu Zakona o obligacionim odnosima iz 2006., izostavljeno u nacrtu Zakona o obligacionim odnosima iz 2010)	12.4.2006.
Direktiva 85/374	nije transponovana (samo u nacrtu Zakona o obligacionim odnosima iz 2006. i 2010)	-
Direktiva 86/653	nije transponovana (samo u nacrtu Zakona o obligacionim odnosima iz 2006. i 2010.)	-
Direktiva 99/34	nije transponovana (samo u nacrtu Zakona o obligacionim odnosima iz 2006. i 2010.)	-
Direktiva 99/93	Zakon o elektronskom potpisu	14.5.2007.
Direktiva 2000/35	nije transponovana (samo u nacrtu Zakona o obligacionim odnosima iz 2006. i 2010.)	-
Direktiva 2000/31	Zakon o elektronskom pravnom i poslovnom prometu (takođe delimično u nacrtu Zakona o obligacionim odnosima iz 2006. i 2010.)	29.10.2007.

Direktiva 84/450	ZZP (takođe u nacrtu Zakona o obligacionim odnosima iz 2006. i 2010.)	12.4.2006
Direktiva 2002/65	nije transponovana	-
Direktiva 2005/29	nije transponovana	-
Direktiva 87/357	Zakon o opštoj bezbednosti proizvoda iz 2009. (kojim se zamenjuje Zakon o opštoj bezbednosti proizvoda od 09.09.2004.) Izmene i dopune Zakona o nadzoru nad tržištem u Bosni i Hercegovini od 09.09.2004.	15.12.2009. 15.12.2009.
Direktiva 97/5	nije transponovana (samo u nacrtu Zakona o obligacionim odnosima iz 2006., izostavljeno u nacrtu Zakona o obligacionim odnosima iz 2010)	-
Direktiva 98/26	nije transponovana	-
Direktiva 2000/46	nije transponovana	-
Direktiva 2001/95	Zakon o opštoj bezbednosti proizvoda iz 2009. (kojim se zamenjuje Zakon o opštoj bezbednosti proizvoda od 09.09.2004.)	15.12.2009.
Direktiva 2002/22	nije transponovana	-
Direktiva 2002/58	nije transponovana	-

I. Stanje zaštite potrošača na planu Direktiva 99/44 (prodaja robe široke potrošnje), 93/13 (nepravične odredbe), 97/7 (ugovori na daljinu) i 85/577 (van poslovnih prostorija) pre transponovanja u nacionalno pravo

Pre preuzimanja Direktiva u pogledu zaštite potrošača, pravni sistem Bosne i Hercegovine nije sadržao nikakve odredbe čija bi primena bila ograničena na potrošače. Međutim, neke odredbe jugoslovenskog Zakona o obligacionim odnosima iz 1978. godine[6] pružale su visok nivo zaštite, naročito u slučajevima ugovora o prodaji potrošačke robe i odgovornosti proizvođača za štetu od proizvoda sa nedostatkom. Posle podele Jugoslavije, ovaj zakon se na osnovu sukcesije i dalje primenjivao, u dve nešto različite verzije, u oba entiteta Bosne i Hercegovine, i to kao Zakon o obligacionim odnosima Republike Srpske[7] i Zakon o obligacionim odnosima Federacije Bosne i Hercegovine[8]. Kako se odredbe koje su relevantne za ovu analizu ne razlikuju, a u cilju što veće jasnoće, ovaj tekst će govoriti samo o „Zakonu o obligacionim odnosima Bosne i Hercegovine (BZOO)"[9]. Prvi Zakon o zaštiti potrošača Bosne i Hercegovine donet je u 2002 godine[10]; zbog izostanka njegove primene u praksi, 2006. godine on je zamenjen važećim Zakonom o zaštiti potrošača[11].

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[6] *Sl.list SFRJ* br. 29/78, 39/85, 46/85, 45/89, 57/89.

[7] *Sl.list SFRJ* br. 29/78, 39/85, 46/85, 45/89, 57/89 i *Sl.glasnik Republike Srpske*, br. 17/93, 57/98, 39/03, 74/04.

[8] *Sl.list SFRJ* br. 29/78, 39/85, 46/85, 45/89, 57/89, *Sl.list Republike Bosne i Hercegovine*, br. 2/92, 13/93, 13/94 i *Sl.glasnik Federacije Bosne i Herzegovine*, br. 29/03.

[9] Čini se da je ovaj naziv odgovarajući, s obzirom na tekući proces ponovnog objedinjavanja Zakona o obligacionim odnosima na državnom nivou. Poslednji pokušaj usvajanja jedinstvenog Zakona o obligacionim odnosima Bosne i Hercegovine počeo je 08.01.2010. godine. Međutim, nacrt Zakona o obligacionim odnosima iz 2010. godine nije uspeo da prođe kroz skupštinsku procedure u februaru 2010. godine.

[10] *Sl.glasnik BiH* br. 17/02.

[11] *Sl.glasnik BiH* br. 25/06.

II. Zakonodavne tehnike transponovanja

Bosna i Hercegovina je ugradila većinu Direktiva, uključujući ovde relevantne četiri Direktive, u svoj Zakon o zaštiti potrošača koji je stupio na snagu 04.12.2006. Osim toga su doneti pojedinačni transpozicioni zakoni koji se odnose na posebne pravne oblasti, kao što su, na primer, Zakon o elektronskom pravnom i poslovnom prometu[12], Zakon o elektronskom potpisu[13] i Zakon o opštoj bezbednosti proizvoda[14].

III. Primena minimalne harmonizacije

Prilikom transponovanja Direktiva vezanih za zaštitu potrošača, Bosna i Hercegovina je primenjivala minimalnu harmonizaciju na više mesta. Rok za raskid ugovora u okviru prodaje van poslovnih prostorija i prodaje na daljinu produžen je na 15 dana, dok Direktive predviđaju rok od samo sedam dana (Direktiva 85/577 i 97/7). Osim toga, bosanski Zakon o zaštiti potrošača sadrži „crnu listu" klauzula koje se uvek smatraju nepravičnim (nepravičnim po sebi), za razliku od Direktive koja koristi listu klauzula koje se mogu smatrati nepravičnim (član 3., stav (3), Direktive 93/13).

U skladu sa Zakonom o zaštiti potrošača, potrošači mogu da zahtevaju nadoknadu i vraćanje plaćenog iznosa novca bez obaveze da prethodno zahtevaju od prodavca da robu popravi ili zameni, kako je predviđeno u članu 3. 5) Direktive 99/44. Za razliku od Direktive 99/44, pravo potrošača na raskid ugovora postoji čak i onda kad je nesaobraznost neznatna (član 3.6) Direktive 99/44).

IV. Ostala proširenja

Zakon o zaštiti potrošača uređuje prodaju usluga, koje nisu pokrivene Direktivom 99/44, po modelu prodaje robe u skladu sa tom Direktivom. Oblast primene odredbi kojima se transponuje Direktiva 85/577 dodatno uključuje ugovore zaključene kao rezultat neočekivanog pristupa trgovca potrošaču u sredstvima javnog prevoza ili na bilo kom drugom javnom mestu.

Dalja proširenja oblasti primene odredbi o zaštiti potrošača rezultat su netransponovanja odredbi koje uređuju granice oblasti primene relevantnih Direktiva, kao što su član 3.2) Direktive 85/577, član 3.2) Direktive 97/7 i član 4. Direktive 93/13.

V. Moguća kršenja prava EZ

1. Najznačajnije moguće kršenje prava EU tiče se određivanja pojma potrošač. U skladu sa Zakonom o zaštiti potrošača, potrošač je svako fizičko lice koje kupuje, stiče ili koristi proizvode ili usluge za svoje lične potrebe i za potrebe svog domaćinstva. Ova definicija je dvostruko uža u odnosu na uobičajeno određenje pojma potrošač u Direktivama. Umesto opšteg pojma „delovati" koji se koristi u definiciji potrošača u Direktivama, bosanski Zakon o zaštiti potrošača ograničava delovanje potrošača na kupovinu, sticanje ili korišćenje proizvoda ili usluga. Još je značajnije sužavanje na „svoje lične potrebe i potrebe svog domaćinstva", što se zbog veznika „i" treba shvatiti kumulativno, dok negativno formulisana definicija u Direktivi, uključuje sve svrhe koje nisu u vezi s potrošačevom poslovnom delatnošću ili profesijom.

Isto važi i za pojam trgovac, koji se u Zakonu o zaštiti potrošača definiše kao svako lice koje direktno ili kao posrednik među drugim licima prodaje proizvode ili pruža usluge po-

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[12] *Sl.glasnik BiH* br. 88/07.

[13] *Sl.glasnik BiH* br. 91/06.

[14] *Sl.glasnik BiH* br. 102/09, kojim se zamenjuje prethodni Zakon o opštoj bezbednosti proizvoda, *Sl.glasnik* br. 45/04.

trošaču. S obzirom da su obe definicije uže od odgovarajućih definicija u Direktivama, u skladu sa Zakonom o zaštiti potrošača postoji slobodan prostor između pojma potrošača i pojma trgovaca. U Direktivama koje se tiču zaštite potrošača ovi termini su komplementarni, te stoga svako ono lice koje nije potrošač jeste trgovac, i *vice versa*. Ograničavanje ovih termina neminovno smanjuje nivo zaštite potrošača, suprotno Direktivama.

2. Član 1.2) Direktive o prodaji van poslovnih prostorija nije prenet u Zakon o zaštiti potrošača. Što se tiče ugovora sklopljenih van poslovnih prostorija, Zakon o zaštiti potrošača predviđa rok za raskid od 15 dana od dana zaključenja ugovora, bez odlaganja početka roka za raskid u slučaju kada trgovac nije obavestio potrošača o njegovom pravu raskida, što je eksplicitno predviđeno u Direktivi[15]. U skladu sa članom 41.2) Zakona o zaštiti potrošača, potrošač je obavezan da plati troškove vraćanja proizvoda, za šta se može smatrati da je saglasno sa članom 5. i 7. Direktiva u vezi prodaje izvan poslovnih prostorija.[16]

3. Analiza nepravičnosti prema odredbama člana 95. Zakona o zaštiti potrošača važi za sve ugovorne odredbe koje potrošač nije „lično" ugovarao. Upotreba ovog termina vodi ka drugačijem domašaju važenja klauzule pravičnosti, od one koju daje termin „individualno ugovoren".

4. Što se tiče Direktive 97/7 manja je mogućnost kršenja prava EU s obzirom da je ona transponovana primenom tehnike „prepisivanja".

5. Najsloženija je pravna situacija u pogledu transponovanja Direktive 99/44. Član 3.2) i član 5.1) i 2) Direktive 99/44 su direktno uneti u Zakon o zaštiti potrošača, s izuzetkom što potrošač nema pravo da od prodavca zahteva srazmerno smanjenje cene. Što se tiče netransponovanog člana 2.1) - 3) Direktive, može se smatrati da on već postoji u Zakonu o obligacionim odnosima (1978), dok odredbe člana 2.4) i 5) nisu uključene u pozitivni zakon. Osim toga, nije transponovana pretpostavka u vezi nesaobraznosti koja je postala vidljiva u roku od 6 meseci od isporuke, predviđena u članu 5.3) Direktive.

6. Konačno, treba naglasiti da bi usvajanjem Nacrta Zakona o obligacionim odnosima Bosne i Hercegovine 2006 (BNZOO 2006)[17] najvećim delom bila izbegnuta napred navedena moguća kršenja prava EU. BNZOO iz 2006. godine bi transponovao 14 direktiva iz oblasti zaštite potrošača.[18] Međutim, kako za sada izgleda nije izvesno da li postoji politička volja za donošenje jedinstvenog Zakona o obligacionim odnosima na državnom nivou. Poslednji pokušaj je počeo 08.01.2010. godine, kada je Vlada usvojila nov Nacrt Zakona o obligacionim odnosima (BNZOO 2010) i uputila ga Parlamentarnoj skupštini. Nažalost, nacrt nije uspeo da prođe kroz skupštinsku procedure u februaru 2010. godine S obzirom da je neuspeh poslednje dve verzije Nacrta Zakona o obligacionim odnosima da prođu kroz skupštinsku proceduru, čiji su najznačajniji razlozi i oni političe prirode[19], bio izazvan uključivanjem velikog broja potro-

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[15] Videti u Presudi ESP od 13.12.2001. godine, u predmetu C-481/99 - *Georg Heininger i Helga Heininger protiv Bayerische Hypound Vereinsbank AG* [2001] ECR I-09945.

[16] Videti ESP, 22.04.1999, u predmetu C-423/97 –*Travel Vac SL protiv Manuel José Antelm Sanchi* [1999] ECR I-02195; Presuda ESP od 25.11. 2005, u predmetu C-229/04 - *Crailsheimer Volksbank AG protiv Klaus Conrads, Frank Schulzke i Petra Schulzke-Lösche, Joachim Nitschke* [2005] ECR I-9273.

[17] Videti B. Morait, A. Bikić, *Objašnjenja uz Nacrt Zakona o obligacionim odnosima*, u sradnji sa GTZ, Sarajevo 2006.

[18] Videti fusnotu iznad.

[19] Politički predstavnici Republike Srpske tvrde da Ustav Bosne i Hercegovine ne predviđa nadležnost za usvajanje Zakona o obligacionim odnosima na državnom nivou. Savet ministara se poziva na član 1.4) Ustava kao pravni osnov, navodeći da će sloboda kretanja robe, lica, usluga i kapitala biti obezbeđena u Bosni i Hercegovini, i da je neće ometati ni Bosna i Hercegovina niti entiteti.

šačkih odredbi u nacrt, teško je predvideti koje će odredbe ostati u konačnoj verziji Zakona o obligacionim odnosima kao i da li će nov Zakon o obligacionim odnosima biti usvojen na državnom ili na nivou entiteta. Izgledi za dugo očekivano donošenje bi ipak mogli da budu dobri, jer su mnoge od odredbi koje se odnose na posebne vrste potrošačkih ugovora, kao što su ugovori o prodaji van poslovnih prostorija ili ugovori o vremenski podeljenom korišćenju nekretnina izostavljene iz poslednjeg Nacrta i da usvajanje novog Zakona o obligacionim odnosima predstavlja jedan od prioriteta „Evropskog partnerstva sa Bosnom i Hercegovinom."

VI. Sudska praksa

Nedavni slučajevi nepravičnih odredbi u opštim uslovima ugovora o potrošačkim kreditima bili su prvi slučajevi koji su podigli nivo svesti o ZZP u Bosni i Hercegovini. Međutim, pokrenut je samo postupak za upravni prestup pred nadležnim sudom od strane Savezne uprave za inspekcijske poslove i ombudsmana za zaštitu potrošača. Osnovne činjenice iz 192 odnosna predmeta[20] bile su da su privatne banke donele jednostranu odluku i značajno podigle plivajuću kamatnu stopu za potrošačke kredite usled ekonomskih faktora vezanih za recesiju. U raspoloživim predmetima se ni u ugovorima o potrošačkim kreditima niti u tipskim uslovima zaključenim s potrošačima ne navode faktori koji bi mogli da opravdaju tako značajnu promenu stope, te su sudovi konstatovali kršenje člana 54. i člana 57. 2) ZZP, koji definišu obavezan sadržaj ugovora o potrošačkom kreditu. Nadležni sudovi su doneli odluku kojom se utvrđuju upravni prestupi od 750-2,000 evra, ali još nije poznato da li ima kolektivnih ili pojedinačnih parničnih postupaka pokrenutih na osnovu ovih odluka.[21]

Žalosno je što je čak i Ustavni sud Bosne i Hercegovine prilikom odlučivanja o potrošačkim ugovorima, koje je priznao kao takve, ignorisao postojanje Zakona o zaštiti potrošača i oslanjao se samo na BZOO.[22] Ovo je svakako jedan od argumenata u prilog ugrađivanja odredbi o zaštiti potrošača u budući Zakon o obligacionim odnosima.

VII. Rezime

Bosna i Hercegovina je transponovala većinu Direktiva iz oblasti zaštite potrošača u svom prvom Zakonu o zaštiti potrošača iz 2002. godine, koji je zbog izostanka primene u praksi 2006. godine zamenjen sada važećim Zakonom o zaštiti potrošača (ZZP). Kroz ZZP je preuzeto 10 direktiva iz oblasti zaštite potrošača, delimično ili u celosti, a još 4 su transponovane putem posebnih transpozicionih zakona, uključujući Zakon o elektronskom pravnom i poslovnom prometu, Zakon o elektronskom potpisu i Zakon o opštoj bezbednosti proizvoda. Transpozicioni zakoni su koristili klauzulu minimalne harmonizacije na više mesta kako bi obezbedili viši nivo zaštite, uglavnom proširujući oblast njihove primene ili određujući duže rokove za raskid. Novim Zakonom o obligacionim odnosima Bosne i Hercegovine, koji još nije usvojen, planirano je transponovanje najmanje još pet Direktiva iz oblasti zaštite potrošača kao i revizija nekih odredbi ZZP. Uvođenje odredbi o zaštiti potrošača u Zakon o obligacionim odnosima dodatno će rešiti problem ignorisanja ZZP-a u praksi.

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[20] Izveštaj Savezne uprave za inspekcijske poslove, 22.6.2009.

[21] U raspoloživim predmetima nadležni sud nije preispitivao pravičnost standardnih odredbi već je samo ukazao na nedostajuće informacije koje su banke bile obavezne da pruže shodno odredbama ZZP o potrošačkim kreditima.

[22] Ustavni sud Bosne i Hercegovine, AP-1385/06**,** 26.06.2007, *Sl.glasnik BiH* br. 60/05.

C. HRVATSKA – ZAKONODAVNE TEHNIKE *(Emilia Čikara)*

Direktiva	**Transponovana u**	**Datum transponovanja**
Direktiva 85/577	Zakon o zaštiti potrošača	10.6.2003.
Direktiva 90/314	Zakon o obveznim odnosima (takođe relevantan Zakon o pružanju usluga u turizmu)	17.3.2005.
Direktiva 93/13	Zakon o zaštiti potrošača	10.6.2003.
Direktiva 94/47 (od 23. 2. 2011: Direktiva 2008./122)	Zakon o zaštiti potrošača	10.6.2003.
Direktiva 97/7	Zakon o zaštiti potrošača	10.6.2003.
Direktiva 98/6	Zakon o zaštiti potrošača	10.6.2003.
Direktiva 98/27 (kodifikovana verzija: Direktiva 2009/22)	Zakon o zaštiti potrošača	30.7.2007.
Direktiva 99/44	Zakon o obveznim odnosima Zakon o zaštiti potrošača	17.3.2005. 10.6.2003.
Direktiva 87/102 (od 12. 5. 2010: Direktiva 2008/48)	Zakon o zaštiti potrošača Zakon o potrošačkom kreditiranju	10.6.2003. 1.1.2010.
Direktiva 85/374	Zakon o obveznim odnosima	17.3.2005. 9.4.2008.
Direktiva 86/653	Zakon o obveznim odnosima	17.3.2005. 9.4.2008.
Direktiva 99/34	Zakon o obveznim odnosima	17.3.2005.
Direktiva 99/93	Zakon o elektroničkom potpisu	30.1.2002.
Direktiva 2000/35	Zakon o obveznim odnosima	17.3.2005.
Direktiva 2000/31	Zakon o elektroničkoj trgovini	15.10.2003.
Direktiva 84/450	Zakon o zaštiti potrošača	10.6.2003.
Direktiva 2002/65	Zakon o zaštiti potrošača	30.7.2007.
Direktiva 2005/29	Zakon o zaštiti potrošača	30.7.2007.
Direktiva 87/357	Zakon o općoj sigurnosti proizvoda	9.3.2009.
Direktiva 97/5	Zakon o deviznom poslovanju	10.6.2003.
Direktiva 98/26	Zakon o konačnosti namire u platnim sustavima i sustavima za namiru financijskih instrumenata	13.10.2008.
Direktiva 2000/46	Zakon o institucijama za elektronički novac Zakon o kreditnim institucijama	13.10.2008. 13.10.2008.
Direktiva 2001/95	Zakon o općoj sigurnosti proizvoda (takođe relevantan Zakon o Državnom inspektoratu i Zakon o pravu na pristup informacijama)	7.10.2003.
Direktiva 2002/22	Zakon o elektroničkim komunikacijama	26.6.2008.
Direktiva 2002/58	Zakon o elektroničkim komunikacijama	26.6.2008.

I. Stanje zaštite potrošača na planu Direktiva 99/44 (prodaja robe široke potrošnje), 93/13 (nepravične odredbe), 97/7 (ugovori na daljinu) i 85/577 (van poslovnih prostorija) pre transponovanja u nacionalno pravo

Pre transponovanja evropskih direktiva u vezi zaštite potrošača, Hrvatska nije imala nijedan poseban zakon za zaštitu potrošača i zato su se primenjivale samo opšte norme, koje su potrošače štitile jednako kao i bilo koja druga lica. Ove norme su, međutim, obezbeđivale ve-

oma visok nivo zaštite, na primer, kroz odredbe Zakona o obveznim odnosima (ZOO)[23] koje su uređivale ugovore uopšte i ugovore o prodaji robe. ZOO je sadržao i neke odredbe koje se tiču odgovornosti za proizvode s nedostatkom čak i pre transponovanja Direktive 85/374/EEZ.[24] Potrošači su bili i indirektno zaštićeni preko nekolicine odredbi drugih zakona, kao npr. preko odredbi starog Zakona o trgovini,[25] Zakona o telekomunikacijama,[26] Zakona o Državnom inspektoratu[27] itd. Usaglašavanje postojećeg hrvatskog zakonodavstva sa *acquis communautaire* u ovoj oblasti počelo je kao posledica obaveza propisanih u članu 69. i 74. Sporazuma o stabilizaciji i pridruživanju potpisanog između Republike Hrvatske i Evropskih zajednica i njihovih država članica[28] (SSP) 29.10.2001. godine. Zakon o zaštiti potrošača[29] (ZZP) je prvi put usvojen 2003. godine i zatim je 2007. godine zamenjen danas važećim Zakonom o zaštiti potrošača.[30]

II. Zakonodavne tehnike transponovanja

U tekstu ZZP iz 2003. godine ugrađena je većina direktiva u vezi zaštite potrošača. Potreba za preuzimanjem novih direktiva i za daljim poboljšanjem postojećih propisa dovela je do donošenja novog ZZP, koji je usvojen 2007. godine.[31] Dok ZZP iz 2007. godine preuzima Direktive 98/6, 87/102, 93/13, 97/7, 85/577, 94/47, 98/27, 2002/65 i 2005/29, Direktive 90/314 i 99/44 su implementirane novim Zakonom o obveznim odnosima[32] koji je donet 2005. godine. Za transponovanje nove Direktive o ugovorima o potrošačkom kreditu (Direktiva 2008/48), međutim, zakonodavac je doneo poseban Zakon o potrošačkom kreditiranju[33] u junu 2009. godine.

III. Primena minimalne harmonizacije

Prilikom transponovanja evropskih direktiva u vezi zaštite potrošača Hrvatska je na više mesta primenjivala minimalnu klauzulu. Tako je rok za otkaz od 7 radnih dana, propisan u Direktivi 85/577 i Direktivi 97/7, u ZZP duži i iznosi 14 radnih dana. Isto važi za ugovore o vremenski podeljenom korišćenju nekretnina, gde ZZP predviđa rok za otkaz od 14 radnih dana, dok Direktiva zahteva samo 10 dana. ZZP prevazilazi neke zahteve iz Direktiva u vezi

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[23] Zakon o obveznim odnosima, *NN* br. 53/91, 73/91, 111/93, 3/94, 107/95, 7/96, 91/96, 112/99, 88/01. Jugoslavenski Zakon o obveznim odnosima (*Sl.list SFRJ* br. 29/78, 39/85, 46/85, 45/89, 57/89) preuzet je kao hrvatski nacionalni zakon putem Zakona o preuzimanju Zakona o obveznim odnosima, *NN* br. 53/91.

[24] T. Josipović, "Das Konsumentenschutzgesetz – Beginn der Europäisierung des kroatischen Vertragsrechts", in S. Grundmann, M. Schauer (ed.), *The Architecture of European Codes and Contract Law*, Kluwer Law International, Alphen aan den Rijn (et al.) 2006, 129 etc.

[25] Zakon o trgovini, *NN* br. 11/96, 30/99, 75/99, 76/99, 62/01, 109/01.

[26] Zakon o telekomunikacijama, *NN* br. 79/99, 128/99, 68/01, 109/01.

[27] Zakon o Državnom inspektoratu, *NN* br. 76/99.

[28] Sporazum o stabilizaciji i pridruživanju između Republike Hrvatske i Evropskih zajednica i njihovih država članica, *NN MU* br. 14/01.

[29] Zakon o zaštiti potrošača, *NN* br. 96/03.

[30] Zakon o zaštiti potrošača, *NN* br. 79/07, 125/07, 79/09, 89/09, 133/09.

[31] E. Čikara, "Die Angleichung des Verbraucherschutzrechts in der Europäischen Gemeinschaften: Unter besonderer Berücksichtigung des Verbraucherschutzrechtes in der Republik Kroatien", *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, Vol. 28, 2/2007., 1082.

[32] Zakon o obveznim odnosima, *NN* br. 35/05, 41/08.

[33] Zakon o potrošačkom kreditiranju, *NN* br. 75/09.

zaštite potrošača i u pogledu obaveza obaveštavanja. Na primer ZZP propisuje strože odredbe nego Direktiva 97/7, određujući da kod ugovora sklopljenih na daljinu potvrda prethodne obavijesti u pisanom obliku mora sadržavati sve podatke koje sadrži i prethodna obavijest. Isto tako, član 41. ZZP propisuje viši nivo zaštite potrošača nego Direktiva 97/7 zabranom sklapanja ugovora o prodaji lekova, medicinskih i veterinarskih proizvoda sredstvima daljinske komunikacije. Osim toga, propisujući odgovornost organizatora putovanja za svu štetu koju prouzroči putniku neispunjenjem, delimičnim ispunjenjem ili neurednim ispunjenjem obaveza po principu objektivne odgovornosti, član 888 ZOO potrošačima pruža dalekosežniju zaštitu nego član 5. Direktive 90/314. Hrvatski zakonodavac je primenio minimalnu harmonizaciju i prilikom transponovanja Direktive 99/44. Odredbe ZOO o materijalnim nedostacima važe i za ugovore o prodaji robe i za sve druge naplatne ugovore.

IV. Ostala proširenja

Hrvatska je povisila nivo zaštite potrošača usvajanjem šireg određenja pojma potrošač nego što to traže Direktive u drugim *leges specialissimae*. Tako je, na primer, do poslednjih izmena i dopuna iz 2009. godine[34], član 304 Zakona o kreditnim institucijama[35] (ZKI) definisao potrošača kao fizičko lice koje je klijent kreditne institucije. Prema originalnoj verziji člana 304 ZKI potrošač je bio takođe i fizička osoba koja deluje u području svoje poslovne delatnosti, što je bilo suprotno pojmu potrošača po članu 3stavak 1. alineja 4 ZZP. Ova nedoslednost je otklonjena izmenama i dopunama ZKI iz 2009. godine, po kojima je potrošač svaka fizička osoba koja je klijent kreditne institucije, a koja deluje izvan područja svoje gospodarske delatnosti ili slobodnog zanimanja.

Osim toga, odredbe ZZP kojima se preuzima Direktiva o prodaji van poslovnih prostorija primenjuju se i na ugovore čije je sklapanje ponudio potrošač u vreme izleta koji je organizovao trgovac izvan njegovih poslovnih prostorija, u vreme posete trgovca domu potrošača, domu drugog potrošača, ili radnom mestu potrošača. Isto tako, Hrvatska nije transponovala mogućnost predviđenu u članu 3stavak 1. Direktive 85/577 po kojoj odredbe o ugovorima sklopljenim van poslovnih prostorija ne važe za ugovore za koje plaćanje koje treba da izvrši potrošač prelazi određeni iznos.

V. Moguća kršenja prava EU

Bliže informacije o mogućim kršenjima prava EU date su u 2. delu koji govori o transponovanju pojedinih direktiva (izveštaji o prodaji van poslovnih prostorija u Delu 2.A., nepravičnim ugovornimodredbama u Delu 2.B., prodaji na daljinu u Delu 2.C., i prodaji robe široke potrošnje u Delu 2.D.).

VI. Sudska praksa

Značajno nedostaje sudska praksa bazirana na odredbama ZZP. Sudovi pre primenjuju, npr. odredbe ZOO i štite potrošača jednako kao bilo koje drugo lice, istovremeno ignorišući postojanje posebnih odredbi o zaštiti potrošača. Koliko je poznato, postoji tek mali broj presuda koje se odnose na odredbe ZZP o potrošačkom zajmu[36] i na odredbe ZOO o prodaji ro-

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[34] *NN* br. 153/09.

[35] Zakon o kreditnim institucijama, *NN* br. 117/08, 74/09, 153/09.

[36] Županijski sud u Varaždinu, Gž. 1052/08–2 od 12.06.2008.

be.[37] Međutim, osim kroz redovne sudske postupke, potrošač može da ostvari pristup pravdi i putem instrumenata alternativnog rešavanja sporova i putem upravnog postupka.[38]

VII. Rezime

Usaglašavanje postojećeg hrvatskog zakonodavstva sa acquis communautaire u oblasti zaštite potrošača počelo je potpisivanjem Sporazuma o stabilizaciji i pridruživanju između Republike Hrvatske i Evropskih zajednica i njihovih država članica 29.10.2001. godine. Prvi Zakon o zaštiti potrošača donet je 2003. godine i on je transponovao većinu evropskih direktiva koje se tiču zaštite potrošača. Zbog neophodnosti daljeg transponovanja i poboljšanja, u 2007. godini je donet nov Zakon o zaštiti potrošača (ZZP). ZZP implementira Direktive 98/6, 87/102, 93/13, 97/7, 85/577, 94/47, 98/27, 2002/65 i 2005/29, dok su Direktive 90/314 i 99/44 transponovane unutar hrvatskog novog Zakona o obveznim odnosima iz 2005. godine. Prilikom transponovanja ovih direktiva u nacionalni pravni sistem, hrvatski zakonodavac je značajno povećao nivo zaštite potrošača učestalim primenjivanjem minimalne klauzule. Međutim, zbog ignorisanja postojanja posebnih pravila za zaštitu potrošača u praksi (od strane trgovaca, s jedne strane, i sudova i potrošača, s druge strane) nivo zaštite potrošačkih prava još uvek nije zadovoljavajući.

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[37] Županijski sud u Varaždinu, Gž. 1074/08–2 od 04.08.2008.

[38] Videti Deo V. ZZP-a pod naslovom "Zaštita potrošačkih prava", koji je podeljen na Glavu I. Izvansudsko rješavanje potrošačkih sporova i Glavu II.Zaštita kolektivnih interesa potrošača. Prvi slučaj zaštite potrošačkih prava na osnovu ZZP bio je predmet "Ponikve" u vezi pružanja javnih usluga, videti Odluku Agencije za zaštitu tržišnog natjecanja, UP/I 030-02/2004-01/66, *NN* br. 135/05.

D. MAKEDONIJA – ZAKONODAVNE TEHNIKE

(Neda Zdraveva, Jadranka Dabović-Anastasovska, Nenad Gavrilović)

Direktiva	**Transponovana u**	**Datum transponovanja**
Direktiva 85/577	Zakon o zaštiti potrošača	29.07.2000. delimično, 30.06.2004. potpuno
Direktiva 90/314	Zakon o turističkoj delatnosti	30.09.2006.
Direktiva 93/13	Zakon o zaštiti potrošača	29.07.2000.delimično, 30.06.2004. potpuno
Direktiva 94/47 (od 23.02. 2011: Direktiva 2008/122/EZ)	Zakon o zaštiti potrošača	30.06.2004.
Direktiva 97/7	Zakon o zaštiti potrošača	29.07.2000. delimično, 30.06.2004.potpuno
Direktiva 98/6	Zakon o zaštiti potrošača	29.07.2000. delimično, 30.06.2004. potpuno
Direktiva 98/27 (kodifikovana verzija: Direktiva 2009/22/EZ)	Zakon o zaštiti potrošača	29.07.2000.delimično, 30.06.2004. potpuno
Direktiva 99/44	Zakon o zaštiti potrošača Zakon o izmenama i dopunama Zakona o obligacionim odnosima	30.06.2004. 11.07.2008.
Direktiva 87/102/EEZ (od 12.05. 2010: Direktiva 2008/48/EZ)	Zakon o zaštiti potrošača u vezi Ugovora o korišćenju potrošačkih kredita; Pravilnik kojim se propisuje oblik i sadržaj zahteva za dobijanje dozvole za davanje potrošačkih kredita i oblik i sadržaj dozvole za davanje potrošačkih kredita; Pravilnik o obliku i sadržini Registra davalaca potrošačkih zajmova koji su dobili dozvolu Ministarstva privrede za davanje zajmova i o Registru posrednika u potrošačkim zajmovima koji su dobili dozvolu za odobravanje zajmova od Ministarstva privrede; Pravilnik kojim se propisuje oblik, sadržina i način pisanja izveštaja koji izdavaoci potrošačkih zajmova podnose Ministarstvu privrede, o broju zaključenih ugovora o zajmu i o dogovorenoj godišnjoj stopi ukupnih troškova; Pravilnik o raspoloživoj tehničkoj opremi, odnosno o tehničkim uslovima koje treba da ispunjavaju davaoci potrošačkih kredita	30.04.2007. 06.08.2007. 06.08.2007. 06.08.2007. 30.08.2007.
Direktiva 85/374	Zakon o zaštiti potrošača	30.06.2004.
Direktiva 86/653	Zakon o izmenama i dopunama Zakona o obligacionim odnosima	11.07.2008.

Direktiva 99/34	Zakon o izmenama i dopunama Zakona o obligacionim odnosima	11.07.2008.
Direktiva 99/93	Zakon o elektronskim podacima i elektronskom potpisu	31.03.2002.
Direktiva 2000/35	Zakon o izmenama i dopunama Zakona o obligacionim odnosima	11.07.2008.
Direktiva 2000/31	Zakon o izmenama i dopunama Zakona o elektronskim podacima i elektronskom potpisu	04.08.2008.
Direktiva 84/450	Zakon o zaštiti potrošača	29.07.2000. delimično, 30.06.2004. potpuno
Direktiva 02/65	Zakon o zaštiti ličnih podataka	01.02.2005.
Direktiva 05/29	Biće transponovana u Zakonu o izmenama i dopunama Zakona o zaštiti potrošača	Planirano najkasnije do 01.11.2010.
Direktiva 87/357	Zakon o zaštiti potrošača	29.07.2000. delimično, 30.06.2004. potpuno
Direktiva 97/5	Zakon o brzom transponovanju novca Zakon o deviznom poslovanju	03.12.2003. 30.06.2003.
Direktiva 98/26	Zakon o platnom prometu	20.09.2007.
Direktiva 2000/46	Zakon o izdavaocima elektronskog novca	30.12.2007.
Direktiva 01/95	Zakon o zaštiti potrošača	29.07.2000. delimično, 30.06.2004. potpuno
Direktiva 02/22	Zakon o elektronskim komunikacijama	31.03.2005.
Direktiva 02/58	Zakon o zaštiti ličnih podataka	01.02.2005.

I. Stanje zaštite potrošača na planu Direktiva 99/44 (prodaja robe široke potrošnje), 93/13 (nepravične odredbe), 97/7 (ugovori na daljinu) i 85/577 (van poslovnih prostorija) pre transponovanja u nacionalno pravo

U MAKEDONIJI je veliki deo zakonodavstva o zaštiti potrošača bio sadržan u Zakonu o zaštiti potrošača iz 2000, i njegovim izmenama i dopunama iz 2002. godine. Dalji pomak je napravljen donošenjem novog Zakona o zaštiti potrošača u 2004. godini, i njegovih izmena i dopuna u 2007. i zatim 2008. godini.[39] Značajne norme su se mogle naći i u Zakonu o obligacionim odnosima (načelo zaštite potrošača, načelo poštenog poslovanja, jednakost strana i opšta pravila ugovaranja, garancije za proizvode i odgovornost za bezbednost proizvoda).

Postojeće zakonodavstvo se bavilo većinom pitanja pokrivenih Direktivama. Pitanje nepoštenih pravila je uopšteno pokrivao Zakon o obligacionim odnosima, ali ne u istoj meri kao Direktiva. Zakon o obligacionim odnosima ima nekoliko odredbi u vezi saobraznosti proizvoda koji se isporučuju po ugovorima o prodaji, kao i sa njima povezanih garancija.

U skladu sa Sporazumom o stabilizaciji i pridruživanju između Evropskih zajednica i njihovih država članica i Republike Makedonije, potpisanim aprila 2001. godine, zemlja je obavezna da usaglasi svoje zakonodavstvo i prakse u oblasti zaštite potrošača.

II. Zakonodavne tehnike transponovanja

Zakonodavni akt koji pokriva većinu normi u vezi zaštite potrošača u Makedoniji je Zakon o zaštiti potrošača. U tom pogledu Zakon o zaštiti potrošača deluje kao *lex specialis* u

[39] *Sl.list RM* br. 38/2004, 77/2007 i 103/2008.

ovoj oblasti, dok su opšte odredbe o ugovaranju i odgovornostima koje proističu iz ugovora regulisane Zakonom o obligacionim odnosima. Umesto za izmene i dopune ovog zakona, zakonodavac se 2004. godine opredelio za donošenje novog Zakona o zaštiti potrošača u kome su Direktive implementirane u potpunosti. Osim toga, posebne odredbe u vezi prava potrošača u finansijskim stvarima sadržane su u posebnom Zakonu o zaštiti potrošača u pogledu ugovora o korišćenju potrošačkih kredita i u podzakonskim aktima donetim na osnovu ovog Zakona.

III. Primena minimalne harmonizacije

Makedonsko zakonodavstvo je, generalno gledano, koristilo minimalnu harmonizaciju na više mesta prilikom usaglašavanja nacionalnog zakonodavstva sa potrošačkim *aquisem*. Tako su uz ostale norme propisane Direktivom u zakon uključene i dodatne norme za ono što se trebalo smatrati nepravičnom klauzulom. U nekim slučajevima propisani rokovi su produženi (kao što je slučaj s rokom za otkazivanje ugovora sklopljenih van poslovnih prostorija koji ovde iznosi 8 radnih dana). Isto važi za rok za otkazivanje ugovora u vezi proizvoda s nedostatkom. Većina strožih odredbi predviđena je u vezi obaveza obaveštavanja i sadržaja pojedinih dokumenata koji se uručuju potrošaču (na primer, pisano obaveštenje u slučaju ugovora na daljinu, obavezan sadržaj garancije za proizvode, itd.). ZZP zabranjuje sklapanje ugovora na daljinu za prodaju lekova, medicinskih i veterinarskih proizvoda, kao i eksploziva, čime ide dalje od zahteva odgovarajuće Direktive. Osim toga Zakon predviđa mogućnost da se zahteva zamena prehrambenih proizvoda, što je više od prava predviđenih za potrošače po Direktivi 99/44.

IV. Ostala proširenja

Većina proširenja se može naći u normama vezanim za odgovornost za proizvode s nedostatkom.

V. Moguća kršenja prava EZ

Formalno gledano, pošto Makedonija nije država članica ne možemo da govorimo o kršenjima prava EZ. Međutim, treba reći da neke od odredbi Direktiva nisu implementirane u nacionalnom zakonodavstvu. Ma kako da je malo u odnosu na ceo opseg Direktiva, odsustvo određenih normi u nacionalnom zakonodavstvu mogao bi da ima negativan uticaj. Pošto se očekuju izmene i dopune Zakona o zaštiti potrošača, može se smatrati da će ova situacija biti prevaziđena.

VI. Sudska praksa

Nema podataka o sudskoj praksi u oblasti zaštite potrošača. Upravni sud je nadležan za predmete u kojima se osporavaju odluke relevantnog Inspektorata[40], kojima se trgovci kažnjavaju za pojedina kršenja svojih obaveza (prekršaji). U skladu sa Zakonom, Inspektorati su obavezni da pre pokretanja prekršajnog postupka ponude postupak vansudskog poravnanja, odnosno postupak mirenja. U nekim predmetima može da se primeni i medijacija.

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[40] U skladu sa članom 130 Zakona o zaštiti potrošača, nadzor nad primenom Zakona vrši Ministarstvo privrede. Inspekcijski nadzor nad primenom odredbi Zakona sprovodi Državni tržišni inspektorat, Inspektorat za hranu i Odeljenje za veterinarsku državnu sanitarnu i zdravstvenu inspekciju i Državni inspektorat za zaštitu životne sredine, u skladu sa svojim nadležnostima i postupcima određenim zakonom.

Građanski sudovi nisu po sebi nadležni za zaštitu potrošača. Prema Zakonu o zaštiti potrošača potrošač može da traži odštetu za nastalu štetu, kao i da se ugovor proglasi nevažećim kada za to postoji osnov. Ovakvi postupci se onda vode u skladu sa Zakonom o obligacionim odnosima[41] i zakonima koji uređuju sudske postupke[42]. Nema podataka o broju i sadržaju ovakvih predmeta.

U toku su aktivnosti Organizacije za zaštitu potrošača koja u saradnji sa nadležnim državnim telima radi na izgradnji sistema nadzora nad radom relevantnih državnih organa u oblasti zaštite potrošača, tako da se može očekivati da će i na ovom planu biti uspostavljena odgovarajuća politika.

VII. Rezime

Usaglašavanje makedonskog zakonodavstva u oblasti zaštite potrošača je formalno počelo u okviru Sporazuma o stabilizaciji i pridruživanju između Evropskih zajednica i njihovih država članica i Republike Makedonije, potpisanog u aprilu 2001. godine, kojim se zemlja obavezala da usaglasi svoje zakonodavstvo i praksu u oblasti zaštite potrošača. Međutim, i pre toga je zakonodavstvo kojim se reguliše zaštita potrošača sadržano u Zakonu o zaštiti potrošača iz 2000. godine, i potom u njegovim izmenama i dopunama iz 2002. godine u određenoj meri bilo usaglašeno sa normama zaštite potrošača iz *acquis communautaire*. Naredni pomak je načinjen donošenjem novog Zakona o zaštiti potrošača u 2004. godini, i njegovih izmena i dopuna u 2007. i zatim 2008. godini. Određene važne norme se nalaze i u Zakonu o obligacionim odnosima (načelo zaštite potrošača, načelo poštenog poslovanja, jednakost strana i opšta pravila ugovaranja, garancije za proizvode i odgovornost za bezbednost proizvoda), koji je takođe bio izmenjen i dopunjen 2008. godine, da bi bolje zadovoljio zahteve zaštite potrošača.

Potrebne su dalje aktivnosti, koje su već u toku, kako bi se posebni zakoni u vezi zaštite potrošača poboljšali tako da se obezbedi puno usaglašavanje makedonskog zakonodavstva sa *acquis communautaire.*

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[41] Zakon o obligacionim odnosima, *Sl.list RM* br.18/2001; 4/2002; 5/2003; 84/2008.; 81/2009. i 161/2009.

[42] Zakon o sudovima, *Sl.list RM* br.58/2006; 62/2006 i 35/2008*;* Zakon o parničnom postupku, *Sl.list RM* br. 79/2005; 110/2008. i 83/2009.

E. CRNA GORA – ZAKONODAVNE TEHNIKE *(Zvezdan Čađenović)*

Direktiva	Transponovana u	Datum transponovanja
Direktiva 85/577	Zakon o zaštiti potrošača	16.05.2007.
	Zakon o unutrašnjoj trgovini	07.08.2008.
	Uredba o uslovima za organizovanje javne i aukcijske prodaje robe	15.01.2010.
Direktiva 90/314	Zakon o obligacionim odnosima	07.08.2008.
	Zakon o turizmu	25.06.2002. (sa izmenama i dopunama)
Direktiva 93/13	Zakon o zaštiti potrošača	16. 05. 2007.
Direktiva 94/47 (od 23.02.2011: Direktiva 2008/122/EZ)	Zakon o zaštiti potrošača	16.05.2007.
Direktiva 97/7	Zakon o zaštiti potrošača	16.05.2007.
	Zakon o obligacionim odnosima	07.08.2008.
Direktiva 98/6	Zakon o zaštiti potrošača	16.05.2007.
Direktiva 98/27 (kodifikovana verzija: Direktiva 2009/22/EZ)	Zakon o zaštiti potrošača	16.05.2007.
Direktiva 99/44	Zakon o zaštiti potrošača	16.05.2007.
	Zakon o obligacionim odnosima	07.08.2008.
Direktiva 87/102/EEZ (od 12 05. 2010: Direktiva 2008/48/EZ)	Zakon o zaštiti potrošača	16. 05.2007.
	Zakon o obligacionim odnosima	07.08.2008.
	Zakon o bankama	11.03.2008.
	Odluke Centralne banke CG	
Direktiva 85/374	Zakon o zaštiti potrošača	16.05.2007.
	Zakon o obligacionim odnosima	07.08.2008.
Direktiva 86/653	Zakon o obligacionim odnosima	07.08.2008.
Direktiva 99/34	Zakon o obligacionim odnosima	07.08.2008.
Direktiva 99/93	Zakon o elektronskom potpisu	1.10.2003. (sa izmenama i dopunama)
Direktiva 2000/35	Zakon o obligacionim odnosima	07.08.2008.
Direktiva 2000/31	Zakon o elektronskoj trgovini	29. 12.2004.
Direktiva 84/450	Zakon o zaštiti potrošača	16.05.2007.
Direktiva 02/65	Zakon o zaštiti potrošača	16.05.2007.
Direktiva 05/29	Zakon o zaštiti potrošača	16.05.2007.
Direktiva 87/357	Zakon o opštoj bezbjednosti proizvoda	11.08.2008.
Direktiva 97/5	Zakon o tekućim i kapitalnim poslovima sa inostranstvom	28.07.2005.
Direktiva 98/26	Zakon o tekućim i kapitalnim poslovima sa inostranstvom	28.07.2005.
	Zakon o platnom prometu u zemlji	13.10.2008.
	Zakon o hartijama od vrednosti	27.12.2000. (sa izmenama i dopunama)

Direktiva 2000/46	Zakon o platnom prometu u zemlji Odluke Centralne banke CG Zakon o instrumentima elektronskog novca	13.10.2008. Treba da se donese
Direktiva 01/95	Zakon o opštoj bezbjednosti proizvoda	11.08.2008.
Direktiva 02/22	Zakon o elektronskim komunikacijama	27.08.2008.
Direktiva 02/58	Zakon o elektronskim komunikacijama	27.08.2008.

I. Stanje zaštite potrošača na planu Direktiva 99/44 (prodaja robe široke potrošnje), 93/13 (nepravične odredbe), 97/7 (ugovori na daljinu) i 85/577 (van poslovnih prostorija) pre transponovanja u nacionalno pravo

Pre transponovanja četiri direktive, situacija je bila značajno drugačija u odnosu na sadašnju. Detaljnije norme u oblasti ovde razmatrana četiri akta *acquis*-a postojala su samo u pogledu direktive u vezi prodaje. Osim putem opšte primene bivšeg saveznog Zakona o zaštiti potrošača[43], ova oblast je uglavnom bila uređena opštim obligacionim pravom (Zakon o obligacionim odnosima[44]).

Ne može se reći isto i za ostale tri direktive, jer nisu postojale posebne norme, bar ne u značajnijoj meri.

Što se tiče nepravičnih odredbi, nekada je bivši savezni Zakon o trgovini, u poglavlju "Zaštita potrošača" sadržao odredbu o kontroli standardnih ugovora (i njihovih odredbi) i o nadležnostima državnih organa u pogledu odredbi kojima se narušava jednak položaj ugovornih strana[45]. Posle toga, savezni Zakon o zaštiti potrošača posvećuje dva člana pravilu transparentnosti[46] i pravilu da će se odredbe u tipskim ugovorima tumačiti u korist potrošač[47]. Paralelno s tim, opet se primenjivao opšti zakon o obligacijama, i mada nije sadržao norme kakve se mogu naći u Direktivi u vezi nepravičnih ugovornih odredbi, on je ipak imao svojevrstan pristup s čitavim nizom odredbi koje treba da se smatraju nepravičnim, i koje postoje čak i danas paralelno sa čisto potrošačkim zakonodavstvom.

Što se tiče prodaje van poslovnih prostorija, savezni Zakon o zaštiti potrošača iz 2002. godine sadržao je samo jedan član[48] koji se bavio ovim predmetom. Naime, on je posvetio tri stava prodaji van poslovnih prostorija i prodaji na daljinu, i dao potrošačima rok od 7 dana za odustajanje od obaveze, bez troškova i objašnjenja. Rok za odustajanje za robu računao se od dana prijema robe, a za usluge od dana zaključenja ugovora i, konačno, potrošač je bio dužan da plati troškove vraćanja robe.

II. Zakonodavne tehnike transponovanja

Situacija se danas značajno razlikuje. Crna Gora je podnela svoj zahtev za članstvo u EU 15.12.2008. godine i u skladu sa čl. 72. Sporazuma o stabilizaciji i pridruživanju između Evropskih zajednica i njenih država članica i Republike Crne Gore (SSP)[49] dužna je da obez-

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[43] Zakon o zaštiti potrošača, *Sl.list SRJ* br. 37/02.

[44] Zakon o obligacionim odnosima, *Sl.list SFRJ br*. 29/78, 39/85, 57/89 i Sl.list FRJ br.31/93.

[45] Čl. 39. Zakona o trgovini, *Sl.list SRJ* br. 32/93, 50/93, 41/94, 29/96.

[46] Čl. 18. Zakona o zaštiti potrošača, *Sl.list SRJ* br. 37/02.

[47] Čl. 19. Zakona o zaštiti potrošača, *Sl.list SRJ* br. 37/02

[48] Čl. 21. Zakona o zaštiti potrošača, *Sl.list SRJ* br. 37/02

[49] Sporazum o stabilizaciji i pridruživanju između Evropskih zajednica i država članica, s jedne strane, i Republike Crne Gore, s druge strane, *Sl.list RCG,* br. 07/07

bedi da njeni važeći zakoni, kao i buduće zakonodavstvo, budu postepeno usaglašeni sa pravnom tekovinom Zajednice.

Tako je crnogorski Zakon o zaštiti potrošača[50] iz maja 2007. godine predstavljao veliki pomak u odnosu na ranije savezne zakone i pokušaje usklađivanja sa potrošačkim pravom EU[51]. Paralelno je došlo i do promena opšteg zakona o obligacijama. Crna Gora je usvojila svoj Zakon o obligacionim odnosima 2008. godine[52] u koji je, kao što će se videti u daljem tekstu, ugrađen ceo niz relevantnih odredbi Direktive u vezi prodaje koje se primenjuju paralelno[53] sa posebnim odredbama kojima se reguliše zaštita potrošača.

Od ostalih zakona, takođe treba pomenuti Zakon o unutrašnjoj trgovini[54] kojim se uređuje unutrašnja trgovina, uslovi i oblici vršenja trgovine. Osim što daje definiciju trgovca, proširivanjem ovog pojma, i definiše prodajne prostorije itd., on sadrži i značajne odredbe o distancionoj trgovini i trgovini izvan poslovnih prostorija.

III. Primena minimalne harmonizacije

Crna Gora je primenila jedan vidljiv broj klauzula minimalne harmonizacije, mada ne i sve ((npr. član 3.2) Direktive 85/577 daje državama članicama mogućnost da izuzmu ugovore čija vrednost nije veća od 60 ECU iz oblasti primene svog nacionalnog transpozicionog zakona, gde je Crna Gora za limit odredila tačno 60 EUR). S druge strane, po istoj Direktivi, Crna Gora se opredelila da potrošač ima pravo na otkaz ugovora u roku od sedam radnih dana, umesto samo sedam dana. Osim toga, predvidela je dodatne norme u slučaju odustajanja, koje su potpuno iste kao odredba čl. 6.4) Direktive 97/7 koja predviđa automatski prestanak i glavnog i kreditnog ugovora.

U slučaju Direktive 97/7 i čl. 6.4), crnogorski zakon ide dalje od Direktive jer je povoljniji za potrošače, oslobađajući ih ne samo od kazne prilikom raskida kreditnog ugovora, već i od obaveze naknade za štetu u vidu troškova, kamata, kazni ili sličnih troškova.

Crna Gora je kroz Zakon o zaštiti potrošača, zajedno sa zahtevima koji se nalaze u opštem zakonodavstvu o prodaji, predvidela dodatne vrste faktora zahteva saobraznosti od onih koji su predviđeni u Direktivi 99/44, kao što su: proizvodi u tačnoj meri i količini; pogodan materijal za pakovanje u skladu sa vrstom i svojstvima robe; propisan, odnosno ugovoren kvalitet, a ako kvalitet nije propisan, odnosno ugovoren – uobičajen kvalitet; način određivanja i obračuna cene, itd.

Konačno, na primer, veoma je značajan i način na koji je Crna Gora prišla klauzulama iz Dodatka Direktivi 93/13. Naime, odredbe iz 1. Dodatka se uvek smatraju nepravičnim (crna lista) dok je 2. Dodatak (izuzeci u odnosu na klauzule koje koriste pružaoci finansijskih usluga) transponovan samo u slučaju koji je određen pod br. 2 d. Oba pristupa obezbeđuju viši nivo zaštite potrošača (stavljanje odredbi na crnu listu, i netransponovanje 2. Dodatka).

IV. Ostala proširenja

Prilikom transponovanja čl. 1. Direktive 85/577 i određivanja situacija koje potpadaju pod njen domašaj, Crna Gora se opredelila da ih proširi, obuhvativši i javna mesta. Ova od-

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[50] Zakon o zaštiti potrošača, *Sl.list RCG* br. 26/07

[51] Nacrt zakona je pripremljen uz podršku projekta PLAC ("Centar za politiku i pravne savete") koji finansira EU, a implementira konzorcijum na čelu sa GTZ International Service.

[52] Zakon o obligacionim odnosima, *Sl.list RCG* br. 47/08

[53] Čl. 6. Zakona o zaštiti potrošača predviđa da ukoliko nije drugačije predviđeno, na obligacione odnose će se primenjivati odredbe Zakona o obligacionim odnosima.

[54] Zakon o unutrašnjoj trgovini, *Sl.list RCG* br.49/08

redba izgleda obuhvata čitav niz mesta kao što su ulice, trgovi, parkovi, plaže, marine, restorani/kafići/diskoteke, železničke stanice, aerodromske zgrade, unutrašnji objekti lučkog saobraćaja, škole, itd. U pogledu tereta dokazivanja koji bi mogao da poveća nivo zaštite potrošača, a koji čak nije ni predmet odredbi Direktive, Crna Gora je upotrebila opštu normu vezanu za postojanje poštovanja rokova.

Crna Gora je transponovala odredbe Direktive 85/577 za izuzimanje određenih vrsta ugovora navedenih u čl. 3 stav 2). U tom kontekstu, za isporuku prehrambenih proizvoda, pića ili druge robe namenjene tekućoj upotrebi u domaćinstvu, Zakon o zaštiti potrošača ne zahteva da robu isporučuje "redovan dostavljač".[55]

Prilikom transponovanja čl. 5, 2. rečenice Direktive 93/13, pravilo *contra proferentem* se primenjuje ne samo na klauzule koje nisu napisane jednostavnim jezikom ("jasnim"), već i na nerazumljive klauzule ("razumljive potrošaču"), što predstavlja prednost u odnosu na Direktivu jer se može posmatrati kao sredstvo za postizanje višeg nivoa zaštite potrošača.

Pravila za implementiranje Direktive 99/44 se protežu izvan područja predviđenog u Direktivi. Tako se odredbe Zakona o zaštiti potrošača, osim na robu, primenjuju i na usluge, što je suprotno definiciji iz člana 1.2)(b) Direktive 99/44. Osim toga, pravila saobraznosti, kao i pravila obavezne garancije otvorena su ne samo za potrošače, već i za pravna lica, što znači za svako lice koje je strana u ugovoru. Ovo je posledica toga što su ove norme transponovane opštim obligacionim pravom, naime Zakonom o obligacionim odnosima.

V. Moguća kršenja prava EZ

Crna Gora nije ugradila čl. 1. stav 3) i 4) Direktive 85/577 koji nastoji da objasni da potrošač mora da ima mogućnost odustajanja od ponude date van poslovnih prostorija, bez obzira na to da li je ponuda bila obavezujuća ili neobavezujuća.

Na to što, slično nekolicini država članica EU, Crna Gora ne pominje reči "blagovremeno" ili njihovu varijaciju, prilikom transponovanja čl. 4.1), 5.1) i 7.2) Direktive 97/7 može se gledati kao na manje odstupanje od normi *acquis*-a. Ako se ima na umu da je svrha izostavljenih reči da se potrošaču obezbedi dovoljno vremena da razmisli o informaciji (npr. pre zaključivanja ugovora), može se ustvrditi da bi ovo izostavljanje moglo da suzi delotvornu zaštitu potrošača u praksi.

No, na isključivanje prava potrošača na odustajanje (ako nije drugačije dogovoreno) u pogledu određenih ugovora u situacijama prodaje van poslovnih prostorija, koje su iste kao one koje se nalaze u čl. 6. Direktive 97/7, ne bi trebalo gledati kao na manje odstupanje od prava EZ, jer se time može značajno smanjiti nivo zaštite potrošača.

Transponovanje člana 5, 2. rečenica Direktive 93/13 deluje problematično jer Direktiva traži da tumačenje bude ne samo "povoljno" za potrošača, već da bude "najpovoljnije" za potrošača.

VI. Sudska praksa

U Crnoj Gori još uvek nema vidljive sudske prakse koja bi se temeljila na odredbama Zakona o zaštiti potrošača[56]. Kao i u drugim zemljama učesnicama trenutno jedine odluke koje se mogu naći su one koje proističu iz sudske prakse koja se temelji na Zakonu o obligacionim odnosima.

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[55] Čl. 54. tačka (3) Zakona o zaštiti potrošača, *Sl.list RCG* br. 26/07

[56] U toku su postupci koji se tiču potrošačkih prava, ali se oni temelje na posebnim sektorskim zakonima. Najznačajniji predmet u Crnoj Gori je jedan predmet koji se tiče načina izračunavanja cene za električnu energiju koji je trenutno privukao pažnju javnosti.

S druge strane, Crna Gora je utrla put za razvoj značajnog modela vansudskog rešavanja sporova. U tom smislu, za manje od godinu i po njenog formalnog postojanja[57], zabeležena su četiri predmeta, a peti je u toku. Dva od ovih predmeta se vode kao rešena putem protokola o sporazumnom rešenju spora od strane Arbitražnog odbora za vansudsko rešavanje potrošačkih sporova.

Konačno, osim kroz redovne sudske i vansudske postupke, potrošač može da ostvari pristup pravdi i kroz upravni postupak.

VII. Rezime

Proces integracije u EU je svakako bio glavni pokretač harmonizacije nacionalnog zakonodavstva sa potrošačkim pravom EU. Naime, zaštita potrošača je jedna od prioritetnih oblasti harmonizacije kako je predviđeno u Naslovu VI "Usklađivanje propisa, primena prava i pravila konkurencije", član 72. u vezi člana 78. SSP.

U tom smislu, crnogorski Zakon o zaštiti potrošača donet sredinom 2007. godine predstavlja veliki korak napred u usklađivanju sa potrošačkim pravom EU. Dok su Direktive 85/577, 97/7, 93/13 transponovane pomenutim zakonom, Direktiva 99/44 je uglavnom transponovana novim crnogorskim Zakonom o obligacionim odnosima. Shodno tome, u crnogorskom Zakonu o zaštiti potrošača može se primetiti da je primenjen vidljiv broj klauzula minimalne harmonizacije, uz istovremeno opredeljivanje za proširivanje nekih normi čak izvan opsega predviđenog odnosnim Direktivama.

Iako još nema vidljive sudske prakse na temelju odredbi Zakona o zaštiti potrošača, trenutno se efikasno implementira veoma značajan model vansudskog rešavanja sporova.

Konačno, dalja harmonizacija je obavezna, i zato je Vlada CG za nju pripremila temeljne planove za 2010-2011. godinu; harmonizacija će takođe biti i predmet tehničke pomoći u okviru programske pomoći IPA 2009. (Projekat "Pristupanje unutrašnjem tržištu"[58]).

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[57] Dvadeset članova Arbitražnog odbora je izabrano i imenovano u decembru 2008. godine na mandat od 4 godine. Pošto je još uvek mlado, ovom telu bi pre svega koristilo jačanje svesti o njegovim razvijajućim aktivnostima, da bi ono moglo da se još više unapredi i da se u potpunosti iskoriste odredbe Zakona o zaštiti potrošača i Pravilnik o Arbitražnom odboru za rešavanje potrošačkih sporova, *Sl.list RCG,* br. 28/08.

[58] Implementira Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH.

F. SRBIJA – ZAKONODAVNA TEHNIKA *(Marija Karanikić Mirić)*

N.B. *Činjenica što pojedini zakoni u određenoj meri uređuju navedene oblasti ne znači da su ti zakoni u skladu sa datim direktivama.*

Direktiva	**Transponovana u**	**Datum transponovanja**
Direktiva 85/577	nije transponovana	-
Direktiva 90/314	nije transponovana [Određene norme u: 1) Zakonu o obligacionim odnosima (ZOO); 2) Zakonu o turizmu]	- [30.03.1978. (izmene i dopune 1985, 1989, 1993)] 13.05.2009.
Direktiva 93/13	Zakon o zaštiti potrošača (ZZP) (u ograničenoj meri) [Takođe relevantan: ZOO]	16.09.2005. [30.03.1978. (izmene i dopune 1985, 1989, 1993)]
Direktiva 94/47 (od 23.02.2011: Direktiva 2008/122/EZ)	ZZP	16.09.2005.
Direktiva 97/7	ZZP (u ograničenoj meri)	16.09.2005.
Direktiva 98/6	ZZP	16.09.2005.
Direktiva 98/27 (kodifikovana verzija: Direktiva 2009/22/EZ)	ZZP (samo dotiče pitanja nadzora nad tržištem i potrošačkih organizacija)	16.09.2005.
Direktiva 99/44	ZZP (u ograničenoj meri) [Takođe relevantan: ZOO]	16.09.2005. [30.03.1978.]
Direktiva 87/102/EEZ (od 12. 05. 2010: Direktiva 2008/48/EZ)	ZZP (u ograničenoj meri)	16.09.2005.
Direktiva 85/374	Zakon o odgovornosti proizvođača stvari sa nedostatkom	14.11.2005.
Direktiva 86/653	nije transponovana [Određene norme o trgovinskim zastupnicima: ZOO, čl. 790 *et seq.*]	- [30.03.1978.]
Direktiva 99/34	nije transponovana	-
Direktiva 99/93	Zakon o elektronskom potpisu Zakon o elektronskoj trgovini	21.12.2004. 29.5.2009.
Direktiva 2000/35	nije transponovana [Određena pravila o docnji: ZOO, čl. 277-279]	- [30.03.1978.]
Direktiva 2000/31	Zakon o elektronskoj trgovini; ZZP	29.5.2009. 16.09.2005.
Direktiva 84/450	ZZP (u ograničenoj meri)	16.09.2005.
Direktiva 2002/65	nije transponovana	-
Direktiva 2005/29	ZZP (u ograničenoj meri)	16.09.2005.
Direktiva 87/357	Zakon o opštoj bezbednosti proizvoda	29.5.2009.
Direktiva 97/5	nije transponovana [Neke norme o prekograničnim prenosima kreditnih sredstava u Zakonu o deviznom poslovanju]	- [14.7.2006.]

Direktiva 98/26	nije transponovana	-
Direktiva 2000/46	nije transponovana	-
Direktiva 2001/95	Zakon o opštoj bezbednosti proizvoda	29.5.2009.
Direktiva 2002/22	Zakon o telekomunikacijama; ZZP (u ograničenoj meri)	24.4.2003 (izmene i dopune 2006). 16.09.2005.
Direktiva 2002/58	Zakon o telekomunikacijama; Zakon o zaštiti podataka o ličnosti	24.4.2003. 23.10.2008.

I. Zaštita potrošača pre usklađivanja srpskog prava sa direktivama 99/44 (o prodaji robe široke potrošnje), 93/13 (o nepravičnim odredbama u potrošačkim ugovorima), 97/7 (o ugovorima na daljinu) i 85/577 (o ugovorima zaključenim van poslovnih prostorija)

Prvi okvirni (savezni) Zakon o zaštiti potrošača usvojen je 2002. godine.[59] Taj zakon zamenjen je važećim Zakonom o zaštiti potrošača Republike Srbije iz 2005. godine.[60]

U periodu pre 2002. godine u Srbiji nije bilo posebnog zakona kojim se uređuju pitanja zaštite potrošača. Na ugovorne odnose trgovaca i potrošača primenjivala su se opšta pravila ugovornog prava, koja su garantovala kupcima solidan nivo zaštite. Pored toga, u Zakonu o obligacionim odnosima iz 1978. godine nalazile su se (i još se nalaze) određena pravila o vanugovornoj odgovornosti proizvođača za štetu od stvari sa nedostatkom.

Nakon dva neuspela pokušaja da se važeći Zakon o zaštiti potrošača (ZZP) izmeni i dopuni, napuštena je ideja o njegovom poboljšanju i započet rad na nacrtu novog zakona, koji bi trebalo da uredi kako javnopravne, tako privatnopravne aspekte zaštite potrošača i da uskladi domaće pravo sa potrošačkim pravom Evropske unije.

II. Zakonodavna tehnika usklađivanja domaćeg prava sa pravom EU

ZZP iz 2005. godine koncipiran je tako da služi kao okvirni zakon u oblasti zaštite potrošača. Tim zakonom uređuje se zaštita ekonomskih interesa potrošača i, u određenom obimu, zaštita njihovog zdravlja i bezbednosti, i to na sasvim uopšten i površan način. Zakonodavac nije ni pokušao da uredi brojna pitanja koja su uređena evropskim potrošačkim direktivima.

Srbija od 2002. godine ima okvirni zakon u oblasti zaštite potrošača. Ipak, zakonodavna tehnika i dalje je segmentirana. Brojna pitanja koja se tiču prava i interesa potrošača uređena su drugim zakonima. Pored toga, Zakon o zaštiti potrošača iz 2005. nije se ni dotakao nekih osnovnih pitanja u oblasti zaštite potrošača.

ZZP iz 2005. godine sadrži 81 član. Ti članovi organizovani su u deset poglavlja, koja se odnose na: 1. osnovna prava potrošača; 2. zaštitu života, zdravlja i sigurnosti potrošača (uključujući norme o sigurnosti proizvoda i ambalaži, zaštiti maloletnih lica, obaveštenjima o kvalitetu vode i vazduha, genetski modifikovanim proizvodima); 3. zaštitu ekonomskih interesa potrošača (uključujući norme o ceni i isticanju cene, materijalu za pakovanje, izdavanju računa, garantnom listu, isporuci proizvoda, kupovini na daljinu, potrošačkom kreditu, kupovini na rate, rasprodaji proizvoda, prodaji proizvoda sa nedostatkom, reklamacijama); 4. posebne oblike zaštite potrošača u oblasti usluga (obaveze davaoca usluga, cene usluga, pro-

[59] Zakon o zaštiti potrošača, Službeni list SRJ br. 37/02.

[60] Zakon o zaštiti potrošača, Sl.list RS br. 79/2005, 16.09.2005.

izvodi i usluge od opšteg interesa, usluge u turizmu, vremenski podeljeno korišćenje nepokretnosti); 5. tipske ugovore; 6. informisanje i obrazovanje potrošača; 7. naknadu štete (uključujući norme o teretu dokazivanja, sudskoj zaštiti i vansudskom poravnanju); 8. nacionalni program i subjekte zaštite (uključujući norme o Nacionalnom programu zaštite potrošača, nadležnosti resornog ministarstva, Savetu za zaštitu potrošača, zaštiti potrošača u lokalnoj samoupravi, organizacijama potrošača i finansiranju njihovih aktivnosti); 9. nadzor nad tržištem; i 10. kaznene odredbe.

Važeći Zakon o zaštiti potrošača svedoči o neuspelom pokušaju zakonodavca da u srpsko pravo transponuje nekoliko potrošačkih direktiva: 93/13/EEZ o nepravičnim odredbama u potrošačkim ugovorima; 97/7/EZ o ugovorima na daljinu; 98/6/EZ o isticanju cena; 99/44/EZ o prodaji robe široke potrošnje i pratećim garancijama; 87/102/EEZ o potrošačkim kreditima; 84/450/EEZ o obmanjujućem oglašavanju; i 94/47/EZ o vremenski podeljenom korišćenju nepokretnosti. ZZP sadrži samo jedan član (član 27) koji se odnosi na elektronsku trgovinu.

Činjenica što ZZP u određenom obimu uređuju navedene oblasti ne znači da je taj zakon u skladu sa pobrojanim direktivama. Kada je reč o ugovornom potrošačkom pravu, ZZP samo u grubim crtama skicira neke osnovne principe evropskog ugovornog potrošačkog prava.

Zakon o odgovornosti proizvođača stvari sa nedostatkom (ZOPSN) iz 2005. godine predstavlja poseban pokušaj zakonodavca da u srpsko pravo transponuje Direktivu 85/374/EEZ o odgovornosti za štetu od proizvoda s nedostatkom.[61] ZOPSN je u velikoj meri usklađen sa Direktivom 85/374. Međutim, tu postoje određeni nedostaci. Na primer, ZOPSN izričito isključuje osnovne poljoprivredne proizvode (proizvode iz zemljišta, stočarstva i ribarstva) iz pojma proizvoda; zakonom propisano merilo za utvrđivanje kada jedan proizvod ima nedostatak razlikuju se od merila koje propisuje Direktiva; pojam uvoznih proizvoda ograničen je na proizvode namenjene prodaji, pa se zakonska pravila o odgovornosti proizvođača ne primenjuju na uvozne proizvode uvezene u svrhu davanja u zakup, lizing ili drugog stavljanja u promet.

Ne postoji namera da se izmenama i dopunama Zakona o obligacionim odnosima u srpsko pravo transponuju direktive koje spadaju u oblast potrošačkog ugovornog prava.[62] Vlada Republike Srbije formirala je 2006. godine Komisiju za izradu Građanskog zakonika.[63] Sudeći po dosadašnjim izveštajima te Komisije, ne postoji namera da se odredbama buduće građanske kodifikacije posebno urede potrošački ugovori.[64]

Ideje o načinu na koji bi trebalo poboljšati Zakon o obligacionim odnosima uglavnom su inspirisane *Skicom za zakonik o obligacijama i ugovorima*. Reč je o nacrtu zakona koji je napisao, i 1969. godine objavio, profesor Mihailo Konstantinović, osnivač Beogradske škole građanskog prava. Jugoslovenski Zakon o obligacionim odnosima rađen je po ugledu na Skicu. Vladina komisija razmatra usvajanje upravo onih pravila iz Skice koja je 1978. godine izostavio jugoslovenski zakonodavac. Pored toga, Komisija razmatra prihvatanje određenih re-

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[61] Zakon o odgovornosti proizvođača stvari sa nedostatkom, Sl. glasnik RS br. 101/05 od 14.11.2005.

[62] Vlada Republike Srbije. Komisija za izradu Građanskog zakonika, Rad na izradi Građanskog zakonika. Izveštaj Komisije sa otvorenim pitanjima, Pravni život, Tom III, 11/2007, 5–407. Komisija za izradu Građanskog zakonika, Prednacrt. Građanski zakonik Republike Srbije. Druga knjiga. Obligacioni odnosi, Vlada Republike Srbije, Beograd 2009, 1-451.

[63] Odluka o obrazovanju posebne Komisije radi kodifikacije građanskog prava i izrade Građanskog zakonika, Službeni glasnik RS 104/06, 110/06 i 85/09.

[64] Komisija za izradu Građanskog zakonika*, Prednacrt. Građanski zakonik Republike Srbije. Druga knjiga. Obligacioni odnosi*, Vlada Republike Srbije, Beograd 2009, 1-451.

šenja domaće sudske prakse i uporednog prava. Međutim, u izveštajima Komisije nema traga o uzimanju potrošačkih direktiva u obzir.

Ministarstvo trgovine i usluga Republike Srbije, kao resorno ministarstvo u oblasti zaštite potrošača, izradilo je novi Nacrt zakona o zaštiti potrošača (NZZP), koji je objavljen u junu mesecu 2010. godine i o kojem se vodi javna rasprava.[65] Taj nacrt trebalo bi da uđe u zakonodavnu proceduru u jesen 2010. godine.

NZZP predstavlja pokušaj da se u srpsko pravo transponuju brojni propisi EU u oblasti zaštite potrošača. Tu spadaju direktive 98/6/EC o isticanju cena; 85/577/EEC o prodaji van poslovnih prostorija; 97/7/EC o prodaji na daljinu; 2000/31/EC o elektronskoj trgovini; 93/13/EEC o nepravičnim ugovornim odredbama; 99/44/EC o prodaji robe široke potrošnje i pratećim garancijama; 2002/22/EC o univerzalnim uslugama u oblasti telekomunikacija; 2003/54/EC o električnoj energiji; 2003/55/EC o prirodnom gasu; 90/314/EEC o putnim aranžmanima; 2008/122/EC o vremenski podeljenom korišćenju nepokretnosti; 2008/48/EC o potrošačkim kreditima; 2002/65/EC o prodaji finansijskih usluga na daljinu; 2008/52/EC o medijaciji u građanskim i privrednim stvarima; 98/27/EC o sudskim zabranama; 2005/29/EC o nepoštenom poslovanju; Uredba 861/2007 o postupku u sporovima male vrednosti; i preporuke 98/257/EC i 2001/310/EC o načelima vansudskog rešavanja potrošačkih sporova.

Pored toga, prilikom izrade NZZP u obzir je uzet Predlog Direktive o pravima potrošača,[66] kao i pojedina rešenja uporednog prava.

Kao pravni osnov za usklađivanje srpskog ugovornog potrošačkog prava sa pravom Evropske unije može navesti član 78 Zakona o potvrđivanju Sporazuma o stabilizaciji i pridruživanju između evropskih zajednica i njihovih država članica, sa jedne strane, i Republike Srbije, sa druge strane, u kojem stoji:[67]

"Ugovorne strane će sarađivati kako bi usaglasile standarde zaštite potrošača u Srbiji sa standardima u Zajednici. Delotvorna zaštita potrošača je nužna kako bi se obezbedilo valjano funkcionisanje tržišne ekonomije i ta zaštita će zavisiti od razvoja administrativne infrastrukture radi obezbeđivanja nadzora nad tržištem i sprovođenja zakona u ovoj oblasti."

Ova saradnja obuhvata, između ostalog, obavezu Republike Srbije da nacionalne propise u oblasti zaštite potrošača uskladi sa odgovarajućim propisima Evropske unije.

III. Pozivanje na pravilo o minimalnoj harmonizaciji

Veoma je teško oceniti srpski ZZP iz 2005. godine iz ove perspektive, budući da taj zakon uopšte ne uređuje većinu pitanja koja su u Evropskoj uniji uređena pravilima materijalnog potrošačkog prava. Reč je o neuspelom pokušaju zakonodavca da u srpsko pravo transponuje nekoliko potrošačkih direktiva. ZZP sadrži malobrojna pravila o: garanciji, potrošačkom kreditu, ugovorima zaključenim na daljinu, dužnosti trgovca da obavesti potrošača o nekim pojedinostima, vremenski podeljenom korišćenju nepokretnosti, sudskim zabranama. Međutim, ta pravila su veoma uopštena i sasvim grubo skiciraju pojedine osnovne ideje *Acquis Communautaire* u oblasti potrošačkog ugovornog prava.

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[65] Nacrt zakona o zaštiti potrošača, Ministarstvo trgovine i usluga Republike Srbije, http://www.mtu.gov.rs/cms/?page_id=362, preuzeto 25.06.2010.

[66] Proposal for a Directive of the European Parliament and of the Council on consumer rights, COM(2008) 614/3.

[67] Čl. 78, Zakon o potvrđivanju Sporazuma o stabilizaciji i pridruživanju između Evropskih zajednica i njihovih država članica, sa jedne strane, i Republike Srbije, sa druge strane, Sl. glasnik RS 83/08.

IV. Ostala proširenja

Prema članu 2, stav 2 ZZP, pojam potrošača proširen je tako da obuhvati i privredna društva, preduzeća, druga pravna lica i preduzetnike, kada kupuju proizvode ili koriste usluge za sopstvene potrebe, to jest kada postupaju izvan svoje profesije, delatnosti ili zanata.

ZZP garantuje određeni stepen zaštite potrošača prilikom zaključenja i izvršavanja potrošačkih ugovora. U tom pogledu, ZZP se odnosi kako na prodaju robe, tako na pružanje usluga.

V. Moguća kršenja komunitarnog prava

Zakonodavac nije ni pokušao da Zakonom o zaštiti potrošača iz 2005. godine u srpsko pravo transponuje Direktivu 85/577/EEZ o ugovorima zaključenim van poslovnih prostorija.

Zakon o zaštiti potrošača predstavlja pokušaj da se u srpsko pravo preuzmu pravila iz nekoliko potrošačkih direktiva, među kojima su direktive 93/13/EEZ o nepravičnim odredbama u potrošačkim ugovorima; 97/7/EZ o ugovorima na daljinu; i 99/44/EZ o prodaji robe široke potrošnje i pratećim garancijama. Posebni izveštaji o preuzimanju svake od pomenutih direktiva sadrže podatke o nedostacima njihovog transponovanja u srpsko pravo.

VI. Sudska praksa

Nema sudskih odluka na osnovu postojećeg Zakona o zaštiti potrošača. U većini predmeta koji bi se mogli klasifikovati kao potrošački sporovi, sudovi primenjuju Zakon o obligacionim odnosima i posebne sektorske zakone.

VII. Rezime

Prvi okvirni (savezni) Zakon o zaštiti potrošača usvojen je 2002. godine. Taj zakon zamenjen je važećim Zakonom o zaštiti potrošača Republike Srbije iz 2005. godine. Nakon dva neuspela pokušaja da se ovaj potonji propis izmeni i dopuni, napuštena je ideja o njegovom poboljšanju i započet rad na nacrtu novog zakona, koji bi trebalo da uredi kako javnopravne, tako privatnopravne aspekte zaštite potrošača i da uskladi domaće pravo sa potrošačkim pravom Evropske unije. Ne postoji namera da se direktive koje spadaju u oblast potrošačkog ugovornog prava transponuju u srpsko pravo izmenama i dopunama srpskog Zakona o obligacionim odnosima.

ZZP iz 2005. godine koncipiran je tako da služi kao okvirni zakon u oblasti zaštite potrošača. Tim zakonom uređuje se zaštita ekonomskih interesa potrošača i, u određenom obimu, zaštita njihovog zdravlja i bezbednosti, i to na sasvim uopšten i površan način. Zakonodavac nije ni pokušao da uredi brojna pitanja koja su uređena evropskim potrošačkim direktivama.

Važeći Zakon o zaštiti potrošača svedoči o neuspelom pokušaju zakonodavca da u srpsko pravo transponuje nekoliko potrošačkih direktiva: 93/13/EEZ; 97/7/EZ; 98/6/EZ; 99/44/EZ; 87/102/EEZ; 84/450/EEZ; i 94/47/EZ. Činjenica što ZZP u određenom obimu uređuju navedene oblasti ne znači da je taj zakon u skladu sa pobrojanim direktivama. Kada je reč o ugovornom potrošačkom pravu, ZZP samo u grubim crtama skicira neke osnovne principe evropskog ugovornog potrošačkog prava.

Ministarstvo trgovine i usluga Republike Srbije, kao resorno ministarstvo u oblasti zaštite potrošača, izradilo je novi Nacrt zakona o zaštiti potrošača (NZZP), koji je objavljen u junu mesecu 2010. godine i o kojem se vodi javna rasprava. Taj nacrt trebalo bi da uđe u zakonodavnu proceduru u jesen 2010. godine. NZZP predstavlja pokušaj da se u srpsko pravo transponuju brojni propisi EU u oblasti zaštite potrošača.

2. deo:
TRANSPONOVANJE POJEDINIH DIREKTIVA[68]

A. DIREKTIVA O PRODAJI VAN POSLOVNIH PROSTORIJA (85/577)

Kordinatori: *Emilia Čikara, Zlatan Meškić*

I. Zakonodavstvo u državama članicama pre transponovanja Direktive o prodaji van poslovnih prostorija

Pre transponovanja Direktive 85/577 u njihove relevantne Zakone o zaštiti potrošača države učesnice nisu imale koherentno zakonodavstvo koje se odnosi na zaštitu potrošača u slučaju prodaje van poslovnih prostorija. U nekim zemljama je nivo ovakve zaštite bio vrlo nizak (npr. Hrvatska, Srbija, Crna Gora i Albanija) a u drugim ona nije ni postojala (npr. Bosna i Hercegovina, Makedonija). Tako, na primer, prodaja od vrata do vrata se pominjala u čl. 16. starog hrvatskog Zakona o trgovini[69] koji je propisivao da ugovore o prodaji na vratima stana mogu da sklapaju samo pravne osobe koje su registrovane za pružanje takve delatnosti. Jugoslovenski savezni Zakon o zaštiti potrošača[70] predviđa u članu 21.[71], isto kao i albanski Građanski zakonik u članu 672., 2. alineja[72], pravo na odustajanje. Dakle, u većini zemalja učesnica primenjivane su samo opšte odredbe koje se tiču ugovora i ugovorne odgovornosti.

Transponovanje Direktive 85/577 je u većini zemalja bilo praćeno usvajanjem novih zakona. Hrvatska je po prvi put regulisala prodaju van poslovnih prostorija u posebnom poglavlju Zakona o zaštiti potrošača iz 2003. godine,[73] koje je potom bilo poboljšano izmenama i dopunama, da bi sada ovu oblast regulisao novi Zakon o zaštiti potrošača iz 2007. godine.[74] Isti slučaj je bio u Bosni i Hercegovini, gde je Direktiva 85/577 bila prvo transponovana u posebno poglavlje Zakona o zaštiti potrošača iz 2002. godine,[75] a potom je kasnije usvojen nov

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[68] Sledeće izlaganje je bazirano na šest nacionalnih izveštaja koje su pripremili Nada Dollani (Albanija), Zlatan Meškić (Bosna i Hercegovina), Emilia Čikara (Hrvatska), Jadranka Dabović-Anastasovska, Nenad Gavrilović, Neda Zdraveva (Makedonija), Zvezdan Čadjenović (Crna Gora) i Marija Karanikić Mirić (Srbija). Zbog ograničenog prostora, ovi nacionalni izveštaji ne mogu da se ovde objave u celosti.

[69] Zakon o trgovini, *NN* br. 11/96, 30/99, 75/99, 76/99, 62/01, 109/01.

[70] Savezni Zakon o zaštiti potrošača, *Sl.list SRJ* br. 37/02.

[71] Posvetio je tri stava prodaji van poslovnih prostorija (i na daljinu) i predvideo rok od 7 dana za poništavanje posledica stupanja u ugovorni odnos, bez troškova i objašnjenja; rok za vraćanje robe se računao od dana njenog prijema, a za usluge od dana zaključenja ugovora, i konačno, potrošač je bio dužan da plati troškove vraćanja robe.

[72] Ovaj član reguliše pravo na odustajanje od ugovora sklopljenog na radnom mestu ili u domu jedne od strana, u toku putovanja ili u okolnostima koje nisu uobičajene za sklapanje ugovora, u roku od sedam dana od njegovog zaključenja. Videti Građanski zakonik, *Sl.list RAl* br. 11/1994.

[73] Glava 6 (čl. 29–34) "Ugovori sklopljeni izvan poslovnih prostorija trgovca", *NN* br. 96/03.

[74] Glava VI (čl. 30–35) Zakon o zaštiti potrošača, *NN* br. 79/07, 125/07, 79/09, 89/09, 133/09.

[75] Glava XI (čl. 48-49) Zakon o zaštiti potrošača, *Sl.glasnik BiH* br. 17/02.

Zakon o zaštiti potrošača 2006. godine.[76] Isti scenario se ponovio i u albanskom zakonu, gde je Direktiva bila prvo transponovana u posebno poglavlje Zakona o zaštiti potrošača iz 2003. godine,[77] koga je zamenio nov Zakon o zaštiti potrošača[78] donet 2008. godine. U Makedoniji je ugovore zaključene van poslovnih prostorija regulisao Zakon o zaštiti potrošača iz 2000. godine[79], a zatim su propisi poboljšani u novom Zakonu o zaštiti potrošača koji je donet 2004. godine[80]. Crnogorski Zakon o zaštiti potrošača iz 2007[81] sadrži posebno poglavlje koje transponuje Direktivu 85/77, dok u srpskom zakonu nema odgovarajućeg transponovanja.[82] Međutim, srpski zakonodavac trenutno radi na nacrtu predloga za novi zakon o zaštiti potrošača (Nacrt predloga),[83] kojim se Direktiva 85/577 transponuje u Poglavlju III o ugovorima na daljinu i ugovorima sklopljenim van poslovnih prostorija.

II. Područje primene

U sledećem tekstu će biti dat kratak prikaz transponovanja u nacionalno pravo država učesnica člana 1. i 3. Direktive 85/577 (opšte područje primene i izuzeci), kao i člana 2. Direktive (lično područje primene). Neke od država članica, kao npr. Hrvatska, sledile su istu strukturu kakvu ima Direktiva, i prvo propisivale opšte područje primene odredbi u vezi sa prodajom van poslovnih prostorija (čl. 30. hrvatskog Zakona o zaštiti potrošača), a zatim posebno regulisale izuzetke u drugoj odredbi (čl. 31. hrvatskog Zakona o zaštiti potrošača).

1. Lica pokrivena Direktivom

U svom članu 1 (1) Direktiva 85/577 određuje da se primenjuje na "ugovore prema kojima trgovac isporučuje robu ili pruža usluge potrošaču". Zakoni koji regulišu zaštitu potrošača u većini država učesnica sadrže opštu definiciju "potrošača" i "trgovca" datu u opštim odredbama koje definišu lično područje primene za ceo zakon (npr. čl. 1 (3) i (5) bosansko-hercegovačkog Zakona o zaštiti potrošača i čl. 3 (1) hrvatskog Zakona o zaštiti potrošača).

a. Potrošač

Dok čl. 2. Direktive 85/577 definiše "potrošača" kao "fizičko lice koje (…) deluje u svrhu za koju se može smatrati da je van njegove delatnosti ili profesije, čl. 3. (1) alineja 4. hrvatskog Zakona o zaštiti potrošača definiše potrošača kao svaku fizičku osobu „koja sklapa pravni posao ili djeluje na tržištu u svrhe koje nisu namijenjene njegovoj poslovnoj djelatnosti niti obavljanju djelatnosti slobodnog zanimanja". Bosansko-hercegovački Zakon o zaštiti potrošača u svom čl. 1.3) propisuje užu definiciju, po kojoj je "potrošač svako fizičko lice koje kupuje, stiče ili koristi proizvode ili usluge za svoje lične potrebe i za potrebe svog domaćinstva". Ograničavanjem delovanja potrošača na kupovinu, sticanje i korišćenje proizvoda i

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[76] Glava IX (čl. 39-41) Zakon o zaštiti potrošača, *Sl.glasnik BiH* br. 25/06.

[77] Zakon o zaštiti potrošača, *Sl.list RAl* br. 84/03.

[78] Deo VI, Glava I (čl. 34-35) Zakona o zaštiti potrošača, *Sl.list RAl* br. 61/08.

[79] Zakon o zaštiti potrošača, *Sl.list RM* br. 63/2000.

[80] Zakon o zaštiti potrošača, *Sl.list RM* br. 38/2004.

[81] Zakon o zaštiti potrošača, *Sl.list CG* br. 26/07.

[82] Čl. 25. srpskog Zakona o zaštiti potrošača (*Sl.list RS* br. 79/05), koji nosi naslov "Kupovina na osnovu uzorka i modela", samo poimence navodi ugovore zaključene van poslovnih prostorija prodavca. Međutim, ovaj član nastoji da potvrdi čl. 538 Zakona o obligacionim odnosima (Sl.list SFRJ br. 29/78), u vezi odgovornosti prodavca za nesaobraznost u slučaju prodaje na osnovu uzoraka i modela.

[83] Nacrt predloga za novi Zakon o zaštiti potrošača (Nacrt predloga), koji je izradilo Ministarstvo trgovine i usluga Republike Srbije.

usluga, i njegovim dodatnim sužavanjem na svrhu njegovih "ličnih potreba i potreba njegovog domaćinstva", kao uslova koji moraju biti kumulativno ispunjeni, područje primene ove definicije je vrlo ograničeno.[84] Slična ali ne ista definicija potrošača nalazi se u čl. 2.1) i 2) srpskog Zakona o zaštiti potrošača, koji ga definiše kao fizičko lice koje kupuje proizvode ili usluge za sopstvene potrebe ili za potrebe svog domaćinstva.[85] U izvesnoj meri šira definicija propisana je u čl. 1., alineja 8 crnogorskog Zakona o zaštiti potrošača, koji definiše potrošača kao fizičko lice koje kupuje, poručuje, prima, koristi robe ili usluge, uključujući i javne usluge, u neposlovne, odnosno neprofesionalne svrhe ili kome je upućena ponuda za robu ili uslugu. Druga sasvim uska definicija u poređenju sa čl. 2. Direktive 85/577 uneta je u čl. 4.1) makedonskog Zakona o zaštiti potrošača koja kaže da je potrošač svako fizičko ili pravno lice koje kupuje proizvode ili koristi usluge za neposrednu sopstvenu potrošnju za ciljeve koji nisu namenjeni vršenju njegovog zanimanja ili drugih poslovnih delatnosti. Veoma širok pojam potrošača nalazi se u čl. 3. (6) albanskog Zakona o zaštiti potrošača, koji "potrošača" definiše kao svako fizičko lice koje deluje u svrhe koje nisu povezane sa trgovinom, poslovanjem ili obavljanjem svoje profesije. U smislu ovog Zakona, i neprofitne organizacije se mogu smatrati potrošačima. Može se zaključiti da je lični element definisanja potrošača (fizičko lice) zajednički svim zakonima o zaštiti potrošača u zemljama učesnicama, ali se pri tom funkcionalni element (delovanje za svrhe za koje se može smatrati da su van njegove poslovne delatnosti ili profesije) značajno razlikuje.

b. Trgovac

Prema čl. 2. Direktive 85/577 "trgovac" označava fizičko ili pravno lice koje "u datom pravnom poslu, nastupa u okviru svoje privredne ili profesionalne delatnosti, kao i svako lice koje deluje u ime ili za račun trgovca". Države učesnice su transponovale ovu definiciju iz Direktive uz određene izmene. Član 3., stav 1., alineja 8. hrvatskog Zakona o zaštiti potrošača definiše "trgovca" kao bilo koju osobu „koja sklapa pravni posao ili djeluje na tržištu u okviru svoje poslovne djelatnosti ili u okviru obavljanja djelatnosti slobodnog zanimanja". Shodno čl. 3. stav 2., u smislu Glave VI hrvatskog Zakona o zaštiti potrošača, trgovcem se smatra i osoba koja nastupa u ime ili za račun trgovca. Ova definicija obuhvata fizička i pravna lica, a ova druga uključuju i pravna lica iz oblasti javnog prava i neprofitne organizacije. Druga široka definicija pojma "trgovac" propisana je u čl. 3 (14) albanskog Zakona o zaštiti potrošača, i ona označava svako fizičko ili pravno lice koje deluje za svrhe povezane sa svojom poslovnom delatnošću, strukom, zanimanjem, poslom, zanatom ili slobodnom profesijom i svakog ko deluje u ime i za račun trgovca. Bosansko-hercegovački Zakon o zaštiti potrošača definiše trgovca u čl. 1.5) kao "svako lice koje direktno ili kao posrednik među drugim licima prodaje proizvode ili pruža usluge potrošaču". Zbog ograničenja na "prodaju proizvoda i pružanja usluga" lično polje primene je vrlo suženo.[86] Po čl. 2.3) srpskog Zakona o zaštiti potro-

[84] Međutim, čl. 15 novog nacrta Zakona o obligacionim odnosima Bosne i Hercegovine iz 2010. godine definiše potrošača kao "svako fizičko lice koje zaključuje neki pravni posao u svrhu koja ne spada u njegovu privrednu ili samostalnu profesionalnu djelatnost". Ovo je u principu široka definicija, utoliko što uključuje pravna lica, a s druge strane isključuje predugovorne situacije, jer se odnosi samo na "zaključenje pravnih poslova".

[85] Srpski Nacrt predloga u Glavi I definiše potrošača kao fizičko lice koje u pravnim poslovima na koje se odnosi ovaj zakon, postupa pretežno izvan svoje poslovne delatnosti, profesije ili zanata.

[86] Čl. 14 novog nacrta Zakona o obligacionim odnosima Bosne i Hercegovine iz 2010. godine govori o privredniku ("business person"), koga definiše kao "fizičko ili pravno lice koje u vreme zaključivanja pravnog posla deluje u vršenju svoje privredne ili samostalne profesionalne delatnosti". S jedne strane "delovanje u vršenju" nije uspešna formulacija ni na bosanskom jeziku, a s druge, isto tako, ova definicija isključuje predugovorne situacije, suprotno direktivama za zaštitu potrošača.

šača, trgovac je privredno društvo, preduzeće, drugo pravno lice i preduzetnik, koji prodaje proizvode ili pruža usluge potrošaču.[87] Član 2., alineja 11 crnogorskog Zakona o zaštiti potrošača definiše "trgovca" kao lice koje prodaje robu ili pruža usluge potrošačima. U pogledu proširenja definicije iz Direktive i na one koji deluju u ime ili za račun trgovca, crnogorski Zakon o zaštiti trgovaca ne kaže ništa.[88] Po čl. 4.1), alineja 2 makedonskog Zakona o zaštiti potrošača trgovcem se smatra svako fizičko ili pravno lice koje u vršenju svoje delatnosti neposredno zadovoljava potrebe građana za proizvodima i uslugama. Pošto ova definicija ne uključuje zastupnike, primenjuju se opšte norme o zastupnicima regulisane u makedonskom Zakonu o obligacionim odnosima[89].

2. Situacije koje spadaju u područje primene Direktive

Područje primene *ratione materiae* regulisano je u čl. 1 (1) Direktive 85/577, i obuhvata "ugovore prema kojima trgovac isporučuje robu ili pruža usluge potrošaču i koji su zaključeni: tokom putovanja koje je organizovao trgovac van svog poslovnog prostora, ili tokom posete od strane trgovca (i) domu tog potrošača ili domu drugog potrošača, ili (ii) radnom mestu potrošača, ukoliko do posete nije došlo na izričit zahtev potrošača".

a. Opšta primena

Većina država učesnica je implementirala istu vrstu ugovora i situacija kao što su ove koje spadaju u područje primene Direktive 85/577. Međutim, ponegde se koriste nešto drugačije formulacije. Isto tako, postoje značajne razlike na području primene odredbi u vezi prodaje van poslovnih prostorija nekih država učesnica. Tako na primer, po crnogorskom zakonu ugovori zaključeni tokom putovanja nisu zaštićeni transpozicionim zakonom. Osim toga, makedonski Zakon o zaštiti potrošača isključuje ugovore za pružanje usluga iz područja primene odredbi u vezi prodaje van poslovnih prostorija.[90] S druge strane, u nekim slučajevima potrošačko zakonodavstvo država učesnica proširuje područje primene svojih odredbi u vezi prodaje van poslovnih prostorija, i time ide dalje od odredbi Direktive. Npr. odredbe u vezi prodaje van poslovnih prostorija hrvatskog Zakona o zaštiti potrošača primenjuju se i ako je potrošač ponudio zaključenje ugovora u predmetnim situacijama. Konačno, nacionalni sudovi u državama učesnicima, iako još nisu u državama članicama EU, bi osim Direktive, trebalo da poštuju i odluke ESP u predmetu *Travel VAC*, C-423/97 i *Crailsheimer Volksbank*, C-229/04.[91]

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[87] Srpski Nacrt predloga definiše trgovca kao pravno ili fizičko lice koje, u pravnim odnosima na koje se odnosi ovaj zakon, postupa u okviru svoje poslovne delatnosti, profesije ili zanata, kao i svako koje deluje u ime i za račun trgovca.

[88] Ipak, čl. 17.2) Zakona o unutrašnjoj trgovini (*Sl.list RCG* br. 49/08) koji reguliše "trgovinu van poslovnih prostorija", određuje da distancionu prodaju trgovac može obavljati neposredno ili preko lica kojima izdaje ovlašćenje za prodaju robe potrošačima. Čl. 17.3) dalje određuje da prodaju van poslovnih prostorija mogu obavljati trgovci registrovani za ovaj oblik trgovine, i ovaj Zakon dodatno obavezuje Ministarstvo privrede Crne Gore da donese podzakonska akta o vrstama robe i načinu za obavljanje trgovine van poslovnih prostorija.

[89] Zakon o obligacionim odnosima, *Sl.list RM* br. 18/2001

[90] Član 104. Zakona o zaštiti potrošača, *Sl.list RM* br. 38/2004

[91] Presuda ESP od 22.04.1999, u predmetu C-423/97 – *Travel Vac SL protiv Manuel José Antelm Sanchi* [1999] ECR I-02195; Presuda ESP od 25.11.2005., u predmetu C-229/04 - *Crailsheimer Volksbank eG protiv Klaus Conrads, Frank Schulzke and Petra Schulzke-Lösche, Joachim Nitschke* [2005] ECR I-9273.

aa. Proširenje spiska situacija prodaje van poslovnih prostorija

Dok su neke države učesnice proširile listu situacija u kojima su potrošači zaštićeni, druge su je suzile. Lista situacija prodaje van poslovnih prostorija data u čl. 30 (1) hrvatskog Zakona o zaštiti potrošača odgovara odredbama Direktive predviđajući primenu odredbi u vezi prodaje van poslovnih prostorija na "ugovore koji su sklopljeni u vrijeme izleta koji je organizirao trgovac izvan njegovih poslovnih prostorija, u vrijeme posjeta trgovca domu potrošača, domu drugog potrošača ili radnome mjestu potrošača". Član 39.1) bosansko-hercegovačkog Zakona o zaštiti potrošača transponuje čl. 1.1) Direktive 85/577 gotovo istim rečima, uz neznatnu razliku u odnosu na formulaciju iz Direktive koja glasi "tokom putovanja (izleta) koje je organizovao trgovac van svog poslovnog prostora", tako da u čl. 39.1) bosansko-hercegovačkog Zakona o zaštiti potrošača ona glasi: "u toku poslovnog puta trgovca van njegovih poslovnih prostorija". Međutim, značajno proširenje zaštite potrošača ostvaruje se kroz uključivanje "ugovora zaključenih kao rezultat neočekivanog pristupa trgovca potrošaču u sredstvima javnog prijevoza ili na bilo kom drugom javnom mjestu." Makedonski Zakon o zaštiti potrošača u svom čl. 104. obuhvata ugovore zaključene: u domu potrošača; u domu nekog drugog potrošača ili na radnom mestu potrošača, kada poseta trgovca nije bila organizovana na izričit poziv potrošača; za vreme putovanja ili ekskurzija organizovanih od strane trgovca ili u njegovo ime; i u prodajnim salonima, na sajmovima i izložbama, osim kada se ukupna cena proizvoda ili usluga naplaćuje na licu mesta, ili ako cena nadmašuje 2.500 EUR u denarskoj protiv-vrednosti. Poslednjom rečenicom se proširuje lista situacija prodaja van poslovnih prostorija iz Direktive. Član 34. (1) tačka a) i b) albanskog Zakona o zaštiti potrošača odgovara čl. 1 (1) Direktive 85/577 i uključuje ugovore zaključene u toku putovanja organizovanih od strane trgovca van njegovih poslovnih prostorija, ili tokom posete trgovca domu potrošača ili radnom mestu potrošača, kada takva poseta nije organizovana na izričit zahtev potrošača. Crnogorski Zakon o zaštiti potrošača proširuje listu situacija prodaje van poslovnih prostorija obuhvatanjem ugovora zaključenih na javnim mestima, odnosno mestima koja su svima dostupna kao što su ulice, trgovi, parkovi, plaže, marine i javne površine.[92] Iako srpski Zakon o zaštiti potrošača ne transponuje Direktivu 85/577, odredbe nacrta predloga za novi zakon o zaštiti potrošača uključuju ugovore zaključene van poslovnih prostorija uz istovremeno fizičko prisustvo trgovca i potrošača (a), kao i ugovore o prodaji robe ili pružanju usluga o čijem zaključenju su vođeni pregovori ili za čije zaključenje je potrošač učinio ponudu izvan poslovnih prostorija trgovca uz istovremeno fizičko prisustvo trgovca i potrošača (b).

bb. Roba i usluge

Neke države učesnice u svojim transpozicionim zakonima upućuju na robu i usluge bez njihovog daljeg objašnjenja. Na primer, čl. 39.1) bosansko-hercegovačkog Zakona o zaštiti potrošača bukvalno prenosi formulaciju iz čl. 1 (1) Direktive 85/577, koja navodi "ugovore po osnovu kojih trgovac prodaje robu ili usluge potrošaču". Srpski nacrt predloga za novi zakon o zaštiti potrošača govori o ugovorima o prodaji ili uslugama. Međutim, ima i nekih izuzetaka kao u čl. 30. (1) hrvatskog Zakona o zaštiti potrošača, koji ide dalje od nivoa zaštite potrošača iz Direktive time što propisuje da se "odredbe ove glave Zakona primjenjuju na ugovore". U nekim odredbama u vezi prodaje van poslovnih prostorija koristi se pojam "proizvod", koji se u čl. 3. (1) alineja 4. definiše kao svaka roba ili usluga, uključujući nekretni-

[92] Međutim, on ne pokriva posebne načine redovne prodaje na "drugim prodajnim mestima" (npr. štandovi, pokretne prodavnice, otvorene ili zatvorene tržnice, sajmove, izložbe, itd.) u skladu sa čl. 15 Zakona o unutrašnjoj trgovini (*Sl.list RCG* br. 49/08).

ne, prava i obveze. Isto tako, crnogorski Zakon o zaštiti potrošača, osim što govori o robi i uslugama, koristi i pojam "proizvod", koji se definiše kao "roba ili usluga koja može biti u prometu uključujući i javne usluge". Na sličan način albanski Zakon o zaštiti potrošača, koji govori samo o "ugovorima", daje i definicije "potrošačke robe" i "usluga" u svojim opštim odredbama. U skladu sa čl. 3. (7), "'potrošačka roba', u daljem tekstu: 'roba' (uključujući robu upotrebljenu u kontekstu pružanja usluga) znači svaku pokretnu ili nepokretnu stvar namenjenu potrošačima ili koju će verovatno koristiti potrošači, pod razumno predvidivim uslovima, koju će koristiti potrošači čak iako nije bila njima namenjena, a pruža se ili stavlja na raspolaganje, bilo sa ili bez naknade, u toku poslovne delatnosti, bilo kao nova, korišćena ili popravljena". "Usluga" je usluga određena za nuđenje potrošaču, na bilo koji od načina predviđenih albanskim Građanskim zakonikom.[93] Makedonski Zakon o zaštiti potrošača u svom čl. 104. govori samo o ugovorima o prodaji, i time moguće isključuje ugovore o pružanju usluga iz svog područja primene. Međutim, u nekim drugim relevantnim odredbama u vezi prodaje van poslovnih prostorija, on govori i o proizvodima i uslugama, kao što je slučaj i u čl. 105. Ovaj Zakon takođe definiše robu ili proizvode kao bilo koju robu ili predmet bez obzira na stepen njihove obrade, namenjen za ponuda potrošačima; a usluga je bilo koja delatnost koja je namenjena za ponudu potrošačima.

cc. Ponude i/ili jednostrani pravni akti

Stavovi 3) i 4) člana 1. Direktive 85/577 koji daju mogućnost potrošaču da odustane od ponude date u situaciji prodaje van prodajnih prostorija, bez obzira da li je ponuda obavezujuća ili ne, transponovani su gotovo doslovce u čl. 30 (2) hrvatskog Zakona o zaštiti potrošača. Isto važi za albanski Zakon o zaštiti potrošača, po kome se, shodno njegovom čl. 34. (1), odredbe u vezi prodaje van poslovnih prostorija primenjuju i na situacije kada je ponudu dao potrošač, bez obzira da li je potrošač vezan sopstvenom ponudom. Transpozicioni zakoni Bosne i Hercegovine, Crne Gore i Makedonije nemaju takve odredbe. Tako se primenjuju samo opšte norme o obavezujućem delovanju ponude predviđene u njihovim obligacionim zakonima.

dd. Ugovori o kojima je pregovarano u situaciji van poslovnih prostorija a koji su zaključeni kasnije

Nijedan od transpozicionih zakona ni u jednoj od država učesnica ne sadrži posebne odredbe o ugovorima o kojima je pregovarano u situaciji van poslovnih prostorija, a koji su zaključeni kasnije.

ee. Posete na zahtev potrošača

Što se tiče čl. 1. (2) Direktive 85/577 koji se bavi posetama na zahtev potrošača, u transpozicionim zakonima se mogu naći različite odredbe. Na primer, čl. 39.1) bosansko-hercegovačkog Zakona o zaštiti potrošača primenjuje se samo na netražene posete i on ne prenosi čl. 1.2) Direktive. Nivo zaštite potrošača je viši u hrvatskom Zakonu o zaštiti potrošača, koji ne prenosi čl. 1 (2) Direktive 85/577, ali ni ne implementira uslov iz čl. 1 (1) Direktive 85/577, da do posete nije došlo na izričit zahtev potrošača. U skladu sa čl. 106.1), alineja 1. makedonskog Zakona o zaštiti potrošača, ugovori zaključeni van poslovnih prostorija po prethodnoj poseti potrošača isključuju se iz oblasti primene. Međutim, norme u vezi prodaje van poslovnih prostorija se primenjuju ako se potrošač saglasio sa posetom koju mu je trgovac ponudio preko telefona. Član 48.3) crnogorskog Zakona o zaštiti potrošača ugrađuje ovu odredbu Direktive gotovo doslovce, predviđajući primenu zaštitnih odredbi na "poset trgovca na izričit

[93] Član 3. (13) Zakona o zaštiti potrošača, *Sl.list RAl* br. 61/08.

zahtjev potrošača, kada je ugovor zaključen za proizvod za koji potrošač nije znao ili nije mogao znati da se nalazi u ponudi trgovca u okviru njegove djelatnosti". Odredbe o prodaji van poslovnih prostorija albanskog Zakona o zaštiti potrošača ne primenjuju se na situacije kada je do posete došlo na zahtev potrošača, s izuzetkom ugovora za prodaju druge robe ili pružanje drugih usluga od onih zbog koje je potrošač tražio posetu trgovca, pod uslovom da onda kada je tražio posetu potrošač nije znao, ili razumno nije mogao da zna da prodaja te druge robe ili usluga čini sastavni deo trgovčevih poslovnih ili profesionalnih aktivnosti.

b. Izuzeci predviđeni u Direktivi u vezi prodaje van poslovnih prostorija

aa. čl. 3. stav 1. (Ugovori vrednosti ispod 60 ECU)

Hrvatski, makedonski i bosansko-hercegovački zakonodavac nisu preneli mogućnost datu u čl. 3.1) Direktive 85/577 po kome se odredbe o ugovorima sklopljenim van poslovnih prostorija ne primenjuju na ugovore vrednosti ispod 60 EKU. Crna Gora je upotrebila ovu mogućnost i odredila limit na tačno 60 evra. Član 34.1) albanskog Zakona o zaštiti potrošača određuje da se odredbe u vezi prodaje van poslovnih prostorija ne primenjuju na ugovore čija je vrednost manja od 7000 leka.

bb. član 3. stav 2.

Države učesnice nisu dosledno koristile mogućnost ograničavanja područja primene kako je određeno u čl. 3. (2) Direktive 85/577. Na primer, po hrvatskom transpozicionom zakonu situacije predviđene u čl. 3. (2) Direktive 85/577 izuzete su od zaštite.[94] Međutim, čl. 31. (2) hrvatskog Zakona o zaštiti potrošača propisuje primenu svojih odredbi u vezi prodaje van poslovnih prostorija na ugovore o prodaji proizvoda namenjenog njegovoj ugradnji u nekretninu, kao i na ugovore o građenju kojima je svrha popravak ili obnova nekretnine. Nasuprot tome, bosansko-hercegovački Zakon o zaštiti potrošača ne transponuje ovu odredbu Direktive. Crnogorski Zakon o zaštiti potrošača implementira ovu odredbu, s jednom razlikom u vezi isporuke prehrambenih proizvoda, pića ili druge robe namenjene tekućoj upotrebi u domaćinstvu, utoliko što čl. 54.3) ne propisuje da robu isporučuje "redovan dostavljač". Član 34., stav 2., tačka a) i b) albanskog Zakona o zaštiti potrošača izuzima samo ugovore o građenju, prodaji ili zakupu nepokretnosti i ugovore koji se tiču drugih prava na nepokretnostima, kao i ugovore o isporuci prehrambenih proizvoda, pića ili druge robe namijenjene tekućoj upotrebi u domaćinstvu koje isporučuju redovni dostavljači. Koristeći nešto drugačiju formulaciju, makedonski Zakon o zaštiti potrošača isključuje istu listu ugovora kao čl. 3.2) Direktive 85/577, ali dodaje kao još jedan izuzetak prodaju koja je rezultat prezentacije proizvoda pod uslovima utvrđenim zakonom koji nemaju komercijalni karakter, kao i za dobrotvorne – humanitarne ciljeve, ako cena ne nadmašuje 500 EUR u denarskoj protivvrednost. Srpski Nacrt predloga za novi zakon o zaštiti potrošača predviđa transponovanje samo dva izuzetka iz čl. 3.2) Direktive 85/577, naime ugovore koji se odnose na osiguranje i ugovore za isporuku hrane ili pića koje trgovac redovno dostavlja potrošačima u blizini svojih poslovnih prostorija. Međutim, on ide dalje od zahteva Direktive propisujući da se izuzimaju ugovori koji se odnose na finansijske usluge čija cena zavisi od promena na finansijskom tržištu koje su izvan kontrole trgovca, a mogu se dogoditi u vremenu u kome je potrošaču garantovano pravo na jednostrani raskid, ugovori o potrošačkim kreditima, ugovori zaključeni upotrebom automata za prodaju ili u poslovnim prostorijama koje su automatizovane, i ugovori zaključeni sa operaterima telekomunikacija upotrebom javnih telefonskih govornica.

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[94] Član 31. (1) Zakona o zaštiti potrošača, *NN* br. 79/07, 125/07, 79/09, 89/09, 133/09.

c. Teret dokazivanja

Većina transpozicionih zakona država učesnica ne sadrži posebne odredbe o teretu dokazivanja u pogledu ugovora o prodaji zaključenih van poslovnih prostorija. Međutim, oni često propisuju opšte norme o teretu dokazivanja, kao čl. 5.3) crnogorskog Zakona o zaštiti potrošača po kome ako je sporno da li je potrošač ispunio uslov u vezi roka za ostvarivanje prava, smatraće se da je potrošač ispunio taj uslov. Srpski Nacrt predloga za novi zakon o zaštiti potrošača određuje opštu normu po kojoj na trgovcu leži teret dokazivanja da je izvršio opštu predugovornu obavezu obaveštavanja potrošača. Hrvatski Zakon o zaštiti potrošača sadrži samo jednu odredbu u vezi tereta dokazivanja, koja je data u poglavlju u vezi prodaje van poslovnih prostorija, naime čl. 32. (5) predviđa da je u slučaju spora trgovac dužan dokazati da je potrošaču na vreme predao obavest o pravu na raskid ugovora. Posebne norme posvećene teretu dokazivanja određene su i u čl. 41.3) i 4) bosansko-hercegovačkog Zakona o zaštiti potrošača. U skladu sa njegovim čl. 41.4) "teret dokazivanja bit će obaveza trgovca od momenta nastupanja roka za raskid ugovora".[95] Osim toga, u skladu sa čl. 40.3) "u slučaju spora trgovac je dužan dokazati da je potrošaču na vrijeme predao obavještenje iz ovog člana", odnosno obaveštenje o pravu na raskid ugovora".[96]

III. Instrumenti za zaštitu potrošača

1. Zahtevi vezani za obaveštavanje

Države učesnice, s izuzetkom Srbije, preuzele su obavezu trgovca po čl. 4. Direktive 85/577 da potrošačima daju pisano obaveštenje o njihovom pravu da raskinu ugovor. Član 32 (3) hrvatskog Zakona o zaštiti potrošača dodatno predviđa da ukoliko je obavest o pravu na raskid sastavni deo ugovora, tada mora da bude posebno istaknuta i napisana na isti način kao i ostale odredbe ugovora. Ova obavest mora biti uručena potrošaču najkasnije u trenutku sklapanja ugovora. Albanski zakon zahteva da se obaveštenje potrošaču daje u vidu posebnog dokumenta, koji sadrži samo obaveštenje i koji je odvojen je od eventualnih opštih uslova ugovora. Takvo obaveštenje mora da bude dato pre zaključivanja ugovora ili u vreme kada ponudu daje potrošač.[97] Čl. 50.1) crnogorskog Zakona o zaštiti potrošača predviđa da pisano obaveštenje treba da bude dato do zaključenja ugovora i da opciono može da bude dato i u elektronskoj formi. Poglavlje II, Deo 2 srpskog Nacrta predloga za novi zakon o zaštiti potrošača predviđa dužnost obaveštavanja potrošača pre zaključivanja ugovora o postojanju prava potrošača na jednostrani raskid ugovora, ili o nepostojanju takvog prava. U slučaju zaključenja ugovora, ovo obaveštenje treba da bude sastavni deo ugovora.

Transpozicioni zakoni država učesnica se razlikuju u pogledu sadržine potrebnog obaveštenja. Prema čl. 34. hrvatskog Zakona o zaštiti potrošača kao i čl. 40. bosansko-hercegovač-

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[95] Na taj način, u skladu sa čl. 41.1), s jedne strane, potrošač ima pravo da raskine ugovor u roku od 15 dana od dana zaključenja ugovora a, s druge strane, trgovac je obavezan dati potrošačima pisano obavještenje o njihovom pravu da raskinu ugovor u roku od 15 dana od dana zaključenja ugovora. Kao rezultat toga, rok za podnošenje obaveštenja i rok za raskid ugovora počinju u isto vreme, odnosno od momenta zaključenja ugovora. Stoga teret dokazivanja leži na trgovcu od momenta zaključenja ugovora.

[96] Teret dokazivanja je uspešnije rešen u čl. 146. stav 5) novog nacrta Zakona o obligacionim odnosima Bosne i Hercegovine iz 2010. godine, u okviru Poglavlju pod nazivom "Pravo opoziva i povrata kod potrošačkih ugovora". Ovaj član određuje da je "na privredniku teret dokazivanja na okolnost početka roka za opoziv".

[97] Odluka Saveta ministara o ugovorima zaključenim van poslovnih prostorija, br. 63. od 21.01.2009., *Sl.list RAl* br. 8/09 (tačka 3, a, b).

kog Zakona o zaštiti potrošača[98], obaveštenje treba da sadrži ime, odnosno tvrtku ili naziv trgovca, njegovu adresu, datum slanja obaveštenja, podatke potrebne radi identifikacije ugovora, posebno naznaku ugovornih strana i predmet ugovora i njegovu cijenu, kao i rok za raskid ugovora. Prema crnogorskom Zakonu o zaštiti potrošača, osim obaveštenja o pravu na jednostrani raskid, trgovac je obavezan da dostavi podatke o sebi, proizvodu koji je predmet ugovora i njegovoj cijeni, o datumu dostave potrošaču,[99] i drugim bitnim elementima ugovora. Albanski Zakon o zaštiti potrošača obavezuje trgovca da potrošaču da pisano obaveštenje, napisano na jasan i razumljiv način, o pravu potrošača na jednostrani raskid ugovora, zajedno sa drugim relevantnim informacijama,[100] uključujući ime i adresu lica protiv kojeg to pravo može da se primeni. Takvo obaveštenje treba da nosi datum i navede posebne podatke koji omogućuju identifikaciju ugovora. Sadržaj potrebnog obaveštenja je određen u čl. 107 makedonskog Zakona o zaštiti potrošača, koji predviđa da je u slučaju zaključenja ugovora trgovac dužan da obavesti potrošača u pisanoj formi o njegovom pravu na jednostrani raskid ugovora putem izjave, u roku koji ne može da bude kraći od sedam dana od dana sklapanja ugovora. Obaveštenje mora da sadrži podatke o adresi na koju može da se pošalje izjava o jednostranom raskidu ugovora.[101]

Srpski Nacrt predloga za novi zakon o zaštiti potrošača pravi razliku između trgovčeve opšte preudgovorne obaveze obaveštavanja, navodeći pojedinačna obaveštenja koja je trgovac dužan da da potrošaču pre zaključenja ugovora o prodaji robe ili pružanju usluga[102], uključujući posebne obaveze posrednika u pogledu obaveštavanja[103], i dodatna obaveštenja koja

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[98] Prema čl. 146.3) novog nacrta Zakona o obligacionim odnosima Bosne i Hercegovine rok za raskid počinje od kada privrednik da potrošaču obaveštenje sa "punom informacijom" o njegovom pravu na opoziv ugovora.

[99] Član 50.2) Zakona o zaštiti potrošača, *Sl.list CG* br. 26/07.

[100] Član 35.3) Zakona o zaštiti potrošača, *Sl.list RAl* br. 61/08.

[101] Dodatno uz čl. 105.3) makedonskog Zakona o zaštiti potrošača, u slučaju sklapanja ugovora van poslovnih prostorija, trgovac mora da se legitimiše pokazivanjem lične karte.

[102] Pre zaključenja ugovora o prodaji robe ili pružanju usluga, trgovac je dužan da potrošača obavesti o sledećim pojedinostima, ako te pojedinosti nisu očigledne iz konteksta: (1) osnovna obeležja robe ili usluga; (2) fizička adresa i podaci koji su od značaja za utvrđivanje identiteta trgovca, ka što je ime trgovca i, ako je potrebno, ime trgovca u čije ime on postupa (u slučaju javne aukcije, ove pojedinosti mogu da budu zamenjene fizičkom adresom i identitetom aukcionara); (3) cena koja uključuje porez; a ako je priroda proizvoda takva da se cena ne može razumno pretpostaviti, onda način na koji će se cena izračunati; kao i svi dodatni poštanski troškovi i troškovi transporta i isporuke po potrebi; ili, u slučaju da se pomenuti dodatni troškovi ne mogu razumno pretpostaviti, činjenica da se ovakvi troškovi mogu staviti potrošaču na teret; (4) način plaćanja, način i rok isporuke, izvršenja drugih ugovornih obaveza, kao i način na koji se postupa po pritužbama potrošača (5) postojanje prava potrošača na jednostrani raskid ugovora kao i nepostojanje takvog prava; (6) postojanje postprodajnog servisa i ugovorne garancije, i uslovi pod kojima potrošač ima pravo na njih; (7) vreme na koje je ugovor zaključen, ako je to prikladno; ili, ako je ugovor zaključen na neodređeno vreme, uslovi za prestanak ugovora; (8) minimalno trajanje ugovorne obaveze potrošača, po potrebi; (9) obaveza potrošača da položi depozit ili drugi vid obezbeđenja na zahtev trgovca, i uslovi pod kojima ova obaveza postoji. U slučaju da ugovor bude zaključen, obaveštenja o ovim pojedinostima predstavljaju njegov sastavni deo. Trgovac je dužan da obavezu obaveštavanja potrošača o ovim pojedinostima izvrši u skladu sa načelom savesnosti i poštenja.

[103] Pre zaključenja ugovora sa potrošačem, nalogoprimac ima obavezu da obavesti potrošača o tome da postupa u ime i za račun drugog potrošača; da ugovor ne zaključuju trgovac i potrošač, nego dva potrošača; i da se na takav ugovor ne mogu odnositi odredbe zakona čiji je cilj zaštita potrošača u ugovornom odnosu s trgovcem. Za nalogodavca koji ne ispuni ovu obavezu smatra se da je zaključio ugovor s potrošačem u vlastito ime. Ova odredba se ne primenjuje na javne aukcije.

trgovac treba da da u slučaju ugovora zaključenih van poslovnih prostorija. U skladu sa odredbama Poglavlja III Nacrta predloga, u slučaju ugovora zaključenih izvan poslovnih prostorija trgovac je dužan da pruži obaveštenja o sledećim pojedinostima, koje predstavljaju sastavni deo ugovora: 1) uslovi i postupak prema kojima se ostvaruje pravo na jednostrani raskid; 2) fizička adresa na kojoj trgovac posluje, ako je različita od adrese na kojoj je registrovan, a tamo gde je prikladno adresa trgovca u čije ime on postupa na koju potrošač može da uputi pritužbe; 3) postojanje kodeksa ponašanja koji obavezuju trgovca, i način na koji mu se može pristupiti; 4) cena upotrebe sredstava komunikacije na daljinu, ako se ne obračunava po osnovnoj tarifi; 5) da potrošač stupa u ugovorni odnos s trgovcem, i da u takvom ugovornom odnosu uživa zaštitu koja je potrošačima garantovana zakonom; 6) da pravo na jednostrani raskid ne važi ako je, uz izričitu saglasnost potrošača, trgovac započeo pružanje usluga pre isteka vremena u kome je dozvoljen jednostrani raskid; 7) mogućnost vansudskog rešavanja sporova tamo gde je to prikladno. Trgovac je dužan da potrošaču preda obrazac za raskid ugovora, kako bi mu olakšao korišćenje prava na jednostrani raskid.[104] Sadržinu obrasca za raskid ugovora će propisati Vlada Republike Srbije, na predlog ministarstva nadležnog za poslove zaštite potrošača, u roku od tri meseca od donošenja novog Zakona o zaštiti potrošača.

Što se tiče sankcija za kršenje obaveze obaveštavanja potrošača o njegovom pravu na jednostrani raskid, propisi o zaštiti potrošača država učesnica idu od ne predviđanja sankcija (Srbija i Bosna i Hercegovina) do vremenski neograničenog prava potrošača da raskine ugovor[105] i novčanih kazni do cca. 13700 EUR (Hrvatska). U Hrvatskoj nadležni inspektor će rešenjem narediti trgovcu otklanjanje utvrđene nepravilnosti određujući rok u kojem se ta nepravilnost mora ukloniti (čl. 143. (3) alineja 8. Zakona o zaštiti potrošača). Za kršenje navedene odredbe hrvatski zakon propisuje novčane kazne u iznosu od 5.000,00 do 100.000,00 kuna (cca. EUR 685 do 13700)[106] i predviđa mogućnost pokretanja postupka za zaštitu kolek-

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[104] Zajedno s obrascem, trgovac je dužan da potrošaču pruži obaveštenje o sledećim pojedinostima: 1) ime, fizička adresa i adresa elektronske pošte trgovca, na koju potrošač šalje obrazac za raskid ugovora; 2) izjavu da potrošač ima pravo na raskid, i da ugovor može raskinuti slanjem obrasca za raskid ugovora trgovcu, na trajnom nosaču zapisa u roku od četrnaest dana od kada je potrošač potpisao porudžbenicu (ovo se primenjuje na ugovore zaključene izvan poslovnih prostorija, a postoje posebne odredbe za ugovore na daljinu i ugovore o pružanju usluga); 3) kod ugovora na daljinu i ugovora zaključenih van poslovnih prostorija, izjavu kojom se potrošač obaveštava o načinu i roku za vraćanje primljene robe trgovcu; (4) izjavu da potrošač može da upotrebi standardni obrazac za raskid ugovora; 5) izjavu da se slanje primljene robe nazad trgovcu u roku u kome potrošač može jednostrano raskinuti ugovor, smatra kao blagovremena izjava o raskidu. U slučaju ugovora zaključenih izvan poslovnih prostorija, pomenuta obaveštenja moraju biti čitko napisana na porudžbenici, jednostavnim i razumljivim jezikom. Ugovor zaključen izvan poslovnih prostorija smatra se zaključenim kada potrošač potpiše porudžbenicu a u slučaju da porudžbenica nije u papirnom obliku, kada potrošač primi kopiju popunjene porudžbenice odštampanu na papiru ili, ako se potrošač s tim saglasio, kada potrošač primi kopiju porudžbenice na trajnom nosaču zapisa. Porudžbenica sadrži standardni obrazac za raskid ugovora.

[105] Član 34. Zakona o zaštiti potrošača, *NN* br. 79/07, 125/07, 79/09, 89/09, 133/09.

[106] Novčanom kaznom u iznosu od 10.000,00 do 100.000,00 kuna (cca. EUR 1370 do 13700) kaznit će se za prekršaj pravna osoba ako – potrošač najkasnije u trenutku zaključivanja ugovora ne dobije pisanu obavijest o njegovom pravu na otkazivanje ugovora zaključenog izvan poslovnih prostorija trgovca (čl. 144. (1) 22. alineja Zakona o zaštiti potrošača). Za isti prekršaj, fizičko lice će biti kažnjeno novčanom kaznom u iznosu 5.000,00 do 15.000,00 kuna (cca. EUR 685 do 13700) (čl. 144. (3) Zakona o zaštiti potrošača). Novčanom kaznom u iznosu od 15.000,00 do 100.000,00 kuna (cca. EUR 1370 do 13700) kaznit će se za prekršaj pravna osoba ako potrošaču ne preda ili preda nepotpunu obavijest o pravu na raskid ugovora (čl. 145. (1) 19. alineja Zakona o zaštiti potrošača). U skladu sa čl. 145. (3) Zakona o zaštiti potrošača, za isti prekršaj fizičko lice će biti kažnjeno novčanom kaznom u iznosu 5.000,00 do 15.000,00 kuna (cca. EUR 685 do 13700).

tivnih interesa potrošača protiv lica koje deluje suprotno pomenutim odredbama.[107] Crnogorski Zakon o zaštiti potrošača predviđa rok za primenu prava na jednostrano raskidanje ugovora od tri meseca od dana zaključenja ugovora, ukoliko obaveštenje nije dato, odnosno od 7 dana od ispunjenja ove obaveze ako obaveštenje nije dato odmah, već u roku od 3 meseca od dana zaključenja ugovora[108]. Ako trgovac ne ispuni ove odredbe, može da bude kažnjen novčanom kaznom, a, ukoliko je pravno lice, posebnom kaznom će biti kažnjeno i odgovorno lice[109]. Prema čl. 57. (2) albanskog Zakona o zaštiti potrošača, ukoliko se trgovac ne pridržava pomenutih odredbi u vezi obaveze obaveštavanja, Komisija za zaštitu potrošača može da mu odredi novčanu kaznu do 70.000 leka[110]. Makedonski zakon definiše novčane kazne za neispunjavanje zahteva u pogledu obaveštavanja, koje se određuju u prekršajnom postupku. Konkretno, novčanom kaznom u iznosu od 3.500,00 do 5.000,00 evra u denarskoj protiv-vrednosti kazniće se pravno lice, a u iznosu od 500 do 800 evra fizičko lice, koje zaključi ugovor a potrošaču ne pokaže svoju ličnu kartu.

Ni jedna od država učesnica ne predviđa ništavost ugovora kao sankciju u slučaju da trgovac potrošaču ne da potrebno obaveštenje. U svim državama učesnicama poništavanje ugovora i odšteta se mogu zahtevati u skladu sa opšte važećim odredbama njihovih Građanskih zakonika ili Zakona o obligacionim odnosima.

2. Pravo na odustanak

Zakon o zaštiti potrošača Bosne i Hercegovine govori o "raskidu ugovora" a čl. 172.1) Nacrta Zakona o obligacionim odnosima Bosne i Hercegovine iz 2006. godine[111] i čl. 146.1) Nacrta Zakona o obligacionim odnosima Bosne i Hercegovine iz 2010. godine u Poglavlju "Pravo opoziva i povrata u potrošačkim ugovorima" govori o pravu potrošača da opozove "izjavu volje upravljenu na zaključenje ugovora". Međutim, prema čl. 148.1) poslednjeg Nacrta Zakona o obligacionim odnosima iz 2010. godine (kao i čl. 174.1) Nacrta Zakona o obligacionim odnosima iz 2006. godine), kod primene prava na opoziv i povrat robe, primenjuju se (opšte) odredbe u vezi raskida ugovora. Shodno tome, zakonodavac Bosne i Hercegovine priznao je pravo na opoziv kao jedan od oblika prava na raskid ugovora.[112] Hrvatski Zakon o zaštiti potrošača takođe govori o 'raskidu' a ne 'povlačenju'.[113]

a. Trajanje roka za odustanak

U Albaniji, Bosni i Hercegovini i Hrvatskoj primena minimalne harmonizacije u pogledu trajanja roka za povlačenje garantuje viši nivo zaštite nego Direktiva 85/577. Prema čl. 35. (1) albanskog Zakona o zaštiti potrošača potrošač može da poništi posledice stupanja u ugo-

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[107] Član 131. *et seq.* Zakona o zaštiti potrošača, *NN* br. 79/07, 125/07, 79/09, 89/09, 133/09.

[108] Član 51.2) i 3) Zakona o zaštiti potrošača, *Sl.list RCG* br. 26/07.

[109] Član 129.1) 16. alineja i 2) Zakona o zaštiti potrošača, *Sl.list RCG* br. 26/07.

[110] 70.000 leka = oko. 600 €.

[111] Nacrt Zakona o obligacionim odnosima iz 2006. godine nikad nije usvojen zbog nepostojanja volje političkih predstavnika Republike Srpske za donošenje Zakona o obligacionim odnosima na državnom nivou. Nije izvesno da li će biti više političke volje da se podrži nacrt Zakona o obligacionim odnosima iz 2010. godine.

[112] B. Morait, A. Bikić, *Objašnjenja uz Nacrt Zakona o obligacionim odnosima*, u saradnji sa GTZ-om, Sarajevo 2006, str. 30.

[113] Posebno u vezi ovog problema videti sledeće: S. Šarčević, E. Čikara, "European vs National Terminology in Croatian Legislation Transposing EU Directives", u S. Šarčević (ur.), *Legal Language in Action: Translation, Terminology, Drafting and Procedural Issues,* Globus, Zagreb 2009., str. 209.

vorni odnos u roku od četrnaest kalendarskih dana. Zakon o zaštiti potrošača Bosne i Hercegovine određuje u čl. 41.1) da potrošač ima pravo da ne prihvati posledice ugovora na način da pošalje pisano obaveštenje trgovcu u roku od 15 dana od dana zaključenja ugovora. U skladu sa čl. 33. (1) hrvatskog Zakona o zaštiti potrošača potrošač ima pravo, ne navodeći razloge za to, da jednostrano raskine ugovor sklopljen van poslovnih prostorija u roku od 14 dana od dana prijema pisane obavesti iz člana 32. Zakona o zaštiti potrošača. U Makedoniji rok za povlačenje ne može da bude kraći od 7 dana, a crnogorski Zakon o zaštiti potrošača predviđa isti rok ali eksplicitno govori o sedam radnih dana. Srpski zakon ne sadrži odredbe kojima se transponuje Direktiva o ugovorima sklopljenim van poslovnih prostorija. Srpski Nacrt predloga za novi zakon o zaštiti potrošača određuje rok od četrnaest dana za odustanak.

b. Početak roka za odustanak

Iako čl. 5. Direktive 85/577 kaže da potrošač ima pravo da poništi posledice stupanja u ugovorni odnos time što će poslati obaveštenje u roku koji ne može biti kraći od sedam dana od dana prijema obaveštenja o pravu na raskid, u Hrvatskoj rok za povlačenje počinje da teče od prijema pisane obavesti u vezi prava na raskid ugovora, odnosno najkasnije u trenutku sklapanja ugovora (čl. 33. (1) hrvatskog Zakona o zaštiti potrošača). Ako trgovac potrošaču ne da obaveštenje o njegovom pravu, pravo potrošača na raskid ugovora tada neće biti vremenski ograničeno (čl. 34. hrvatskog Zakona o zaštiti potrošača). Ova odredba je u skladu sa presudama ESP-a u predmetima *Heininger* i *Hamilton*.[114] Crnogorski Zakon o zaštiti potrošača takođe pomera vreme od kada počinje da teče rok za povlačenje u slučaju kada obaveštenje nije bilo dato, određujući u članu 51.2) i 3) da potrošač ima pravo da jednostrano raskine ugovor, u roku od tri mjeseca od dana zaključenja ugovora, ukoliko obaveštenje uopšte nije dato, odnosno u roku d 7 dana od dana kada trgovac ispuni ovu obavezu ukoliko obaveštenje nije bilo dato odmah već u roku od tri meseca od dana zaključenja ugovora. Međutim, ni gore pomenute odredbe crnogorskog Zakona o zaštiti potrošača, ni transpozicioni zakoni Albanije[115], Bosne i Hercegovine i Makedonije, koji ne pomeraju početak roka za povlačenje u slučaju kada obaveštenje nije bilo dato, nisu u skladu sa sudskom praksom ESP u predmetu *Heininger* i *Hamilton*. U Albaniji, Bosni i Hercegovini i Makedoniji rok za povlačenje počinje da teče od dana zaključenja ugovora, bez obzira na eventualno kršenje obaveze trgovca da dostavi pisano obaveštenje. Shodno tome, ovi zakoni krše čl. 5. (1) Direktive 85/577. U skladu sa čl. 40.1) Zakona o zaštiti potrošača Bosne i Hercegovine rok za davanje obaveštenja i rok za raskid ugovora počinju istovremeno, naime s trenutkom zaključenja ugovora, i kao rezultat toga pisano obaveštenje nije preduslov za početak roka za raskid.[116] Srpski zakon ne sadrži odredbe za koje bi se moglo smatrati da za cilj imaju transponovanje Direktive o prodaji van prodajnih prostorija. Srpski Nacrt predloga za novi zakon o zaštiti potrošača predviđa da rok od 14 dana u kome potrošač može jednostrano raskinuti ugovor počinje da teče od počet-

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[114] Presuda ESP od 13.12.2001. godine, u predmetu C–481/99 – *Georg Heininger i Helga Heininger protiv Bayerische HypoundVereinsbank AG* [2001] ECR I-09945; Presuda ESP od 10.04.2008., u predmetu C–412/06 –*Hamilton protiv Volksbank Filder eG* [2008.] ECR I-02383.

[115] U skladu sa čl. 35.1) i 2) albanskog Zakona o zaštiti potrošača, potrošač će obavestiti trgovca o svojoj odluci o odustajanju od ugovora pre isteka roka od 14 kalendarskih dana.

[116] Ova pravna greška bi bila ispravljena usvajanjem Nacrta zakona o obligacionim odnosima Bosne i Hercegovine iz 2010. godine, koji u svom čl. 146.3) određuje da rok za opoziv počinje da teče od dana kada je privrednik stavio na znanje potrošaču pouku kojom se potrošač "na potpun način obaveštava" o njegovom pravu na opoziv ugovora. Ova odredba Nacrta zakona o obligacionim odnosima iz 2010. godine, shodno čl. 146.1) primenjuje se uvek kada nacrt zakona o obligacionim odnosima iz 2010. godine ili "bilo koji drugi zakon" potrošaču daje pravo na opoziv ugovora, i zato pokriva i pravo potrošača na raskid ugovora u skladu sa čl. 40 Zakona o zaštiti potrošača Bosne i Hercegovine (*Sl.glasnik BiH* br. 17/02).

ka prvog sata prvoga dana a završava se istekom poslednjeg sata poslednjeg dana roka. Kod ugovora sklopljenih van poslovnih prostorija, rok za povlačenje počinje da teče kada potrošač potpiše porudžbenicu, a u slučaju da porudžbenica nije u papirnom obliku, kada potrošač primi kopiju popunjene porudžbenice odštampane na papiru ili na drugom trajnom nosaču zapisa. Ako trgovac ne obavesti potrošača blagovremeno o postojanju prava na jednostrani raskid ugovora, u skladu sa srpskim Predlogom za novi zakon o zaštiti potrošača, rok za raskid od četrnaest dana počinje da kada potrošač konačno primi ovo obaveštenje na trajnom nosaču zapisa. U tom slučaju potrošač može da raskine ugovor u svako doba, uključujući vreme koje prethodi prijemu zakasnelog obaveštenja o postojanju prava na jednostrani raskid. Rok u kome potrošač može raskinuti ugovor ne počinje da teče sve dok potrošač ne bude propisno obavešten o svome pravu na jednostrani raskid.

c. Norme u vezi slanja poštom/odašiljanja

Propisi o zaštiti potrošača u vezi prodaje van poslovnih prostorija Bosne i Hercegovine, Makedonije i Srbije ne sadrže odgovarajuće norme u vezi slanja poštom ili odašiljanja. Albanski propisi sadrže samo normu o odašiljanju bez određivanja sredstva takvog odašiljanja, koja glasi: "Potvrda o prijemu pošiljke predstavlja dovoljan dokaz ne samo o tome da je odgovarajuće obaveštenje dato, već i o datumu kada je ono dato".[117] Crnogorski Zakon o zaštiti potrošača predviđa da će se ugovor smatrati raskinutim danom prijema obavještenja o raskidu ugovora od strane trgovca.[118] Iz formulacija drugih članova crnogorskog Zakona o zaštiti potrošača koji regulišu dejstvo otkaza (čl. 53 u vezi poglavlja o distancionoj prodaji i čl. 44.1), koji pak indirektno upućuje na čl. 43) izgleda da bi za poštovanje vremenskog roka trebalo da bude dovoljno ako je obaveštenje poslato pre kraja takvog roka. Hrvatski Zakon o zaštiti potrošača predviđa u svom čl. 33. (3) da je ugovor raskinut u trenutku kada je trgovac primio obavest o raskidu. Ako je obavest o raskidu upućena unutar roka iz čl. 33. (1) hrvatskog Zakona o zaštiti potrošača, smatraće se da je ugovor raskinut na vreme. U skladu sa srpskim Predlogom za nov Zakon o zaštiti potrošača izjava o raskidu smatra se blagovremenom ako je poslata pre isteka roka za jednostrani raskid ugovora. Slanje robe koja je primljena po osnovu ugovora nazad trgovcu, u roku u kome potrošač može jednostrano raskinuti ugovor, smatra se kao blagovremena izjava o raskidu. Smatraće se da je potrošač primenio svoje pravo na raskid u času kada je izjava o raskidu poslata trgovcu.

d. Formalni zahtevi

Transpozicioni zakoni Bosne i Hercegovine,[119] Hrvatske[120] i Crne Gore propisuju da obaveštenje potrošača o odustanku (raskidu ili prestanku) treba da bude poslato trgovcu u pisanoj formi. Makedonski Zakon o zaštiti potrošača određuje da potrošač treba da pošalje izjavu o jednostranom raskidu na adresu koju je trgovac dao. U skladu sa albanskim transpozicionim propisima obaveštenje o raskidu ugovora koje daje potrošač treba da bude ne samo u pi-

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[117] Odluka Saveta ministara o ugovorima sklopljenim van poslovnih prostorija, br. 63. od 21.01.2009., *Sl.list RAl* br. 8/09, (tačka 5).

[118] Član 51.5) Zakona o zaštiti potrošača, *Sl.list RCG* br. 26/07.

[119] U skladu sa čl. 41.1) Zakona o zaštiti potrošača Bosne i Hercegovine (*Sl.glasnik BiH* br. 17/02) potrošač ima pravo da ne prihvati posledice ugovora u roku od 15 dana od zaključenja ugovora slanjem pisanog obaveštenja trgovcu. U skladu sa čl. 146. 1) novog Nacrta zakona o obligacionim odnosima Bosne i Hercegovine opoziv potrošača, za koji nije potrebno objašnjenje, treba da se izrazi na trajnom nosaču zapisa ili putem dokumenta. Vraćanje robe ima isto dejstvo kao opoziv.

[120] U skladu sa čl. 33. (2) hrvatskog Zakona o zaštiti potrošača (NN br. 79/07, 125/07, 79/09, 89/09, 133/09) ugovor se raskida pisanom obaviješću o raskidu.

sanoj formi već i datirano.[121] Potrošač treba da da obaveštenje u pisanoj formi i da na njega stavi datum, jer u suprotnom neće moći da dokaže svoje obaveštenje o odustanku. Ovo je norma koja je potrebna *ad probationem*. Srpski Predlog novog zakona o zaštiti potrošača sadrži dve odredbe koje regulišu formalne zahteve obaveštenja o raskidu. Ili će se vraćanje robe koja je primljena po ugovoru nazad trgovcu u roku u kome potrošač ima pravo na jednostrani raskid smatrati izjavom o jednostranom raskidu. Ili će potrošač obavestiti trgovca o svojoj odluci o jednostranom raskidu na trajnom nosaču zapisa, i to ili u vidu izjave upućene trgovcu koju je on samostalno sročio, ili upotrebom standardnog obrasca za raskid o kome je gore bilo reči.

e. Dejstvo odustanka

Transpozicioni zakoni država učesnica regulišu pitanje dejstva povlačenja na sveobuhvatan način. Član 35. (1) hrvatskog Zakona o zaštiti potrošača predviđa da je u slučaju raskida ugovora, potrošač dužan da vrati isporučen proizvod trgovcu o svom trošku. On ne odgovora za štetu koju je trgovac pretrpeo zbog raskida ugovora (videti čl. 35. (2) Zakona o zaštiti potrošača). Suprotno tome, "trgovac je dužan, najkasnije u roku od 30 dana od dana primitka pisane obavijesti o raskidu, vratiti potrošaču cjelokupan iznos koji je potrošač do tog trenutka platio na temelju ugovora, uvećan za zatezne kamate po kamatnoj stopi poslovne banke trgovca za oročene štedne uloge na tri mjeseca za cijelo razdoblje računajući od primitka pisane obavijesti o raskidu do isplate", čl. 35. (3) Zakona o zaštiti potrošača.

Crnogorski propisi o zaštiti potrošača određuju da će se norme koje uređuju dejstvo povlačenja propisane za ugovore sklopljene u distancionoj prodaji, shodno primenjivati na ugovore sklopljene van poslovnih prostorija. Tako, čl. 44.1) crnogorskog Zakona o zaštiti potrošača propisuje da je potrošač dužan vratiti trgovcu primljenu robu, u roku od 30 dana od dana upućivanja obavještenja; u tom slučaju potrošač nije dužan da plati naknadu štete (troškove, kamate, kaznu i sl.) zbog otkaza[122], izuzev direktnih troškova povraćaja robe[123]. S druge strane, u skladu sa čl. 44.2) Zakona o zaštiti potrošača, trgovac je dužan da, u roku od 30 dana od dana prijema pisanog obaveštenja o raskidu ugovora, vrati potrošaču novčani iznos sredstava koji je potrošač platio na osnovu ugovora. Posebna dejstva su u skladu sa čl. 45. Zakona o zaštiti potrošača propisana u slučaju kada treća strana deluje kao davalac kredita, naime ista onakva kakve se nalaze u Direktivi 97/7.

Član 35. (2) albanskog Zakona o zaštiti potrošača predviđa da će davanje obaveštenja o raskidu imati dejstvo oslobađanja potrošača od ugovornih obaveza.[124] Ako potrošač upotrebi pravo na odustanak, roba koja je predmet ugovora vraća se trgovcu u roku od 5 dana, počev od dana kada je potrošač obavestio trgovca o svojoj odluci o raskidu. Sve iznose koje je potrošač platio za robu ili usluge trgovac će nadoknaditi u roku od 15 dana, počev od istog dana. Ukoliko je cena robe ili usluga u potpunosti ili delimično pokrivena kreditom koji je dao trgovac, ili neka treća strana na osnovu ugovora između treće strane i dobavljača, ugovor o kreditu se poništava bez troškova i kazni, ukoliko potrošač primenjuje svoje pravo na jednostrani raskid ugovora.[125]

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[121] Odluka Saveta ministara o ugovorima sklopljenim van poslovnih prostorija, br. 63. od 21.01.2009., *Sl.list RAl* br. 8/09, (tačka 4).

[122] Član 51.3) Zakona o zaštiti potrošača, *Sl.list RCG* br. 26/07.

[123] Član 44.3) Zakona o zaštiti potrošača, *Sl.list RCG* br. 26/07.

[124] Član 35.2) Zakona o zaštiti potrošača, *Sl.list RAl* br. 61/08.

[125] Odluka Saveta ministara o ugovorima sklopljenim van poslovnih prostorija, br. 63. od 21.01.2009., *Sl.list RAl* br. 8/09, (tačka 6, 7).

U skladu sa makedonskim zakonom raskid ima opšte dejstvo prestanka ugovora kako je predviđeno u Zakonu o obligacionim odnosima. Zakon o zaštiti potrošača konkretno predviđa da je u slučaju prestanka ugovora potrošač dužan da vrati robu o svom trošku. Trgovac je dužan da potrošaču vrati pun iznos koji je potrošač platio po osnovu ugovora do trenutka prestanka. Pre isteka roka za raskid, trgovac nema pravo da od potrošača traži, posredno ili neposredno, bilo kakvo preuzimanje ili davanje usluga.

Dostavljanje obavještenja o raskidu shodno čl. 41.3) Zakona o zaštiti potrošača Bosne i Hercegovine ima za posledicu oslobađanje potrošača od bilo koje obaveze iz zaključenog ugovora, ili bilo kojih troškova osim troškova vraćanja proizvoda koji mu je isporučen. Kada potrošač iskoristi svoje pravo da raskine ugovor, trgovac je takođe dužan, u skladu sa čl. 41.5) Zakona o zaštiti potrošača, da izvrši vraćanje novca uplaćenog za proizvod bez odgađanja u roku od 15 dana od dana kada je primio obaveštenje o raskidu ugovora.[126]

Srpski zakon ne sadrži odredbe za koje bi se moglo smatrati da imaju za cilj transponovanje Direktive o prodaji van prodajnih prostorija. Srpski Predlog novog zakona o zaštiti potrošača predviđa da jednostranim raskidom ugovora prestaju obaveze ugovornih strana nastale zaključenjem ugovora na daljinu, odnosno ugovora zaključenog izvan poslovnih prostorija. Trgovac je dužan da potrošaču bez odlaganja vrati iznos koji je potrošač platio po osnovu ugovora, a najkasnije u roku od 30 dana od prijema izjave o jednostranom raskidu. Ako dođe u docnju s izvršenjem ove obaveze, trgovac je u obavezi da, pored zatezne kamate, plati 10 procenata dugovane sume za svakih 30 dana docnje. U slučaju jednostranog raskida ugovora na daljinu ili ugovora zaključenog izvan poslovnih prostorija od strane potrošača, automatski prestaju i svi povezani ugovori, bez troškova za potrošača. Isto važi za ugovore o kreditu koji su povezani sa potrošačkim ugovorima, nezavisno od toga da li je potrošaču kredit odobrio trgovac ili treće lice. Ako je kredit potrošaču odobrilo treće lice, trgovac je dužan da o raskidu ugovora na daljinu obavesti davaoca kredita. Davalac kredita je dužan da potrošaču bez odlaganja vrati iznos koji je potrošač platio za robu ili usluge do raskida, zajedno s kamatom, a najkasnije 30 dana od dana kada je obavešten o raskidu.

3. Drugi instrumenti za zaštitu potrošača u oblasti prodaje van poslovnih prostorija

Srpski zakon ne sadrži odredbe u vezi prodaje van poslovnih prostorija, dok Albanija, Bosna i Hercegovina i Makedonija pružaju zaštitu svojim gore opisanim propisima. U hrvatskom i crnogorskom pravu postoje dodatni propisi u njihovim zakonima o trgovini. Član 4. (1) hrvatskog Zakona o trgovini[127] određuje da trgovac mora da bude registrovan za prodaju i kupovinu robe i/ili pružanje usluga u trgovini.[128] Crnogorski zakon nalaže registrovanje trgovaca koji žele da obavljaju prodaju van poslovnih prostorija. Kako je gore naznačeno, čl. 31.4) Zakona o unutrašnjoj trgovini predstavlja pravni osnov po kome Ministarstvo privrede donosi podzakonska akta o vrsti robe i načinu vršenja prodaje van poslovnih prostorija, kojima se ova materije detaljnije uređuje.

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[126] U skladu sa čl. 148.1) Nacrta zakona o obligacionim odnosima Bosne i Hercegovine dejstva opoziva su ista kao dejstva prestanka ugovora, predviđena generalno važećim odredbama Nacrta zakona o obligacionim odnosima. Jedina razlika je što je privrednik u docnji ukoliko ne vrati uplaćen iznos novca u roku od 30 dana od izražavanja volje o raskidu.

[127] Zakon o trgovini, NN br. 87/08, 96/08, 116/08.

[128] Pravilnik o minimalnim tehničkim uvjetima za poslovne prostorije u kojima se obavlja trgovina i posredovanje u trgovini i uvjetima za prodaju robe izvan prostorija, *NN* br. 37/98, 73/02, 153/02, 12/06.

IV. Rezime

Pre transponovanja Direktive 85/577 u njihove relevantne Zakone o zaštiti potrošača Albanija, Bosna i Hercegovina, Hrvatska, Makedonija i Crna Gora nisu imale koherentno zakonodavstvo koje se odnosi na zaštitu potrošača u slučaju prodaje van poslovnih prostorija. Srbija ga još uvek nema, ali trenutno radi na njemu. Samo transponovanje je u svim zemljama učesnicama (s izuzetkom Srbije) prolazilo kroz isti scenario: Direktiva 85/577 je transponovana u zasebnom poglavlju posebnog Zakona o zaštiti potrošača odgovarajuće zemlje. Osim različitih odstupanja u formulacijama, prisutne su i neke krupne manjkavosti u transponovanju kao što je isključivanje ugovora zaključenih tokom izleta u crnogorskom Zakonu o zaštiti potrošača, i moguće izuzimanje ugovora za pružanje usluga prema makedonskom Zakonu o zaštiti potrošača. Još jedno značajno ograničenje nalazi se u definiciji potrošača u bosansko-hercegovačkom Zakonu o zaštiti potrošača koje ograničava delovanje potrošača na kupovinu, sticanje ili korišćenje proizvoda ili usluga za svoje lične potrebe "i" za potrebe svog domaćinstva. Sledeća manjkavost se tiče neuključivanja posrednika u pojam trgovac u srpskom, crnogorskom i makedonskom zakonu o zaštiti potrošača. Međutim, neke države učesnice su unapredile zaštitu potrošača uključivanjem i drugih situacija osim onih navedenih u čl. 3. Direktive 85/577, kao npr. uključivanjem ugovora zaključenih u sredstvima javnog prevoza ili na bilo kojim drugim javnim mestima (npr. Bosna i Hercegovina, Crna Gora), ili ugovora zaključenih u prodajnim objektima, na sajmovima i izložbama (npr. Makedonija). Viši nivo zaštite potrošača je ostvaren i nekorišćenjem ograničenja i izuzetaka predviđenih u Direktivi 85/577, npr. nekorišćenjem mogućnosti da se izuzmu ugovori vrednosti ispod 60 EKU koja je data u njenom čl. 3. (1) (npr. Hrvatska, Makedonija i Bosna i Hercegovina), i ne izuzimajući ni jedan (npr. Bosna i Hercegovina) ili neke od ugovora uključenih u čl. 3. (2) Direktive 85/577 (npr. Albanija, Srbija). Transpozicioni zakoni država učesnica, s izuzetkom Srbije, uređuju na eksplicitan način uslove u pogledu forme i sadržaja obaveštenja, a sankcije u slučaju kršenja ovih uslova idu od toga da sankcije nisu predviđene (Bosna i Hercegovina) do vremenski neograničenog prava potrošača na raskid ugovora i novčanih kazni do cca. 13.700 evra (Hrvatska). Zakon o zaštiti potrošača Bosne i Hercegovine i Hrvatske ne govori o pravu na odustanak, nego o pravu na "raskid". Albanija, Hrvatska i Srbija (u njenom Nacrtu predloga za novi potrošački zakon) koriste klauzulu minimalne harmonizacije i predviđaju rok za povlačenje (raskid) od četrnaest dana, dok u Bosni i Hercegovini zakonodavac daje petnaest dana. Međutim, samo su crnogorski i hrvatski zakonodavac odlučili da odlože početak roka za povlačenje u slučaju da trgovac nije ispunio zahteve u vezi obaveštavanja. Na taj način, samo hrvatski Zakon o zaštiti potrošača ostaje u skladu sa odlukama ESP-a u predmetu *Heininger* i *Hamilton,* propisujući da u takvim slučajevima pravo potrošača na raskid ugovora neće biti vremenski ograničeno, dok crnogorski Zakon o zaštiti potrošača određuje rok od tri meseca, odnosno sedam dana od zaključenja ugovora. U Albaniji, Bosni i Hercegovini i Makedoniji rok za povlačenje počinje od dana zaključenja ugovora, bez obzira na eventualno kršenje dužnosti trgovca da pošalje pisano obaveštenje i, shodno tome, ovi zakoni direktno krše čl. 5.1) Direktive 85/577. Pisana forma kao zahtev za odustanak je prihvaćena u svim zemljama učesnicama. Srpski Nacrt predloga za novi Zakon o zaštiti potrošača daje mogućnost odustanka putem "obrasca za raskid" koji obezbeđuje trgovac a uređuje Vlada Republike Srbije. Dejstvo odustanka uključuje obavezu kupca da vrati primljenu robu o svom trošku (sve države učesnice) i obavezu trgovca da vrati plaćeni iznos novca u roku od 15 dana (Bosna i Hercegovina i Albanija) ili 30 dana (Crna Gora i Hrvatska). U skladu sa makedonskim zakonom kao i Nacrtom Zakona o obligacionim odnosima Bosne i Hercegovine dejstva odustanka su ista kao dejstva raskida ugovora predviđena Zakonom o obligacionim odnosima.

B. DIREKTIVA O NEPRAVIČNIM ODREDBAMA U POTROŠAČKIM UGOVORIMA (93/13)

Koordinatori*: Marija Karanikić Mirić (I-IV), Zvezdan Čađenović (V-VII)*

I. Uvod: Politički razlozi za kontrolu pravičnosti standardnih odredaba u potrošačkim ugovorima

1. Prava država učesnica pre prvih pokušaja da se transponuje Direktiva o nepravičnim odredbama u potrošačkim ugovorima[129]

U vremenu koje je prethodilo prvim pokušajima da se u domaća prava transponuje Direktiva 93/13/EEZ,[130] u zemljama učesnicama nije bilo posebnih pravila o ništavosti nepravičnih odredaba u potrošačkim ugovorima.

U članovima 142-144 jugoslovenskog Zakona o obligacionim odnosima, koji je usvojen 30. marta 1978. godine, postojala su opšta pravila o ništavosti nepravičnih odredaba u athezionim ugovorima.[131] Ta pravila odnosila su se na standardne odredbe u ugovorima po pristupu, kako između dva pravna ili dva fizička lica, tako između pravnog i fizičkog lica. U zakonu je postojao manji broj posebnih pravila o ugovorima u privredi, ali nije bilo posebnih pravila o potrošačima i potrošačkim ugovorima. Pored toga, u zakonu nije bilo procesnih pravila.

Nakon što je 1992. godine došlo do raspada SFRJ, jugoslovenski Zakon o obligacionim odnosima nastavio je da se primenjuje u novoj Saveznoj Republici Jugoslaviji, uz određene izmene i dopune iz 1993. godine. Taj zakon ostao je na snazi i u Državnoj Zajednici Srbije i Crne Gore, koja je formirana 2003. godine. Nakon prestanka Državne Zajednice, Zakon o obligacionim odnosima ostao je osnovni formalni izvor obligacionog prava u Republici Srbiji.[132]

Posle raspada SFRJ, jugoslovenski Zakon o obligacionim odnosima nastavio je da se primenjuje i u novoformiranoj Republici Hrvatskoj, kao nacionalni Zakon o obveznim odnosima. Taj zakon menjan je i dopunjavan u nekoliko navrata.[133] Važeći Zakon o obveznim odnosima Republike Hrvatske usvojen je 2005. a izmenjen i dopunjen 2008. godine.[134]

Jugoslovenski Zakon o obligacionim odnosima nastavio je da se primenjuje i u Republici Makedoniji i Republici Crnoj Gori u vremenu nakon raspada savezne države. Makedonski zakonodavac je 2001. godine usvojio novi Zakon o obligacionim odnosima, koji je izmenjen i dopunjen nekoliko puta.[135] U Crnoj Gori, novi Zakon o obligacionim odnosima usvojen je 2008. godine.[136]

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[129] Pod državama učesnicama misli se na države čije pravo je predmet ove studije.

[130] Direktiva Saveta 93/13/EEC od 5. aprila 1993. o nepravičnim odredbama u potrošačkim ugovorima, OJ L 095, 21/04/1993 P. 0029 - 0034.

[131] Jugoslovenski Zakon o obligacionim odnosima objavljen je u *Službenom listu SFRJ* br. 29/78, a stupio je na snagu šest meseci kasnije, 1. oktobra 1978. Menjan je i dopunjavan nekoliko puta pre raspada SFRJ. Vid. *Službeni list SFRJ* br. 39/85, 45/89 i 57/89.

[132] Za kasnije izmene i dopune u Srbiji, vid. *Službeni list SRJ* br. 31/93, 31/93, 22/99, 23/99, 35/99, 44/99.

[133] Zakon o prihvatanju Zakona o obveznim odnosima, *NN RH* br. 53/1991, 73/1991 sa izmenama i dopunama (*NN RH* br. 03/1994, 07/1996, 112/1999).

[134] Zakon o obveznim odnosima, *NN RH* br. 35/2005, 41/2008.

[135] Zakon o obligacionim odnosima, *Službeni list RMak br.* 18/2001.

[136] Zakon o obligacionim odnosima, *Službeni list Crne Gore* br. 47/2008.

Jugoslovenski Zakon o obligacionim odnosima recipiran je i u pravni sistem novoformirane Bosne i Hercegovine. Do toga je došlo 11. aprila 1992. godine. Recepcija jugoslovenskog Zakona o obligacionim odnosima odvijala se zasebno u dva trenutno postojeća administrativna entiteta Bosne i Hercegovine – u Federaciji Bosne i Hercegovine[137] i u Republici Srpskoj.[138]

Da sumiramo. Države koje su nastale nakon što je prestala da postoji Socijalistička Federativna Republika Jugoslavija, u prvo vreme su recipirale i, uz određene izmene, zadržale pravila jugoslovenskog Zakona o obligacionim odnosima. Pre nego što je u ovim državama došlo do prvih pokušaja da se u domaće pravo transponuje Direktiva o nepravičnim odredbama u potrošačkim ugovorima, pravila koja su derivirala iz članova 142-144 jugoslovenskog Zakona o obligacionim odnosima bila su najbliža onome na šta se ta direktiva odnosi. Pomenuta pravila bila su ista u svim državama koje su nastale nakon raspada SFRJ.

U svim zakonima koji potiču od jugoslovenskog Zakona o obligacionim odnosima nalaze se pravila o opštim uslovima formularnih ugovora. Svi navedeni zakoni propisuju ništavost odredaba opštih uslova koje su protivne samom cilju zaključenog ugovora ili dobrim poslovnim običajima, čak i ako su opšti uslovi koji ih sadrže odobreni od nadležnog organa. Pored toga, sud može da odbije primenu pojedinih odredbi opštih uslova koje lišavaju drugu stranu prava da stavi prigovore, ili onih na osnovu kojih ona gubi prava iz ugovora ili gubi rokove, ili koje su inače nepravične ili preterano stroge prema njoj.

Opšti uslovi koje je utvrdila jedna strana ugovornica, bilo da su sadržani u formularnom ugovoru, bilo da se na njih ugovor poziva, dopunjuju sporazumno utvrđene posebne pogodbe. Obavezna snaga opštih uslova i posebnih pogodaba po pravilu je jednaka.

Opšti uslovi moraju biti objavljeni na uobičajeni način. Oni obavezuju ugovornu stranu koja im je pristupila jedino ako su joj bili poznati ili morali biti poznati u času zaključenja ugovora. U slučaju da postoji neslaganje između opštih uslova i sporazumno određenih pogodbi, prevagu odnose sporazumno određene pogodbe. Ako dođe do spora, nejasne odredbe athezionih ugovora tumače se u korist one strane koja je ugovoru pristupila.

Svi zakoni koji potiču od jugoslovenskog Zakona o obligacionim odnosima sadrže pravilo o apsolutnoj ništavosti ugovora koji je protivan prinudnim propisima, javnom poretku ili dobrim običajima, ako cilj povređenog pravila ne upućuje na neku drugu sankciju ili ako zakon u određenom slučaju ne propisuje što drugo. Ništavost jedne ugovorne odredbe ne povlači ništavost samog ugovora, ako on može opstati bez ništave odredbe, i ako ona nije bila ni uslov ugovora ni odlučujuća pobuda zbog koje je ugovor zaključen. Sud pazi na ništavost ugovora po službenoj dužnosti. Pravo na isticanje ništavosti ne gasi se protekom vremena. Na ništavost se može pozivati svako (pravno-) zainteresovano lice a utvrđivanje ništavosti može da zahteva i državni tužilac.

U članu 686 Albanskog građanskog zakonika iz 1994. godine nalaze se pravila o sudskoj kontroli opštih uslova u formularnim ugovorima.[139] Ugovorne odredbe koje je unapred formulisala jedna ugovorna strana ništave su: ako nisu bile poznate drugoj strani, ako narušavaju princip ravnopravnosti ugovornih strana i remete ravnotežu među njihovim interesima, ili ako ograničavaju odgovornost one strane koja ih je formulisala. Formularni ugovori tumače se u korist strane koja nije uticala na njihovu sadržinu.

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[137] Član 1 Zakona o usvajanju Zakona o obligacionim odnosima služio je kao osnov za recepciju Zakona o obligacionim odnosima bivše SFRJ u Federaciji BiH. Vid. *Službeni list Republike Bosne i Hercegovine* br. 2/92, 13/93 i 13/94.

[138] Član 12 Ustavnog zakona o primeni Ustava Srpske Republike Bosne i Hercegovine služio je kao pravni osnov za usvajanje Zakona o obligacionim odnosima bivše SFRJ u entitetu koji se danas naziva Republika Srpska. Vid. *Službeni glasnik Republike Srpske* br. 3/92.

[139] Albanski građanski zakonik, *Sl. list RAl br.* 11/1994.

2. Model Direktive o nepravičnim odredbama u potrošačkim ugovorima

Direktiva o nepravičnim odredbama u potrošačkim ugovorima omogućava sudsku kontrolu pravičnosti ugovornih odredaba u formularnim potrošačkim ugovorima. Ugovorna odredba smatra se nepravičnom ako je protivna načelu savesnosti i poštenja i ako izaziva značajnu neravnotežu u pogledu prava i obaveza ugovornih strana na štetu potrošača. Pored opštih (standardnih) odredaba u potrošačkim ugovorima po pristupu, sud kontroliše pravičnost odredaba koje je trgovac unapred formulisao za potrebe zaključenja ugovora sa određenim potrošačem. Pitanje koje ostaje otvoreno jeste može li sud da kontroliše pravičnost posebnih pogodbi, to jest onih odredaba u potrošačkom ugovoru koje trgovac nije samostalno unapred formulisao, nego je o njihovoj sadržini pregovarao sa određenim potrošačem. Pored pravičnosti, sudovi ispituju transparentnost standardnih odredaba u potrošačkim ugovorima.

Direktiva o nepravičnim odredbama u potrošačkim ugovorima sadrži indikativnu listu standardnih odredaba koje se smatraju nepravičnim. Sudovi ispituju pravičnost standardnih odredaba u potrošačkim ugovorima po službenoj dužnosti.[140] Nejasna ugovorna odredba koju je unapred formulisao trgovac, tumači se na način koji je najpovoljniji za potrošača.

Direktiva 93/13 spada u takozvane minimalne direktive. To znači da je minimalnom klauzulom Direktive 93/13 država članica ovlašćena da svojim nacionalnim propisima garantuje potrošačima jaču zaštitu od one koja im je garantovana Direktivom.[141] Kao razlog za kontrolu pravičnosti standardnih odredaba u potrošačkim ugovorima, u odlukama Evropskog suda pravde po pravilu se navodi mogućnost da trgovac zloupotrebi vlastitu poziciju moći:[142] "Potrošač se nalazi u slabijem položaju od trgovca, kako po pregovaračkoj snazi, tako po nivou raspoloživog znanja. Zbog svoje slabe pozicije potrošač često pristaje na one ugovorne odredbe koje je trgovac unapred formulisao, na čiju sadržinu potrošač nije mogao da utiče."

3. Prava država učesnica nakon pokušaja da se transponuje Direktiva o nepravičnim odredbama u potrošačkim ugovorima

Preuzimanje osnovnih potrošačkih direktiva u albansko pravo izvršeno je donošenjem posebnih zakona i odluka Saveta ministara. Direktiva o nepravičnim odredbama u potrošačkim ugovorima transponovana je usvajanjem Zakona o zaštiti potrošača Republike Albanije iz 2008. godine.[143]

Prvi pokušaj transponovanja većeg broja potrošačkih direktiva u hrvatsko pravo izvršen je 2003. godine, usvajanjem prvog okvirnog Zakona o zaštiti potrošača.[144] Taj Zakon zamenjen je novim Zakonom o zaštiti potrošača Republike Hrvatske iz 2007. godine.[145]

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[140] Odluka ESP od 27 juna 2000. godine, objedinjeni predmeti C-240/98 do C-244/98 – *Océano Grupo Editorial SA v. Murciano Quintero* [2000] ECR I-04941; Odluka ESP od 21. novembra 2002. godine, predmet C-473/00 – *Cofidis v. Fredout* [2002] ECR I-10875; Odluka ESP od 26 oktobra 2006. godine, predmet C-168/05 – *Elisa María Mostaza Claro v. Centro Móvil Milenium SL* [2006] ECR I-10421.

[141] S. Weatherill, *Law And Integration in the European Union*, Oxford University Press, Oksford 1995, 151-157; C. Barnard, *The Substantive Law iz the EU: The Four Freedoms*, Oxford University Press, Oksford, 2007, 600; F. De Cecco, "Room to Move? Minimum Harmonization and Fundamental Rights", *Common Market Law Review*, tom 43, 1/2006, 9-30.

[142] Odluka ESP od 27 juna 2000. godine, objedinjeni predmeti C-240/98 do C-244/98 – *Océano Grupo Editorial SA v. Murciano Quintero* [2000] ECR I-04941.

[143] Zakon o zaštiti potrošača, *Sl. list RAl br.* 61/08.

[144] Zakon o zaštiti potrošača, *NN RH* br. 96/03.

[145] Zakon o zaštiti potrošača, *NN RH* br. 79/07, 125/07, 79/09, 89/09.

Prvi pokušaj da se jednim okvirnim zakonom uredi oblast zaštite potrošača u Bosni i Hercegovini učinjen je 2002. godine.[146] Važećim Zakonom o zaštiti potrošača iz 2006. godine u pravo Bosne i Hercegovine transponovan je veći broj potrošačkih direktiva, uključujući Direktivu 93/13.[147]

Prvi Zakon o zaštiti potrošača u Republici Makedoniji usvojen je 2000. a dopunjen 2002. godine [148] Makedonski zakonodavac usvojio je važeći Zakon o zaštiti potrošača 2004. godine. Taj zakon je menjan i dopunjavan u dva navrata.[149]

Prvi okvirni Zakon o zaštiti potrošača u Srbiji i Crnoj Gori usvojen je 2002. godine. Reč je o saveznom zakonu koje je važio na teritoriji obe republike u sastavu Savezne Republike Jugoslavije (docnije Državne Zajednice Srbija i Crna Gora).[150]

Savezni Zakon o zaštiti potrošača ukinut je 2005. godine u Republici Srbiji, kada je usvojen važeći Zakon o zaštiti potrošača.[151]

Vlada Republike Srbije pokušala je u nekoliko navrata da izradi nacrt neophodnih izmena i dopuna tog zakona. Od te ideje se na kraju odustalo i Vlada je pristupila izradi nacrta sasvim novog okvirnog zakona o zaštiti potrošača. Nacrt Zakona o zaštiti potrošača Republike Srbije (u daljem tekstu: NZZP) ušao je u javnu raspravu i njegovo usvajanje može se očekivati u poslednjem kvartalu 2010. godine.[152]

U Crnoj Gori, savezni Zakon o zaštiti potrošača godine ukinut je 2007. godine, usvajanjem novog Zakona o zaštiti potrošača.[153]

Kao što je već rečeno, u pravima onih država koje su nastale nakon raspada SFRJ postoje posebna pravila o opštim uslovima u formularnim ugovorima. Njihovi zakoni o obligacionim odnosima nastali su na temelju jugoslovenskog Zakona o obligacionim odnosima iz 1978. godine i uređuju obligacione odnose pravnih lica, fizičkih lica, kao i odnose između pravnog i fizičkog lica. Prilikom transponovanja Direktive 93/13 u prava bivših jugoslovenskih republika, po pravilu nisu unošene izmene u zakone o obligacionim odnosima, nego su usvajani posebni zakoni.

Zakon o zaštiti potrošača Bosne i Hercegovine iz 2006. godine primenjuje se samo na ugovorne odnose između trgovaca i potrošača (*Business-to-Consumer – B2C*). Pravila Zakona o obligacionim odnosima o tumačenju nejasnih opštih uslova u formularnim ugovorima primenjuju se i na pogodbe o kojima su trgovac i potrošač posebno pregovarali. Sudska kontrola nepravičnih odredaba ograničena je na one odredbe o kojima trgovac i potrošač nisu *lično* pregovarali. Tu je reč o pogrešnom prevodu izraza *pojedinačno* koji je upotrebljen u Direktivi. Prema pravilima Direktive, van domašaja sudske kontrole nalaze se ugovorne odredbe o kojima je trgovac posebno pregovarao sa konkretnim potrošačem, bez obzira na to da li su ovi pregovori vođeni lično.

Hrvatski Zakon o zaštiti potrošača iz 2007. godine primenjuje se samo na ugovore između trgovca i potrošača. Zakon predviđa sudsku kontrolu opštih uslova formularnih potrošač-

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[146] Zakon o zaštiti potrošača, *Sl. glasnik BiH* br. 17/02.

[147] Zakon o zaštiti potrošača, *Sl. glasnik BiH* br. 25/06.

[148] Zakon o zaštiti potrošača, *Sl. list RMak br.* 63/00, 4/02.

[149] Zakon o zaštiti potrošača, *Sl. list RMak br.* 38/04, 77/07, 103/08.

[150] Savezni Zakon o zaštiti potrošača, *Sl. glasnik SRJ* br. 37/02.

[151] Zakon o zaštiti potrošača, *Sl. glasnik RS* br. 79/05.

[152] Nacrt zakona o zaštiti potrošača, Ministarstvo trgovine i usluga Republike Srbije, http://www.mtu.gov.rs/cms/?page_id=362, preuzeto 25.06.2010.

[153] Zakon o zaštiti potrošača, *Sl. list CG* br. 26/07.

kih ugovora, to jest samo onih ugovornih odredaba o kojima trgovac i potrošač nisu posebno pregovarali. Isto važi prema makedonskom Zakonu o zaštiti potrošača iz 2004. godine i crnogorskom Zakon o zaštiti potrošača iz 2007. godine.

Prema odredbi člana 2, stav 2 hrvatskog Zakona o zaštiti potrošača, na ugovore zaključene između trgovca i potrošača primenjuju se pravila Zakona o obveznim odnosima, ako Zakon o zaštiti potrošača ne propisuje neko specijalno pravilo. Isti odnos zakona kojim se uređuje zaštita potrošača i zakona kojim se uređuju obligacioni odnosi postoji u drugim državama učesnicama.

Zakon o zaštiti potrošača Republike Srbije iz 2005. godine ne može se smatrati ozbiljnim pokušajem da se u srpsko pravo transponuje Direktiva o nepravičnim odredbama u potrošačkim ugovorima.[154] U tom zakonu preuzeto je nekoliko već poznatih pravila iz Zakona o obligacionim odnosima, koje se odnose na ugovore po pristupu. To preuzimanje izvršeno je polovično. NZZP (Nacrt Zakona o zaštiti potrošača o kojem se u Srbiji trenutno (leto 2010. godine) vodi javna rasprava) predviđa sudsku kontrolu pravičnosti svih odredaba potrošačkih ugovora – kako opštih uslova koje je unapred formulisao trgovac, tako posebnih pogodbi o kojima su trgovac i potrošač pregovarali.

II. Oblast primene

1. Potrošač. Trgovac (prodavac robe odnosno pružalac usluga). Javna preduzeća.

a. Potrošački ugovori (između trgovca i potrošača – B2C*), ugovori u privredi (između trgovaca* – B2B*) i privatni ugovori (između fizičkih lica* – P2P*)*

Direktiva 93/13 odnosi se na potrošačke ugovore, to jest na ugovore zaključene između trgovaca i potrošača. U gotovo svim državama koje su predmet ove studije, zakon kojim se pomenuta Direktiva transponuje u nacionalna prava omogućava sudsku kontrolu pravičnosti onih odredaba u potrošačkim ugovorima koje je unapred formulisao trgovac.

Albanski Zakon o zaštiti potrošača propisuje da se pravila o nepravičnim odredbama primenjuju samo na potrošačke ugovore.[155] Pravilo iste sadržine važi u Hrvatskoj, Bosni i Hercegovini, Makedoniji i Crnoj Gori.

Zakon o zaštiti potrošača Republike Srbije iz 2005. odnosi se na pravne poslove između trgovca (prodavca robe odnosno pružaoca usluga) i potrošača, ali je pojam potrošača proširen na pravna lica pod određenim uslovima. Odredbe NZZP odnose se samo na ugovore zaključene između trgovca i fizičkog lica u svojstvu potrošača.

U državama koje su nastale nakon raspada SFRJ, pravila o opštim uslovima formularnih ugovora sadržana u zakonima kojima se uređuju obligacioni odnosi i dalje se primenjuju na ugovore koji se ne kvalifikuju kao potrošački (ugovori između dva trgovca ili ugovori između dva fizička lica).

b. Pojam potrošača

Prema Direktivi o nepravičnim odredbama u potrošačkim ugovorima potrošač je fizičko lice koje postupa u svrhe koje su izvan njegove profesionalne, poslovne ili zanatske delatnosti. Pojedine države koje su predmet ove studije samo delimično su transponovale ovo pravilo.

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[154] Zakon o zaštiti potrošača, *Sl.glasnik RS* br.79/05

[155] Član 2 i član 27, stav 1, Zakon o zaštiti potrošača, *Sl. list RAl br.* 61/08.

Prema albanskom Zakonu o zaštiti potrošača, potrošač je fizičko lice koje postupa u svrhe koje izlaze iz okvira njegove profesionalne, poslovne ili zanatske delatnosti. Albanski zakonodavac proširio je pojam potrošača na neprofitne organizacije.[156]

Prema makedonskom Zakonu o zaštiti potrošača, potrošač je fizičko lice koje kupuje proizvode ili pribavlja usluge za neposrednu ličnu potrošnju, odnosno za potrebe izvan svoje zanatske, poslovne ili profesionalne delatnosti.[157]

U crnogorskom pravu, potrošač je fizičko lice koje kupuje, naručuje, prihvata, ili koristi robu ili usluge, uključujući usluge javnih službi, u svrhe koje nisu poslovne. Potrošač je i lice kojem je upućena ponuda da stupi u ugovorni odnos sa takvom namenom. Crnogorski Zakon o zaštiti potrošača definiše grupu potrošača, odnosno grupu formiranu od strane potrošača u cilju pružanja pomoći članovima grupe da steknu pravo svojine nad određenim proizvodima.

Prema Zakonu o zaštiti potrošača Republike Hrvatske, potrošač je fizičko lice koje sklapa pravni posao ili deluje na tržištu u svrhe koje nisu namenjene njegovoj poslovnoj delatnosti, niti obavljanju delatnosti slobodnog zanimanja.[158]

Prema važećem Zakonu o zaštiti potrošača Republike Srbije, potrošač je svako fizičko lice koje kupuje proizvode ili usluge za sopstvene potrebe, ili za potrebe svog domaćinstva. Potrošač je i privredno društvo, preduzeće, drugo pravno lice ili preduzetnik kada kupuje proizvode ili usluge za sopstvene potrebe. Prema NZZP, potrošač je samo fizičko lice, i to ono koje postupa *pretežno* izvan svoje poslovne delatnosti, profesije ili zanata.

Zakon o zaštiti potrošača Bosne i Hercegovine definiše potrošača kao fizičko lice koje kupuje, stiče ili koristi proizvode ili usluge za svoje lične potrebe i potrebe svog domaćinstva. Ovde je pojam potrošača sužen. Nije dovoljno da fizičko lice postupa izvan svog zanata, poslovne delatnosti ili profesije, nego je neophodno da ono to čini za svoje lične potrebe i potrebe svog domaćinstva.

c. Pojam trgovca (prodavca robe odnosno pružaoca usluga)

Prema odredbi člana 2(2) Direktive 93/13, trgovac (prodavac robe, odnosno pružalac usluga) podrazumeva fizičko ili pravno lice koje postupa u okviru svoje poslovne, profesionalne ili zanatske delatnosti. Ako je reč o pravnom licu, ono ima status trgovca bez obzira na to što se nalazi u privatnoj ili državnoj svojini. Pojam trgovca tumači se široko, pa obuhvata poljoprivrednike i lica koja se bave slobodnim profesijama.

U albanskom pravu, trgovac je fizičko ili pravno lice koje postupa u svrhe sopstvene profesionalne ili poslovne delatnosti ili zanata, uključujući svakoga ko postupa u ime ili za račun trgovca.[159]

U pravu Bosne i Hercegovine, trgovac je lice koje neposredno ili kao posrednik među drugim licima prodaje proizvode ili pruža usluge potrošaču.[160] Ova definicija uža je od definicije sadržane u Direktivi, utoliko što umesto lica koje postupa u određene svrhe upućuje na lica koja prodaju proizvode ili pružaju usluge.

U crnogorskom pravu, trgovac je lice koja prodaje robu ili pruža usluge potrošačima. Kao i u potrošačkom pravu Bosne i Hercegovine, ovde je pojam trgovca sužen na lica koja

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[156] Član 3, stav 6, Zakon o zaštiti potrošača, *Sl. list RAl br.* 61/08.

[157] Član 4, Zakon o zaštiti potrošača, *Sl. list RMak br.* 38/04, 77/07, 103/08.

[158] Član 3, stav 1, alineja 4, Zakon o zaštiti potrošača, *NN RH* br. 79/07, 125/07, 79/09, 89/09.

[159] Član 3, stav 14, Zakon o zaštiti potrošača, *Sl. list RAl br.* 61/08.

[160] Član 1, stav 5, Zakon o zaštiti potrošača, *Sl. glasnik BiH* br. 25/06.

prodaju robu ili pružaju usluge, što makar na prvi pogled isključuje period koji prethodi zaključenju ugovora.

U hrvatskom pravu, trgovac je fizičko ili pravno lice koje sklapa pravni posao ili deluje na tržištu u okviru svoje poslovne delatnosti, ili u okviru obavljanja delatnosti slobodnog zanimanja.[161]

U Makedoniji, trgovac je pravno ili fizičko lice koje, u toku obavljanja svoje delatnosti, neposredno zadovoljava potrebe građana za proizvodima i uslugama. Makedonski Zakon o zaštiti potrošača ne ulazi u pitanje vlasništva nad pravnim licem koje neposredno zadovoljava potrebe građana za proizvodima i uslugama, pa se može zaključiti da se svako takvo pravno lice kvalifikuje kao trgovac, bilo da se ono nalazi u privatnoj bilo u državnoj svojini.

Prema važećem Zakonu o zaštiti potrošača Republike Srbije, trgovac je privredno društvo, preduzeće, drugo pravno lice i preduzetnik, koji prodaje proizvode ili pruža usluge potrošaču. Prema NZZP (pomenuti Nacrt Zakona o zaštiti potrošača o kojem se trenutno vodi javna rasprava), trgovac je fizičko ili pravno lice koje postupa u okviru svoje poslovne delatnosti, profesije ili zanata, kao i svako ko dela u ime i za račun trgovca.

d. Javna preduzeća

Albanski Zakon o zaštiti potrošača iz 2008. godine ne pominje javna preduzeća. Isto važi za srpski Zakon o zaštiti potrošača iz 2005. godine.

Treba napomenuti da pomenuti Nacrt Zakona o zaštiti potrošača iza kojeg stoji Ministarstvo trgovine i usluga Republike Srbije (NZZP) sadrži posebno poglavlje čiji cilj je da se u srpsko pravo transponuju Direktiva 2002/22/EZ (dopunjena Direktivom 2009/136/EZ) o univerzalnim uslugama u oblasti telekomunikacija, Direktiva 2009/72/EZ o električnoj energiji i Direktiva 2009/73/EZ o gasu, u meri u kojoj su one od značaja za pitanja zaštite prava i interesa potrošača. NZZP propisuje posebnu dužnost trgovca koji pruža usluge od opšteg ekonomskog interesa da potrošača obavesti o pojedinostima koje su od značaja za donošenje racionalne odluke o stupanju u ugovorni odnos. Međutim, NZZP ne sadrži nikakva posebna pravila o nepravičnim odredbama ugovora za slučaj da uslugu od opšteg ekonomskog interesa pruža javno preduzeće. Odsustvo posebnih pravila o nepravičnim odredbama ugovora između javnog preduzeća i potrošača, znači da se na te ugovore primenjuju opšta pravila o nepravičnim odredbama u potrošačkim ugovorima.

Makedonski Zakon o zaštiti potrošača sadrži tri člana koji se odnose na pružanje javnih usluga potrošačima,[162] ali nijedan od tih članova ne odnosi se na nepravičnost ugovornih odredaba.

U Bosni i Hercegovini, kada javna preduzeća sa potrošačima zaključuju formularne ugovore, njihov ugovorni odnos uređen je opštim pravilima potrošačkog prava. To znači da se na opšte uslove formularnih ugovora između javnog preduzeća i potrošača primenjuju pravila Zakona o zaštiti potrošača o nepravičnim odredbama u potrošačkim ugovorima.

U hrvatskom pravu, pravna lica javnog prava smatraju se za trgovce kada stupaju u građanskopravne odnose. To se na prvom mestu odnosi na javna preduzeća koja pružaju javne usluge iz člana 24 hrvatskog Zakona o zaštiti potrošača. Pravilo iste sadržine važi u Crnoj Gori.

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[161] U hrvatskom Zakonu o zaštiti potrošača upotrebljava se reč *trgovac*, a ne *prodavac* ili *pružalac usluga*. S. Šarčević, E. Čikara, "European vs National Terminology in Croatian Legislation Transposing EU Directives", u: S. Šarčević (ed.), *Legal Language in Action: Translation, Terminology, Drafting and Procedural Issues,* Globus, Zagreb 2009, 205. i dalje.

[162] Član 118-120, Zakon o zaštiti potrošača, *Sl. list RMak br.* 38/04, 77/07, 103/08.

2. Ugovori na koje se ova pravila ne primenjuju

a. Ugovori u oblasti naslednog, porodičnog, radnog i kompanijskog prava

Prema tački 10 Preambule Direktive o nepravičnim odredbama u potrošačkim ugovorima, pravila Direktive ne odnose se na ugovore u oblasti radnog, naslednog i porodičnog prava, ugovor o ortakluku i ugovore o osnivanju i organizaciji privrednih društava. Nije sporno da se ugovor o radu, kao i porodičnopravni i naslednopravni ugovori, ne mogu se kvalifikovati kao potrošački. S druge strane, otvara se pitanje da li se ugovor o ortakluku i ugovor osnivanju privrednog društva mogu pod određenim uslovima označiti kao potrošački. Sticanje prava na udelu u privrednom društvu može se pod određenim uslovima kvalifikovati kao potrošački ugovor.

U albanskom Zakonu o zaštiti potrošača nema izričite odredbe o tome da se pravila o nepravičnim odredbama ne primenjuju na pomenute vrste ugovora. Isto važi za Zakon o zaštiti potrošača Bosne i Hercegovine. Međutim, ugovori radnog, porodičnog, naslednog i kompanijskog prava isključeni su iz primene pomenutih zakona o zaštiti potrošača posredno, pomoću zakonskih odredaba o tome ko su strane u potrošačkom ugovoru. Naime, način na koji su definisani pojmovi trgovca i potrošača onemogućava primenu pravila o nepravičnim odredbama u potrošačkim ugovorima na ugovore radnog, porodičnog, naslednog i kompanijskog prava. Isto važi u srpskom, hrvatskom,[163] crnogorskom i makedonskom pravu.

Nasuprot svemu navedenom, ugovor o prodaji akcija može se kvalifikovati kao potrošački ugovor. U tom slučaju na njega bi se primenjivala nacionalna pravila o ništavosti nepravičnih odredaba u potrošačkim ugovorima.

b. Ugovori o ustupanju prava na nepokretnostima

Albanski Zakon o zaštiti potrošača ne sadrži posebna pravila o ugovorima koji se odnose na nepokretnosti. Makedonski pravni pisci smatraju da ugovore koji se odnose na nepokretnosti ne treba kvalifikovati kao potrošačke ugovore.

Prema Zakonu o zaštiti potrošača Bosne i Hercegovine, fizičko lice koje kupuje, stiče ili koristi *proizvode* ili usluge za svoje lične potrebe i za potrebe svog domaćinstva. Zakonska definicija robe obuhvata proizvode i nepokretnu imovinu. Postoji izvesna nedoslednost u upotrebi reči roba i proizvod u zakonskom tekstu. Zakonodavac ih ponekad koristi kao sinonime, što bi moglo da znači da ugovori koji se odnose na nepokretnosti spadaju u delokrug Zakona o zaštiti potrošača Bosne i Hercegovine.

Hrvatski Zakon o zaštiti potrošača dopušta takvo tumačenje prema kojem se pravila o ništavosti nepravičnih odredaba u potrošačkim ugovorima primenjuju na ugovore o prodaji ili ustupanju nekog užeg prava kako na pokretnim stvarima, tako na nepokretnostima. Isto važi u crnogorskom pravu, budući da crnogorski zakonodavac nije izričito propisao da se reč roba odnosi samo na pokretne stvari.

U srpskom Zakonu o zaštiti potrošača nema posebnih pravila kojima se iz pojma potrošačkih ugovora izuzimaju ugovori o prodaji ili ustupanju nekog užeg prava na nepokretnosti. NZZP (pomenuti Nacrt Zakona o zaštiti potrošača iza kojeg stoji Ministarstvo trgovine i usluga Republike Srbije) definiše robu kao svaku telesnu pokretnu stvar; s tim što se kao roba ne smatraju: stvar prodata u izvršnom postupku ili na drugi način po sili zakona; voda i gas koji se ne prodaju u ograničenoj ili unapred utvrđenoj količini; električna energija. To znači da se odredbe NZZP o ništavosti nepravičnih odredaba u potrošačkim ugovorima ne odnose na ugo-

[163] M. Baretić, "Nepoštene odredbe u potrošačkim ugovorima", u M. Dika, Z. Pogarčić (ured.), *Obveze trgovca u sustavu zaštite potrošača*, Narodne novine, Zagreb 2003, 67.

vore o prodaji nepokretnosti. NZZP definiše proizvod kao svaku robu i uslugu, uključujući nepokretnosti, prava i obaveze. Međutim, ta definicija proizvoda ima ograničenu primenu: ona se odnosi na proizvode u domenu zabrane nepoštenog poslovanja, odnosno transponovanja u srpsko pravo Direktive 2005/29 o nepoštenom poslovanju.

3. Ugovorne odredbe na koje se ova pravila ne primenjuju

a. Ugovorne odredbe koje su u skladu sa imperativnim propisima

Prema članu 1(2) Direktive 93/13, pravila te Direktive ne odnose se na ugovorne odredbe koje su u skladu sa imperativnim zakonskim i podzakonskim normama i sa pravilima ili principima međunarodnih konvencija koje su potpisane od strane država članica ili Zajednice, posebno u oblasti transporta.

Albanski Zakon o zaštiti potrošača ne propisuje takav izuzetak. Isto važi za Zakon o zaštiti potrošača Bosne i Hercegovine i Zakon o zaštiti potrošača Crne Gore.[164]

Hrvatski zakonodavac preuzeo je pomenuto pravilo iz Direktive 93/13. Ono se nalazi u članu 96, stav 5 hrvatskog Zakona o zaštiti potrošača. Tu je propisano da se pravila o nepravičnim ugovornim odredbama ne primenjuju na one ugovorne odredbe koje su u skladu sa imperativnim zakonskim normama, odnosno odredbama i načelima međunarodnih konvencija koje su obavezujuće za Republiku Hrvatsku. Isto pravilo prihvaćeno je u makedonskom pravu.[165]

Važeći Zakon o zaštiti potrošača Republike Srbije ne sadrži pravilo kojim bi se u srpsko pravo transponovao pomenuti izuzetak iz Direktive. Štaviše, prema odredbi člana 143 srpskog Zakona o obligacionim odnosima, odredbe opštih uslova koje su protivne samom cilju zaključenog ugovora ili dobrim poslovnim običajima ništave su, čak i ako su opšti uslovi koji ih sadrže odobreni od nadležnog organa. Isto pravilo sadržano je u zakonima kojima se uređuju obligacioni odnosi u svim ostalim bivšim jugoslovenskim republikama. NZZP (pomenuti Nacrt Zakona o zaštiti potrošača Republike Srbije) predviđa da se pravila o ništavosti nepravičnih odredaba u potrošačkim ugovorima ne odnose na ugovorne odredbe čija sadržina je propisana prinudnim zakonskim ili podzakonskim normama.

b. Posebne pogodbe između trgovca i potrošača

Prema pravilima Direktive 93/13, sudska kontrola nepravičnosti i posledične ništavosti ugovornih odredaba ograničena je na one odredbe potrošačkih ugovora čija sadržina nije sporazumno ugovorena, to jest na ugovorne odredbe koje je trgovac unapred formulisao. Pravila Direktive ne primenjuju se na posebne pogodbe, to jest na ugovorne odredbe o čijem je postojanju i sadržini trgovac pregovarao sa određenim potrošačem.

Prema članu 27, stav 2 albanskog Zakona o zaštiti potrošača, pravila o ništavosti nepravičnih ugovornih odredaba ne odnose se na posebne pogodbe u potrošačkom ugovoru. Na trgovca pada teret dokazivanja da je reč o posebnoj pogodbi a ne o opštem uslovu formularnog ugovora. Ista pravila mogu se naći u crnogorskom Zakonu o zaštiti potrošača.

Član 51, stav 1 makedonskog Zakona o zaštiti potrošača propisuje isto isključenje posebnih pogodbi. Međutim, opšta pravila o ništavosti sadržana u makedonskom Zakonu o obliga-

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[164] Prema članu 9 Ustava Republike Crne Gore, potvrđeni i objavljeni međunarodni ugovori i opšteprihvaćena pravila međunarodnog prava sastavni su dio unutrašnjeg pravnog poretka, imaju primat nad domaćim zakonodavstvom i neposredno se primjenjuju kada odnose uređuju drukčije od unutrašnjeg zakonodavstva. Prema članu 16 Ustava Republike Srbije opšteprihvaćena pravila međunarodnog prava i potvrđeni međunarodni ugovori sastavni su deo pravnog poretka Republike Srbije i neposredno se primenjuju.

[165] Član 53, stav 4, Zakon o zaštiti potrošača, *Sl. list RMak br.* 38/04, 77/07, 103/08.

cionim odnosima mogu se primeniti kako na opšte uslove formularnih ugovora, tako na posebne pogodbe.

Zakon o zaštiti potrošača Bosne i Hercegovine propisuje da se pravila o nepravičnim odredbama primenjuju samo na one odredbe o kojima trgovac i potrošač nisu lično pregovarali. Zakonodavac je tu pogrešno transponovao pravilo kojim se iz Direktive izuzimaju ugovorne odredbe o kojima su trgovac i potrošač posebno pregovarali. Umesto odredbi o kojima je *posebno* pregovarano sa konkretnim potrošačem, zakonodavac pominje odredbe o kojima je pregovarano *lično*, to jest bez posrednika.

Prema članu 96 hrvatskog Zakona o zaštiti potrošača, pravila o nepravičnim odredbama ne primenjuju se na posebne pogodbe, to jest odredbe koje su posebno ugovorene sa određenim potrošačem. Kada trgovac tvrdi da je o nekoj odredbi posebno pregovarano sa potrošačem, teret dokazivanja leži na trgovcu.

Prema članu 296 novog Zakona o obveznim odnosima Republike Hrvatske, ništave su odredbe opštih uslova ugovora koje, suprotno načelu savesnosti i poštenja, izazivaju očiglednu neravnopravnost u pravima i obvezama strana na štetu strane koja pristupa ugovoru ili ugrožavaju postizanje svrhe ugovora, čak i ako su opšti uslovi koji ih sadrže odobreni od nadležnog tela. Međutim, to pravilo se ne primenjuje na one opšte uslove ugovora čiji sadržaj je preuzet iz važećih propisa, ili se pre sklapanja ugovora o njima pojedinačno pregovaralo, a druga strana je pritom mogla da utiče na njihov sadržaj, kao ni na odredbe o predmetu i ceni, ako su jasne, razumljive i lako uočljive.[166]

Već je rečeno da važeći Zakon o zaštiti potrošača Republike Srbije ne predstavlja ozbiljan pokušaj da se u srpsko pravo transponuje Direktiva 93/13. Naprotiv, taj zakon samo preuzima neka pravila iz Zakona o obligacionim odnosima koja se tiču athezionih ugovora. Pored toga, srpski Zakon o obligacionim odnosima sadrži opšta pravila o apsolutnoj ništavosti, ali ta pravila ne prave razliku između unapred formulisanih ugovornih odredaba i onih odredaba o kojima je posebno pregovarano sa određenim kupcem. Prema NZZP (pomenuti Nacrt Zakona o zaštiti potrošača Republike Srbije), pravila o ništavosti odnose se na sve nepravične ugovorne odredbe. Ugovorna odredba označava svaku odredbu potrošačkog ugovora, uključujući posebne pogodbe o čijoj sadržini je potrošač pregovarao ili mogao da pregovara s trgovcem, i opšte odredbe čiju sadržinu je unapred odredio trgovac ili treća strana.

III. Kriterijum pravičnosti ugovornih odredaba

1. Koncept Direktive o nepravičnim odredbama potrošačkih ugovora

Prema članu 3(1) Direktive 93/13, ugovorna odredba čija sadržina nije sporazumno ugovorena smatra se nepravičnom ako protivno načelu savesnosti i poštenja stvara bitnu nesrazmeru u pravima i obavezama ugovornih strana na štetu potrošača. Tim pravilom propisano je jedno opšte merilo prema kojem se utvrđuje da li je neka odredba u potrošačkom ugovoru nepravična. Opšti uslov formularnog ugovora nepravičan je ako dovodi do bitne nesrazmere u pravima i obavezama ugovornih strana na štetu potrošača. Međutim, sudska kontrola pravičnosti ne može se odnositi na onu ugovornu odredbu kojom je uređen predmet ugovora. Pravilima Direktive onemogućena je kontrola pravičnosti ugovorne odredbe kojom je određen predmet ugovora i odnos uzajamnih davanja, izuzev ako je ta ugovorna odredba nejasna i nerazumljiva. Nesrazmera u pravima i obavezama ugovornih strana na štetu potrošača ne sme

[166] Ograničenje iz stava 296 hrvatskog Zakona o obveznim odnosima smatra se suviše uskim. Vid. S. Petrić, „Opšti uslovi ugovora prema novom ZOO", u Z. Slakoper (ured.), Bankovni i financijski ugovori, Pravni fakultet u Rijeci, Rijeka 2007, str. 37.

se ticati predmeta ugovora i odnosa između robe odnosno usluge i cene, već ta nesrazmera mora postojati u pogledu preostalih ugovornih prava i obaveza. Položaj potrošača upoređuje se sa položajem u kojem bi on bio da odredba o kojoj je reč nije ugovorena.

Pored svega navedenog, opšte merilo sadržano u članu 3(1) Direktive 93/13 nalaže da ugovorna odredba mora biti u skladu sa načelom savesnosti i poštenja da bi mogla da se kvalifikuje kao pravična.

Taj uslov može se tumačiti na više načina. Može biti da jedno podrazumeva drugo, to jest da je svaka ugovorna odredba koja značajno remeti ravnotežu u ugovornim pravima i obavezama trgovca i potrošača, i to na teret potrošača, protivna načelu savesnosti i poštenja. S druge strane, može se uzeti da je ugovorna odredba nepravična ako kumulativno zadovoljava dva uslova: ako je protivna načelu savesnosti i poštenja i ako značajno remeti ravnotežu u interesima ugovornih strana na štetu potrošača. Na kraju, može se uzeti da je ugovorna odredba nepravična ako zadovoljava makar jedan od pomenuta dva uslova.

Dakle, prema članu 4(2) Direktive 93/13, prilikom utvrđivanja nepravičnog karaktera ugovorne odredbe, ne procenjuje se način na koji je uređen predmet ugovora, niti se procenjuje u kojoj meri je ugovorena cena ili naknada srazmerna robi ili usluzi koja se uzvrat duguje, ako je ugovorna odredba napisana jednostavnim i razumljivim jezikom. Prema članu 4(1) Direktive 93/13, prilikom utvrđivanja nepravičnog karaktera ugovorne odredbe uzima se u obzir priroda robe ili usluge koja je predmet ugovorne obaveze, sve okolnosti koje su prethodile zaključenju ugovora, kao i sve druge odredbe istog potrošačkog ugovora i odredbe onih ugovora koji su povezani sa potrošačkim ugovorom. Direktiva 93/13 sadrži Aneks u kojem se nalazi ilustrativna, indikativna lista opštih odredaba u potrošačkim ugovorima, koje se smatraju nepravičnim.

2. Merilo pravičnosti u državama učesnicama

Prema članu 3 Direktive 93/13, a u vezi sa tačkom 15 Preambule, svaka država članica ima obavezu da propiše opšte merilo, to jest kriterijum za utvrđivanje da li je odredba u potrošačkom ugovoru koju je unapred formulisao trgovac pravična prema potrošačima. Prema tom kriterijumu procenjuje se pravičnost opštih (standardnih) uslova formularnih ugovora, kao i onih ugovornih odredaba koje nisu opšte ali potrošač nije mogao da utiče na njihovu sadržinu. Direktiva 93/13 sadrži minimalnu klauzulu. To znači da su države članice slobodne da potrošačima garantuju jaču zaštitu od nepravičnih odredaba od one zaštite koja im je garantovana pravilima Direktive 93/13. U tom smislu države su slobodne da sudsku kontrolu prošire na posebne pogodbe, to jest na ugovorne odredbe o kojima je trgovac posebno pregovarao sa određenim potrošačem.

Prema članu 94 Zakona o zaštiti potrošača Bosne i Hercegovine, trgovac ne sme da zahteva ugovorne odredbe koje su nepravične ili koje bi prouzrokovale štetu potrošaču. Ugovorne odredbe koje potrošač nije lično ugovarao smatraju se nepravičnim ako stvaraju značajnu nejednakost između prava i obaveza ugovornih strana na štetu potrošača; ako bi ispunjenje ugovornih obaveza značajno odstupilo od opravdanog očekivanja potrošača; ili ako su u suprotnosti s principom poštenja, savesti i dobrim poslovnim običajima. Svaki od navedenih uslova dovoljan je da se odredba potrošačkog ugovora kvalifikuje kao nepravična.

Prema članu 93 Zakona o zaštiti potrošača Bosne i Hercegovine, ugovorne odredbe treba da budu razumljive i u vezi s drugim odredbama u istom ili drugom ugovoru između istih strana, uzimajući u obzir prirodu proizvoda ili usluge i svih drugih učesnika u vezi sa zaključenjem ugovora. Uzima se da nejasne odredbe imaju ono značenje koje je povoljnije za potrošača. Pravilo Direktive 93/13 kojim se isključuje mogućnost kontrole pravičnosti onih ugovornih odredaba kojima je određen predmet ugovora ili odnos uzajamnih davanja nije transponovano u pravo Bosne i Hercegovine.

Hrvatski zakonodavac doslovno je transponovao pravilo iz člana 3(1) Direktive 93/13. U članu 96, stav 1 Zakona o zaštiti potrošača Republike Hrvatske stoji da se ugovorna odredba o kojoj se nije pojedinačno pregovaralo smatra nepravičnom ako, suprotno načelu savesnosti i poštenja, izaziva znatnu neravnotežu u pravima i obvezama ugovornih strana na štetu potrošača. Prema članu 99 hrvatskog Zakona nije dopušteno ocenjivati jesu li ugovorne odredbe o predmetu ugovora i ceni pravične, ako su te odredbe jasne, lako razumljive i uočljive. To znači da je isključena mogućnost kontrole pravičnosti onih ugovornih odredaba kojima je određen predmet ugovora ili odnos uzajamnih davanja. Članom 98 propisano je da se prilikom ocene da li je određena ugovorna odredba pravična uzima u obzir priroda robe ili usluge koja predstavlja predmet ugovora, sve okolnosti pre i tokom zaključenja ugovora, ostale ugovorne odredbe, kao i drugi ugovor koji, s obzirom na ugovor koji se ocenjuje, predstavlja glavni ugovor.

Zakon o obveznim odnosima Republike Hrvatske propisuje u članu 296, stav 1 ništavost odredaba opštih uslova ugovora koje, suprotno načelu savesnosti i poštenja, stvaraju očiglednu nesrazmeru u pravima i obvezama strana na štetu strane koja pristupa ugovoru. ili ugrožavaju ostvarivanje svrhe ugovora, čak i ako je nadležno telo odobrilo opšte uslove. Ipak, ovo pravilo se ne primenjuje na odredbe o predmetu i ceni ugovora, ako su te odredbe jasne, razumljive i lako uočljive. Prilikom ocene ništavosti određene odredbe opštih uslova uzimaju se u obzir sve okolnosti pre i u vreme sklapanja ugovora, pravna priroda ugovora, vrsta robe ili usluge koja je predmet prestacije, ostale odredbe ugovora, kao i odredbe drugog ugovora s kojim je ta odredba opštih uslova ugovora povezana.

Prema članu 143 Zakona o obligacionim odnosima Republike Srbije, ništave su one odredbe opštih uslova koje su protivne samom cilju zaključenog ugovora ili dobrim poslovnim običajima, čak i ako su opšti uslovi koji ih sadrže odobreni od nadležnog organa. Sud može da odbije primenu pojedinih odredbi opštih uslova koje lišavaju drugu stranu prava da stavi prigovore, ili onih na osnovu kojih ona gubi prava iz ugovora ili gubi rokove, ili koje su inače nepravične ili preterano stroge prema njoj. Važeći Zakon o zaštiti potrošača Republike Srbije samo preuzima neke odredbe Zakona o obligacionim odnosima koje se tiču ugovora po pristupu. Prema Nacrtu Zakona o zaštiti potrošača Republike Srbije (NZZP), ugovorna odredba smatra se nepravičnom ako: za posledicu ima značajnu nesrazmeru u obavezama ugovornih strana, na štetu potrošača; ili za posledicu ima da izvršenje ugovorne obaveze opterećuje potrošača bez opravdanog razloga; ili za posledicu ima da se izvršenje ugovora značajno razlikuje od onoga što je potrošač osnovano očekivao; ili je protivna zahtevu transparentnosti; ili je u suprotnosti sa načelom savesnosti i poštenja. Pri proceni da li je ugovorna odredba nepravična, u obzir se uzima: priroda robe ili usluga na koje se ugovor odnosi; okolnosti pod kojima je ugovor zaključen; ostale odredbe istog potrošačkog ugovora, ili drugog ugovora s kojim je potrošački ugovor povezan; način na koji je postignuta saglasnost o sadržini ugovora, i način na koji je, s obzirom na zahtev transparentnosti, potrošač obavešten o sadržini ugovora. NZZP propušta da u srpsko pravo transponuje pravilo Direktive 93/13 koje onemogućava kontrolu pravičnosti ugovornih odredaba kojima je određen predmet ugovora ili odnos uzajamnih davanja.

Albanski zakonodavac doslovno je preuzeo kriterijum pravičnosti iz Direktive 93/13. Prema Zakonu o zaštiti potrošača Republike Albanije, ugovorna odredba čija sadržina nije sporazumno ugovorena smatra se nepravičnom ako, suprotno načelu savesnosti i poštenja, izaziva znatnu neravnotežu u pravima i obvezama ugovornih strana na štetu potrošača. Smatra se da sadržina odredbe nije sporazumno ugovorena ako je ta odredba sačinjena unapred, tako da potrošač nije mogao da utiče na njenu sadržinu, naročito ako se odredba nalazi u ugovoru koji je formularan. Činjenica što je sadržina određene ugovorne odredbe, ili jednog nje-

nog dela, sporazumno ugovorena, ne isključuje primenu pravila o ništavosti na ostatak ugovora, ako se taj ugovor ipak kvalifikuje kao formularan. Ako trgovac tvrdi da je o opštoj odredbi posebno pregovarano, teret dokazivanja leži na njemu. Nepravičnost ugovorne odredbe ceni se s obzirom na prirodu robe ili usluge koje je predmet ugovorne obaveze, sve okolnosti koje su prethodile zaključenju ugovora, kao i sve druge odredbe istog ugovora ili drugog ugovora prema kojem je dati potrošački ugovor akcesoran.

Makedonski zakonodavac je takođe doslovno transponovao pravila Direktive 93/13 koja se odnose na kriterijum pravičnosti opštih uslova formularnih potrošačkih ugovora.

Prema crnogorskom Zakonu o zaštiti potrošača, nepravična odredba u potrošačkom ugovoru je ona odredba o kojoj se nije pojedinačno pregovaralo i koja, suprotno načelu savesnosti i poštenja, narušava ravnotežu prava i obaveza na štetu potrošača. Ravnoteža prava i obaveza ugovornih strana ne mora biti značajno narušena da bi se ugovorna odredba smatrala nepravičnom; dovoljno je da je ravnoteža narušena i da je to na štetu potrošača. To znači da je obim zaštite potrošača postavljen nešto šire nego u Direktivi 93/13: nepravičnost ugovorne odredbe lakše je utvrditi po pravilima crnogorskog Zakona o zaštiti potrošača nego po pravilima Direktive 93/13.

3. Način na koji je Aneks Direktive 93/13 transponovan u državama učesnicama

a. Pravna priroda Aneksa

Prema članu 3(3) Direktive 93/13, Aneks sadrži indikativnu i nezaključenu listu odredaba koje se kvalifikuju kao nepravične. Taj spisak obično nosi naziv siva lista. Nepravičnost ugovornih odredaba koje su navedene u Aneksu oborivo se pretpostavlja. Spisak iz Aneksa nije konačan: ugovorna odredba koja se ne nalazi na listi može da bude nepravična a ugovorna odredba sa liste to ne mora biti. Sud ili drugi nadležni organ mora imati slobodu da proceni da li su odredbe iz Aneksa nepravične u konkretnom slučaju, imajući u vidu opšte merilo pravičnosti propisano Direktivom 93/13.[167]

b. Transpozicija Aneksa u zemljama učesnicama

1. tabela: Transpozicija Aneksa br. 1 Direktive o nepravičnim odredbama u potrošačkim ugovorima

Albanski zakonodavac u celosti je preuzeo listu odredbi iz Aneksa br. 1, ali kao takozvanu crnu listu, odnosno spisak odredaba koje se bez izuzetka smatraju nepravičnim. To znači da se u albanskom pravu neoborivo pretpostavlja da su te ugovorne odredbe nepravične.[168] Ugovorne odredbe sa crne liste ne proizvode pravno dejstvo, one su apsolutno ništave. Pored toga, ugovaranje tih odredaba u poslovanju sa potrošačima sankcionisano je kao prekršaj.

Zakon o zaštiti potrošača Bosne i Hercegovine sadrži crnu listu na kojoj se nalaze dvadeset i dve ugovorne odredbe koje se smatraju nepravičnim.[169] Ona se u određenoj meri preklapa sa sivom listom iz Direktive 93/13. Ipak, izrazi koje koristi zakonodavac ne odgovaraju u potpunosti izrazima iz Direktive, što stvara potrebu da se utvrdi prava namera zakonodavca. Može se, dakle, zaključiti da je siva lista nepravičnih ugovornih odredaba iz Direktive 93/13 samo delimično preuzeta u pravo Bosne i Hercegovine.

Crnogorski zakonodavac je delimično transponovao Aneks Direktive 93/13, propisujući ništavost samo za neke ugovorne odredbe od onih koje su pobrojane u Aneksu i dodajući na

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[167] Odluka ESP od 7. maja 2002. godine, predmet C-478/99, *Commission of the European Communities v. Kingdom of Sweden* [2002] ECR I-04147.

[168] Član 27, stav 3, Zakon o zaštiti potrošača, *Sl. list RAl br.* 61/08.

[169] Član 96, Zakon o zaštiti potrošača, *Sl. glasnik BiH* br. 25/06.

zakonom propisanu listu jednu ugovornu odredbu koje nema u Aneksu.[170] Ugovorne odredbe sa zakonom propisane liste nepravične su u svakom slučaju, bez izuzetka. U tom smislu, crnogorski Zakon o zaštiti potrošača sadrži crnu listu nepravičnih odredaba u potrošačkim ugovorima.

U članu 97 hrvatskog Zakona o zaštiti potrošača transponovana je u potpunosti siva lista iz Aneksa Direktive 93/13. Reč je o otvorenoj, indikativnoj listi odredaba koje se mogu smatrati nepravičnim.

Makedonski zakonodavac samo je delimično transponovao listu iz Aneksa Direktive 93/13. Spisak nepravičnih ugovornih odredaba iz makedonskog zakona predstavlja crnu listu, to jest katalog odredaba koje su nepravične same po sebi. Na taj spisak dodate su neke odredbe kojih nema u Aneksu Direktive 93/13.[171]

Siva lista iz Aneksa I Direktive 93/13 nije preuzeta u srpskom pravu. Lista nepravičnih ugovornih odredaba ne postoji ni u važećem Zakonu o zaštiti potrošača, niti u Zakonu o obligacionim odnosima Republike Srbije. NZZP (pomenuti Nacrt Zakona o zaštiti potrošača Republike Srbije) previđa da se u srpsko pravo transponuju Aneks II (spisak ugovornih odredaba čija se nepravičnost neoborivo pretpostavlja) i Aneks III (spisak ugovornih odredaba čija se nepravičnost oborivo pretpostavlja) iz Predloga Direktive o pravima potrošača.[172]

Član Direktive 93/13	Crna lista	Siva lista	Nije transponovano
ANEKS br. 1.a Smrt ili fizička povreda	ALB (član 27), MAK (član 73), CG (član 64)[173]	HRV (član 97, alineja 1)	BA, SRB

[170] Član 64, stav 1, tačka 19, Zakon o zaštiti potrošača, *Sl. list CG* br. 26/07. Zakonodavac je na listu dodao ugovornu odredbu kojom se isključuje ili ograničava pravo potrošača na srazmerno sniženje ukupnog troška kredita u slučaju vraćanja kredita pre ugovorenog roka.

[171] To su odredbe koje predviđaju: pravo trgovca da jednostrano odredi ili izmeni rok za isporuku proizvoda ili izvršenje usluge; ograničenje prava potrošača da raskine ugovor kada trgovac ne ispunjava svoje obaveze iz garancije; ograničenje prava potrošaču da ugovor prestane u slučaju više sile; isključenje odgovornosti trgovca za štetu koju je skrivio ili za neizvršenje obaveze koja je bitan element ugovora; isključenje odgovornosti trgovca za pravne i skrivene materijalne nedostatke proizvoda; zabrana poravnanja međusobnih obaveza kada su za to ispunjeni zakonski uslovi; nametanje nerazumnog roka u kojem potrošač mora trgovca da obavesti o nedostacima na proizvodu; određivanje unapred iznosa koji potrošač treba da plati trgovcu u slučaju neizvršavanja svojih obaveza a da ista obaveza ne postoji za trgovca; postavljanje neodređenog roka za ispunjenje obaveze trgovca bez određivanja razumnog roka za prestanak ugovora; neopravdano isključenje ili ograničenje zakonskih prava i obaveza potrošača prema trgovcu ili trećem licu u slučaju neizvršenja ili delimičnog izvršenja obaveza od strane trgovca; isključenje kontrole nepravičnosti ugovorne odredbe.

[172] Proposal for a Directive of the European Parliament and of the Council on consumer rights, COM(2008) 614/3.

[173] Ugovorne odredbe sa crne liste crnogorskog Zakona o zaštiti potrošača odstupaju od formulacija koje je u Direktivi 93/13 upotrebio evropski zakonodavac. Na primer, u odredbi kojom se transponuje tačka b Aneksa nema reči *neodgovarajuće* i ne pominje se prebijanje potraživanja koje trgovac ima prema potrošaču sa potraživanjem koje potrošač ima prema trgovcu. U odredbi kojom se transponuje tačka c Aneksa ne pominje se vezivanje obaveze trgovca za uslov čije ostvarenje zavisi jedino od njegove volje, iako je upravo to smisao tačke c. U odredbi kojom se transponuje tačka i Aneksa nedostaje reč *neopozivo* i zakonodavac propušta da naglasi da potrošač mora imati *stvarnu* priliku da se upozna sa sadržinom ugovora. U odredbi kojom se transponuje tačka l Aneksa ne pominje se previsoka cena. U odredbi kojom se transponuje tačka p Aneksa, umesto smanjenja garancija koje su date potrošaču, zakonodavac govori o dovođenju potrošača u nepovoljniji položaj.

ANEKS br. 1.b Neispunjenje, delimično ispunjenje ili neadekvatno ispunjenje ugovorne obaveze	ALB (član 27), MAK (član 61), CG (član 64)	HRV (član 97, alineja 2)	BA, SRB
ANEKS br. 1.c Uslov čije ostvarenje zavisi isključivo od volje prodavca	ALB (član 27), MAK (član 54), CG (član 64)	HRV (član 97, alineja 3)	BA, SRB
ANEKS br. 1.d Pravo trgovca da zadrži primljeno ako potrošač odustane od ugovora ili zaključenja ugovora, ako za potrošača nije ugovoreno pravo na isti iznos u slučaju da trgovac odustane od ugovora ili zaključenja ugovora	ALB (član 27), CG (član 64)	HRV (član 97, alineja 4)	BA, SRB, MAK
ANEKS br. 1.e Nesrazmerno visok iznos naknade	ALB (član 27), BA (član 96, tačka g), MAK (član 72) CG (član 64)	HRV (član 97, alineja 1)	SRB
ANEKS br. 1.f Pravo trgovca da raskine ugovor i zadrži ono što je primio na ime usluge koju nije pružio	ALB (član 27), MAK (član 74), CG (član 64)	HRV (član 97, alineja 6 i 7)	BA, SRB
ANEKS br. 1.g Raskid ugovora na neodređeno vreme bez prethodnog upozorenja	ALB (član 27), CG (član 64)	HRV (član 97, alineja 8)	BA, SRB, MAK
ANEKS br. 1.h Automatsko produženje ugovora na određeno vreme	ALB (član 27), MAK (član 70), CG (član 64)	HRV (član 97, alineja 9)	BA, SRB
ANEKS br. 1i Nametanje potrošaču onih ugovornih odredaba s kojima nije imao stvarnu priliku da se upozna	ALB (član 27), CG (član 64)	HRV (član 97, alineja 10)	BA, SRB, MAK
ANEKS br. 1.j Jednostrana izmena ugovornih odredaba	ALB (član 27), MAK (član 62), CG (član 64)	HRV (član 97, alineja 11)	BA, SRB
ANEKS br. 1.k Jednostrana izmena bitnih obeležja robe ili usluge koju duguje trgovac	ALB (član 27), BA (član 96, tačka d), MAK (član 56), CG (član 64)	HRV (član 97, alineja 12)	SRB
ANEKS br. 1.l Određivanje ili povećanje cene	ALB (član 27), MAK (član 55, stav 1), CG (član 64)	HRV (član 97, alineja 13)	BA, SRB
ANEKS br. 1.m Pravo trgovca da odredi da li je roba ili usluga u skladu sa ugovorom, ili da tumači ugovorne odredbe;	ALB (član 27), MAK (član 58), CG (član 64)	HRV (član 97, alineja 14 i 15)	BA, SRB
ANEKS br. 1.n Ograničavanje odgovornosti posrednika	ALB (član 27), MAK (član 75), CG (član 64)	HRV (član 97, alineja 16)	BA, SRB
ANEKS br. 1.o Obavezivanje potrošača da izvrši sve obaveze i ako trgovac nije izvršio svoje	ALB (član 27), MAK (član 59), CG (član 64)	HRV (član 97, alineja 17)	BA, SRB

ANEKS br. 1.p Mogućnost ustupanja prava i obaveza iz ugovora	ALB (član 27), BA (član 96, tačka t), MAK (član 77), CG (član 64)	HRV (član 97, alineja 18)	SRB
ANEKS br. 1q Isključenje ili otežavanje vršenja prava potrošača da preduzme pravne radnje; uskraćivanje uvida u dokaze ili prebacivanje tereta dokazivanja na potrošača.	ALB (član 27), MAK (član 71), CG (član 64)	HRV (član 97, alineja 19)	BA, SRB

2. tabela: Transpozicija Aneksa br. 2 Direktive o nepravičnim odredbama u potrošačkim ugovorima

Aneksom br. 2 Direktive 93/13 državama je dopušteno da propišu određene izuzetke u oblasti ugovora o pružanju finansijskih usluga. Ako država odluči da iskoristi ovu opciju, ona može da propiše da pojedine odredbe iz Aneksa br. 1 nisu nepravične u slučaju da ih sa potrošačem ugovori pružalac finansijskih usluga. Ona država koja propusti da iskoristi opciju iz Aneksa br. 2, garantuje potrošačima viši stepen zaštite.

Aneks br. 2 Direktive 93/13 nije transponovan u albansko, srpsko i hrvatsko pravo. Crnogorski zakonodavac iskoristio je neke od opcija koje su mu date Aneksom II.

Aneks br. 2 Direktive 93/13 nije transponovan u pravo Bosne i Hercegovine nisu transponovan. Međutim, tu je zakonodavac propustio da transponuje i one tri odredbe iz Aneksa br. 1 Direktive 93/13, na koje bi izuzeci iz Aneksa br. 2 trebalo da se odnose.

Činjenica što zakonodavac nije iskoristio mogućnosti koje mu ostavlja Aneks br. 2, ne znači da je u Bosni i Hercegovini potrošačima garantovan viši stepen zaštite. Tu nije napravljen izuzetak, ali nije ni propisano pravilo od kojeg bi se mogao napraviti izuzetak.

Član Direktive 93/13	Transponovan Aneks II	Nije transponovan Aneks II
ANEKS br. 2.a Izuzetak od člana 1.g za pružaoce finansijskih usluga		HRV, SRB, ALB, MAK, CG
ANEKS br. 2.b rečenica 1 Izuzetak od člana 1.j za pružaoce finansijskih usluga	MAK(član 55, stav 2, tačke 2 i 3)	HRV, SRB, ALB, CG
ANEKS br. 2b, rečenica 2 Izuzetak od člana 1.j kada je potrošač slobodan da poništi ugovor		HRV, SRB, ALB, MAK, CG
ANEKS br. 2.c Izuzetak od člana 1.g, 1.j i 1.l u slučaju proizvoda ili usluga gde je cena povezana sa fluktuacijama na berzi akcija, kao i u slučaju ugovora o kupoprodaji strane valute		HRV, SRB, ALB, MAK, CG
ANEKS br. 2.d Izuzetak od člana 1.l u slučaju odredbi o indeksiranju cene	MAK (član 55, stav 2, tačka 1), CG (član 64)[2]	HRV, SRB, ALB

[174] Odredbe crnogorskog Zakona o zaštiti potrošača i ovde odstupaju od formulacija koje je u upotrebio evropski zakonodavac. U Aneksu II, tačka d, pominju se zakonom dozvoljene ugovorne odredbe o indeksiranju cena, pod uslovom da je način na koji se cene menjaju izričito naveden u ugovoru. Umesto toga, crnogorski zakonodavac govori o cenama proizvoda koje se utvrđuju na osnovu propisanog metoda, ako je taj metod izričito opisan.

IV. Pravne posledice nepravičnosti ugovornih odredaba

a. Posledice koje predviđa Direktiva 93/13

Prema članu 6(1) Direktive o nepravičnim odredbama u potrošačkim ugovorima, država je dužna da propiše da potrošača ne obavezuje nepravična odredba iz ugovora koji je prema pravilima domaćeg prava potrošač zaključio sa trgovcem (prodavcem robe odnosno pružaocem usluga). Zaključeni ugovor dalje obavezuje ugovorne strane ako može da opstane bez te nepravične ugovorne odredbe: Direktiva 93/13 dopušta da ugovor opstane, prema pravilima o delimičnoj ništavosti, ako je to moguće nakon što se utvrdi na nepravična odredba ne proizvodi pravna dejstva.

Evropski sud prave istakao je u odluci *Mostaza Claro* da je odredba člana 6(1) Direktive 93/13 obavezujuća, to jest imperativna po svojoj pravnoj prirodi. Ta odredba uvažava slabiju poziciju jedne ugovorne strane i ima za cilj uspostavljanje ravnoteže i jednakosti između strana. Formalna ravnoteža između prava i obaveza jedne i druge ugovorne strane nije dovoljna.[175]

aa. Nepravična ugovorna odredba ne obavezuje potrošača

Način na koji je sročena odredba člana 6(1) Direktive 93/13 otvara prostor za raspravu o tome o kojoj vrsti ništavosti je reč.

Danas je jasno da isključivo apsolutna ništavost nepravične odredbe u potrošačkim ugovorima odgovara shvatanjima Evropskog suda pravde. Ustanova relativne ništavosti, to jest rušljivosti (koja znači da ugovor proizvodi pravno dejstvo i konvalidira protekom vremena ako ugovorna strana u čijem interesu je konstituisana rušljivost ne zahteva blagovremeno da se ugovor poništi), nije u skladu sa odlukama Evropskog suda pravde u slučajevima *Océano*, *Cofidis* i *Mostaza Claro*.[176]

Domaći sudovi dužni su da kontrolišu pravičnost odredaba u potrošačkim ugovorima po službenoj dužnosti. Pored toga, domaći sudovi treba da budu ovlašćeni da samostalno nalože prikupljanje dokaza u pogledu činjeničnih navoda stranaka. Pravilo nacionalnog prava po kojem domaći sud više ne može, nakon isteka određenog roka, da utvrđuje da li je odredba potrošačkog ugovora nepravična i posledično ništava, nije u skladu sa Direktivom 93/13.[177]

bb. Posledice po ugovornu odredbu i ugovor u celini

Ništavost jedne ugovorne odredbe ne povlači za sobom ništavost ugovora u celini. Zaključeni ugovor obavezuje obe strane, ako on može da opstane bez odredbe koja je nepravična i zato ništava. Ustanova delimične ništavosti omogućava da ugovor preživi apsolutnu ništavost jedne ugovorne odredbe, ako to dopušta svrha i pravna priroda ugovora.

U Direktivi 93/13 nema pravila o izmeni nepravične ugovorne odredbe, to jest o mogućnosti da nepravična odredba opstane u izmenjenom obliku. Mogućnost da sud izmeni nepravičnu odredbu u potrošačkom ugovoru tako da izmenjena odredba obavezuje ugovorne strane, otvorila bi pitanje postojanja i kvaliteta saglasnosti volja trgovca i potrošača.

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[175] Odluka ESP od 26. oktobra 2006, predmet C–168/05 – *Elisa María Mostaza Claro v. Centro Móvil Milenium SL* [2006] ECR I–10421.

[176] Odluka ESP od 27. juna 2000, spojeni predmeti C–240/98 do C–244/98 – *Océano Grupo Editorial SA v. Murciano Quintero* [2000] ECR I–04941;Odluka ESP od 21. novembra 2002, C–473/00 – *Cofidis v. Fredout*, [2002] ECR I–10875; Odluka ESP od 26. oktobra 2006, C–168/05 – *Elisa María Mostaza Claro v. Centro Móvil Milenium SL* [2006] ECR I–10421.

[177] Odluka ESP od 21. novembra 2002, predmet C–473/00 – *Cofidis v. Fredout*, [2002] ECR I–10875.

b. Transponovanje pravila o ništavosti nepravične ugovorne odredbe

aa. Apsolutna ništavost

Apsolutna ništavost nepravičnih odredaba u potrošačkim ugovorima propisana je u Hrvatskoj, Makedoniji, Crnoj Gori i Bosni i Hercegovini. To je u skladu sa članom 6(1) Direktive 93/13, kao i sa praksom Evropskog suda pravde.[178] U svim navedenim pravnim sistemima zaključeni ugovor obavezuje ugovorne strane, ako može da opstane bez ništave odredbe.

Prema pravilima hrvatskog prava sudovi su ovlašćeni da utvrđuju nepravičnost i posledičnu ništavost ugovorne odredbe po službenoj dužnosti. Po odredbama članova 296, 323 i 327 hrvatskog Zakona o obveznim odnosima, pravo da se pozove na ništavost ugovora ili ugovorne odredbe ima svako zainteresovano lice. To pravo ima i državni tužilac. Hrvatski Zakon o zaštiti potrošača ne daje ovlašćenje sudovima da menjaju sadržinu nepravične odredbe u potrošačkom ugovoru. U zakonima drugih bivših jugoslovenskih republika, koji deriviraju iz jugoslovenskog Zakona o obligacionim odnosima, postoje odredbe poput navedenih odredaba hrvatskog Zakona o obveznim odnosima. Takav je slučaj u Srbiji, Crnoj Gori, Makedoniji i Bosni i Hercegovini.

Prema odredbi člana 102 hrvatskog Zakona o zaštiti potrošača, ništavost jedne odredbe ugovora ne povlači ništavost samog ugovora, ako on može da opstane bez ništave odredbe. Slično pravilo nalazi se u članu 324, stav 1 hrvatskog Zakona o obveznim odnosima, koji propisuje da ništavost neke odredbe ugovora ne povlači ništavost ugovora, ako on može da opstane bez ništave odredbe i ako ona nije bila ni uslov ugovora ni odlučujuća pobuda zbog koje je ugovor sklopljen. Prema sledećem stavu, kada je ništavost ustanovljena upravo da bi ugovor bio oslobođen te odredbe i važio bez nje, ugovor će biti valjan čak i ako je ništava odredba bila uslov ili odlučujuća pobuda ugovora.

Već je rečeno da se u svim ostalim zakonima o obligacionim odnosima koji su nastali na temelju jugoslovenskog Zakona o obligacionim odnosima, mogu naći pravila koja su po sadržini ista kao pravila iz člana 324 hrvatskog Zakona o obveznim odnosima. To važi za Srbiju, Crnu Goru, Bosnu i Hercegovinu i Makedoniju. Takođe, prema svim pomenutim zakonima, pravila o delimičnoj ništavosti omogućavaju da ugovor opstane pod jednim dodatnim uslovom, a to je da ništava odredba nije bila ni uslov ugovora, ni odlučujuća pobuda zbog koje je ugovor zaključen. Taj dodatni uslov otežava opstanak ugovora u kojem postoji neka apsolutno ništava odredba i njega nema u Direktivi 93/13. U pomenutim zakonima dalje se otvara pitanje da li je ništavost ugovorne odredbe ustanovljena upravo da bi ugovor bio oslobođen te odredbe i važio bez nje. Treba sagledati odnos između nacionalnog zakona kojim se uređuje zaštita potrošača i nacionalnog zakona kojim se uređuju obligacioni odnosi, i videti može li se ovaj dodatni uslov (da ništava odredba nije bila ni uslov ugovora, ni odlučujuća pobuda za njegovo zaključenje) primeniti na potrošačke ugovore. Pitanje je da li taj dodatni uslov važi a ne kako se on tumači.

Prema odredbama članova 94 i 96 Zakona o zaštiti potrošača Bosne i Hercegovine a u vezi sa odredbom člana 105, stav 2 Zakona o obligacionim odnosima Bosne i Hercegovine, nepravične odredbe u potrošačkim ugovorima su apsolutno ništave. Zakon o zaštiti potrošača ne predviđa mogućnost da sud izmeni nepravičnu odredbu tako da ta odredba u izmenjenom obliku obavezuje ugovorne strane. Zakon ne predviđa ni mogućnost da se nepravična ugovorna odredba podeli na deo koji je ništav i deo koji opstaje.

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[178] Odluka ESP od 27. juna 2000, spojeni predmeti C–240/98 to C–244/98 – *Océano Grupo Editorial SA v. Murciano Quintero* [2000] ECR I–04941; Odluka ESP od 21. novembra 2002, C–473/00 – *Cofidis v. Fredout*, [2002] ECR I–10875; Odluka ESP od 26. oktobra 2006, predmet C–168/05 – *Elisa María Mostaza Claro v. Centro Móvil Milenium SL* [2006] ECR I–10421.

U Zakonu o zaštiti potrošača Bosne i Hercegovine nema posebnih pravila o delimičnoj ništavosti. Ipak, članom 94 tog zakona uređuje se ništavost ugovorne odredbe a ne ništavost ugovora. To treba tumačiti u vezi sa članom 105 Zakona o obligacionim odnosima Bosne i Hercegovine, tako da zaključeni ugovor vezuje ugovorne strane ako može da opstane bez nepravične odredbe koja je pogođena sankcijom apsolutne ništavosti. Prema odredbi člana 105, stav 2 Zakona o obligacionim odnosima, spremnost ugovorne strane za koju je ništava odredba bila uslov ili odlučujuća pobuda za zaključenje ugovora, da ugovor zaključi bez te odredbe, nema pravni značaj. To je u skladu sa pravilom iz člana 6(1) Direktive 93/13.

Odredbom člana 66 crnogorskog Zakona o zaštiti potrošača propisana je apsolutna ništavost nepravičnih odredaba u potrošačkim ugovorima. Ništavost ugovorne odredbe ne povlači ništavost samog ugovora, ako on može da opstane bez ništave odredbe.

Odredbom člana 83 makedonskog Zakona o zaštiti potrošača propisana je apsolutna ništavost nepravičnih odredaba u potrošačkim ugovorima. Takva odredba ne proizvodi pravna dejstva. Prema članu 84 istog zakona, svako pravno zainteresovano lice, uključujući organizacije za zaštitu potrošača, može da zahteva od suda da utvrdi ništavost nepravične odredbe u potrošačkom ugovoru. Sud će utvrditi da je nepravična odredba ništava *ex tunc*, to jest da ona ne proizvodi pravno dejstvo od početka. U članu 82, stav 2 makedonskog Zakona o zaštiti potrošača propisano je da ništavost odredbe ne povlači ništavost potrošačkog ugovora, ako on može da opstane bez ništave odredbe. Makedonski Zakon o zaštiti potrošača ne predviđa mogućnost da sud izmeni nepravičnu odredbu tako da ta odredba u izmenjenom obliku obavezuje ugovorne strane. Zakon ne predviđa ni mogućnost da se nepravična ugovorna odredba podeli na deo koji je ništav i deo koji opstaje.

Srpski Zakon o obligacionim odnosima sadrži sva pravila o ništavosti i delimičnoj ništavosti koja sadrže ostali zakoni koji deriviraju iz jugoslovenskog Zakona o obligacionim odnosima. Prema pravilu iz člana 103, stav 1, ništav je svaki ugovor koji je protivan prinudnim propisima, javnom poretku ili dobrim običajima. Prema odredbama člana 105, ništavost neke odredbe ugovora ne povlači ništavost ugovora, ako on može da opstane bez ništave odredbe i ako ona nije bila ni uslov ugovora ni odlučujuća pobuda zbog koje je ugovor sklopljen. Kada je ništavost ustanovljena upravo da bi ugovor bio oslobođen te odredbe i važio bez nje, ugovor će biti punovažan čak i ako je ništava odredba bila uslov ili odlučujuća pobuda ugovora. Sud pazi na ništavost po službenoj dužnosti. Na ništavost se može pozivati svako zainteresovano lice. Pravo da zahteva utvrđenje ništavosti ima i javni tužilac. To pravo se ne gasi protekom vremena.

Već je rečeno da važećim Zakonom o zaštiti potrošača Republike Srbije nije transponovana Direktiva 93/13. To ovim zakonom nije ni pokušavano. Prema pomenutom Nacrtu Zakona o zaštiti potrošača koji je izradilo Ministarstvo trgovine i usluga Republike Srbije (NZZP), nepravične ugovorne odredbe su ništave a ništavost neke odredbe ugovora ne povlači ništavost samog ugovora, ako on može opstati bez ništave odredbe. NZZP ne predviđa mogućnost da sud izmeni nepravičnu odredbu tako da ta odredba u izmenjenom obliku obavezuje ugovorne strane, kao ni mogućnost da se nepravična ugovorna odredba podeli na deo koji je ništav i deo koji opstaje. Na kraju, treba istaći da NZZP pod ugovornom odredbom podrazumeva svaku odredbu potrošačkog ugovora, uključujući posebne pogodbe o čijoj sadržini je potrošač pregovarao ili mogao da pregovara s trgovcem, i opšte odredbe čiju sadržinu je unapred odredio trgovac ili treća strana.

bb. Relativna ništavost

U svim državama koje su predmet ove studije, nepravične odredbe u potrošačkim ugovorima pogođene su sankcijom apsolutne ništavosti. Jedini izuzetak u tom smislu mogla bi da bude Albanija, čije pravo u ovom slučaju ostaje nedorečeno.

cc. Nejasna pravna situacija

Prema članu 28 albanskog Zakona o zaštiti potrošača, ako se utvrdi nepravičnost neke odredbe u potrošačkom ugovoru, smatra se da ta odredba ne proizvodi pravno dejstvo od trenutka zaključenja ugovora. Iz ove formulacije nije jasno da li albanski zakonodavac propisuje apsolutnu ili relativnu ništavost (rušljivost) nepravičnih odredaba u potrošačkim ugovorima.

Prema članu 28 albanskog Zakona o zaštiti potrošača i članu 111 Albanskog građanskog zakonika ništavost jedne ugovorne odredbe ne povlači ništavost samog ugovora, ako on može opstati bez ništave odredbe.

dd. Izmena, dopuna i prilagođavanje odredbe i ugovora

Zakoni o zaštiti potrošača Albanije, Srbije, Crne Gore, Makedonije i Bosne i Hercegovine ne predviđaju mogućnost da sud izmeni ili dopuni nepravičnu odredbu u potrošačkom ugovoru tako da ta odredba u izmenjenom obliku obavezuje ugovorne strane. Međutim, zakoni koji potiču od jugoslovenskog Zakona o obligacionim odnosima sadrže odredbe o zelenaškim ugovorima i propisuju da oštećeni iz zelenaškog ugovora može da zahteva od suda da se njegova obaveza smanji na pravičan iznos. Sud će udovoljiti takvom zahtevu ako je to moguće, a u tom slučaju ugovor sa odgovarajućom izmenom ostaje na snazi. Pravilo te sadržine nalazi se u članu 141 srpskog ZOO, članu 135 crnogorskog ZOO, članu 129 makedonskog ZOO, članu 329 hrvatskog ZOO i članu 141 ZOO Bosne i Hercegovine.

ee. Podela ugovorne odredbe na važeći i nevažeći deo

Zakoni o zaštiti potrošača zemalja učesnica ne predviđaju mogućnost da se nepravična odredba u potrošačkom ugovoru podeli na deo koji je ništav i deo koji opstaje.

ff. Posledice po ugovor u celini

Svi zakoni kojima se uređuju obligacioni odnosi, a koji potiču od jugoslovenskog Zakona o obligacionim odnosima, sadrže odredbe o delimičnoj ništavosti. Reč je o apsolutnoj ništavosti jedne ugovorne odredbe. Ništavost neke odredbe ugovora ne povlači ništavost i samog ugovora, ako on može opstati bez ništave odredbe, i ako ona nije bila ni uslov ugovora ni odlučujuća pobuda zbog koje je ugovor zaključen. Pravilo te sadržine nalazi se u članu 105 srpskog ZOO, članu 103 crnogorskog ZOO, članu 82 makedonskog ZOO, članu 102 hrvatskog ZOO i članu 105 ZOO Bosne i Hercegovine.

c. Naknada štete

Prema zakonima o zaštiti potrošača svih država koje su predmet ove studije, pitanje naknade pretrpljene štete prepušteno je opštim pravilima nacionalnog prava o odgovornosti za štetu.

V. Zahtev transparentnosti iz člana 5 Direktive 93/13

Prema članu 5 Direktive 93/13, ako su sve ili pojedine odredbe budućeg ugovora potrošaču predložene u pisanoj formi, te odredbe moraju biti izražene jednostavnim i razumljivim jezikom. U slučaju sumnje u pogledu značenja ugovorne odredbe, primenjuje se ono tumačenje koje je najpovoljnije za potrošača.

Ideja da odredbe potrošačkog ugovora moraju biti transparentne, odnosno izražene jednostavnim i razumljivim jezikom, u skladu je sa obavezama trgovca da u različitim situacijama obavesti potrošača o svim pojedinostima koje su od značaja za donošenje racionalne odluke o stupanju u ugovorni odnos. Takve obaveze trgovca propisane su različitim evropskim potrošačkim direktivama.

1. Zahtev da odredbe budu izražene jednostavnim i razumljivim jezikom

a. Pravila Direktive 93/13

Prema članu 5 Direktive 93/13, trgovac je dužan da potrošaču saopšti odredbe budućeg ugovora jednostavnim i razumljivim jezikom. Ta dva kriterijuma, jednostavnost i razumljivost jezika kojim su izražene ugovorne odredbe, međusobno se dopunjuju. Zahtev transparentnosti, to jest zahtev da jezik potrošačkog ugovora bude jednostavan i razumljiv, podrazumeva da u ugovoru nema nejasnoća, povoda za nerazumevanje, nedoumica, te da potrošač može lako da razume sadržinu ugovornih odredaba koje mu trgovac nudi.

b. Transponovanje pravila iz člana 5 Direktive 93/13

Gotovo sve države učesnice transponovale su pravilo iz člana 5 Direktive 93/13 u domaće pravo. Neke su to učinile doslovno, kao Albanija, dok su u drugima pravljena određena odstupanja od izraza koje je upotrebio evropski zakonodavac.

Prema albanskom Zakonu o zaštiti potrošača, ako su sve ili pojedine odredbe budućeg ugovora potrošaču predložene u pisanoj formi, te odredbe moraju biti izražene jednostavnim i razumljivim jezikom.[179] Pravilo iste sadržine može se naći u članu 80 makedonskog Zakona o zaštiti potrošača, članu 65, stav 1 crnogorskog Zakona o zaštiti potrošača i članu 100 hrvatskog Zakona o zaštiti potrošača. Hrvatski zakonodavac opravdano dodaje uslovima iz Direktive 93/13 zahtev da pisane ugovorne odredbe budu lako uočljive. Prema članu 93, stav 2 Zakona o zaštiti potrošača Bosne i Hercegovine, ugovorne odredbe treba da budu razumljive i u vezi s drugim odredbama u istom ili drugom ugovoru između istih strana uzimajući u obzir prirodu proizvoda ili usluge i svih drugih učesnika u vezi sa zaključenjem ugovora.

Prema odredbi člana 142, stav 2 srpskog Zakona o obligacionim odnosima, opšti uslovi formularnih ugovora moraju se objaviti na uobičajeni način. Važeći srpski Zakon o zaštiti potrošača ne preuzima pravilo iz člana 5 Direktive 93/13: zakonodavac ne postavlja zahtev da pisane odredbe potrošačkog ugovora budu izražene jasnim i razumljivim jezikom. Prema NZZP (pomenuti Nacrt Zakona o zaštiti potrošača koji je izradilo Ministarstvo trgovine i usluga Republike Srbije), ugovorna odredba obavezuje potrošača ako je izražena jednostavnim i jasnim jezikom, i ako bi je shvatio razuman čovek potrošačevog znanja i informisanosti. Pored toga, NZZP propisuje dužnost trgovca da ugovornu odredbu učini dostupnom potrošaču pre zaključenja ugovora, na način koji, s obzirom na korišćeno sredstvo komunikacije, potrošaču pruža stvarnu mogućnost da se upozna sa sadržinom odredbe.

Prema pravilu iz važećeg srpskog Zakona o zaštiti potrošača tipski ugovor mora da bude napisan na jeziku koji je u službenoj upotrebi u Republici Srbiji. U crnogorskom Zakonu o zaštiti potrošača stoji da standardne odredbe u formularnim ugovorima moraju biti sastavljene na jeziku koji je u službenoj upotrebi u Republici. U protivnom, trgovac podleže prekršajnoj odgovornosti.[180]

c. Tumačenje pravila o transparentnosti u nacionalnim pravima

U albanskom i makedonskom pravu nema posebnih pravila o tumačenju zahteva da odredbe potrošačkog ugovora budu izražene jednostavnim i razumljivim jezikom. Crnogorski zakonodavac postavio je nedvosmisleni zahtev da tipski potrošački ugovor bude na jeziku koji je u zvaničnoj upotrebi. Isto je učinio srpski zakonodavac. U Zakonu o zaštiti potrošača Bo-

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[179] Član 28, stav 1, Zakon o zaštiti potrošača, *Sl. list RAl br.* 61/08.

[180] Član 129, stav 1, tačka 19, Zakon o zaštiti potrošača, *Sl. list CG* br. 26/07.

sne i Hercegovine stoji da ugovorne odredbe treba da budu razumljive. Tako široko postavljen zahtev mora se podvrgnuti dodatnom tumačenju.

Hrvatski zakonodavac pokazao je dobro razumevanje člana 5 Direktive 93/13, upotpunivši pravilo koje je preuzeto iz Direktive zahtevom da odredbe potrošačkog ugovora koji je zaključen u pisanoj formi moraju biti lako uočljive. U tom smislu, zakon garantuje potrošaču viši stepen zaštite nego Direktiva 93/13 i pripadajuća praksa Evropskog suda pravde. Različiti oblici nepoštenog poslovanja, kao što je štampanje potrošačkog ugovora izuzetno sitnim slovima, vređaju pravilo o transparentnosti koje je propisano hrvatskim zakonom. Na istom tragu je srpski NZZP koji predviđa da je trgovac dužan da ugovornu odredbu učini dostupnom potrošaču pre zaključenja ugovora, na način koji, s obzirom na korišćeno sredstvo komunikacije, potrošaču pruža stvarnu mogućnost da se upozna sa sadržinom te odredbe.

2. Posledice nedostatka transparentnosti

a. Pravila sadržana u Direktivi 93/13

U članu 5 Direktive 93/13 stoji da odredbe koje su potrošaču predložene u pisanoj formi moraju biti sročene jednostavnim i razumljivim jezikom i da se one tumače na način koji je najpovoljniji potrošača. Evropski zakonodavac u istom članu propisuje da se izloženo pravilo o transparentnosti ne primenjuje u postupcima za zaštitu kolektivnih prava potrošača.

Pravna posledica ugovaranja nejasne i nerazumljive odredbe sastoji se u primeni pravila tumačenja *contra proferentem*, to jest tumačenju ugovora na štetu one strane koja je samostalno uredila sadržinu formularnog ugovora. Direktivom je propisano da se nejasna i nerazumljiva odredba tumači u korist potrošača, i to na način koji je za njega najpovoljniji. Direktiva ne propisuje posledice ugovaranja odredbe iskazane jednostavnim jezikom koji nije razumljiv za potrošača.[181]

Direktiva 93/13 ne daje odgovor na jedno važno pitanje koje se tiče pravnih posledica netransparentnosti. Reč je o pitanju da li netransparentnost jedne ugovorne odredbe nužno znači da je ta ugovorna odredba nepravična. Drugim rečima, da li je moguće da se nejasna i nerazumljiva odredba, kada se protumači na način koji je najpovoljniji za potrošača, ipak kvalifikuje kao pravična.

b. Prenošenje pravila contra proferentem *u zemljama učesnicama*

Pravilo iz člana 5 Direktive 93/13 nalaže da se u slučaju sumnje u pogledu značenja ugovorne odredbe ta odredba tumači na način koji je *najpovoljniji* za potrošača. Albanski zakonodavac doslovno je preuzeo ovo pravilo i u slučaju sumnje propisao tumačenje koje je najpovoljnije za potrošača.[182]

U Makedoniji i Bosni i Hercegovini zakonodavac propisuje tumačenje u korist potrošača. U Crnoj Gori i Hrvatskoj pravilo *contra proferentem* nalaže tumačenje koje je povoljnije (a ne najpovoljnije) za potrošača. Srpski Zakon o obligacionim odnosima nalaže tumačenje nejasnih odredaba u korist strane koja nije sastavila ugovor, dok Zakon o zaštiti potrošača propisuje tumačenje u korist potrošača. Pomenuti Nacrt Zakona o zaštiti potrošača koji je izradilo Ministarstvo trgovine i usluga Republike Srbije predviđa da sporne odredbe potrošačkog ugovora treba tumačiti u korist potrošača. To pravilo odnosilo bi se kako na ugovorne odredbe koje je unapred formulisao trgovac, tako na odredbe sa sporazumno uređenom sadržinom.

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[181] *Cf.* Martin Ebers, *Unfair Contract Terms Directive*, u: Hans Schulte-Nölke (ur.), *Consumer Law Compendium*, Universität Bielefeld, 2008, 415.

[182] Član 28, stav 1, Zakon o zaštiti potrošača, *Sl. list RAl br.* 61/08.

Čini se da u svim državama koje su predmet ove studije, pravilo *contra proferentem* važi i kada je ugovorna odredba napisana jednostavnim jezikom, ali ipak nije razumljiva za potrošača.

c. Ostale posledice netransparentnosti ugovornih odredaba u nacionalnim pravima

Crnogorski zakonodavac propisao je da formularni ugovor mora biti sastavljen na jeziku koji je u službenoj upotrebi Crnoj Gori. Sličnu odredbu sadrži važeći srpski Zakon o zaštiti potrošača. U Crnoj Gori se zaključenje formularnog potrošačkog ugovora na jeziku koji nije u službenoj upotrebi prekršajno sankcioniše.

aa. Postojanje i kvalitet saglasnosti volja o netransparentnim odredbama

Svi zakoni koji potiču od jugoslovenskog Zakona o obligacionim odnosima (a to su zakoni o obligacionim odnosima Crne Gore, Makedonije, Hrvatske, Srbije i Bosne i Hercegovine), sadrže pravilo koje bi moglo da bude od značaja za pitanje vezanosti potrošača onom odredbom formularnog ugovora koju nije mogao da razume. Prema tom pravilu, opšti uslovi formularnog ugovora moraju se objaviti na uobičajeni način i obavezuju ugovornu stranu samo ako su joj bili poznati ili morali biti poznati u času zaključenja ugovora.

bb. Nepravičnost netransparentnih odredaba

Nijedna od država koje su predmet ove studije nije propisala da se odredbe potrošačkog ugovora koje nisu napisane jednostavnim i razumljivim jezikom imaju smatrati nepravičnim. Drugim rečima, nacionalnim pravima tih država nije propisana apsolutna ništavost ugovornih odredaba koje nisu transparentne.

cc. Nejasne pravne situacije

Nejasna situacija postoji svim zemljama učesnicama u pogledu pravnih posledica netransparentnosti, odnosno građanskopravnih sankcija u slučaju da trgovac unapred formuliše odredbu potrošačkog ugovora jezikom koji nije jednostavan i razumljiv. Jedan od opštih uslova punovažnog nastanka ugovora jeste saglasnost izjavljenih volja ugovornih strana. Nije jasno u kojoj meri netransparentnost ugovorne odredbe utiče na postojanje i kvalitet te saglasnosti. Svi zakoni koji potiču od jugoslovenskog Zakona o obligacionim odnosima propisuju da ugovor ne nastaje ako među stranama postoji nesporazum o prirodi ugovora ili o osnovu ili o predmetu obaveze.

3. Zaključak

Ugovorno potrošačko pravo Evropske unije trebalo bi da pruži odgovor na pitanje da li se svaka ugovorna odredba koja nije napisana jasnim i razumljivim jezikom nužno smatra nepravičnom i stoga apsolutno ništavnom; odnosno, da li je moguće da se nejasna i nerazumljiva odredba, kada se protumači na način koji je najpovoljniji za potrošača, ipak kvalifikuje kao pravična.

VI. Postupci za zaštitu kolektivnih prava potrošača iz člana 7(2) Direktive 93/13

1. Opšti pregled

Prema članu 7(1) Direktive 93/13 država je dužna da propiše odgovarajuća efikasna pravna sredstva u cilju sprečavanja trgovaca da formularnim ugovorima nameću potrošačima nepravične ugovorne odredbe. To bi bilo u interesu potrošača i konkurenata pomenutih trgovaca. Država je slobodna da izabere koja će to pravna sredstva biti.

Član7(2) Direktive 93/13 predviđa samo da u tom smislu država propisuje pravila po kojima pojedinci i organizacije za koje zaštita potrošača predstavlja legitiman interes, mogu da pokrenu postupak pred sudom ili organom uprave i da zahtevaju da se utvrdi nepravičnost opštih uslova formularnih ugovora, kako bi se sprečilo da trgovac nastavi da potrošačima nameće nepravične ugovorne odredbe. Takav postupak može se pokrenuti odvojeno ili zajedno protiv određenog broja trgovaca iz iste privredne grane, kao i protiv njihovih udruženja preporučuju ugovaranje nepravičnih opštih uslova formularnih potrošačkih ugovora.

Gotovo sve države koje su predmet ove studije propisale su takva pravila. Izuzetak u tom smislu predstavlja Srbija. Pomenuti Nacrt Zakona o zaštiti potrošača koji je izradilo Ministarstvo trgovine i usluga Republike Srbije (NZZP) sadrži pravila koja se tiču zaštite kolektivnih prava potrošača u pogledu zabrane nepravičnih ugovornih odredaba i različitih oblika nepoštenog poslovanja.

2. Upravna kontrola nepravičnih odredaba

a. Uloga organa uprave u zemljama učesnicama

Subjekti odgovorni za zaštitu potrošača u Bosni i Hercegovini su Ministarstvo vanjske trgovine i ekonomskih odnosa, Ombudsman za zaštitu potrošača, Vijeće za zaštitu potrošača, Konkurencijsko vijeće, nadležni organi entiteta i Brčko Distrikta BiH, uredi za konkurenciju i zaštitu potrošača entiteta, udruženja potrošača, obrazovne institucije i mediji i inspekcijski i drugi organi u skladu sa zakonom.[183]

U Hrvatskoj, to su Ministarstvo gospodarstva, rada i poduzetništva, Ministarstvo zdravstva i socijalne skrbi, Državni inspektorat, Agencija za elektroničke medije (u slučaju povrede Zakona o elektroničkim medijima), Pravobranitelj za djecu (u slučaju postupanja u suprotnosti s odredbama Zakona o zaštiti potrošača kojima se uređuje nepoštena poslovna praksa), "Potrošač" – Hrvatski savez udruga za zaštitu potrošača, Savez udruga za zaštitu potrošača Hrvatske.[184]

Postupak zabrane nepravičenih ugovornih odredaba i nepoštenog poslovanja prema srpskom NZZP mogu da pokrenu potrošačke organizacije koje su za to posebno ovlašćene, privredne, profesionalne i zanatske komore i ministarstvo nadležno za poslove zaštite potrošača.

U albanskom pravu, državni organi u čiju nadležnost spada zaštita potrošača i potrošačke organizacije koje su stekle status zastupnika kolektivnih interesa potrošača, mogu da pokreću postupke kolektivne zaštite pred sudom i pred Komisijom za zaštitu potrošača.

Nasuprot tome, u Crnoj Gori i Makedoniji državni organi nemaju ovlašćenja da pokreću postupak kolektivne zaštite pred sudom.

U Crnoj Gori, određeni državni organi imaju dužnost da obaveste potrošača o tome da svoja prava može da zaštiti u postupku pred sudom. Nadzor nad sprovođenjem Zakona o za-

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[183] Član 98, u vezi sa članom 121, Zakon o zaštiti potrošača, *Sl. glasnik BiH* br. 25/06.

[184] Upor. Član 132, stav 2, Zakon o zaštiti potrošača, *NN RH* br. 79/07, 125/07, 79/09, 89/09. Pravo da pokrenu postupak pred sudom imala su sledeća pravna lica: Hrvatska gospodarska komora, Hrvatska obrtnička komora, Hrvatska udruga poslodavaca, Hrvatska udruga banaka, Hrvatski ured za osiguranje, "Potrošač" – Hrvatski savez udruga za zaštitu potrošača, Savez udruga za zaštitu potrošača Hrvatske (Uredba o određivanju pravnih osoba ovlaštenih za podnošenje tužbe u vezi sa zabranom korištenja nepoštenih ugovornih odredaba u potrošačkim ugovorima, *NN HR* 41/08). Nakon što je došlo do izmena Zakona o zaštiti potrošača (*NN RH* br. 79/09), na predlog ministra nadležnog za poslove zaštite potrošača, Vlada Republike Hrvatske usvojila je novu Uredbu i odredila lica ovlaćena za pokretanje postupka pred nadležnim trgovinskim sudom radi zaštite kolektivnih interesa potrošača (Uredba o određivanju osoba ovlaštenih za pokretanje postupka radi zaštite kolektivnih interesa potrošača, *NN RH* br. 124/09).

štiti potrošača vrši ministarstvo nadležno za poslove zaštite potrošača preko tržišnih inspektora. Inspekcijski nadzor vrše i druga resorna ministarstva, Centralna banka i drugi nadležni organi.[185] Pojedini državni organi imaju izričita ovlašćenja u pogledu kontrole opštih uslova formularnih potrošačkih ugovora.[186] U nekim slučajevima ta ovlašćenja su savetodavne prirode.[187]

Prema Zakonu o obligacionim odnosima Makedonije (kao i prema drugim zakonima koji deriviraju iz jugoslovenskog Zakona o obligacionim odnosima) državni tužilac može da zahteva od suda da utvrdi ništavost određenog ugovora ili ugovorne odredbe.

b. Istražna ovlašćenja državnih organa

U nekim od zemalja koje su predmet ove studije upravni organi imaju određena istražna ovlašćenja. Takav je slučaj sa organom nadležnim za nadzor nad tržištem u Albaniji. U Crnoj Gori, inspekcijski nadzor podrazumeva da nadležni organi imaju obavezu da prime i reaguju na svaku pritužbu potrošača i da u te svrhe od trgovca zahtevaju da im stavi na raspolaganje određena dokumenta i informacije.

Ombudsman za zaštitu potrošača u Bosni i Hercegovini ima dužnost da istražuje aktivnosti na tržištu usmjerene prema potrošaču po službenoj dužnosti ili po osnovu žalbi, kao i da preporučuje upotrebu određenih ugovornih odredaba u posebnim sektorima poslovanja.[188]

c. Pregovori i smernice

Treba razmotriti mogućnost da državne institucije učestvuju u pregovorima i daju smernice u pogledu pravičnosti opštih uslova formularnih potrošačkih ugovora.

Takva mogućnost postoji u Bosni i Hercegovini, gde je dužnost ombudsmana za zaštitu potrošača da preporučuje upotrebu određenih standardnih ugovornih odredaba u ugovorima koji se koriste u posebnim sektorima poslovanja, kao i da pregovara s predstavnicima određenih trgovinskih udruženja o modelima ugovora koji se primjenjuju u specifičnim sektorima poslovanja.

Albanska ministarstva u čiju nadležnost spadaju poslovi iz oblasti ekonomije, trgovine i energetike učestvuju u izradi kodeksa ponašanja i tipskih ugovora, u saradnji sa privrednim subjektima.[189]

Crnogorsko ministarstvo nadležno za poslove zaštite potrošača proučava i daje predloge koji se odnose na potrošače i politiku zaštite potrošača. Pored toga, vansudska zaštita u Crnoj Gori ostvaruje se preko Arbitražnog odbora za vansudsko rješavanje sporova potrošača. Prema članu 92 Zakona o bankama Crne Gore, bankarski ombudsman daje preporuke bankama i mikrokreditnim finansijskim institucijama i kreditnim unijama za poboljšanje odnosa prema klijentima. Oba navedena mehanizma mogu se primeniti u slučaju nepravičnih opštih uslova formularnih potrošačkih ugovora.

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[185] Član 124, Zakon o zaštiti potrošača, *Sl. list RCG* br. 26/07.

[186] Operator javne elektronske komunikacione mreže obavezan je da tipski pretplatnički ugovor za svaki od servisa elektronskih komunikacija koji su u ponudi operatora dostavi na saglasnost Savjetu Agencije za elektronske komunikacije i poštansku djelatnost. Vid. Član 102, Zakon o elektronskim komunikacijama, *Sl. list RCG* br. 50/2008.

[187] Bankarski ombudsman daje preporuke bankama i mikrokreditnim finansijskim institucijama i kreditnim unijama za poboljšanje odnosa prema klijentima, što se može primeniti i na opšte uslove formularnih potrošačkih ugovora. Vid. Član 92, Zakon o bankama, *Sl. list RCG* br. 17/08.

[188] Član 101, Zakon o zaštiti potrošača, *Sl. glasnik BiH* br. 25/06.

[189] Član 49, stav 2, tačke d, h, Zakon o zaštiti potrošača, *Sl. list RAl br.* 61/08.

d. Ovlašćenje javnih organa da izdaju naloge

U pojedinim državama organi uprave ovlašćeni su da trgovcima izdaju određene naloge u pogledu nepravičnih odredaba u potrošačkim ugovorima. U Albaniji, to ovlašćenje (pored sudova) ima Komisija za zaštitu potrošača.[190] U Bosni i Hercegovini, članom 101 Zakona o zaštiti potrošača propisana je dužnost ombudsmana za zaštitu potrošača da donosi odluke i preduzima druge mere u slučajevima pritužbi potrošača ili kršenja dobrih poslovnih običaja, a članom 103 njegova nadležnost da izdaje instrukcije za prestanak aktivnosti koje su u suprotnosti s potrošačkom legislativom i da iznosi te instrukcije pred sud.

Važeći Zakon o zaštiti potrošača i Zakon o obligacionim odnosima Republike Srbije ne sadrže pravila čijim propisivanjem bi bila ispunjena obaveza države iz člana 7 Direktive 93/13. Prema NZZP (pomenuti Nacrt Zakona o zaštiti potrošača koji je izradilo Ministarstvo trgovine i usluga Republike Srbije), kada utvrdi da je došlo do ponovljenog ugovaranja ili preporučivanja ugovorne odredbe koja se smatra nepravičnom, ministarstvo nadležno za poslove zaštite potrošača može da naloži da se sa time bez odlaganja prestane, zatim da naloži licu da vrati koristi koje je na taj način steklo, da zabrani ponovno ugovaranje ili preporučivanje takve odredbe i da izda uputstvo da se odluka objavi o trošku lica kojem je izrečena zabrana.

U ostalim državama koje su predmet ove studije nema takvih pravila. Treba primetiti da će u Hrvatskoj na osnovu člana 132 Zakona o zaštiti potrošača, pre pokretanja postupka za zaštitu kolektivnih interesa potrošača, ovlašćena lica prethodno pisano upozoriti trgovca da će se protiv njega pokrenuti postupak u slučaju da ne prekine s nedopuštenim ponašanjem u roku od 14 dana.[191]

3. Sudska kontrola nepravičnih odredaba

a. Vrste postupaka predviđenih nacionalnim pravima

Gotovo sve pomenute države propisuju postupke zabrane ugovaranja, ili preporučivanja da se ugovaraju, nepravične odredbe u potrošačkim ugovorima. Izuzetak je Srbija u kojoj nije transponovan član 7 Direktive 93/13. Međutim, NZZP predviđa da na predlog ovlašćenih predlagača sud može da oglasi ništavnom nepravičnu odredbu, da naloži licu da bez odlaganja prekine upotrebu te nepravične odredbe u poslovanju s potrošačima, da naloži vraćanje koristi koja je na taj način stečena, da zabrani ponovnu upotrebu te nepravične odredbe i da odredi da se odluka objavi o trošku onoga kome je izrečena zabrana. Treba istaći da NZZP uređuje i skraćeni postupak.

Prema pravilima albanskog Zakona o parničnom postupku, sud može da zabrani određeno postupanje, da naloži da se prestane sa određenim postupanjem, i da naloži objavljivanje ispravke ili objavljivanje donete odluke u odgovarajućem obliku, u celini ili delimično, u cilju otklanjanja trajnih posledica datog postupanja. Nasuprot tome, od makedonskih sudova može se zahtevati jedino da utvrde ništavost ugovora ili ugovorne odredbe.[192]

Prema članovima 120 i 122, stav 2 i 4, Zakona o zaštiti potrošača Bosne i Hercegovine kojima je izvršena obaveza države iz člana 7(2) Direktive 93/13, nadležni sud će svojim ak-

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[190] Član 55, Zakon o zaštiti potrošača, *Sl. list RAl br.* 61/08.

[191] Inspektori ministarstava nadležnog za poslove zaštite potrošača i Državni inspektorat bili su ovlašćeni da izreknu novčanu kaznu u iznosu od 10.000 do 100.000 HRK (cca. 1.370 do 13.700 EUR) pravnom licu koje nameće uslove ugovora koji su nepravični u smislu odredaba Zakona o zaštiti potrošača. Ta mogućnost ukinuta je izmenama hrvatskog Zakona o zaštiti potrošača (*NN RH* br. 79/09).

[192] Član 83, Zakon o zaštiti potrošača, *Sl. list RMak br.* 38/04, 77/07, 103/08.

tom narediti prestanak bilo kakvog čina ili prakse koji su u suprotnosti s odredbama Zakona o zaštiti potrošača ili drugih propisa, a koji štete zajedničkim interesima potrošača. Sud ima ovlaštenja da naloži objavljivanje presude u celosti ili delimično u medijima ili da zatraži korektivnu izjavu od tužene strane. U slučaju kršenja odredaba koje se odnose na postavljanje nekorektnih uslova u potrošačkim ugovorima, postupak pred nadležnim sudom može biti pokrenut zajednički ili pojedinačno protiv trgovaca iz istog ekonomskog sektora ili njihovih asocijacija, koji koriste ili preporučuju postavljanje sličnih nekorektnih uslova. U istom postupku, institucija ili udruženje ima ovlaštenja da zahtijeva kompenzaciju za štetu nanesenu kolektivnim interesima potrošača.[193] Naknada štete može se zahtevati po pravilima Zakona o obligacionim odnosima.

Pravilima iz Glave II, Deo V hrvatskog Zakona o zaštiti potrošača uređen je postupak za zaštitu kolektivnih interesa potrošača. Na osnovu člana 131(1) svako ovlašćeno lice ima pravo da pokrene postupak za zaštitu kolektivnih interesa potrošača protiv lica koje deluje u suprotnosti sa zakonskim odredbama o nepravičnim odredbama u potrošačkim ugovorima. Postupak može biti pokrenut protiv pojedinog trgovca ili grupe trgovaca iz istog privrednog sektora, čije je postupanje u suprotnosti sa pomenutim odredbama, protiv komorskih i interesnih udruženja trgovaca koje preporučuju protivpravno postupanje, ili protiv sastavljača kodeksa postupanja trgovaca kojima se preporučuje nepošteno poslovanje. Važno je napomenuti da do donošenja konačne odluke sud može odrediti privremenu meru kojom nalaže prekid određenog postupanja koje je suprotno zakonskim odredbama o nepoštenim odredbama u potrošačkim ugovorima. Na osnovu člana 136, sud će odlukom: 1) utvrditi čin povrede propisa o zaštiti potrošača i precizno ga definisati; 2) narediti tuženom da prekine postupanje koje je protivno propisima o zaštiti potrošača, te narediti mu da, ukoliko je to moguće, usvoji mere koje su potrebne za uklanjanje štetnih posledica sopstvenog protivpravnog postupanja, i 3) zabraniti mu takvo ili slično ponašanje ubuduće. Ta odluka obavezuje tuženog da se ubuduće uzdrži od istog ili sličnog protivpravnog postupanja u odnosu na sve potrošače (član 138). Sud će narediti tuženom da objavi u celosti ili delimično odluku o vlastitom trošku, ako to objavljivanje može da doprinese da se ublaže ili potpunosti otklone štetne posledice povrede propisa o zaštiti potrošača (član 136a). Opisani postupak ne sprečava lice kojem je šteta naneta da pokrene pred nadležnim sudom postupak za naknadu štete protiv lica koje mu je pričinilo štetu nedopuštenim postupanjem, ili da pokrene pred nadležnim sudom postupak za poništenje ili utvrđenje ništavosti ugovora koji je zaključen pod uticajem nedopuštenog postupanja, odnosno da pred sudom pokrene bilo koji drugi postupak kojim će zahtevati ostvarivanje svojih prava iz Zakona o zaštiti potrošača ili drugih zakona (član 140). Štaviše, sudska odluka doneta u postupku za zaštitu kolektivnih interesa potrošača obavezuje ostale sudove u postupku koji potrošač lično pokrene radi naknade štete pričinjene ponašanjem tuženika. Naknada štete može se dobiti prema pravilima građanskog prava.

Crnogorski Zakon o zaštiti potrošača sadrži pravila o sudskoj zabrani nepravičnih odredaba u potrošačkim ugovorima.[194] Mogućnost izricanja zabrane licima koja preporučuju ugovaranje tih odredaba nije izričito uređena, što nije u skladu sa Direktivom 93/13.[195] Moguće je izricanje privremene zabrane u hitnom postupku. Prema članu 114, stav 2, sud može do do-

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[193] Član 123, Zakon o zaštiti potrošača, *Sl. glasnik BiH* br. 25/06.

[194] Član 114, Zakon o zaštiti potrošača, *Sl. list CG* br. 26/07.

[195] Izricanje sudske zabrane licima koja preporučuju ugovaranje nepravičnih odredaba nije izričito uređeno crnogorskim pravom. Međutim, zakonske odredbe mogle bi se tumačiti tako da je izricanje takve zabrane moguće, budući da se po Zakonu o zaštiti potrošača tužba može podneti i protiv udruženja trgovaca, koja po pravilu predlažu modele ugovora.

nošenja odluke da zabrani korišćenje ugovornih odredbi za koje se učini verovatnim da nisu pravične. Potrošač čije je pravo ili interes povređen može da podnese zahtev za naknadu štete pred nadležnim sudom, u skladu sa opštim propisima. To može da učini i organizacija potrošača.[196]

b. Predlog za izricanje sudske zabrane

Pored državnih institucija o kojima je već bilo reči, predlog za izricanje zabrane nepravičnih odredaba sudu mogu da podnesu potrošačke organizacije. Ono to mogu da učine samostalno (u Makedoniji i Crnoj Gori) ili preko udruženja potrošačkih organizacija (u Albaniji, Hrvatskoj i Bosni i Hercegovini). NZZP (pomenuti Nacrt Zakona o zaštiti potrošača koji je izradilo Ministarstvo trgovine i usluga Republike Srbije) predviđa aktivnu legitimaciju kako potrošačkih organizacija, tako udruženja potrošačkih organizacija. Prema odredbama NZZP aktivno su legitimisane i privredne, profesionalne i zanatske komore. U crnogorskom pravu, pravo da se zahteva izricanje zabrane nepravičnih odredaba dato je i potrošaču kao pojedincu, koji može da podnese tužbu nadležnom sudu protiv pojedinog trgovca, više trgovaca koji posluju u istom privrednom sektoru ili udruženja trgovaca radi poništenja nepravičnih ugovornih odredaba, uključujući odredbe sa crne liste.

c. Pravne posledice kolektivnih postupaka: Princip res judicata

U većini zemalja koje su predmet ove studije sudska odluka može imati dejstvo samo prema trgovcu koji je strana u sporu. Ta odluka nema dejstva prema drugim trgovcima koji ugovaraju iste ili slične nepravične odredbe u formularnim potrošačkim ugovorima. Međutim, pojedini nacionalni propisi dopuštaju da se postupak pokrene protiv više trgovaca koji posluju u istom privrednom sektoru ili udruženja trgovaca i da se na taj način dođe do sudske odluke koja obavezuje veći broj trgovaca. Takav je slučaj u Bosni i Hercegovini, Hrvatskoj, Makedoniji i prema srpskom NZZP. U nekim državama, primera radi u Hrvatskoj i Bosni i Hercegovini, društveni značaj sudske odluke može da se proširi objavljivanjem presude ili ispravke.

I pored opšteg pravila *res judicata*, u crnogorsko pravo uvedena je jedna novina. Naime, prema članu 114, stav 3, crnogorskog Zakona o zaštiti potrošača, unapred formulisana odredba potrošačkog ugovora može se osporavati pred sudom u pogledu pravnog dejstva u predmetnom slučaju kao i u pogledu sličnih odredbi budućih ugovora. To pravilo usmereno je, između ostalog, protiv izigravanja presude od strane trgovaca, budući da zabranjuje svako buduće ugovaranje ne samo iste, nego i sličnih odredaba.

4. Zaključak

Opšti zaključak je sledeći. Sve države koje su predmet ove studije upustile su se u određenom stepenu u zadatak da transponuju Direktivu 93/13 u nacionalno pravo. Budući da je prošlo kratko vreme od implementacije direktive u domaća prava, te da se nova nacionalna pravila tek kratko vreme primenjuju, možda je previše rano za dublje razmatranje praktičnih implikacija obavljenog posla. Institucije koje su dobile potrebna ovlašćenja u oblasti zaštite prava i interesa potrošača još uvek su mlade i potrebno je dati im vremena za razvoj pre nego što njihov rad bude bio ocenjen. U slučaju Srbije, ako NZZP (Nacrt Zakona o zaštiti potrošača koji je izradilo Ministarstvo trgovine i usluga Republike Srbije) uđe u zakonodavni postupak u obliku u kakvom je sada (jun 2010. godine), čini se da će zahtev da se u srpsko pravo transponuje Direktiva 93/13 biti zadovoljen.

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[196] Član 112, Zakon o zaštiti potrošača, *Sl. list CG* br. 26/07.

VII. Praktičan uticaj Direktive o nepravičnim ugovornim odredbama

1. Uticaj na nivo zaštite potrošača

U pravima država koje su predmet ove studije i ranije su postojala pravila prema kojima sud može da odbije primenu pojedinih odredbi opštih uslova koje lišavaju stranu, koja pristupa ugovoru, određenih prava ili su inače nepravične ili preterano stroge prema njoj.

U meri u kojoj je u pojedinim nacionalnim pravima transponovana Direktiva 93/13, potrošačima je garantovana jača zaštita od nepravičnih ugovornih odredaba koje je unapred formulisao trgovac. U praktičnom smislu, potrošači se retko pozivaju na pravila preuzeta iz Direktive 93/13, pa je i sudska praksa koja se tiče tih pravila veoma skromna.[197]

Nema podataka o bitnim promenama u načinu poslovanja, to jest o nastojanju trgovaca da obezbede poštovanje pravila kojima je domaći zakonodavac transponovao Direktivu 93/13, tako što će korigovati opšte uslove formularnih ugovora. Utisak je da kreditne institucije i osiguravajuća društva nameću nepravične odredbe u potrošačkim ugovorima češće nego što to drugi čine. Sve navedeno ukazuje na slabu edukovanost potrošača i na manjkavosti u mehanizmima zaštite njihovih individualnih i kolektivnih prava.

2. Dodatna opterećenja ili troškovi za trgovce

Nedostaci od kojih pate mehanizmi za ostvarivanje i zaštitu prava koja su potrošačima garantovana Direktivom 93/13, dovode do toga da Direktiva 93/13 zapravo ne stvara značajna dodatna opterećenja i troškove za trgovce.

3. Posebne teškoće u vezi sa transponovanjem Direktive 93/13

Nisu uočene.

[197] U Hrvatskoj postoje brojne sudske odluke koje se pozivaju na odredbe Zakona o obveznim odnosima o opštim uslovima formularnih ugovora.

C. DIREKTIVA O UGOVORIMA NA DALJINU (97/7)

Koordinatori: *Nada Dollani* i *Neda Zdraveva / Jadranka Dabović-Anastasovska / Nenad Gavrilović*

I. Zakonodavstvo zemalja učesnica pre usvajanja Direktive o ugovorima na daljinu

Pre transponovanja Direktive 97/7, zaštita potrošača u oblasti prodaje na daljinu bila je prilično beznačajna. Pre usvajanja prvih zakona o zaštiti potrošača, nijedno zakonodavstvo zemalja učesnica nije sadržavalo nikakvu izričitu odredbu niti su imali ikakvu sličnu zaštitu u oblasti prodaje na daljinu, osim Hrvatske koja je regulisala prodaju na daljinu članom 16d starog Zakona o trgovini[198] kao ugovor između trgovca i potrošača, gde se jedno ili više sredstava za komunikaciju na daljinu upotrebljava do zaključenja ugovora.

Pokušaji da se transponuje Direktiva o ugovorima na daljinu su počeli kada su prvi zakoni o zaštiti potrošača stupili na snagu. Dok su u Hrvatskoj i Bosni, ugovori o ugovorima na daljinu bili regulisani u celosti Zakonom o zaštiti potrošača iz 2003[199] i Zakonom o zaštiti potrošača iz 2002[200], albanski Zakon o zaštiti potrošača iz 2003[201] i makedonski Zakon o zaštiti potrošača iz 2000[202] su postigli samo delimičnu implementaciju i nisu svi aspekti prodaje na daljinu njima bili obuhvaćeni. Na drugoj strani, Srbija i Crna Gora, uprkos usvajanju Saveznog Zakona o Zaštiti potrošača iz 2002[203], teško da su načinili ikakav pokušaj da se transponuje Direktiva o ugovorima na daljinu; i umesto toga na prodaju na daljinu i ugovore o uslugama primenjivali su se opšti propisi zakona o ugovorima (to jest, Zakon o obligacionim odnosima).

Mnogo bolja harmonizacija je postignuta novim zakonima o zaštiti potrošača usvojenim od strane zemalja učesnica. Albanija je provela skoro potpuno transponovanje Direktive o ugovorima na daljinu Zakonom o zaštiti potrošača iz 2008[204], koji je dopunjen pravilima o implementaciji. Bosna je regulisala ugovore o ugovorima na daljinu Zakonom o zaštiti potrošača iz 2006[205], koji je zadržao mnoge sličnosti sa ranijom verzijom, uz manje izmene. Usvajanjem novog Zakona o zaštiti potrošača iz 2007[206] Hrvatska je u potpunosti regulisala predmetno pitanje. Makedonija je usvajanjem novog Zakona o zaštiti potrošača iz 2004[207] podigla harmonizaciju unutrašnjeg zakonodavstva sa Direktivom o ugovorima na daljinu na mnogo viši nivo. Isto se može reći za crnogorski Zakon o zaštiti potrošača iz 2007[208]. Pored toga, no-

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[198] Zakon o trgovini, *NN* br. 11/96, 30/99, 75/99, 76/99, 62/01, 109/01.

[199] Zakon o zaštiti potrošača – Glava VII. Dela II., član 35-55; *NN* br. 96/03.

[200] Zakon o zaštiti potrošača, *Sl. glasnik BiH* br. 17/02.

[201] Zakon o zaštiti potrošača, *Sl. list RA Br*. 9135/03.

[202] Zakon o zaštiti potrošača *Sl. list RM Br.* 63/2000.

[203] Savezni Zakon o zaštiti potrošača, *Sl. list SRJ* Br. 37/02. Posvetio je tri pasusa situaciji prodaje na daljinu (i od vrata do vrata) – sedam dana za odustajanje, bez troškova i opravdanja; rok za odustajanje od robe je bio od dana njenog primanja, a za usluge od dana zaključivanja ugovora, i konačno, potrošač je bio u obavezi da plati troškove vraćanja robe.

[204] Deo IV, Poglavlje II (član 36-39) Zakona o zaštiti potrošača, *Sl. list RA Br*. 61/08, i Odluka Saveta Ministara „O ugovorima o prodaji na daljinu“, *Sl. list RA Br*. 64/2009.

[205] Član 42-51 Zakona o zaštiti potrošača, *Sl. glasnik BiH* br. 25/06.

[206] Glava VII. Dela II. (član 36-55 Zakona o zaštiti potrošača, *NN* br. 79/07, 125/07, 79/09, 89/09, 133/09.

[207] Zakon o zaštiti potrošača , *Sl. list RM Br.* 38/04.

[208] Zakon o zaštiti potrošača , *Sl. list RCG* Br. 26/07, koji sadrži posebno poglavlje, međutim, još uvek sa određenim varijacijama i/ili proširenja područja Direktive.

vi Zakon o Unutrašnjoj trgovini Crne Gore takođe sadrži nekoliko odredbi koje se odnose na Prodaju na daljinu[209]. Na drugoj strani, Srbija, u svom Zakonu o zaštiti potrošača iz 2005[210] na uprošćeni način pokušava da transponuje Direktivu o ugovorima na daljinu, koji zapravo rezimira i ponovo izlaže propise srpskog Zakona o obligacionim odnosima[211] koji se odnose na pravne posledice nedostatka usaglašenosti, i tvrdi da se ti propisi takođe odnose na slučajeve kataloške prodaje i probne kupovine. Međutim, Nacrt predloga novog Zakona o zaštiti potrošača (Nacrt Predloga)[212] namerava da transponuje Direktivu o ugovorima na daljinu u svoje Poglavlje III.

II. Područje primene

1. Potrošač

U članu 2(2) ove Direktive, potrošač se definiše kao "fizičko lice koje, u ugovorima koje obuhvata ova Direktiva, deluje u svrhe koje su izvan njegovog zanimanja, poslovanja ili profesije".

a. Zakonodavne tehnike

Zakonodavci svih zemalja učesnica su izabrali da usvoje opštu definiciju potrošača. Svaki od njih ima poseban zakon o zaštiti potrošača, a definicija potrošača se nalazi odmah na početku dotičnih zakona. U svim zemljama učesnicama, pojam potrošača se odnosi na ceo zakon. Nijedna od zemalja nije transponovala definiciju o potrošaču samo glede ugovora o ugovorima na daljinu, jer su odredbe Direktive o ugovorima na daljinu transponovane u okviru dotičnih Zakona o zaštiti potrošača pod posebnim poglavljima; zbog toga, nije smatrano neophodnim da se propisuju različite definicije potrošača koje se odnose na različite Direktive koje su transponovane u okviru tog pojedinačnog zakona.

Novi razvoji mogu da se očekuju u nekoliko zemalja. Naime, u srpskom Nacrtu predloga pojam potrošača se proširuje u svrhe poglavlja koje se bavi sa turističkim paket aranžmanima i tajm šeringom. A novi Nacrt Zakona o obligacionim odnosima u Bosni i Hercegovini daje novu definiciju za pojam potrošača, koja je na jednoj strani šira od aktuelnog pojma, ali na drugoj strani ograničena u području primjene na „zaključenje pravnog posla"[213].

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[209] Zakon o unutrašnjoj trgovini (*Sl. list RCG* Br. 49/08) koji su svom članu 17(2) predviđa „trgovinu izvan poslovnih prostorija", navodeći da prodaja na daljinu može da se obavlja ili direktno od strane trgovca ili preko lica kojima trgovac da ovlašćenje za prodaju robe potrošačima.

[210] Zakon o zaštiti potrošača, *Sl. list RS* Br. 79/05. Poglavlje VIII, pod naslovom *Kupovina na daljinu*, obuhvata član 24 o kataloškoj prodaji, član 25 o prodaji preko uzorka ili modela, član 26 o probnoj kupovini, član 27 o ponudi preko sredstava elektronske komunikacije, i član 28 o prodaji po inerciji. Ta pravila mogu pre da se shvate kao pokušaj ponovnog utvrđivanja odredbi Zakona o obligacionim odnosima (iz bilo kojih razloga), nego kao pokušaj transponovanja Direktive o ugovorima na daljinu. Činjenica da se ti članci dotiču pitanja koja su obično povezana za prodaju na daljinu, ni na koji način ne nagoveštava da oni zaista transponuju Direktivu o ugovorima na daljinu u srpski zakon.

[211] Zakon o obligacionim odnosima, *Sl. list SFRJ* Br. 29/78, 39/85, 45/89 i 57/89, *Sl. list SRJ* Br. 31/93, 22/99, 35/99, 44/99.

[212] Nacrt Predloga novog Zakona o zaštiti potrošača (Nacrt predloga), koga priprema Ministarstvo trgovine i usluga Republike Srbije.

[213] Član 15 Nacrta Zakona o obligacionim odnosima Bosne i Hercegovine iz 2010 definiše potrošača kao „svakog subjekta koji zaključi neki pravni posao u svrhu koja ne spada u njegovu privrednu ili samostalnu profesionalnu djelatnost". Ova u principu široka definicija (jer obuhvata i pravna lica) isključuje predugovorne situacije, jer se odnosi samo na „zaključenje pravnog posla".

b. Sadržaj definicija

U pravnoj definiciji potrošača *de lege lata*, može se primetiti niz varijacija. U poređenju sa definicijom iz Direktive 97/7, širu definiciju daje albanski Zakon o zaštiti potrošača, koji u svom članu 3(6) kaže „Potrošač je svaka osoba, koja kupuje ili koristi robu ili usluge za ispunjenje ličnih potreba, za svrhe koje se ne odnose na trgovinske aktivnosti ili vršenje profesije. U smislu ovog zakona, i ne-profitne organizacije se smatraju potrošačima“[214]. Time se pojam potrošača proširuje takođe i na ne-profitne organizacije. U Bosni i Hercegovini, pravna lica su potpuno isključena članom 1(3) Zakona o zaštiti potrošača, na osnovu koga je „potrošač svako fizičko lice koje kupuje, stiče ili koristi proizvode ili usluge za svoje lične potrebe i potrebe svog domaćinstva“. Ograničavanjem opsega na delovanje potrošača na kupovinu, sticanje ili upotrebu neke usluge ili proizvoda, i njegovim dodatnim smanjivanjem u svrhe „ličnih potreba i potreba njegovog domaćinstva“, kao uslovi koji se moraju zajedno ispuniti, obim definicije je veoma ograničen[215]. Definicija koja je bliža onoj iz Direktive 97/7 je propisana u hrvatskom Zakonu o zaštiti potrošača, koji u svom članu 3(1) četvrti pasus, definiše potrošača kao svaku fizičku osobu „koja sklapa pravni posao ili djeluje na tržištu u svrhe koje nisu namijenjene njegovoj poslovnoj djelatnosti niti obavljanju djelatnosti slobodnog zanimanja“. Veoma uska definicija je data u članu 4(1) makedonskog Zakona o zaštiti potrošača, koji navodi da je „potrošač svako fizičko lice koje kupuje proizvode ili koristi usluge za direktnu ličnu potrošnju, u svrhe koje nisu namenjene za obavljanje zanimanja, poslovnih aktivnosti ili profesije“. U nekom stepenu šira definicija je data u članu 1, pasus 8 crnogorskog Zakona o zaštiti potrošača, koji definiše potrošača kao fizičko lice koje kupuje, naručuje, prima, koristi robu ili usluge, uključujući javne servise, za ne-poslovne, to jest ne-profesionalne svrhe, ili kome je namenjena ponuda za neki proizvod ili uslugu. Veoma uska definicija u poređenju sa definicijom Direktive 97/7 je data u srpskom Zakonu o zaštiti potrošača, koji u članu 2, paragraf 1-2, definiše potrošača „kao svako fizičko lice koje kupuje proizvode ili usluge za svoje vlastite potrebe ili za potrebe svog domaćinstva“. Na jednoj strani, ova definicija je preuska („kupovina za potrebe potrošača ili potrebe njihovih domaćinstava“). Na drugoj strani, ona je takođe preširoka, jer se obim proširuje i na društvo, preduzeće, ostale pravne subjekte ili preduzetnike, kada kupuju proizvode ili usluge za svoje vlastite potrebe. Mnogo bolja definicija potrošača, koja je kompatibilna sa Direktivom 97/7 je data u Poglavlju I srpskog Nacrta predloga, gde se potrošač definiše kao svako fizičko lice koje deluje uglavnom u svrhe mimo njegovog zanimanja, poslovanja, zanata ili profesije.

aa. Uključivanje određenih pravnih lica

Kao i u Direktivi 97/7, hrvatsko, makedonsko, i crnogorsko zakonodavstvo o ugovorima na daljinu se odnosi samo na fizička lica. Takođe, u bosansko-hercegovačkom Zakonu o zaštiti potrošača, definicija potrošača se ograničava na fizička lica. Međutim, usvajanjem bosansko-hercegovačkog nacrta Zakona o obligacionim odnosima 2010, definicija potrošača u tom nacrtu zakona uključuje takođe i pravna lica. U slučaju kolizije ta dva zakona, na osnovu člana 1(2) bosansko-hercegovačkog Zakona o zaštiti potrošača, primeniće se zakon koji

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[214] To je prevod reč po reč autora albanskog Zakona o zaštiti potrošača. Zvanični prevod glasi: “Potrošač” je svako fizičko lice, koje deluje u svrhe koje nisu u vezi sa zanimanjem, poslom ili upražnjavanjem njegove profesije. U smislu ovog zakona, neprofitne organizacije se takođe smatraju za potrošače. Vidi član 3(6) Zakona o zaštiti potrošača, *Sl. list RA Br*. 61/08.

[215] Vidi supra fn. 17.

pruža viši nivo zaštite[216]. U Srbiji, definicija potrošača obuhvata ne samo svako fizičko lice, već se proširuje i na društva, preduzeća, druge pravne subjekte ili preduzetnike, kada kupuju proizvode ili usluge za svoje vlastite potrebe. Albanija je jedina zemlja gde zakon *expressis verbis* uključuje neka (ne sva) pravna lica. Naime, na osnovu člana 3(6) druge rečenice albanskog Zakona o zaštiti potrošača, i ne-profitne organizacije se smatraju za potrošače.

Pregled: Uključivanje pravnih lica

Ograničenje na fizička lica	BiH, HR, MAK, CG
Uključivanje određenih pravnih lica	AL, SRB

bb. Pojašnjenje slučajeva „kombinovane" svrhe

Definicija potrošača u članu 2(2) Direktive 97/7 ne objašnjava jasno da li lice koje zaključi neki ugovor namenjen u „kombinovanu" svrhu (na pr. neka svrha koja je delimično u okviru a delimično izvan okvira njegovog zanimanja ili profesije, na primer, kupovina automobila i za privatnu i za profesionalnu upotrebu) spada pod pojam potrošača. Nijedno zakonodavstvo zemalja učesnica ne sadrži odredbu ili objašnjenje slučajeva kombinovane svrhe. Što se tiče varijacija u tekstu definicije potrošača, može se primetiti sledeće.

U hrvatskom Zakonu o zaštiti potrošača nema jasnog objašnjenja da li je osoba koja zaključi ugovor u „kombinovane" svrhe potrošač. Takođe, do sada nije bilo sudske prakse koja bi mogla biti od pomoći po tom pitanju. Međutim, na osnovu sudske prakse Evropskog suda pravde[217] hrvatska pravna teorija smatra da ocena da li je neko lice potrošač ili nije treba da se da na osnovu svih činjenica koje su postojale u vreme zaključivanja ugovora. Dakle, ako neko fizičko lice u vreme zaključenja ugovora deluje u svrhe koje spadaju u sferu njegovog ili njenog posla ili profesionalne aktivnosti, to lice se neće smatrati za potrošača[218].

Bosansko-hercegovački Zakon o zaštiti potrošača, umesto definisanja potrošača kao fizičkog lica koje „deluje" u određene svrhe kao u Direktivi 97/7, ograničava se na kupovinu, sticanje ili korištenje proizvoda ili usluga od strane fizičkog lica. Od još veće važnosti je ograničenje na „lične potrebe i potrebe njegovog domaćinstva", koje zbog veznika „i" treba da se shvati kumulativno, dok negativno formulisana definicija u Direktivi uključuje svaku svrhu koja se ne odnosi na zanimanje, posao ili profesiju potrošača. Zbog toga, na osnovu bosansko-hercegovačkog Zakona o zaštiti potrošača, slučajevi „kombinovane svrhe" biće prilično retki tako da još uvek nema nacionalne pravne prakse[219] po tom pitanju. Slučajevi „kombinovane svrhe" će pre biti mogući u okviru sfere bosansko-hercegovačkog Nacrta zakona o obli-

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[216] Shodno tome, pravna lica mogu da dobiju zaštitu potrošača po bosansko-hercegovačkom Nacrtu Zakona o obligacionim odnosima iz 2010. To bi bilo u suprotnosti sa sudskom praksom Evropskog Suda Pravde, na primer od 14 marta 1991 C-361/89 *Patrice di Pinto* (1991) ECR I-01189; videti takođe Z. Meškić, „*Harmonizacija Evropskog potrošačkog prava – Zelena knjiga 2007. Godina i Nacrt Zajedničkog referentnog okvira"*, Zbornik radova Pravnog fakulteta u Splitu 3/2009, str559; N. Misita, *Osnove prava zaštite potrošača Evropske zajednice*, Pravni centar, Fond otvoreno društvo Bosne i Hercegovine, Sarajevo 1997.

[217] Presuda Evropskog suda pravde od 3. jula 1997, C-269/95 – *Francesco Benincasa/Dentalkit Srl* (1997), ECRI-3767.

[218] M. Dika, Z.Pogarčić (ur.), *Obveze trgovca u sustavu zaštite potrošača*, Narodne novine, Zagreb 2003.

[219] Najnovije objašnjenje po pitanju definicije potrošača u pravu EU donosi presuda Evropskog suda pravde *Gruber*; presuda ESP od 20. januara 2005., C-464/01 – *Johhan Gruber v Bay Wa AG* (2005) ECR I-00439; Za dalje podatke videti Z. Meškić, „*Harmonizacija Evropskog potrošačkog prava – Zelena knjiga 2007. Godina i Nacrt Zajedničkog referentnog okvira"*, Zbornik radova Pravnog fakulteta u Splitu 3/2009, str 559.

gacionim odnosima 2010, koji definiše potrošača sa gotovo istom formulacijom kao Direktiva 97/7. Uprkos tome, bosansko-hercegovački Nacrt zakona o obligacionim odnosima 2010 takođe ne sadrži nijednu odredbu sa objašnjenjem slučajeva kombinovane svrhe.

U Makedoniji i Crnoj Gori fizičko lice se smatra potrošačem samo ako je on ili ona zaključio ugovor u čisto privatne svrhe. Ista situacija postoji i u srpskom zakonodavstvu. U tim zemljama, nema odredbi o slučajevima kombinovane svrhe.

Isto tako, u albanskom Zakonu o zaštiti potrošača, nema jasne odredbe koja može da pokrije transakcije sa kombinovanom svrhom. Po albanskom zakonu, potrošač može da deluje u svrhu zadovoljenja ličnih potreba, u svrhe koje se ne odnose na poslovne aktivnosti ili vršenje profesije. Takođe, ne-profitne organizacije se smatraju potrošačima kada deluju u gore navedene svrhe. Svrha „zadovoljenja ličnih potreba" i „svrha izvan poslovne aktivnosti ili vršenja profesije" su odvojene zarezom i nema nikakvog veznika koji bi ih međusobno povezao. Tako da se mogu shvatiti u smislu da kada se zaključuje ugovor ili jedna ili druga svrha treba da se izvrši. Ta situacija nije razjašnjena ni u sudskoj praksi ni u teoriji u ovoj oblasti.

Pregled: transakcije sa „kombinovanom" svrhom kao potrošački ugovor

Čisto lična svrha	MAK, CG
I „kombinovana svrha", pretežna svrha preovladava	
I „kombinovana svrha" – nejasno je da li lična svrha mora da pretegne	
Nema jasnog pravila o transakcijama sa „kombinovanom" svrhom koje je vidljivo	AL, HR, BiH, SRB

c. Proširenje na određene profesionalce

Albansko zakonodavstvo proširuje definiciju potrošača takođe i na ne-profitne organizacije u smislu Zakona o zaštiti potrošača, nudeći tako najširu zaštitu u poređenju sa ostalim zemljama učesnicama. Bosansko-hercegovački Zakon o zaštiti potrošača sužava definiciju potrošača u poređenju sa Direktivom 97/7 i ne sadrži proširenja na određenje profesionalce. U Hrvatskoj, iako član 3(1) pasus 4 Zakona o zaštiti potrošača ne štiti profesionalce kao potrošače, izuzeci mogu da se nađu u nekim *lex specialissima*[220]. U Makedoniji, nema proširenja primene na određene profesionalce.

U Crnoj Gori, član 2(8) Zakona o zaštiti potrošača se odnosi samo na fizička lica i tako ne pruža zaštitu pravnih lica. To je takođe bio pristup i namera zakonodavca kada je regulisao predmetno pitanje (međutim, izraz „...ili kome je ponuda za proizvod ili uslugu usmerena", ostavlja mesto za tumačenje. Ostale varijante proširenja (na pr. Pravna lica, zaposleni) nisu razmatrane. U Srbiji, član 2, paragraf 1-2 Zakona o zaštiti potrošača iz 2005, definiše potrošača kao bilo koje fizičko lice. Kako je funkcija ove odredbe ograničena samo na kupovinu za „njihove vlastite potrebe ili za potrebe njihovog domaćinstva", potrošač može takođe da bude i društvo, preduzeće, drugi pravni subjekt ili preduzetnik, kada kupuju proizvode ili usluge za svoje vlastite potrebe. Međutim, pod Poglavljem I srpskog Predloga Nacrta Zakona o zaštiti potrošača, potrošač se definiše kao svako fizičko lice koje deluje *uglavnom* u svrhe koje su izvan njegovog zanimanja, posla, zanata ili profesije, što može da se protumači kao proširenje definicije takođe na profesionalce, jer koristi reč „uglavnom", a ne kaže „samo".

[220] Na primer u članu 304. hrvatskog Zakona o kreditnim institucijama pre poslednje izmene objavljene u *NN* br. 153/09. Ta odredba je definisala potrošača kao fizičko lice, koje je klijent kreditne institucije. Na osnovu te definicije potrošač je takođe mogao biti i fizičko lice koje deluje u okviru svoje komercijalne aktivnosti.

Pregled: proširenje na određene profesionalce

Proširenje na određene profesionalce	AL: neprofitne organizacije SRB: ostala pravna lica CG: na koga je usmerena ponuda za proizvod ili uslugu
Objašnjenje da su zaposleni potrošači	-

dd. Primeri za razlike u formulaciji

Zakonodavstva svih zemalja učesnica se razlikuju u formulacijama kada definišu potrošača. Hrvatska definicija je najbliža formulaciji iz Direktive 97/7, utoliko jer obuhvata „svaku fizičku osobu „koja sklapa pravni posao ili djeluje na tržištu u svrhe koje nisu namijenjene njegovoj poslovnoj djelatnosti niti obavljanju djelatnosti slobodnog zanimanja". S druge strane, na osnovu crnogorskog zakonodavstva, potrošač je fizičko lice koje kupuje, naručuje, prima, koristi robu ili usluge, uključujući javne servise, za ne-poslovne, to jest ne-profesionalne svrhe, ili na koga je usmerena ponuda za neki proizvod ili uslugu. Makedonska definicija za potrošača označava svako fizičko lice koje kupuje proizvode ili koristi usluge za direktnu ličnu potrošnju, u svrhe koje nisu namenjene za obavljanje zanimanja, poslovne aktivnosti ili profesije. Albanska definicija je šira po pitanju kategorije lica, ali nije mnogo jasna po pitanju akcija i svrha, jer ista obuhvata svako lice, koje kupuje ili koristi robu ili usluge radi ispunjenja ličnih potreba, u svrhe koje nisu u vezi sa poslovnom aktivnošću ili obavljanjem profesije. U smislu tog zakona, i ne-profitne organizacije se smatraju za potrošače. Iako različite po formulaciji, takve definicije izgleda da pravilno transponuju Direktivu, ili se mogu tumačiti u skladu sa Direktivom.

Samo Bosna i Hercegovina i Srbija imaju prilično uske definicije koje su prilično slične jedna drugoj. Bosansko-hercegovački zakonodavac je suzio definiciju potrošača na svako fizičko lice koje kupuje, pribavlja, ili koristi proizvode ili usluge za svoje lične potrebe i potrebe svog domaćinstva. Srpska definicija je nešto šira i uključuje i pravna lica. Po srpskom zakonodavcu, potrošač je svako lice koje kupuje proizvode ili usluge za svoje lične potrebe ili za potrebe svog domaćinstva. Potrošač je takođe i kompanija, preduzeće, drugi pravni subjekti ili preduzetnik, kada kupuje proizvode ili usluge za svoje vlastite potrebe. Međutim, i Bosna i Srbija imaju različitu formulaciju u svojim nacrtima zakona[221].

2. Isporučilac

Po odredbama Direktive 97/7, druga strana u ugovoru o ugovorima na daljinu se zove isporučilac, koji se definiše kao „svako fizičko ili pravno lice koje, u ugovoru koga obuhvata ova Direktiva, deluje u svom komercijalnom ili profesionalnom svojstvu". Formulacija ove definicije blago varira od definicije o pojmu trgovca koja se koristi u drugim direktivama za zaštitu potrošača. Glavni cilj te definicije isporučioca je prosto da razjasni da se Direktiva odnosi samo na situacije B2C, ali ne u C2C odnosima.

Zakonodavstva svih zemalja učesnica su transponovala pojam trgovca umesto isporučioca za celo polje primene i sve svrhe njihovih zakona o zaštiti potrošača. Albanski Zakon o zaštiti potrošača sadrži širu definiciju koja obuhvata i lica koja deluju u ime ili za račun trgovca. Po članu 3(14) Albanskog Zakona o zaštiti potrošača, „trgovac" označava svako fizičko ili pravno lice koje deluje u svrhe koje se odnose na njegovu privrednu aktivnost, zanimanje, poslovanje, zanat ili profesiju i svako ko deluje u ime ili za račun nekog trgovca. Različitu definiciju daje bosansko-hercegovački Zakon o zaštiti potrošača, koji u svom članu 1(5) defini-

[221] Vidi *supra*, pod naslovom „b. Sadržaj definicija".

še trgovca kao „svako lice koje direktno ili kao posrednik među drugim licima, prodaje proizvode ili pruža usluge potrošaču“. Zbog ograničenja na „prodaju proizvoda i pružanje usluga“, lično polje primene ove odredbe prilično je usko[222]. Širu definiciju, bližu definiciji albanskog zakonodavstva, propisuje hrvatski Zakon o zaštiti potrošača, koji u svom članu 3(1) osmi pasus definiše „trgovca“ kao „bilo koju osobu „koja sklapa pravni posao ili djeluje na tržištu u okviru svoje poslovne djelatnosti ili u okviru obavljanja djelatnosti slobodnog zanimanja“. Potonji uključuje i pravna lica javnog prava i ne-profitne organizacije. Makedonski Zakon o zaštiti potrošača, u članu 4(1) drugi pasus, definiše trgovca kao svako fizičko ili pravno lice koje, u toku vršenja svoje aktivnosti, direktno zadovoljava potrebe građana za proizvodima ili uslugama. U isto vreme, treba uzeti u obzir da se aktivnost trgovanja reguliše Zakonom o trgovini[223]. Pošto ta definicija ne obuhvata agente, primenjuju se opšta pravila o posredništvu koje reguliše makedonski Zakon o obligacionim odnosima[224]. Član 2 pasus 11, crnogorskog Zakona o zaštiti potrošača definiše „trgovca“ kao osobu koja prodaje robu ili pruža usluge potrošačima. Po pitaju Direktivinog proširenja definicije i na one koji deluju u i me ili ispred trgovca, crnogorski Zakon o zaštiti potrošača ništa ne kaže[225]. Pod članom 2(3) srpskog Zakona o zaštiti potrošača, trgovac je kompanija, preduzeće, drugi pravni subjekt ili preduzetnik, kada prodaje proizvode ili pruža usluge potrošačima[226]. Definicija u srpskom predlogu nacrta Zakona o zaštiti potrošača je vrlo slična albanskoj definiciji o trgovcu.

3. Ugovori koji spadaju u opseg Direktive

a. Definicija „ugovora o ugovorima na daljinu“

Po članu 2(1) Direktive, termin „ugovor o ugovorima na daljinu“ označava svaki ugovor koji se odnosi na robe ili usluge, u okviru organizovane prodaje na daljinu ili šeme pružanja usluga od strane isporučioca, koji, u svrhu ugovora, isključivo koristi jedno ili više sredstava komunikacije na daljinu sve do i uključujući momenat kada je ugovor zaključen.

Zakonodavstva svih zemalja članica, osim Srbije, su doslovno ili skoro doslovno transponovali ovu definiciju. Albanski Zakon o zaštiti potrošača, u svom članu 36(1) predviđa da „ugovori o ugovorima na daljinu označavaju svaki ugovor koji se odnosi na robe ili usluge zaključen između isporučioca i potrošača u okviru organizovane prodaje na daljinu ili šeme pružanja usluga od strane isporučioca, koji, u svrhu tog ugovora, isključivo koristi jedno ili više sredstava komunikacije na daljinu sve do i zaključno sa momentom zaključenja ugovora“.

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[222] Član 14 Nacrta Zakona o obligacionima odnosima Bosne i Hercegovine iz 2010 se odnosi na „privrednika“ i definiše ga kao „fizičkog ili pravnog subjekta koji prilikom zaključivanja pravnog posla deluje u vršenju svoje privredne ili samostalne profesionalne djelatnosti“. Kao neuspešna formulacija i na bosanskom jeziku, izraz „deluje u vršenju“ takođe isključuje predugovorne situacije, na suprot direktivama o zaštiti potrošača.

[223] Zakon o trgovini, *Sl. list RM Br.* 16/04.

[224] Zakon o obligacionim odnosima, *Sl. list RM Br.* 18/2001.

[225] Bez obzira na to, član 17(2) Zakona o unutrašnjoj trgovini (*Sl. list RCG* Br. 49/08) koji reguliše „trgovinu izvan poslovnih prostorija“, predviđa da prodaja na daljinu može da se obavlja ili direktno od strane trgovca ili preko lica kome trgovac izda ovlašćenje za prodaju robe potrošačima. Član 17 (3) dalje predviđa da prodaju izvan poslovnih prostorija mogu da obavljaju trgovci koji su registrovani za tu vrstu trgovine, a Zakon o dodatno obavezuje crnogorsko Ministarstvo ekonomije da usvoji podzakon o vrsti robe i načinu obavljanja prodaje od vrata do vrata.

[226] Srpski nacrt predloga definiše trgovca kao svako fizičko ili pravno lice koje, u ugovorima obuhvaćenim ovim zakonom, deluje u svrhe koje se odnose na njegovo zanimanje, posao, zanat ili profesiju, i svako ko deluje u ime ili ispred trgovca.

Bosansko-hercegovački Zakon o zaštiti potrošača takođe daje definiciju o ugovorima o ugovorima na daljinu jednaku onoj iz Direktive, u kojoj se određuje da „Ugovor o ugovorima na daljinu je svaki ugovor koji se odnosi na prodaju proizvoda ili usluga, organizovanu od strane trgovca putem nekog sredstva prodaje na daljinu, a zaključuje se između trgovca i potrošača. Do konačnog zaključenja ugovora koristi se jedno ili više sredstava za daljinsku komunikaciju ". Hrvatski Zakon o zaštiti potrošača u svom članu 36 definiše da ugovor sklopljen na daljinu označava „ugovor sklopljen između trgovca i potrošača u okviru organizirane prodaje proizvoda ili organiziranog obavljanja usluga trgovca koji za potrebe sklapanja takvih ugovora isključivo koristi jedno ili više sredstava daljinske komunikacije". Dakle, hrvatski zakonodavac je transponovao definiciju iz člana 2(1) Direktive 97/7 skoro doslovno. Međutim, deo definicije koji propisuje da se ugovor zaključuje upotrebom jednog ili više sredstava komunikacije na daljinu „sve do i uključujući momenat kada je ugovor zaključen", nije transponovan. Ista situacija može da se nađe u makedonskom Zakonu o zaštiti potrošača, koji u svom članu 84 definiše da je „Ugovor o ugovorima na daljinu ugovor zaključen između trgovca i potrošača u okviru organizovane prodaje proizvoda ili organizovanog pružanja usluga od strane trgovca koji, u vreme zaključivanja ugovora, koristi ekskluzivno jedno ili više sredstava komunikacije na daljinu". Crnogorski Zakon o zaštiti potrošača u svom članu 37 koristi vrlo sličnu odredbu koja daje isto značenje kao definicija iz Direktive 97/7: „Ugovor o ugovorima na daljinu će označavati ugovor koji je ugovaran i zaključen preko sredstava komunikacije na daljinu u okviru prodajne mreže koju je napravio trgovac". Za razliku od toga, u srpskom Zakonu o zaštiti potrošača iz 2005, nema odgovarajućih odredbi. Ali u srpskom Predlogu nacrta, ugovor o ugovorima na daljinu označava svaki ugovor o prodaji ili uslugama gde trgovac, za zaključenje ugovora, *pretežno* koristi jedno ili više sredstava komunikacije na daljinu.

b. Definicija „sredstava za komunikaciju na daljinu"

Član 2(4), rečenica 1 Direktive 97/7 definiše „sredstva komunikacije na daljinu", kao jednog od elemenata ugovora o ugovorima na daljinu, kao „svako sredstvo koje, bez istovremenog fizičkog prisustva isporučioca i potrošača, može da se upotrebi za zaključenje ugovora između tih strana".

Član 2(4), rečenica 2 Direktive 97/7 se poziva na Aneks I koji sadrži prilično detaljnu pokaznu listu primera sredstava komunikacije na daljinu. Većina zemalja učesnica je uključila takvu listu u svoj Zakon o zaštiti potrošača.

Većina njih je transponovala tu definiciju doslovce ili sa samo nekim odstupanjima u formulaciji. Primer za doslovno transponovanje je albanski Zakon o zaštiti potrošača, čiji član 36(2) glasi: „Sredstva za komunikaciju na daljinu su sva sredstva koja, bez istovremenog fizičkog prisustva isporučioca i potrošača, mogu da se upotrebe za zaključenje ugovora". Bosansko-hercegovački Zakon o zaštiti potrošača u svom članu 42(2) definiše sredstva komunikacije na daljinu kao svako sredstvo koje, bez stvarnog fizičkog prisustva trgovca i potrošača, može biti korišteno za zaključenje ugovora između tih strana. Hrvatski Zakon o zaštiti potrošača u svom članu 37(1) definiše sredstva daljinske komunikacije kao ona sredstva koja su pogodna za sklapanje ugovora između trgovca i potrošača bez istodobnog fizičkog prisustva trgovca i potrošača na jednome mestu. Makedonija je transponovala definiciju sa samo nekim varijacijama u formulaciji. Član 85 makedonskog Zakona o zaštiti potrošača navodi sledeće: „Sredstva komunikacije na daljinu su ona sredstva koja su pogodna za zaključivanje ugovora između trgovca i potrošača bez istovremenog fizičkog prisustva trgovca i potrošača". Slično tome, Crna Gora je transponovala definiciju sa samo nekim varijacijama u formulaciji. Član 2(19) crnogorskog Zakona o zaštiti potrošača glasi sledeće: „Sredstva komunikacije na daljinu će označavati svako sredstvo komunikacije koje omogućava zaključivanje ugo-

vora između trgovca i potrošača, bez njihovog neposrednog fizičkog prisustva". Samo u srpskom zakonodavstvu nema sličnih odredbi. Ali u srpskom Nacrtu predloga, *sredstva komunikacije na daljinu* označavaju svako sredstvo koje, bez istovremenog fizičkog prisustva trgovca i potrošača, mogu da se upotrebe za zaključenje ugovora između tih strana.

Zakonodavstva svih zemalja učesnica, osim Srbije, su uključile listu sličnu onoj u Aneksu I u svojim Zakonima o zaštiti potrošača. Takve liste su samo indikativne a ne detaljne. Albanski Zakon o zaštiti potrošača u članu 36(2) obuhvata: „standardna pisma, štampani materijal, štampani materijala sa narudžbenicom, katalog, elektronsku poštu, elektronsku trgovinu, faks, telefon i televiziju". Druga lista sredstava komunikacije je data u Uredbi[227], koja obuhvata preostala sredstva komunikacije iz Aneksa I i predviđa proširenje na internet i računare. To takođe nije detaljna lista, jer obuhvata svako sredstvo koje može da se upotrebi za zaključivanje ugovora o ugovorima na daljinu. Indikativna lista primera sredstava komunikacije na daljinu kako je definisano u Aneksu I Direktive 97/7 je preuzeta u članu 37(2) hrvatskog Zakona o zaštiti potrošača i poboljšana dodavanjem „interneta" na listu. Član 85(2) makedonskog Zakona o zaštiti potrošača predviđa da sredstva za komunikaciju obuhvataju između ostalog: adresovani ili neadresovani štampani materijal, standardna pisma, štampane reklame sa narudžbenicom, kataloge, telefon sa automatskim ili ljudskim odgovorom, radio, videofon, videotekst, faks, televiziju, e-mail. Većina sredstava prezentovanih u Aneksu I Direktive su uključena u hrvatsku definiciju; za ostala se može shvatiti da spadaju u neku širu kategoriju, ili se može shvatiti da je lista samo primjerična a ne konačna. U Crnoj Gori, iako većina sredstava navedena u Aneksu I Direktive se navode u Zakonu o zaštiti potrošača, nisu ipak sva transponovana *ad literam*. Neka od njih (na pr. telefon sa ljudskim glasom, telefon bez ljudskog glasa, videofon, videotekst, neadresovani štampani materijal, adresovani štampani materijal, pisani obrasci) mogu da se nađu pod terminima „..telefon, pisani materijali, televizija..." koji su prošireni na različite varijacije istih dodatkom „i slična sredstva". Srpski Zakon o zaštiti potrošača iz 2005 ne uključuje takvu listu, ali u srpskom Nacrtu predloga su uključena sredstva komunikacije na daljinu kao što su: adresovani ili neadresovani štampani materijal, standardno pismo, reklama u štampi sa narudžbenicom, katalog, telefon, uključujući telefon bez ljudske intervencije (mašina sa automatskim pozivom, audiotekst), radio, videofon (telefon sa ekranom), videotekst (mikrokompjuter i televizijski ekran) sa tastaturom ili ekranom na dodir (touch screen), elektronska pošta, faks mašina, televizija (telešoping), internet.

c. Definicija „operatera sredstava za komunikaciju"

Član 2(5) Direktive 97/7 definiše 'operatera sredstava za komunikaciju' kao „svako javno ili privatno fizičko ili pravno lice čije zanimanje, posao ili profesija obuhvata to da isporučiocima stavlja na raspolaganje jedno ili više sredstava komunikacije na daljinu". Treba napomenuti da termin 'operater sredstava za komunikaciju' je termin koji uglavnom objašnjava samog sebe i koristi se u Direktivi samo u dva slučaja, to jest u članu 5(2) i članu 11(3)(b), prvi koji je mali izuzetak od opšteg pravila, drugi sadrži prilično opšti zadatak dodeljen zemljama članicama koji može da se implementira na mnogo načina. Zbog toga, lako je moguće da se ova dva člana Direktive transponuju bez jasne definicije termina 'operatera sredstava za komunikaciju' ili čak bez ikakve njegove upotrebe.

Samo su Hrvatska i Makedonija transponovale u njihove Zakone o zaštiti potrošača definiciju 'operatera sredstava za komunikaciju'. Član 38(1) hrvatskog Zakona o zaštiti potrošača definiše operatera sredstava daljinske komunikacije kao bilo koju osobu „čiji posao, zani-

[227] Albanska Odluka Saveta Ministara br. 64 od 21.01.2009, *Sl. list RA Br*. 8/09.

manje ili djelatnost uključuje i omogućavanje trgovcu uporabu jednog ili više sredstava daljinske komunikacije". Nasuprot članu 2(5) Direktive 97/7, ova odredba ne pravi razliku između fizičkih i pravnih ili javnih i privatnih lica jer široki termin 'osoba' obuhvata sve to. Po članu 86 makedonskog Zakona o zaštiti potrošača, operater sredstava komunikacije na daljinu je svako javno ili privatno fizičko ili pravno lice čiji posao, profesija ili aktivnost nudi isporučiocu upotrebu jednog ili više sredstava za komunikaciju na daljinu. Ta definicija, mada nije tačna u formulaciji, barem u svom okviru i smislu daje osnove za poređenje sa Direktivom 97/7. Nema definicije termina 'operater sredstava za komunikaciju' u crnogorskom Zakonu o zaštiti potrošača. I pored toga, taj pojam se upotrebljava u ovom zakonu u istom kontekstu[228] kao što se navodi u članu 5(2) Direktive. Time se ne krši Direktiva 97/7, jer jedna upotreba pojma ne povećava potrebu pravne definicije 'operatera sredstava za komunikaciju'. Međutim, posebni zakoni koji regulišu različite oblasti politike sadrže pripadajuće definicije *operatera* u dotičnim oblastima (na pr. Isporučilac usluga u informatičkom društvu[229], operateri javnih mreža elektronske komunikacije[230]). Albanija je transponovala ovu definiciju tehnikom copy paste, koja je identična formulaciji u Direktivi 97/7, podzakonskim aktom[231]. Bosna i Hercegovina i Srbija nisu uopšte transponovali ovu definiciju.

d. Izuzeci koje predviđa član 3 Direktive o ugovorima na daljinu

aa. Ugovori zaključeni preko automata za prodaju ili automatizovanih komercijalnih prostorija

Izuzeci (član 3(1) drugi pasus	Zemlje učesnice
Kao u Direktivi	AL, BiH
Sa varijacijama	HR, CG, MAK
Nije transponovano	SRB

Izuzimanje po pitanju ugovora zaključenih preko automata za prodaju ili automatizovanih komercijalnih prostorija su usvojili Albanija[232] i Bosna[233]. Takođe, srpski Predlog nacrta je transponovao ovo izuzeće kao u Direktivi. Hrvatska[234], Makedonija[235] i Crna Gora[236] su transponovale izuzeća koja se odnose na ugovore zaključene preko automata za prodaju, ali nisu implementirale izuzeće za „automatizovane komercijalne prostorije".

bb. Ugovori zaključeni sa operaterima telekomunikacija preko upotrebe javnih telefonskih govornica, član 3(1) treći pasus

Izuzeci (član 3(1) treći pasus)	Zemlje učesnice
Kao u Direktivi	AL, HR, MAK, CG
Sa varijacijama	
Nije transponovano	BiH, SRB

[228] Član 40 paragraf 2 Zakona o zaštiti potrošača, *Sl. list RCG* Br. 26/07.

[229] Zakon o elektronskoj trgovini, *Sl. list RCG* Br. 84/04.

[230] Zakon o elektronskim komunikacijama, *Sl. list RCG* Br. 50/08.

[231] Albanska Odluka Saveta Ministara br. 64 od 21.09.2009, *Sl. list RA Br*. 8/09.

[232] Član 36,3 (a) Zakona o zaštiti potrošača, *Sl. list RA Br*. 61/08.

[233] Član 43 Zakona o zaštiti potrošača, *Sl. glasnik BiH* br. 17/02.

[234] Član 39 pasus 3 Zakona o zaštiti potrošača, *NN* br. 79/07, 125/07, 79/09, 89/09, 133/09.

[235] Član 87(1), pasus 2, Zakon o zaštiti potrošača *Sl. list RM Br.* 38/04, 77/2007 i 103/2008.

[236] Član 47(1) (1) Zakona o zaštiti potrošača, *Sl. list RCG* Br. 26/07.

Ovo izuzimanje je transponovano od strane većine zemalja učesnica, kao što su Albanija[237], Hrvatska[238], Makedonija[239], i Crna Gora[240], dok Bosna i Srbija to nisu uradile. Međutim, srpski Nacrt predloga ga transponuje.

cc. Ugovori zaključeni za izgradnju i prodaju nepokretne imovine, član 3(1) četvrti pasus

Izuzeci (član 3(1) četvrti pasus)	Zemlje učesnice
Kao u Direktivi	AL, HR, MAK,
Sa varijacijama	BiH, CG
Nije transponovano	SRB

Albanija[241], Hrvatska[242], i Makedonija[243] su transponovali ovaj primer kao u Direktivi 97/7. Tako su iz odredbi o ugovorima na daljinu izuzeti ugovori zaključeni za izgradnju i prodaju nepokretne imovine ili koji se odnose na ostala prava nepokretne imovine, izuzev za rentiranje. Bosna i Hercegovina je transponovala ovo izuzeće sa jednom varijacijom u tekstu. Naime, odredbe o ugovorima o ugovorima na daljinu se neće primenjivati na ugovore koji se odnose na nepokretnu imovinu, osim ugovora o najmu. Ova odredba obezbeđuje viši nivo zaštite potrošača[244]. Ovo izuzeće je transponovano takođe i u crnogorskom Zakonu o zaštiti potrošača, ali bez dela koji se odnosi na „ili druga prava iz nepokretne imovine[245]. Srbija nije uopšte transponovala ovo izuzeće.

dd. Ugovori zaključeni na aukciji, član 3(1) pasus 5

Izuzeci (član 3(1) peti pasus)	Zemlje učesnice
Kao u Direktivi	AL, BiH
Sa varijacijama	HR, MAK, CG
Nije transponovano	SRB

Albanija[246] i Bosna[247] su transponovale ovo izuzeće kao u Direktivi 97/7. U Hrvatskoj odredbe Zakona o zaštiti potrošača o ugovorima za prodaju na daljinu se ne primenjuju na ugovore sklopljene „javnom dražbom“[248]. U Makedoniji je nejasno da li je to izuzeće implementirano u nacionalnom zakonodavstvu ili ne. Makedonski Zakon o zaštiti potrošača koristi izraz „ugovori zaključeni preko javnih nabavki“. Pošto ugovori o javnim nabavkama *per se*, ne spadaju pod primenu Zakona o zaštiti potrošača, trebalo bi shvatiti da se ovaj izraz odnosi na svaki ugovor zaključen postupkom javnog tendera. U Crnoj Gori ugovori koji su zaključeni na aukciji se transponuju Zakonom o zaštiti potrošača kao izuzeće, ali sa malom razli-

[237] Član 36,3 (b) Zakona o zaštiti potrošača, *Sl. list RA Br*. 61/0.

[238] Član 39 pasus 3 Zakona o zaštiti potrošača, *NN* br. 79/07, 125/07, 79/09, 89/09, 133/09.

[239] Član 87(1), pasus 3, Zakon o zaštiti potrošača, *Sl. list RM Br.* 38/04, 77/2007 i 103/2008.

[240] Član 47(1) (2) Zakona o zaštiti potrošača, *Sl. list RCG* Br. 26/07.

[241] Član 36,3 (c) Zakona o zaštiti potrošača *Sl. list RA Br*. 61/08.

[242] Član 39 pasus 4 Zakona o zaštiti potrošača *NN* br. 79/07, 125/07, 79/09, 89/09, 133/09.

[243] Član 87(1), pasus 4, Zakon o zaštiti potrošača, *Sl. list RM Br.* 38/04, 77/2007 i 103/2008.

[244] Član 43 Zakona o zaštiti potrošača, *Sl. glasnik BiH* br. 17/02.

[245] Član 47(1) (3) (4) Zakona o zaštiti potrošača *Sl. list RCG* Br. 26/07.

[246] Član 36,3 (ç) Zakona o zaštiti potrošača *Sl. list RA Br*. 61/08.

[247] Član 43 Zakona o zaštiti potrošača, *Sl. glasnik BiH* br. 17/02.

[248] Član 39 pasus 6 Zakona o zaštiti potrošača, *NN* br. 79/07, 125/07, 79/09, 89/09, 133/09.

kom u formulaciji. On se formalno odnosi na „ugovore zaključene posle prodaje metodom javnog tendera“[249]. Međutim, ovaj izraz kada se koristi za namernu prodaju neke robe, znači „aukcijska prodaja“, jer Zakon o unutrašnjoj trgovini u članu 18 reguliše „javnu i aukcijsku vrstu prodaje“, gde potonje znači „prodaja metodom javnog tendera na određenom mestu i u određeno vreme“[250]. Vredno je napomenuti da ovo izuzeće takođe pokriva prinudnu aukcijsku prodaju, koja se kao prodaja javnim nadmetanjem određenih zaplenjenih pokretnih dobara reguliše Zakonom o izvršnom postupku[251]. Srpsko zakonodavstvo nije uopšte transponovalo ovo izuzeće.

ee. Delimično izuzeće ugovora za snabdevanje namirnicama itd koje isporučuju redovni dostavljači, član 3(2) pasus 1

Izuzeci (član 3(2) prvi pasus)	Zemlje učesnice
Kao u Direktivi	AL, HR, MAK,
Sa varijacijama	CG
Nije transponovano	BiH, SRB

Po članu 3(2) prvi pasus Direktive 97/7, članovi 4 (prethodna informacija), 5 (potvrda), 6 (pravo na odustanak) i 7(1) (obaveza izvršenja naloga u roku od maksimum 30 dana) se ne odnosi na ugovore „za snabdevanje namirnicama, pićem ili drugim robama namenjenim za svakodnevnu potrošnju koje se isporučuju kod kuće potrošača, na njegovo prebivalište ili radno mesto, od strane redovnih dostavljača“.

Albanija[252], Hrvatska[253] i Makedonija[254] su transponovale ovo delimično izuzeće baš kao u Direktivi 97/7. Ovo delimično izuzimanje je transponovano u crnogorski Zakon o zaštiti potrošača, ali bez pozivanja na isporuku od strane „redovnih dostavljača“[255]. U odnosu na mesto isporuke ta odredba ne koristi reči „kuća“ i „prebivalište“ potrošača, već kaže „svakodnevna upotreba u domaćinstvu“ što bi u praksi obuhvatilo oba izraza iz Direktive 97/7. „Radno mesto“ se transponuje kako treba. Bosna i Hercegovina i Srbija nisu uopšte transponovale ovo delimično oslobađanje.

ff. Delimično izuzimanje ugovora za pružanje usluga smeštaja, prevoza, keteringa ili rekreacije, član 3(2) drugi pasus

Izuzeci (član 3(2) drugi pasus)	Zemlje učesnice
Kao u Direktivi	MAK
Sa varijacijama	AL, HR, CG
Nije transponovano	BiH, SRB

[249] Član 47(1) (5) Zakona o zaštiti potrošača, *Sl. list RCG* Br. 26/07.

[250] Vlada Crne Gore, na osnovu člana 19 Zakona o unutrašnjoj trgovini trenutno sprema Dekret kojim će regulisati uslove za organizaciju javnih i aukcijskih prodaja, vrsta robe koje se mogu prodavati u tim vrstama prodaje.

[251] Zakon o izvršnom postupku, u članu 87 reguliše prodaju metodom javnog tendera (javne aukcije) u slučaju pokretne robe veće vrednosti i kada sud očekuje da mogu biti prodati po većoj ceni od procenjene vrednosti.

[252] Član 36,3 (d) Zakona o zaštiti potrošača *Sl. list RA Br*. 61/08.

[253] Član 40 (1) pasus 1 Zakona o zaštiti potrošača, *NN* br. 79/07, 125/07, 79/09, 89/09, 133/09.

[254] Član 100(1), pasus 1, Zakon o zaštiti potrošača, *Sl. list RM Br.* 38/04, 77/2007 i 103/2008.

[255] Član 47paragraf 2 tačka 1 Zakona o zaštiti potrošača, *Sl. list RCG* Br. 26/07.

Član 3(2) drugi pasus predviđa da se članovi 4, 5, 6, i 7(1) neće primenjivati na ugovore za pružanje usluga smeštaja, prevoza, keteringa ili rekreacije, kada isporučilac preuzima, kada se ugovor zaključi, da pruži te usluge nekog posebnog dana ili u okviru nekog posebnog perioda.

Izuzev, u slučaju sportskih događaja na otvorenom prostoru, isporučilac može da zadrži pravo da ne primeni član 7(2) u posebnim okolnostima.

Ovaj član Direktive 97/7 je primenjivan u Evropskom sudu pravde (C-336/03 – *Easyca*[256]). Sud je držao da član 3(2) Direktive treba da se tumači kao da znači da „ugovori za pružanje usluga u prevozu" obuhvataju ugovore za pružanje usluga iznajmljivanja automobila. To mišljenje nudi neke smernice za buduće primenjivanje ove odredbe. Sud je izjavio da izuzimanje ima za cilj zaštitu interesa isporučioca određenih usluga kako oni ne bi trpeli nesrazmerne posledice koje proističu iz otkazivanja. Primer za to bi bila rezervacija koja je načinjena i onda otkazana od strane potrošača uz obaveštenje neposredno pre datuma navedenog za pružanje te usluge. Po mišljenju Evropskog suda pravde, posao sa iznajmljivanjem automobila predstavlja aktivnost koju, protiv takvih posledica, zakonodavstvo namerava da zaštiti preko izuzeća. Razlog je što takvi poslovi moraju da prave aranžmane za izvršenje na datum određen u vreme rezervisanja dogovorene usluge, i stoga trpe iste posledice u slučaju otkazivanja kao i drugi koji rade u sektoru prevoza ili drugim sektorima navedenim u izuzimanjima[257].

Samo je Makedonija[258] verno transponovala član 3(2) pasus 2 Direktive 97/7. Albanija[259] je izostavila, ili „zaboravila" tokom sastavljanja, drugi deo rečenice (prema kojem izuzev u slučaju sportskih događaja na otvorenom prostoru, isporučilac može da zadrži pravo da ne primeni član 7(2) u posebnim okolnostima). Hrvatski Zakon o zaštiti potrošača u članu 40 (1) drugi pasus određuje da se odredbe članova 43 – 51 i član 52(1) ovoga Zakona (o prethodnoj obavijesti i pravu na raskid ugovora) neće primenjivati na „ugovore o smještaju, prijevozu i opskrbi pripremljenom hranom (catering), i uslugama za slobodno vrijeme kojima se trgovac obvezuje ispuniti svoju obvezu u točno određenom trenutku ili u točno određenom roku". Temeljem člana 40(2) Zakona o zaštiti potrošača izuzetno, kod ugovora o pružanju usluga razonode na otvorenome, trgovac može ugovorom isključiti od primjene na taj ugovor odredbu člana 52(2) Zakona (glede neispunjenja ugovora od strane trgovca) u pojedinim, ugovorom određenim, situacijama. Suštinski deo ovog delimičnog oslobađanja, to jest deo odredbe koja reguliše da datum izvršenja mora da bude fiksan u vreme zaključenja ugovora, nije bio izričito transponovan. Situacija je slična u Crnoj Gori. Delimično izuzimanje je transponovano u crnogorskom Zakonu o zaštiti potrošača uz manje varijacije, tako da je skoro potpuno transponovanje Direktive u nacionalni zakon neupitno. Varijacije su sledeće: a) iako Direktiva 97/7 zahteva da datum izvršenja mora da bude utvrđen „kada se ugovor zaključuje". Crnogorsko zakonodavstvo je izostavilo ove reči, ali krajnji rezultat je isti jer formulacija paragrafa sugeriše da datum treba bude „u ugovoru"; b) iako je Crna Gora transponovala drugi deo izuzimanja (rekreativni događaji na otvorenom prostoru), to se ne odnosi na „posebne okolnosti", već umesto toga na „slučajeve navedene u ugovoru"[260].

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[256] Presuda Evropskog suda pravde, mart 2005, C-336/03- *EasyCar (UK) v Office of fair trading* (2005) ECR I-1947.

[257] Presuda ESP od 10. marta 2005., , C-336/03- *EasyCar (UK) v Office of fair trading*. Ceo komentar ovog slučaja je dat u Consumer Law Compendium, Februar 2008, str. 527.

[258] Član 100(1), pasus 2, Zakon o zaštiti potrošača, *Sl. list RM Br.* 38/04, 77/2007 i 103/2008.

[259] Član 36,3 (dh) Zakona o zaštiti potrošača *Sl. list RA Br*. 61/08.

[260] Član 47paragraf 2 tačka 2 Zakona o zaštiti potrošača, *Sl. list RCG* Br. 26/07.

III. Instrumenti za zaštitu potrošača

1. Obaveze davanja informacija

a. Predugovorna obaveza informisanja potrošača

Član 4(1) Direktive 97/7 obavezuje države da predvide u svom zakonodavstvu obavezu isporučioca da potrošaču pruži, blagovremeno pre zaključenja ugovora o ugovorima na daljinu, sledeće informacije:

a) Identitet isporučioca i, u slučaju ugovora po kojima se zahteva plaćanje unapred, njegovu adresu;
b) Glavne karakteristike roba ili usluga;
c) Cenu roba ili usluga uključujući sve poreze;
d) Troškove isporuke, gde je moguće;
e) Uslove plaćanja, isporuke ili izvršenja;
f) Postojanje prava na odustanak, osim u slučajevima na koje se odnosi član 6(3);
g) Troškovi upotrebe sredstava komunikacije na daljinu, kada se obračunava mimo osnovne cene;
h) Period u kome ponuda ili cena ostaju važeće;
i) Kada je moguće, minimalno trajanje ugovora u slučaju ugovora za isporuku proizvoda ili usluga koje će se vršiti trajno ili periodično.

Na osnovu člana 4(2), informacije moraju da se pruže na jasan i razumljiv način koji u svakom smislu odgovara upotrebljenom sredstvu komunikacije na daljinu, dok član 4(3) dodatno objašnjava da u slučaju komunikacije telefonom, identitet isporučioca i komercijalna svrha poziva moraju biti izričito jasni na početku svakog razgovora sa potrošačem.

Sve zemlje, osim Srbije, su uključile takvu obavezu i napravile tačno takvu ili sličnu listu informacija koje treba da se daju. U svrhu ove studije, istaći ćemo sledeće aspekte:

aa. "U primerenom roku" pre zaključenja ugovora

Postoje određene razlike u transponovanju ovog uslova. Tačno takva formulacija je upotrebljena u Albaniji (Zakon o zaštiti potrošača član 37(1)) i Hrvatskoj (član 43(1) Zakona o zaštiti potrošača: „u primjerenom roku prije sklapanja ugovora"). Varijacija u formulaciji postoji u Makedoniji, gde je zakonodavac upotrebio izraz *određeno vreme pre zaključenja*, bez definisanja kako se ono određuje (član 89(1) Zakona o zaštiti potrošača). U Crnoj Gori je upotrebljen izraz *pre zaključenja*. Ovaj uslov nije transponovan u zakonodavstvu Bosne i Hercegovine i Srbije[261].

bb. Dodatne obaveze predugovornog obaveštavanja

Sve ove zemlje, osim Srbije, su dodale još neke informacije na listu. U Albaniji su one iznete u članu 37(1) Zakona o zaštiti potrošača. Član 44 Zakona o zaštiti potrošača u Bosni i Hercegovini propisuje odredbu o daljem obaveštavanju o mestu i kontaktima sa trgovcem i isporučiocem u svakom slučaju, ne samo za „ugovore koji zahtevaju plaćanje unapred, o identifikaciji roba ili usluga, informacije o garancijama i post prodajnim uslugama i nadležnost i primenu određenih materijalnih prava u slučaju nekog spora. Isto to je dato u članu 43(1) hr-

[261] Poglavlje II, Glava 2 Nacrta predloga sadrži dva člana koja se bave sa opštom obavezom trgovca o predugovornom davanju informacija, navodeći informacije koje je trgovac u obavezi da pruži potrošaču pre zaključivanja ugovora o prodaji ili uslugama, uključujući posebne obaveze posrednika za davanje informacija.

vatskog Zakona o zaštiti potrošača, koji dodatno zahteva da isporučilac/trgovac pruži informacije koje se odnose na pravo potrošača na raskid ugovora kao i o situacijama u kojima je ono isključeno. Konačno, član 43(4) Zakona o zaštiti potrošača određuje još jednu dodatnu predugovornu informaciju koja sadrži upozorenje „da ugovor u ime i za račun maloljetnika ili potpuno poslovno nesposobne osobe mogu sklopiti samo njihovi zakonski zastupnici, odnosno upozorenje da djelomično poslovno sposobne osobe mogu sklopiti ugovor samo uz suglasnost njihova zakonskog zastupnika". Proširenja koja postoje u makedonskom Zakona o zaštiti potrošača (član 89(2)) se odnose na odredbu o detaljnim informacijama koje se odnose na identitet trgovca/isporučioca u svakom slučaju, identitet proizvoda ili usluge i pravo na povlačenje. Proširene informacije o identitetu trgovca/isporučioca i pravo na povlačenje će biti dati i u crnogorskom zakonodavstvu takođe. Pored toga Zakon o elektronskoj trgovini određuje dužnosti u vezi specifičnih informacija iz sektora[262].

U Srbiji, trenutno nema odgovarajućih odredbi u Zakonu o obligacionim odnosima ili Zakonu o zaštiti potrošača iz 2005[263].

b. Pisana potvrda, član 5

Član 5(1) Direktive obavezuje isporučioca da da, blagovremeno u toku izvršenja ugovora, pisanu potvrdu (ili potvrdu na nekom drugom trajnom mediju) o nekim informacijama koje će se dati pre ugovora, osim ako su te informacije već date potrošaču u takvoj formi.

U albanskom zakonodavstvu ovaj zahtev je transponovan doslovno (član 37 (2 a,b,c,ç) Zakona o zaštiti potrošača). Zakon o zaštiti potrošača Bosne i Hercegovine (član 45(1))[264] i Hrvatske (član 44 (1, 2)), Makedonije (član 91) i Crne Gore (član 40(1)) zahteva pisanu potvrdu koja će se dati najkasnije po isporuci robe/usluge. Ta pisana potvrda treba da sadrži sve informacije koje se od trgovca/isporučioca traže da ih pruži, dok Direktiva zahteva samo da neke od njih budu date.

aa. Formalni zahtevi

Član 5(1) Direktive određuje da potrošač mora da primi pisanu potvrdu, ili potvrdu u nekom drugom trajnom mediju koji mu je na raspolaganju i pristupačan, o nekim informacijama datim u članu 4 Direktive.

Formalni zahtevi	Zemlje učesnice
Kao u Direktivi	AL, BiH, HR, MAK
Nisu transponovani	SRB
Varijacije	CG

Zahtev koji se odnosi na medij za davanje potvrde (u pisanom ili nekom drugom trajnom, raspoloživom i pristupačnom mediju) je transponovan doslovno u Albaniji (član 37 (2

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[262] Član 14 Zakona o elektronskoj trgovini, *Sl. list RCG* Br. 84/04.

[263] Nacrt predloga navodi informacije koje treba da se daju i način na koji treba da se daju.

[264] Na osnovu člana 146 (3) Bosansko-hercegovački Nacrt Zakona o obligacionim odnosima od 2010. potrošač ima pravo da dobije punu informaciju o svom pravu na opoziv na nekom trajnom nosaču podataka. Ta informacija treba da sadrži ime i adresu primaoca opoziva, kao i početak perioda opoziva. Član 146 (4) BDLO dalje predviđa, da ako potrošački ugovor nije overen kod beležnika informacija o pravu na povlačenje treba da bude posebno potpisana ili da sadrži kvalifikovan elektronski potpis. Ako ugovor treba da bude zaključen u pisanoj formi, potrošač mora da primi original ili kopiju potvrde ugovora ili pisanu ponudu potrošača za zaključenje ugovora.

a,b,c,ç) Zakona o zaštiti potrošača), Bosni i Hercegovini (član 45(1) Zakona o zaštiti potrošača), Hrvatskoj (član 44(1) Zakona o zaštiti potrošača) i Makedoniji (član 91 Zakona o zaštiti potrošača). Crnogorski zakon je dao samo opciju pisane potvrde (član 40(1) Zakona o zaštiti potrošača). Ova odredba nije transponovana u Srbiji.

bb. Vreme potvrđivanja

Na osnovu člana 5(1) Direktive, potrošač mora da primi pisanu potvrdu, ili potvrdu u nekom drugom trajnom mediju koji mu je na raspolaganju i pristupačan, o informacijama na koje se odnosi član 4(1) (a) do (f), blagovremeno za vreme izvršenja ugovora, a najkasnije u vreme isporuke (ne primenjuje se kada je u pitanju roba za isporuku trećim licima).

Postoje razlike u prenošenju ovog zahteva. U Albaniji je prenet doslovno. U Bosni i Hercegovini postoje razlike jer član 45 (1) Zakona o zaštiti potrošača koji reguliše ovo pitanje ne uključuje izraz „*blagovremeno*". Po članu 44 (1) hrvatskog Zakona o zaštiti potrošača potvrda prethodnih informacija mora da se da „što je moguće prije, a najkasnije u trenutku isporuke proizvoda, odnosno najkasnije na dan početka pružanja usluge". Makedonski Zakon o zaštiti potrošača (član 91, paragraf 1, drugi deo rečenice) definiše da ta potvrda mora da se da blagovremeno za vreme izvršenja ugovora, a najkasnije u vreme isporuke proizvoda ili na dan davanja usluga, i ne pravi razliku između isporuke proizvoda potrošaču za njegovu/njenu ličnu upotrebu ili za neko treće lice. Član 39 crnogorskog Zakona o zaštiti potrošača izostavlja deo „na robu koja nije za isporuku trećim licima" i „najkasnije u vreme isporuke". Ovaj zahtev nije prenet u srpski Zakon.

Formalni zahtevi	Zemlje učesnice
Kao u Direktivi	AL
Nisu transponovani	SRB
Varijacije	BiH, HR, MAK, CG

cc. Obaveštenja koje će se dati u svakom slučaju, član 5(1), rečenica 2

Isporučilac, na osnovu člana 5(1) rečenica 2 Direktive, mora da da određena obaveštenja u svakom slučaju, a to su:

- Pisana informacija o uslovima i procedurama za upražnjavanje prava na odustanak;
- Geografska adresa mesta poslovanja isporučioca na koju potrošač može da uputu reklamacije;
- Informacije o post-prodajnim uslugama i postojećim garancijama; i
- Rešenje o raskidu ugovora, kada je na neodređeno vreme ili u trajanju preko jedne godine.

Ovaj uslov je doslovno transponovan u Albaniji. U Bosni i Hercegovini to se smatra predugovornim obaveštavanjem (član 44 Zakona o zaštiti potrošača) koje mora biti potvrđeno pre zaključivanja ugovora. Isti je slučaj sa zakonodavstvom u Hrvatskoj (član 43 (1) i član 44 (2) Zakona o zaštiti potrošača), Makedoniji (član 90 Zakona o zaštiti potrošača) i Crnoj Gori (član 39(1) tačke 6,7,8 i 9 i član 40(1) Zakona o zaštiti potrošača). Ovaj zahtev nije transponovan u srpskom zakonodavstvu.

dd. Izuzeće od člana 5(1) za usluge izvršene preko upotrebe sredstava za komunikaciju na daljinu

Član 5(2) Direktive 97/7 omogućava izuzimanje da isporučilac ne mora da da potvrdu za usluge koje su izvršene preko upotrebe sredstava za komunikaciju na daljinu, kada se one

izvrše samo jednom prilikom i kada ih fakturiše operater tog sredstva za komunikaciju na daljinu. I pored toga, potrošač u svakom slučaju mora da bude u mogućnosti da dobije geografsku adresu mesta poslovanja isporučioca na koju može da uputi reklamacije.

Odgovarajuće odredbe postoje u zakonodavstvu Albanije, Hrvatske, Makedonije i Crne Gore. Srbija i Bosna i Hercegovina nisu transponovale ovo izuzeće u svoja nacionalna zakonodavstva.

c. Sankcije za povredu obaveza davanja obaveštenje

Većina odredbi Direktive o sankcijama za povredu dužnosti davanja obaveštenja su prilično opšte i time ostavljaju veliku slobodu izbora nacionalnim zakonodavcima. Mogu se uočiti sledeće vrste sankcija:

- Produženje roka za odustanak u članu 6(1);
- Zabrane;
- Pravo konkurenata na traženje odštete;
- Novčane kazne po krivičnom ili upravnom pravu;
- Ostale posledice iz privatnog prava.

Sve ove zemlje, osim Srbije[265], daju neki oblik sankcija za povredu obaveza za davanje informacija.

aa. Produženje roka za odustanak iz člana 6(1)

Produženje roka za povlačenje	Zemlje učesnice
Kao u Direktivi	AL, HR, MAK, CG
Varijacije	BiH
Nije transponovano	SRB

Sankcije za produženje roka za odustanak iz člana 6(1) su implementirane kao u Direktivi u nacionalnom zakonodavstvu Albanije[266]. U Bosni i Hercegovini ovo pravilo je transponovano (član 47(4 i 5) Zakona o zaštiti potrošača); međutim, rok u kome potrošač može da odustane od ugovora produžen je na 15 dana. Treba napomenuti da nasuprot presudi *Heninger*[267] Evropskog suda pravde, u Bosni i Hercegovini rok za povlačenje može da počne čak pre nego što je obaveštenje sa informacijama dato potrošaču. On ističe u roku od tri meseca od prijema roba od strane potrošača, ili zaključenja ugovora u slučaju pružanja usluga, i stoga sledi kritike presude *Heininger*, da period za povlačenje ne može da se produžava zauvek usled nemanja obaveštenja o davanju informacija[268].

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[265] Nacrt predloga obuhvata sankcije za zakasnele informacije o pravu na povlačenje (Poglavlje III Nacrta predloga) kao i efekat navođenja potrošača da zaključi ugovor bez poštovanja uslova za davanje informacija (Poglavlje II, Glava 2 Nacrta predloga). Nacrtom predloga teret dokazivanja u vezi sa ispunjenjem obaveze o davanju informacija pada na trgovca. Takođe se očekuje da će nacrt predloga obuhvatiti i poglavlje o administrativnim kaznama.

[266] Tačke 11 i 12 Odluke Saveta Ministara br. 64 od 21.01.2009. br. 08/09.

[267] Presuda Evropskog suda pravde od 13. decembra 2001., C-481/99 – *Georg Heininger and Helga Heininger v. Bayerische Hypound Vereinsbank AG* (2001) ECRI-09945.

[268] Videti Z. Meškić, *Europäisches Verbraucherrecht – Gemeinschaftsrechtliche Vorgaben und europäische Perspektiven*, Band 18 der Schriftenreihe des Ludwig Boltzmann Institutes für Europarecht, Beč, 2008., str. 84; treba napomenuti da se očekuje da taj problem bude rešen usvajanjem Nacrta Zakona o obligacionim odnosima od 2010., sa time da rok za opoziv od 15 dana, na osnovu člana 146 (3) Nacrta Zakona o obligacionim odnosima, počinje kada informacija o pravu na opoziv bude data potrošaču.

Hrvatski zakonodavac je doslovno transponovao član 6(1) Direktive 97/7 u članu 46 (1-4) Zakona o zaštiti potrošača, kao i makedonsko (član 93 Zakona o zaštiti potrošača) i crnogorsko zakonodavstvo (član 41(2) Zakona o zaštiti potrošača). Kao što je gore navedeno, srpsko zakonodavstvo trenutno ne propisuje ovu sankciju.

bb. Tužbe za zaštitu kolektivnih interesa potrošača

Poštovanje obaveze o davanju informacija može da se sprovede preko postupka zabrane na osnovu člana 55 Zakona o zaštiti potrošača Albanije, članova 120-124 Zakona o zaštiti potrošača Bosne i Hercegovine, člana 131 et seq. Zakona o zaštiti potrošača Hrvatske i člana 103 Zakona o zaštiti potrošača Makedonije. U Crnoj Gori to je delimično transponovano Zakonom o zaštiti potrošača[269]. Nije bilo transponovanja ove mogućnosti u zakonodavstvu Srbije.

cc. Pravo konkurenata na traženje odštete

Zakonska odredba koja postoji u nekim zemljama EU, kojom konkurencija takođe može da traži odštetu protiv isporučioca koji povredi obaveze o davanju informacija i time stekne nezakonitu prednost nad učesnicima na tržištu koji poštuju zakon, nije donesena u nacionalnim zakonodavstvima proučavanih zemalja.

dd. Novčane kazne po krivičnom i upravnom pravu

Većina zemalja članica EU je navela administrativne sankcije, po kojima su isporučioci koji ne daju informacije krivi za prekršaj i mogu biti novčano kažnjeni.

Isto postoji i u proučavanim zemljama jugo-istočne Evrope osim u Srbiji. Naime, član 57 (2,a) albanskog Zakona o zaštiti potrošača propisuje novčane kazne do 70.000 leka (cca. 520 Evra). U Bosni i Hercegovini novčane kazne variraju između 2.500 Evra i 8.000 Evra zavisno od prekršaja (član 126 Zakona o zaštiti potrošača). U Hrvatskoj, na osnovu člana 145 (1) pasus 23 i 24, trgovac koji ne pruži informacije biće sankcionisan novčanom kaznom of 15.000 do 100.000 HRK (cca. 1.370 Evra do 13.700 Evra), dok na osnovu člana 145 (3) fizičkom licu za isti prekršaj sledi kazna u iznosu od 5.000 do 15.000 HRK (cca. 685 do 13.700 Evra). Članom 136 (1) red 30 Zakona o zaštiti potrošača Makedonije povreda obaveze trgovca za davanje pisane potvrde može imati za posledicu novčanu kaznu u iznosu od 3.500 do 5.000 Evra. U Crnoj Gori, prekršajne novčane kazne će se nametnuti trgovcu za prekršaj napravljen preko povrede obaveza koje se odnose na prethodno davanje informacija, pisanu potvrdu informacija i ograničenja na upotrebu određenih sredstava komunikacija na daljinu (član 129(1) tačke 13, 14 i 15 Zakona o zaštiti potrošača), kao i posebna kazna za odgovorno lice ako je trgovac pravni subjekt (član 129(2) Zakona o zaštiti potrošača).

ee. Ostale posledice po privatnom pravu

Primenom propisa građanskog prava, a posebno zakona o ugovorima, ostale posledice privatnog prava, u svim proučavanim zemljama obuhvataju zahtev za naknadu štete u slučaju raskida ugovora.

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[269] I pored toga, u slučaju prodaje na daljinu područje primene instrumenata propisanih Poglavljem o "Odredbama o kaznama" je više nego efikasno i pruža adekvatnu zaštitu interesa potrošača. Naime, nije neophodno da neki postupak trgovca povredi kolektivne interese potrošača, ali je dovoljno da je došlo samo do povrede obaveza u odnosu na prethodno davanje informacija, pisanu potvrdu informacija ili ograničenja upotrebe određenih sredstava komunikacije na daljinu (član 129 paragraf 1 stavke 13, 14, 15 i paragraf 2 Zakona o zaštiti potrošača).

2. Pravo na odustanak

a. Izuzimanja od prava na odustanak

aa. Izuzimanje od prava na povlačenje ako je pružanje usluga počelo pre završetka perioda od sedam radnih dana (član 6(3) prvi pasus)

Većina zemalja je transponovala izuzimanje od prava na odustanak ako je pružanje usluga počelo pre završetka perioda od sedam radnih dana, kako se navodi u članu 6(3) prvi pasus Direktive 97/7, osim Srbije[270].

U Albaniji, Zakon daje 14 kalendarskih dana za početak izvršenja. Član 6(2) prvi pasus Direktive 97/7 je doslovno prenet u član 48 (1a) Zakona o zaštiti potrošača Bosne i Hercegovine, ali treba napomenuti da gore navedeni član sadrži lingvističku grešku jer navodi da „potrošač ne može odustati od prava na poništenje ugovora", što se samo može protumačiti kao greška u prevodu. Hrvatska je transponovala to izuzimanje propisivanjem u članu 49 prvi pasus Zakona o zaštiti potrošača da osim ako se stranke nisu drugačije dogovorile, potrošač nema pravo na raskid ugovora ako je riječ o ugovoru o pružanju usluge, ako je pružanje usluge, uz izričit pristanak potrošača, započelo prije isteka roka u kojem je potrošač imao pravo tražiti raskid ugovora. Slična formulacija je upotrebljena u makedonskom zakonodavstvu (član 96, prvi pasus Zakona o zaštiti potrošača) i u Crnoj Gori (član 42(1) tačka 1 Zakona o zaštiti potrošača). Takva formulacija do određenog stepena varira od teksta Direktive, jer izostavljanjem teksta „pre završetka perioda od sedam radnih dana" nacionalne odredbe izgleda da idu izvan Direktive i produžavaju ovaj rok dalje, posebno u slučajevima kada potvrda o informacijama nije uopšte data. Mora da se ponovi da će to moći da se primeni, samo ako je potrošač dao jasnu saglasnost da pružanje usluga počne pre završetka perioda u okviru koga je potrošač imao pravo na raskid ugovora.

Izuzimanje (član 6(3) pasus 1)	Zemlje učesnice
Kao u Direktivi	BiH
Nije transponovano	SRB
Varijacije	AL, HR, MAK, CG

bb. Izuzimanje od prava na povlačenje u slučaju roba i usluga čija cena zavisi od fluktuacija na finansijskom tržištu (član 6(3) drugi pasus)

Ovo izuzimanje je doslovno transponovano u zakonodavstvo Bosne i Hercegovine (član 48(1c) Zakona o zaštiti potrošača), u Hrvatskoj (član 49 drugi pasus Zakona o zaštiti potrošača), Makedoniji (član 96, drugi pasus Zakona o zaštiti potrošača) i Crnoj Gori (član 42 paragraf 1 tačka 2 Zakona i zaštiti potrošača).

Izuzimanje (član 6(3) pasus 2)	Zemlje učesnice
Kao u Direktivi	BiH, HR, MAK, CG
Nije transponovano	AL, SRB
Varijacije	

[270] Pod Nacrtom predloga novog Zakona o zaštiti potrošača u Srbiji, u odnosu na ugovore o ugovorima na daljinu, pravo na povlačenje se neće primenjivati na sledeće (osim ako se ugovorne strane ne dogovore drugačije): (1) usluge gde je izvršenje počelo, uz prethodnu jasnu saglasnost potrošača, pre kraja roka za povlačenje; (2) isporuke robe ili usluga za koje cena zavisi od promena na finansijskom tržištu koje trgovac ne može da kontroliše; (3) isporuka zatvorenih audio ili video snimaka ili kompjuterkog softvera koje je otvorio potrošač; (4) usluge igara na sreću i lutrije.

cc. izuzimanje od prava na povlačenje u slučaju kada se roba izrađuje po specifikacijama potrošača itd. (član 6(3) treći pasus)

Ovo izuzimanje je implementirano u nacionalnom zakonodavstvu Bosne i Hercegovine (član 48(1) red d) i e Zakona o zaštiti potrošača), Hrvatske (član 49 treći pasus Zakona o zaštiti potrošača), Makedonije (član 96, treći pasus Zakona o zaštiti potrošača) i Crne Gore (član 42(1) tačka 3 Zakona o zaštiti potrošača) gde treba razumeti da izostavljanje izraza „ili brzo ističe" ne treba smatrati kao prepreku za pravilnu implementaciju navedenog izuzimanja[271].

Izuzimanje (član 6(3) pasus 3)	Zemlje učesnice
Kao u Direktivi	BiH, HR, MAK, CG
Nije transponovano	AL, SRB
Varijacije	

dd. Izuzimanje od prava na povlačenje u odnosu na audio i video snimaka, ili kompjuterskog softvera (član 6(3) četvrti pasus)

Na osnovu član 48 (1f) Zakona o zaštiti potrošača Bosne i Hercegovine, osim ako se ne dogovori drugačije između strana, potrošač neće imati pravo na raskid ugovora po pitanju ugovora za prodaju audio ili video snimaka ili kompjuterskog softvera koje je koristio potrošač. Shodno tome, izraz „koje potrošač nije otvarao" je zamenjen izrazom „koje je potrošač koristio". Slično tome, u članu 49 četvrti pasus Zakona o zaštiti potrošača Hrvatske, predviđeno je isto izuzimanje, dok je upotrebljen izraz „koje je potrošač otpakirao". Članom 96 četvrti pasus makedonskog Zakona o zaštiti potrošača, potrošač neće imati pravo da raskine ugovor po pitanju ugovora za prodaju audio ili video snimaka ili kompjuterskog softvera koji je bio raspakovan (otvoren) od strane potrošača. Doslovno transponovanje je predviđeno u članu 42(1) tačka 4 Zakona o zaštiti potrošača Crne Gore. Albanija i Srbija nisu transponovale ovo izuzimanje.

Izuzimanje (član 6(3) pasus 4)	Zemlje učesnice
Kao u Direktivi	CG
Nije transponovano	AL, SRB
Varijacije	HR, BiH, MAK

ee. Izuzimanje od prava na povlačenje po pitanju novina, periodike i časopisa (član 6(3) pasus 5)

Odredba člana 6(3) peti pasus Direktive je transponovana, doslovno, u zakonodavstvu Bosne i Hercegovine (član 48(1g) Zakona o zaštiti potrošača), Hrvatske (član 49 peti pasus Zakona o zaštiti potrošača), Makedonije (član 96 peti pasus Zakona o zaštiti potrošača), i Crne Gore (član 42, paragraf 1 tačka 5 Zakona o zaštiti potrošača).

Izuzimanje (član 6(3) pasus 5)	Zemlje učesnice
Kao u Direktivi	BiH, HR, MAK, CG
Nije transponovano	AL, SRB
Varijacije	

[271] Član 42 paragraf 1 tačka 3 Zakona o zaštiti potrošača.

ff. Izuzimanje od prava na povlačenje po pitanju usluga u oblasti kockanja i lutrije (član 6(3) pasus 6)

Izuzimanje (član 6(3) pasus 6)	Zemlje učesnice
Kao u Direktivi	
Nije transponovano	AL, MAK, SRB
Varijacije	BiH, HR, CG

Izuzimanje koje je dato u članu 6(3) pasus 6 (izuzimanje ugovora koji se odnose na kockanje i lutriju) je transponovano u Bosni i Hercegovini, Hrvatskoj i Crnoj Gori uz manje izmene. Naime, član 48 (1b) Zakona o zaštiti potrošača Bosne i Hercegovine koristi širi izraz „usluge igara na sreću". U članu 49 pasus 6 Zakona o zaštiti potrošača Hrvatske upotrebljen je izraz „igre na sreću", kao i u članu 42(1) tačka 6 Zakona o zaštiti potrošača Crne Gore, gde treba napomenuti da je taj izraz usklađen sa nacionalnim zakonodavstvom[272].

b. Formalni uslovi za upražnjavanje prava na povlačenje

Direktiva ne sadrži izričitu odredbu koja omogućava zemljama članicama da regulišu formalne uslove za upražnjavanje prava na povlačenje od strane potrošača. Ali kako član 5(1) prvi pasus Direktive predviđa da potrošač bude obavešten o „uslovima i procedurama za upražnjavanje prava na povlačenje", generalno se pretpostavlja da zemlje članice imaju slobodu da regulišu formalne uslove.

Albansko zakonodavstvo ne predviđa nikakvu formalnu proceduru za upražnjavanje prava na povlačenje. U Bosni i Hercegovini, članom 47(6) Zakona o zaštiti potrošača od potrošača se traži da obaveštenje o odustajanju u pisanoj formi, međutim, nije potrebno objasniti razloge za to[273]. Procedura za raskid ugovora u Hrvatskoj je data u članu 47 Zakona o zaštiti potrošača, na osnovu koga potrošač treba da pošalje trgovcu pisanu obavest o raskidu. Ugovor je raskinut u trenutku kada trgovac primi obavest o raskidu (član 47 (2) Zakona o zaštiti potrošača), pod uslovom da je pisana obavest o raskidu poslata u navedenim vremenskim rokovima iz (člana 47 (3) Zakona o zaštiti potrošača). U Srbiji ovo pitanje nije regulisano.

c. Rok za povlačenje

aa. Dužina roka

Direktiva predviđa rok od sedam radnih dana. Zemlje učesnice koje regulišu ovo pitanje (to jest: sve osim Srbije[274]) imaju različita pravila po pitanju dužine roka koji poštuje minimum koga predviđa Direktiva.

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[272] Videti crnogorski Zakon o igrama na sreću, *Sl. list RCG* Br. 52/04 I *Sl. list RCG* Br. 13/07.

[273] Na osnovu člana 146 (1) Nacrta Zakona o obligacionim odnosima od 2010. opoziv ne mora da sadrži nikakvo objašnjenje, ali mora da bude dato na nekom trajnom nosaču podataka ili dokumentu. Povratak robe ima isti efekat kao i opoziv.

[274] Nema odgovarajućih odredbi u Zakonu o obligacionim odnosima i Zakonu o zaštiti potrošača iz 2005. Po Nacrtu predloga: Po pitanju ugovora na daljinu i ugovora izvan poslovnih prostorija, potrošač će imati rok od 14 dana da se povuče iz tih ugovora, bez davanja razloga. Upražnjavanje njegovog prava na povlačenje iz ugovora će u potpunosti osloboditi potrošača od bilo koje obaveze koja proističe iz ugovora iz koga se povukao. Jedini trošak koja se može zaračunati potrošaču na osnovu upražnjavanja njegovog prava na povlačenje mogu biti direktni troškovi za vraćanje robe. Pod Nacrtom predloga novog Zakona o zaštiti potrošača Srbije rok za povlačenje od 14 dana počinje na početku prvog sata prvog dana i završava se istekom poslednjeg sata poslednjeg dana tog roka. Izjava o povlačenju će se smatrati odgovarajućom ako je poslata u okviru navedenog roka. Vraćanje primljene robe trgovcu u okviru roka, u kome potrošač

Albanski zakon predviđa rok od 14 kalendarskih dana (član 37(3) Zakona o zaštiti potrošača), član 47(1) Zakona o zaštiti potrošača Bosne i Hercegovine propisuje da potrošač ima pravo, bez troškova i bilo kakvog objašnjenja, da odustane od ugovora o ugovorima na daljinu u roku od 15 dana[275]. Sedam radnih dana je rok koji je usvojen u Hrvatskoj (član 45(1) Zakona o zaštiti potrošača) i Crnoj Gori (član 41(1) Zakona o zaštiti potrošača). U Makedoniji je taj rok osam radnih dana (član 92(1) Zakona o zaštiti potrošača).

bb. Početak roka

(1) Početak roka u slučaju isporuke robe

Početak u slučaju isporuke robe (član 6(1) rečenica 3, pasus 1)	Zemlje učesnice
Kao u Direktivi	BiH, HR, MAK, CG
Nije transponovano	AL, SRB
Varijacije	

Član 6(1), rečenica 3, prvi pasus Direktive 97/7 navodi početak roka za povlačenje u slučaju isporuke robe kao dan primanja robe od strane potrošača.

On je transponovan, kako je predviđeno u nacionalnom zakonodavstvu Bosne i Hercegovine (član 47(1,2,4 i 5) Zakona o zaštiti potrošača), Hrvatske (član 45(2) Zakona o zaštiti potrošača), Makedonije (član 92(2) Zakona o zaštiti potrošača), i Crne Gore (član 41(1) Zakona o zaštiti potrošača).

Ovo pitanje nije regulisano u Albaniji i Srbiji.

(2) Početak roka u slučaju pružanja usluga

Početak u slučaju pružanja usluga (član 6(1) rečenica 3, pasus 2)	Zemlje učesnice
Kao u Direktivi	BiH, HR, MAK, CG
Nije transponovano	AL, SRB
Varijacije	

Član 6(1), rečenica 3, drugi pasus Direktive 97/7 predviđa početak roka za povlačenje u slučaju pružanja usluga „od dana zaključenja ugovora ili od dana kada su obaveze date u članu 5 ispunjene ako su ispunjene posle zaključenja ugovora“.

Ova odredba je transponovana u zakonodavstvo Bosne i Hercegovine (član 47(3,4,5) Zakona o zaštiti potrošača[276]), Hrvatske (član 45 (3) Zakona o zaštiti potrošača), Makedonije (član 92(3) Zakona o zaštiti potrošača) i Crne Gore (član 41(1) Zakona o zaštiti potrošača).

Ovo pitanje nije regulisano u zakonodavstvu Albanije i Srbije.

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ima pravo na povlačenje, će se smatrati izjavom o povlačenju. Smatraće se da je potrošač izvršio svoje pravo na povlačenje u trenutku kada je izjava o povlačenju poslata trgovcu. U slučaju ugovora za prodaju robe na daljinu, rok za povlačenje počinje od dana kada je potrošač ili neko treće lice osim prevoznika i naznačeno od strane potrošača steklo materijalni posed nad svakom naručenom robom. U slučaju ugovora na daljinu za pružanje usluga, rok za povlačenje počinje od dana zaključivanja ugovora.

[275] Isti rok je dat u članu 146 (3) Nacrta Zakona o obligacionim odnosima od 2010.

[276] Član 146 Nacrta Zakona o obligacionim odnosima od 2010. ne pravi razliku između isporuke robe i pružanja usluga. Rok za opoziv od 15 dana počinje izjavom volje za opozivom ili vraćanjem robe, ali ne pre nego što je potrošač primio punu informaciju o svom pravu na opoziv.

cc. Poštansko pravilo/pravilo slanja

Direktiva 97/7 ne sadrži nikakvu odredbu koja određuje kako potrošač može da iskoristi pravo na povlačenje na vreme; međutim, ona sadrži pravilo kako obaveštenje treba da se isporuči trgovcu.

U Albaniji, Bosni i Hercegovini, Hrvatskoj i Srbiji[277], ovo predmetno pitanje nije regulisano. Crna Gora ga je regulisala na način da potrošač može da raskine ugovor o ugovorima na daljinu slanjem pisanog obaveštenja trgovcu (član 43(1) Zakona o zaštiti potrošača), gde će ugovor biti raskinut u vreme kada trgovac primi obaveštenje o raskidu.

U eventualnom slučaju da trgovac ne primi obaveštenje opšte pravilo člana 5 paragraf 3 Zakona o zaštiti potrošača će se primeniti što dalje jača položaj potrošača jer se u njemu kaže da „u slučaju bilo kakvog spora o pravu potrošača da iskoristi prava data u ovom Zakonu koja se odnose na poštovanje roka za upražnjavanje prava, smatraće se da potrošač ima pravo po tom pitanju".

d. Efekti povlačenja

U vezi sa efektima povlačenja, Direktiva predviđa barem neke osnovne principe u članu 6(1) i (2):

- Potrošač mora da bude u mogućnosti da se povuče bez ikakve kazne.
- Isporučilac će biti u obavezi da nadoknadi sume koje je platio potrošač bez zaračunavanja troškova; nadoknada mora da se izvrši što je pre moguće a u svakom slučaju u roku od 30 dana.
- Jedini trošak koji može biti zaračunat potrošaču za upražnjavanje prava na povlačenje jeste direktan trošak za povraćaj robe.

Po albanskom zakonodavstvu, povlačenje ima efekta da ugovor između strana više nije na snazi. U Bosni i Hercegovini, na osnovu člana 47(1) Zakona o zaštiti potrošača potrošač ima pravo, bez zaračunavanja troškova i bez ikakvog objašnjenja, da odustane od ugovora o ugovorima na daljinu. U tom slučaju, trgovac je u obavezi da vrati plaćeni iznos bez odlaganja, najkasnije 15 dana od dana kada je primio pisano obaveštenje potrošača (član 47(6) Zakona o zaštiti potrošača), i da plati, pored zakonske kamate na zaostatak, dodatnih 10% od ukupne vrednosti za svakih 30 dana kašnjenja sa vraćanjem (član 47(7) Zakona o zaštiti potrošača)[278]. Po hrvatskom zakonodavstvu (član 48 Zakona o zaštiti potrošača), potrošač će vratiti proizvod trgovcu na svoj vlastiti trošak (član 48(1) Zakona o zaštiti potrošača) i ne odgovara za štetu koju trgovac pretrpi zbog raskida ugovora (član 48(2) Zakona o zaštiti potrošača). Dalje, trgovac je dužan što je pre moguće a najkasnije u roku od 30 dana od dana prijema pisane obavesti o raskidu, vratiti potrošaču cjelokupan iznos koje je primio od potrošača do tog trenutka na osnovu ugovora, povećan za zatezne kamate po kamatnoj stopi poslovne banke trgovca za oročene štedne uloge na tri meseca ceo period, računajući od primitka pisane obavesti o raskidu do isplate (član 48(3) Zakona o zaštiti potrošača). Članom 95 Zakona

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[277] Potrošač će obavestiti trgovca o svojoj odluci o povlačenju na nekom trajnom medijumu, bilo u izjavi upućenoj trgovcu sastavljenoj njegovim rečima, ili uz upotrebu modela za povlačenje. Za ugovore na daljinu zaključene na Internetu, trgovac može dodatno dati opciju potrošaču da elektronskim putem popuni i pošalje standardni obrazac za povlačenje na website-u trgovca. U tom slučaju, trgovac će dati potrošaču potvrdu o prijemu tog povlačenja putem e-maila bez odlaganja.

[278] Na osnovu člana 148 Nacrta Zakona o obligacionim odnosima od 2010., opoziv ima iste efekte kao i raskid ugovora, određen opšte primenjivim pravilima Nacrta Zakona o obligacionim odnosima. Privrednik dolazi u docnju, ako ne vrati plaćeni iznos u roku od 30 dana nakon izjave volje za opozivom ili vraćanje robe od strane potrošača. Potrošač vraća robu na trošak i rizik privrednika.

o zaštiti potrošača Makedonije, u slučaju raskida ugovora, potrošač je u obavezi da vrati proizvod trgovcu na svoj vlastiti trošak i nije odgovoran za štetu koju trgovac pretrpi kao rezultat raskida ugovora. Trgovac je u obavezi da u roku od 30 dana od datuma prijema pisanog obaveštenja o raskidu, da vrati potrošaču ukupan iznos koga je potrošač platio, na osnovu ugovora, do trenutka raskida ugovora, osim za direktne troškove povraćaja proizvoda. Opšta obaveza plaćanja kamata ostaje, kako proističe iz Zakona o obligacionim odnosima. Zakon o zaštiti potrošača Crne Gore (član 44(4)) predviđa da potrošač u slučaju povlačenja snosi troškove povraćaja robe, međutim on neće biti odgovoran da nadoknadi trgovcu štetu (troškove, kamatu, penale, i slično) u slučaju otkazivanja ugovora. Trgovac je u obavezi da nadoknadi, besplatno, iznose koje je potrošač već platio, međutim, odredba ispušta izraz „što je pre moguće" i daje vremenski rok od 30 dana koji počinje da teče od dana prijema pisanog obaveštenja o raskidu ugovora. Po opštim pravilima ugovora strana koja vraća novac će biti u obavezi da plati kamatu na zaostatke od dana primanja uplate[279]. Konačno, po pitanju obaveze potrošača da vrati primljenu robu, Crna Gora je odredila rok od 30 dana od dana slanja obaveštenja.

U Srbiji nema odgovarajućih odredbi u Zakonu o obligacionim odnosima i Zakona o zaštiti potrošača iz 2005[280].

e. Otkazivanje ugovora o kreditu

Po članu 6(4) Direktive otkazivanje ugovora potrošača će povlačiti za sobom i otkazivanje svih ugovora o kreditu odobrenih u svrhu određene kupovine, bez ikakvih penala, troškova ili kamata protiv potrošača. Istovetne odredbe postoje u zakonodavstvu Albanije (član 37(4) Zakona o zaštiti potrošača), Bosne i Hercegovine (član 48(2) Zakona o zaštiti potrošača), Hrvatske (član 50 i 51 Zakona o zaštiti potrošača), Makedonije (član 97 i 98 Zakona o zaštiti potrošača) i Crne Gore (član 45 Zakona o zaštiti potrošača) koje su sve zamenile izraz „bez ikakvih penala" objašnjenjem da trgovac neće imati pravo na nikakvu „nadoknadu troškova, kamatu ili penale"). Nema odgovarajućih odredbi u srpskom Zakonu o obligacionim odnosima i Zakonu o zaštiti potrošača iz 2005[281].

3. Izvršenje

a. Obaveza izvršenja narudžbe u roku od maksimum 30 dana (član 7(1))

Trgovac mora da izvrši narudžbu za isporuku proizvoda ili usluge koju je dobio od potrošača u roku od maksimum 30 dana od dana posle onog kada je potrošač prosledio svoju narudžbu isporučiocu, osim ako se strane ne dogovore drugačije, po Zakonu o zaštiti potrošača

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[279] Član 127 paragraf 5 Zakona o obligacionim odnosima.

[280] Po Nacrtu predloga: Upražnjavanje prava na povlačenje će raskinuti obaveze strana na izvršenje pod ugovorima na daljinu ili izvan poslovnih prostorija. Trgovac će nadoknaditi svaku uplatu primljenu od potrošača u roku od 30 dana od dana kada je primio saopštenje o povlačenju. Ako trgovac zaostaje u nadoknadi iznosa koga je platio potrošač, on će, pored zatezne kamate, platiti dodatnih 10 posto od sume koju je uplatio potrošač za svakih 30 dana kašnjenja.

[281] Po Nacrtu predloga: Ako potrošač upražnjava svoje pravo na povlačenje iz ugovora na daljinu ili izvan poslovnih prostorija, svaki pomoćni ugovori će automatski biti raskinuti, bez ikakvog troška za potrošača. Isto se odnosi na ugovore o kreditima u vezi sa potrošačkim ugovorima, bez obzira da li je kredit odobrio trgovac ili neko treće lice. U slučaju da je kredit odobrilo neko treće lice, trgovac je u obavezi da obavesti davaoca kredita da se potrošač povukao iz ugovora o ugovorima na daljinu. Davaoc kredita će nadoknaditi potrošaču novčani iznos, zajedno sa kamatom, koji je plaćen za robu ili usluge do trenutka povlačenja, bez odlaganja i najkasnije u roku od 30 dana od dana kada je obavešten o povlačenju.

Albanije (član 37(5)), po Zakonu o zaštiti potrošača Hrvatske (52(1)), po Zakonu o zaštiti potrošača Makedonije (član 99(1)), i po Zakonu o zaštiti potrošača Crne Gore (član 46(1)). U Bosni i Hercegovini zakonodavac je usvojio striktnija pravila nego ona data u članu 7(1) Direktive odlučujući da skrati maksimalan rok na 15 dana (član 49(1) Zakona o zaštiti potrošača). Nema odgovarajućih odredbi u srpskom Zakonu o obligacionim odnosima i Zakonu o zaštiti potrošača iz 2005[282].

b. Obaveza isporučioca da obaveštenje i nadoknadu u slučaju nedostupnosti naručenih roba ili usluga (član 7(2))

Na osnovu člana 7(2) Direktive 97/7, u slučaju da naručena roba ili usluge ne mogu biti isporučene jer nisu na raspolaganju, isporučilac je u obavezi da obavesti potrošača i mora da mu nadoknadi sve već uplaćene iznose što je pre moguće, a u svakom slučaju u roku od 30 dana.

Član 7(2) u Albaniji je transponovan onako kako je naveden u Direktivi (tačka 20 Odluke Saveta Ministara br. 64 od 21.01.2009.). U Bosni i Hercegovini postoji obavezujuća odredba koja se odnosi na trajanje perioda u kome nadoknada treba da se izvrši, to jest naveden je rok od 15 dana (član 49 (2) Zakona o zaštiti potrošača). Zakoni Hrvatske, Makedonije i Crne Gore su proširili opcije za potrošače u slučaju kada trgovac nema naručenu robu na raspolaganju i o tome obavesti potrošača. Naime, potrošaču je data opcija da ugovor održi na snazi ili da ga raskine. Ako potrošač odluči da raskine ugovor, trgovac je u obavezi da izvrši nadoknadu što je pre moguće a najkasnije u roku od 30 dana. U Makedoniji je ovo regulisano članom 99 (2 i 3) Zakona o zaštiti potrošača. Zakoni Hrvatske (član 52 (2 i 3) Zakona o zaštiti potrošača) i Crne Gore (član 46(2) Zakona o zaštiti potrošača) to i dalje proširuju izričito navodeći da će trgovac biti u obavezi platiti kamate. Nema odgovarajućih odredbi u srpskom Zakonu o obligacionim odnosima i Zakonu o zaštiti potrošača iz 2005.

c. Upotreba opcije date u članu 7(3) Direktive o ugovorima na daljinu

Data opcija je upotrebljena u zakonodavstvu o zaštiti potrošača samo u Albaniji (tačka 21 Odluke Saveta Ministara br. 64 od 21.01.2009.). U Bosni i Hercegovini, Hrvatskoj, Makedoniji, Crnoj Gori i Srbiji, iako nije predviđena u zakonodavstvu o zaštiti potrošača *per se*, ta opcija može da se koristi u praksi primenom principa opšteg ugovornog prava o fakultativnim obavezama i nemogućnosti izvršenja.

1. Plaćanje karticom

Članom 8 Direktive, zemlje članice treba da obezbede da postoje odgovarajuće mere da se potrošaču omogući:

- Da zahteva poništenje plaćanja kada je izvršena zloupotreba njegove platne kartice u vezi sa ugovorima o ugovorima na daljinu obuhvaćene ovom Direktivom,
- Da mu se u slučaju zloupotrebe, rekreditira isti iznos koji je uplaćen ili da mu se vrati.

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[282] Po Nacrtu predloga: U odnosu na ugovore izvan poslovnih prostorija i ugovore na daljinu, trgovac je u obavezi da izvrši nalog potrošača u roku od maksimum 30 dana od dana zaključivanja ugovora, osim ako su se strane drugačije dogovorile. Trgovac ne može da traži nikakvo plaćanje unapred od potrošača na osnovu ugovora izvan poslovnih prostorija i ugovora na daljinu. Ako naručena roba ili usluge ne mogu da se isporuče jer nisu na raspolaganju, trgovac je u obavezi da odmah obavesti potrošača da nisu na raspolaganju.

Plaćanje po kartici	Zemlje učesnice
Kao u Direktivi	AL
Nije transponovano	CG, SRB
Varijacije	BiH, HR
Transponovanje nije potpuno jasno	

Ovaj uslov je transponovan kao u Direktivi u albanski zakon (član 37 (6) Zakona o zaštiti potrošača). Ima izmena u transponovanju u Bosni i Hercegovini gde na osnovu člana 48(3) potrošač ima pravo povratka celokupnog iznosa u gotovini ili na platnoj kartici, dok je izostavljeno pravo da zahteva poništenje plaćanja kada je načinjena zloupotreba njegove platne kartice u vezi sa ugovorom o ugovorima na daljinu. U Hrvatskoj, članom 53 Zakona o zaštiti potrošača oštećeni je potrošač ovlašten da zahteva storniranje plaćanja, odnosno ako je plaćanje već izvršeno, potrošač ima pravo zahtijevati od trgovca da mu vrati ili nadoknadi plaćeni iznos uvećan za zatezne kamate po kamatnoj stopi poslovne banke trgovca za oročene štedne uloge na tri mjeseca za cijelo razdoblje, računajući od dana kada je plaćanje izvršeno.

Ova odredba Direktive nije transponovana u zakonodavstvo Crne Gore i Srbije[283].

2. Inertia Selling

Član 9 Direktive 97/7, kako je dopunjeno Direktivom 2005/29, obavezuje zemlje članice da „preduzmu mere neophodne za oslobađanje potrošača od bilo kakve naknade u slučajevima netražene isporuke, kada odsustvo odgovora ne predstavlja saglasnost, uzimajući u obzir zabranu prodaje po inerciji datu u Direktivi 2005/29“. Zabrana prodaje po inerciji postoji u svim zemljama, osim u Srbiji, uz razliku da se tretira ili pod ugovorima o ugovorima na daljinu (Albanija, Bosna i Hercegovina, Hrvatska i Makedonija) ili kao nepoštena trgovačka praksa (Crna Gora) ili prodaja izvan poslovnih prostorija (Srbija)[284].

a. Zabrana isporuke roba ili usluga potrošaču koje nisu naručene

Prodaja po inerciji (član 9, prvi pasus)	Zemlje učesnice
Kao u Direktivi	AL, BiH, HR, MAK, CG
Nije transponovano	
Varijacije	SRB

[283] Po Poglavlju II, Glava 4 Nacrta predloga koje se bavi modalitetima plaćanja, ako plaćanje izvrši potrošač ili u ime ili ispred potrošača preko banke ili pošte, smatraće se izvršenim na datum kada banka ili pošta primi propisan nalog za uplatu.

[284] Pravilo o prodaji po inerciji sadržano u Nacrtu predloga zabranjuje isporuku robe ili usluga potrošaču a da iste potrošač nije prethodno naručio, kada takva isporuka uključuje zahtev za plaćanje. Nikakva potraživanja naspram potrošača ne mogu se zasnivati na isporuci netražene robe ili usluga. Potrošač ima pravo da smatra isporuku netražene robe ili usluga kao bezuslovan promotivni poklon. Ako netražena roba dođe greškom do potrošača, i ako je potrošač znao o toj grešci ili je mogao da zna za nju da je obratio standardnu pažnju, onda potrošač mora da obavesti trgovca o grešci u razumnom vremenu, ili pošalje robu nazad o trošku trgovca. Izvršenje se neće smatrati netraženim ako, umesto izvršenja koje je naručio potrošač, trgovac ponudi izvršenje koje je jednako u kvalitetu i ceni, i ako se potrošaču da na znanje da on nije u obavezi da to prihvati i da ne mora da plati za vraćanje robe trgovcu.

Zabrana isporuke roba ili usluga potrošaču koje potrošač nije pre toga naručio, kada takva isporuka uključuje zahtev za plaćanje je transponovana kao u članu 9, prvi pasus Direktive, u zakonodavstvo Albanije (član 38(1) Zakona o zaštiti potrošača), Bosne i Hercegovine (član 50(1) Zakona o zaštiti potrošača)[285], Makedonije (član 102, paragraf 1 Zakona o zaštiti potrošača) i Crne Gore (član 67(3) tačka 5 Zakona o zaštiti potrošača) gde postoji mala izmena u upotrebljenoj formulaciji ali smisao Direktive je očuvan. Hrvatska (član 54(1) Zakona o zaštiti potrošača) takođe sledi Direktivu ali ide još jedan korak dalje jer član 54(2) predviđa da će se takvi proizvodi smatrati promidžbenim darom trgovca. U Srbiji, članom 28, Zakona o zaštiti potrošača iz 2005 predviđeno je da je (1) nuđenje proizvoda ili usluga potrošaču izvan poslovnih prostorija isporučioca (uz upotrebu kataloga, uzorka ili prezentovanja modela, prikazivanje proizvoda u svrhu saopštavanja informacija o njegovim karakteristikama) kao i (2) slanje ponude na adresu potrošača (elektronskim sredstvima ili na neki drugi način), dozvoljeno samo ako je potrošač prethodno dao svoj pristanak – to jest ako potrošač da zeleno svetlo da ponuda bude poslata.

b. Oslobađanje potrošača od davanja bilo kakve nadoknade u slučajevima netražene isporuke; odsustvo odgovora ne predstavlja pristanak

Od potrošača se neće zahtevati nikakva nadoknada za proizvod primljen putem netražene isporuke i odsustvo njegovog odgovora neće predstavljati pristanak, kako se traži u članu 9, pasus 2 Direktive, po zakonodavstvu Albanije (član 38(2) Zakona o zaštiti potrošača) i Bosne i Hercegovine (član 50(2) Zakona o zaštiti potrošača koji čak ovlašćuje potrošača da zadrži u svom posedu netraženi proizvod ili uslugu). Zakoni Makedonije i Hrvatske održavaju svrhu Direktive; međutim način regulisanja varira utoliko što predviđaju da neka odredba u opštim uslovima ugovora trgovca ili u njegovoj ponudi poslatoj bez prethodnog naloga potrošača, na osnovu koje bi odsustvo odgovora značilo pristanak, biće ništavna i nevažeća (član 54(3) Zakona o zaštiti potrošača Hrvatske i član 102(2) Zakona o zaštiti potrošača Makedonije). Crna Gora nije transponovala navedenu odredbu *per se*; međutim, efekti ove odredbe Direktive mogu da se uoče u opštim uslovima ugovornog prava (Zakon o obligacionim odnosima, član 37(1,2)).

3. Ograničenja upotrebe određenih sredstava komunikacije na daljinu

Član 10 Direktive 97/7 navodi da upotreba uređaja za automatsko pozivanje i faks mašina zahteva prethodnu saglasnost potrošača. Sve zemlje članice su transponovale ovu odredbu. U Albaniji (član 39 Zakona o zaštiti potrošača) prethodna saglasnost potrošača je potrebna isporučiocu za upotrebu telefona, faksa ili elektronske pošte. Slično tome, u Bosni i Hercegovini (član 51 Zakona o zaštiti potrošača), bez prethodne saglasnosti potrošača, trgovac ne sme da koristi individualna sredstva komunikacije na daljinu (telefon, faks, e-mail itd.). U Hrvatskoj postoji varijacija koja povećava nivo zaštite, regulisanjem načina upotrebe tih sredstava. Naime, po članu 42(1) Zakona o zaštiti potrošača "uporaba telefona bez ljudskog posredovanja (automatskih govornih automata), elektroničke pošte i telefaks uređaja u svrhu sklapanja ugovora dopuštena je samo uz prethodnu suglasnost potrošača". Upotreba drugih sredstava daljinske komunikacije u cilju zaključenja ugovora može biti dopuštena samo ako se potrošač tomu izričito ne protivi (član 42(2) Zakona o zaštiti potrošača). Upotrebu sredstava da-

[285] Član 28 (1) Nacrta Zakona o obligacionim odnosima od 2010. dodatno predviđa da nikakva obaveza ne može da proistekne iz isporuke robe ili usluga potrošaču a da nije naručena. Isporučilac može samo da traži vraćanje robe (član 28 (2)). Potrošač može da vrati robu sam ili da obavesti privrednika da preuzme robu o svom trošku u primjerenom vremenu.

ljinske komunikacije u navedenim situacijama nije dopušteno naplatiti potrošaču (član 42(3) Zakona o zaštiti potrošača). Član 10 Direktive je u potpunosti transponovan u makedonski Zakon o zaštiti potrošača (član 89) i crnogorski Zakon o zaštiti potrošača (član 38(1,1)). U Srbiji nema pravila po tom pitanju[286].

IV. Upotreba opcija datih u Direktivi

1. Opcija zemalja članica da se dozvoli isporučiocu da potrošaču obezbedi robe ili usluge jednakog kvaliteta i cene

Član 7(3) Direktive 97/7 sadrži opciju za zemlje članice da predvide da isporučioc može da obezbedi potrošaču robu jednakog kvaliteta i cene, ako je takva mogućnost data pre zaključenja ugovora, ili u ugovoru.

Opcija je transponovana	AL
Opcija nije transponovana	
Nema izričitog transponovanja, ali opšte ugovorno pravo ima slični efekat	BiH, HR, MAK, CG, SRB
Samo za robu, ne za usluge	
Informacija mora biti data pisanim putem	
Mogućnost mora biti data pre zaključenja ugovora	

U Albaniji, ova opcija postoji pod tačkom 21 Odluke Saveta Ministara br. 64 od 21.01.2009. U Bosni i Hercegovini, nema odgovarajuće odredbe u Zakonu o zaštiti potrošača, već samo u odredbama opšteg ugovornog prava bosansko-hercegovačkog Zakona o obligacionim obavezama. U Hrvatskoj, pozivanje na ovu opciju može se naći u članu 52. Zakona o zaštiti potrošača koji se bavi ispunjenjem ugovora u roku, gde se u paragrafu 2 daje mogućnost potrošaču da izabere da li će raskinuti ugovor ili „ostaviti trgovcu primjereni naknadni rok za ispunjenje". Pravo zamene je regulisano u hrvatskom opštem ugovornom pravu, tj u Zakonu o obveznim odnosima. Ovo pitanje je regulisano na isti način u Makedoniji (mogućnost produženja roka izvršenja postoji u članu 99(2) Zakona o zaštiti potrošača; ostala pitanja pokrivena su opštim ugovornim pravom) i u Crnoj Gori (mogućnost produženja roka izvršenja postoji u članu 46(2) Zakona o zaštiti potrošača; ostala pitanja pokrivena su opštim ugovornim pravom. U Srbiji generalno pitanja izmene izvršenja su regulisana Zakonom o obligacionim odnosima[287].

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[286] Po Nacrtu predloga, korišćenje telefonskog marketinga, sistema automatskog pozivanja bez ljudske intervencije (mašine za automatsko pozivanje), faks mašina ili elektronske pošte u svrhe direktnog marketinga je dozvoljeno samo u odnosu na potrošača koji je prethodno dao svoj pristanak. Ostala sredstva komunikacije na daljinu koja dozvoljavaju individualne komunikacije mogu da se koriste samo ako nema jasne primedbe od strane potrošača. Ako se potrošač izričito saglasio sa korišćenjem telefonskog marketinga, sistema automatskog pozivanja bez ljudske intervencije (mašine za automatsko pozivanje), faks mašine ili detaljima njegovog elektronskog kontakta za elektronsku poštu, on će biti obavešten o komercijalnoj prirodi komunikacije na jasan I nedvosmislen način, čim komunikacija otpočne.

[287] Po Nacrtu predloga, izvršenje se neće oceniti kao netraženo ako, umesto izvršenja koje je tražio potrošač, trgovac ponudi izvršenje koje je jednako po kvalitetu i ceni, i ako se potrošaču skrene pažnja da on nije u obavezi da ga prihvati niti da mora da plati za njegovo vraćanje trgovcu.

2. Opcija zemalja članica da isporučiocu nametnu teret dokazivanja

Član 11(3)(a) Direktive omogućava zemljama članicama da predvide da se teret dokazivanja po pitanju postojanja prethodnih informacija, pisane potvrde, poštovanja vremenskih rokova ili saglasnosti potrošača može nametnuti isporučiocu.

Upotreba opcije	Zemlje učesnice
Da	AL, HR, MAK, CG (delimično)
Ne	BiH, SRB

U Albaniji je to predviđeno tačkom 45. Odluke Saveta Ministara br. 64 od 21. 01. 2009. godine, u Hrvatskoj je predviđeno u članu 55. Zakona o zaštiti potrošača, i u Makedoniji članom 105. Zakona o zaštiti potrošača. Ova opcija je delimično transponovana u Crnoj Gori i vrši se samo u vezi sa postojanjem poštovanja vremenskih rokova, jer po članu 5(3) Zakona o zaštiti potrošača u slučaju bilo kakvih sporova o podobnosti potrošača da upražnjava prava koja se odnose na ispunjenje roka za upražnjavanje prava, smatraće se da potrošač ima prava po tom pitanju. Ova opcija ne postoji u zakonima Bosne i Hercegovine[288] i Srbije[289].

3. Opcija zemalja članica da predvide dobrovoljan nadzor samo-regulirajućih organa

Član 11(4) Direktive 97/7 daje zemljama članicama opciju da predvide dobrovoljan nadzor samo-regulirajućih organa.

Upotreba opcije	Zemlje učesnice
Da	HR, MAK
Ne	AL, BiH, CG, SRB

Takva opcija je predviđena samo u Hrvatskoj i Makedoniji. Hrvatski član 141. Zakona o zaštiti potrošača je širi od Direktive jer propisuje ne samo mogućnost dobrovoljne kontrole postupanja trgovaca od strane određenih samostalnih organizacija, već takođe daje određenim organima i organizacijama mogućnost da pokreću odgovarajuće postupke pred tim samostalnim organizacijama protiv onih članova tih organizacija koji deluju suprotno odredbama o zaštiti potrošača. U Makedoniji ova opcija nije izričito transponovana. Međutim, članom 103 Zakona o zaštiti potrošača, svako lice koje ima opravdani interes može da zahteva od suda da naredi određenom trgovcu ili operateru sredstava komunikacije na daljinu da prekine sa poslovnom praksom koja je suprotna odredbama datim u ugovorima o ugovorima na daljinu. Time, samo-regulirajući organi imaju pravo na takve akcije.

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[288] Na osnovu člana 146 (5) Nacrta Zakona o obligacionim odnosima od 2010. teret dokazivanja po pitanju početka roka za opoziv je na privredniku.

[289] Pravilo koje se trenutno može primeniti je u suprotnosti sa zahtevom Direktive. Naime, postoji opšte proceduralno pravilo da strana koja tvrdi da ima neko pravo, ili da su uslovi za izvršenje određenog prava ispunjeni, mora da dokaže svoje tvrdnje (član 223 (2) Zakona o građanskom postupku iz 2004). Međutim, pod Poglavljem II, Glava 2 Nacrta predloga koje se bavi opštim obavezama trgovca za davanje informacija, teret dokazivanja po pitanju ispunjenja obaveze davanja informacija je na trgovcu.

4. Opcija zemalja članica da zabrane trgovinu određenim robama ili uslugama, posebno medicinskih proizvoda, u okviru svoje teritorije, u vidu ugovora o ugovorima na daljinu

Član 14, rečenica 2 Direktive 97/7 predviđa opciju zabrane trgovine određenih roba ili usluga, posebno medicinskih proizvoda, u okviru svoje teritorije, u vidu ugovora o ugovorima na daljinu.

Upotreba opcije	Zemlje učesnice
Da	HR, MAK
Ne	AL, BiH, SRB
Transponovanje nije potpuno jasno	CG

Ova opcija je predviđena i proširena u zakonodavstvu Hrvatske i Makedonije. Član 41. Zakona o zaštiti potrošača Hrvatske reguliše zabranu zaključivanja ugovora preko sredstava komunikacije na daljinu u vezi sa prodajom lekova, medicinskih i veterinarsko-medicinskih proizvoda, eksploziva, duvanskih proizvoda, oružja i ostalih proizvoda, čija zabrana prodaje na daljinu je regulisana posebnim propisima. Članom 88. Zakona o zaštiti potrošača Makedonije, nije dozvoljeno zaključivanje ugovora o prodaji lekova, medicinskih i veterinarskih proizvoda, i eksploziva upotrebom sredstava komunikacije na daljinu[290].

U Crnoj Gori nema opcije o trgovini medicinskih proizvoda preko ugovora o ugovorima na daljinu jer Zakon o lekovima[291] reguliše da se prodaja lekova na malo vrši samo u apotekama.

[290] Treba napomenuti da u Makedoniji trgovinu medicinskih i veterinarskih proizvoda kao i eksploziva regulišu posebni zakoni.

[291] Član 69 paragraf 1 Zakona o lekovima (*Sl. list RCG* Br. 80/04 i 18/08).

D. DIREKTIVA O PRODAJI ROBE ŠIROKE POTROŠNJE (99/44)

Koordinatori: *Zlatan Meškić / Neda Zdraveva / Jadranka Dabović-Anastasovska/Nenad Gavrilović*

I. Zakonodavstvo zemalja članica pre usvajanja Direktive o prodaji robe široke potrošnje

Pre transponovanja Direktive 99/44 nacionalna prava zemalja učesnica su sadržavala odredbe u okviru njihovog Zakona o obligacionim odnosima/Građanskog Zakonika koje regulišu prodaju robe, i koje se mogu primeniti na sve vrste ugovora i ne odnose se striktno na ugovore o prodaji robe široke potrošnje. Sve zemlje učesnice su barem delimično transponovale odredbe Direktive 94/44 u njihove propise o zaštiti potrošača, dok su samo neke od njih dodatno ili uglavnom prenele Direktivu u njihov opšte primenjivi Zakon o obligacionim odnosima (Makedonija, Hrvatska i Crna Gora).

U zemljama naslednicama bivše Jugoslavije važio je opšti Zakon o obligacionim odnosima[292] i sadržavao je razrađena pravila o odgovornosti prodavca o saobraznosti robe sa ugovorom o prodaji (članovi 475-500 Zakona o obligacionim odnosima), o saobraznosti pruženih usluga sa ugovorom o pružanju usluga (članovi 614-621 Zakona o obligacionim odnosima), i o komercijalnim garancijama prodavca i proizvođača za pravilno funkcionisanje tehničke robe (članovi 501-507 Zakona o obligacionim odnosima). Taj Zakon je zamenjen novim zakonima u Hrvatskoj[293], Crnoj Gori[294], i Makedoniji[295].

U Albaniji, važeći Građanski Zakonik iz 1994., sadrži opšte primenjiva pravila o prodaji robe[296], dok je Zakon o zaštiti potrošača iz 2003.[297], bio prvi zakon u Albaniji koji je utvrdio određene aspekte prodaje robe široke potrošnje; potonji je zamenjen novim Zakonom o zaštiti potrošača[298] u 2008. godini. Sličan razvoj se desio u Bosni i Hercegovini, koja je usvajanjem Zakona o zaštiti potrošača iz 2002[299], dobila svoje prve odredbe ograničene na zaštitu potrošača u okviru poglavlja II o „Prodaji proizvoda i pružanju usluga“, koji je zamenjen novim Zakonom o zaštiti potrošača iz 2006[300], čije poglavlje III sadrži malo izmenjene odredbe pod istim naslovom. Srpski Zakon o zaštiti potrošača iz 2005[301], može se bolje razumeti kao pokušaj ponavljanja postojećih odredbi Zakona o obligacionim odnosima, nego kao pokušaj transponovanja Direktive o prodaji robe široke potrošnje.

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[292] Jugoslovenski Zakon o obligacionim odnosima, *Sl. list SFRJ* br. 29/78, 39/85, 46/85, 45/89, 57/89; Zakon o građanskim obligacionim odnosima, *Sl. list RH* br. 53/91, 73/91, 107/95, 7/96, 112/99, 88/01; *Sl. list SRJ* br. 31/93, 22/99, 23/99, 35/99, 44/99. Od raspada Jugoslavije taj Zakon je preko nasleđivanja ostao da se primenjuje u dve malo različite verzije u svakom entitetu Bosne i Hercegovine, to jest Zakon o obligacionim odnosima Republike Srpske (*Sl. list Republike Srpske* br. 17/93, 57/98, 39/03, 74/04) i Zakon o obligacionim odnosima Federacije Bosne i Hercegovine (*Sl. list Republike Bosne i Hercegovine* br. 2/92, 13/93, 13/94 i *Sl. list Federacije Bosne i Hercegovine* br. 29/03). Pošto se odredbe koje su bitne za ovu analizu ne razlikuju, u cilju veće jasnoće ovaj tekst će se pozivati samo na „Zakon o obligacionim odnosima Bosne i Hercegovine“.

[293] Zakon o obveznim odnosima, *NN* br. 35/05, 41/08.

[294] Zakon o obligacionim odnosima, *Sl. list RCG* br. 47/08.

[295] Zakon obligacionim odnosima, *Sl. list RMak* br. 18/2001

[296] Građanski zakonik *Sl. list RAl* br. 11/94

[297] Zakon o zaštiti potrošača, *Sl. list RAl* br. 84/03

[298] Deo IV, Poglavlje I (član 34-35) Zakona o zaštiti potrošača *Sl. list RAl* br. 61/08.

[299] Zakon o zaštiti potrošača, *Sl. glasnik BiH* br. 17/02

[300] Zakon o zaštiti potrošača, *Sl. glasnik BiH* br. 25/06.

[301] Zakon o zaštiti potrošača, *Sl. list RS* Br. 79/05.

Hrvatska, Crna Gora i Makedonija su transponovale Direktivu 99/44 dopunom njihovih Zakona o obligacionim odnosima kao i uvođenjem odredbi koje se odnose na potrošače u njihov Zakon o zaštiti potrošača. Transponovanje Direktive 99/44 u novi hrvatski Zakon o obveznim odnosima iz 2005.[302] je takođe upotrebljeno da se proširi primena nekih njenih pravila na sve naplatne ugovore (član 400. et seq. Zakona o obveznim odnosima)[303]. Međutim, kao centralni akt za zaštitu potrošača hrvatski Zakon o zaštiti potrošača[304] sadrži član 5. o obavezi trgovca za ispunjenje ugovora potrošaču. Paragraf (1) te odredbe propisuje da je trgovac dužan potrošaču ispuniti ugovor u skladu s odredbama Zakona o zaštiti potrošača i propisima obveznog prava. Dalje, temeljem paragrafa (2), u slučaju materijalnog nedostatka na proizvodu na odnose potrošača i trgovca primenjuju se odgovarajuće odredbe Zakona o obveznim odnosima.

U Crnoj Gori, pored već opisanog jugoslovenskog Zakona o obligacionim odnosima, posebni propisi su postojali u okviru Federalnog jugoslovenskog Zakona o trgovini[305] i kasnije u okviru Zakona o zaštiti potrošača Savezne Jugoslavije[306]. Konačno, Direktiva 99/44 je transponovana u crnogorski Zakon o zaštiti potrošača iz 2007.[307] i novi crnogorski Zakon o obligacionim odnosima iz 2008., koji se sada istovremeno primenjuju. Makedonski Zakon o zaštiti potrošača iz 2000.[308], sadrži samo pravila o odgovornosti za neispravne proizvode. Ta pravila su zamenjena 2004[309] godine važećim makedonskim Zakonom o zaštiti potrošača koji je transponovao odredbe propisane u Direktivi o zaštiti potrošača za slučajeve neusaglašenosti proizvoda sa njihovom deklaracijom kao i Zakonom o obligacionim odnosima iz 2001. koji je poslednji put dopunjen u 2008.

II. Područje primene

1. Opšte područje

Odredbe Zakona o obligacionim odnosima/Građanskog zakonika zemalja učesnica, uključujući one koje se odnose na odgovornost za saobraznost sa ugovorom, odnose se na transakcije B2B, B2C i P2P. Dalje, one sadrže posebne odredbe o odgovornosti isporučioca za saobraznost pruženih usluga sa ugovorom o uslugama.

Transponovanje Direktive 99/44 u hrvatski Zakon o obveznim odnosima je takođe rezultovalo ustanovljavanjem određenih posebnih pravila koja su primenjiva samo na transakcije potrošača. Propisi o zaštiti potrošača u zemljama učesnicama se mogu primeniti samo na transakcije B2C. Pažnja mora da se obrati na činjenicu da je na osnovu srpskog Zakona o zaštiti potrošača pojam potrošač proširen i uključuje pravna lica koja deluju izvan svojeg zanimanja, posla, zanata ili profesije. Međutim, srpski zakonodavac trenutno priprema Nacrt predloga za novi zakon o zaštiti potrošača (Nacrt predloga)[310], koji je namenjen za primenu na B2C transakcije i regulaciju odgovornosti trgovca kako za saobraznost robe sa ugovorom o prodaji tako i saobraznost usluga sa ugovorom o uslugama.

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[302] Zakon o obveznim odnosima *NN* br. 35/05.

[303] S. Petrić, "Odgovornost za materijalne nedostatke stvari prema novom Zakonu o obveznim odnosima" *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, Vol. 27, 1/2006., str. 87– 128.

[304] Zakon o zaštiti potrošača, *NN* br. 79/07, 125/07, 79/09, 89/09, 113/09.

[305] Savezni Zakon o trgovini, *Sl. list SRJ* br. 46/90, 32/93, 50/93, 41/94, 29/96.

[306] Savezni zakon o zaštiti potrošača, *Sl. list SRJ* br. 37/02

[307] Zakon o zaštiti potrošača, *Sl. list RCG* br. 26/07.

[308] Zakon o zaštiti potrošača, *Sl. list RMak* br. 63/00.

[309] Zakon o zaštiti potrošača, *Sl. list RMak* br. 38/04.

[310] Nacrt Predloga novog Zakona o zaštiti potrošača (Nacrt Predloga), koga je pripremilo Ministarstvo za trgovinu i usluge Republike Srbije.

2. Definicija 'potrošača'

Zemlje učesnice, osim Srbije, ograničavaju pojam potrošača na „fizička lica". Pod članom 2(1) srpskog Zakona o zaštiti potrošača iz 2005., potrošač je svako fizičko lice koje kupuje proizvode ili usluge za svoje vlastite potrebe ili za potrebe svog domaćinstva. Zahvaljujući paragrafu (2), potrošač je takođe i društvo, preduzeće, drugi pravni subjekt ili preduzetnik, kada kupuju proizvode ili usluge za svoje vlastite potrebe. To znači da je pojam potrošača po srpskom Zakonu o zaštiti potrošača iz 2005. neprihvatljivo širok, jer on uključuje pravna lica koja deluju izvan svog zanimanja, poslovanja, zanata ili profesije. Pod Poglavljem I srpskog Nacrta predloga, potrošač se definiše kao svako fizičko lice koje deluje uglavnom u svrhe koje su izvan njegovog zanimanja, poslovanja, zanata ili profesije. Član 1(3) bosansko-hercegovačkog Zakona o zaštiti potrošača sadrži istu definiciju kao član 2(1) srpskog Zakona o zaštiti potrošača, ali zahtijeva kriterijume „lične potrebe potrošača i potrebe njegovog domaćinstva". Ova definicija je veoma ograničena u poređenju sa definicijom potrošača iz Direktive 99/44. Umesto „delovanja u svrhe koje nisu u vezi sa njegovim zanimanjem, poslovanjem ili profesijom", što je upotrebljeno u definiciji potrošača u Direktivi, bosansko-hercegovački Zakon o zaštiti potrošača ograničava delovanje potrošača na kupovinu, sticanje ili korišćenje usluga ili proizvoda, i dodatno ga redukuje na svrhu njegovih „ličnih potreba i potreba njegovog domaćinstva", što zahvaljujući vezi „i" treba da se posmatra kumulativno[311].

U Albaniji potrošač je svako fizičko lice, koje deluje u svrhe koje nisu u vezi sa njegovim zanimanjem, poslovanjem ili obavljanjem njegove profesije. U smislu tog zakona, neprofitne organizacije se takođe smatraju potrošačima[312]. Makedonski Zakon o zaštiti potrošača definiše potrošača kao „svako fizičko lice koje kupuje proizvode ili koristi usluge za direktnu ličnu potrošnju, u svrhe koje nisu namenjene za obavljanje njegovog zanimanja, poslovanja ili profesije"[313]. Iako se razlikuje u formulaciji, ta definicija obuhvata sve aspekte definicije date u Direktivi. Na osnovu crnogorskog Zakona o zaštiti potrošača potrošač je fizičko lice koje kupuje, naručuje, prima, upotrebljava robu ili usluge, uključujući javne servise, u neposlovne, to jest neprofesionalne svrhe, ili na koga je usmerena ponuda za neki proizvod ili uslugu. Taj Zakon takođe utvrđuje izraz „grupa potrošača" definisan kao grupa koju su osnovali potrošači sa ciljem da članovi te grupe steknu vlasnička prava nad određenim proizvodima uz pomoć te grupe.

Hrvatska je jedina zemlja učesnica koja je u vezi sa prodajom robe odredila definiciju potrošača u svom Zakonu o obveznim odnosima. U Hrvatskoj definicija 'potrošača' može da se izvede iz posebne odredbe Zakona o obveznim odnosima koja se odnosi na kupoprodaju, a koja definiše potrošački ugovor. Član 402(3) hrvatskog Zakona o obveznim odnosima definiše potrošačke ugovore kao „ugovore koje fizička osoba kao kupac sklapa izvan svoje gospodarske ili profesionalne djelatnosti s fizičkom ili pravnom osobom koja kao prodavatelj djeluje u okviru svoje gospodarske ili profesionalne djelatnosti (potrošački ugovor)". Po svom sadržaju ta definicija odgovara definiciji potrošača kako je reguliše član 1(2)(a) Direktive 99/44.

3. Definicija 'prodavca/trgovca'

Samo hrvatski zakon se poziva na izraz „prodavac" i izvodi ga u odnosu na prodaju potrošačke robe iz drugog dela definicije potrošačkog ugovora kako je definisano u članu

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[311] Član 15 Nacrta Zakona o obligacionim odnosima Bosne i Hercegovine definiše potrošača kao "svaki subjekt koji zaključuje neki pravni posao u svrhu koja ne spada u njegovu privrednu ili samostalnu profesionalnu djelatnost".

[312] Član 3(6) Zakon o zaštiti potrošača, *Sl. list RAl* Br. 61/08.

[313] Član 4 red 1 Zakona o zaštiti potrošača, *Sl. list RMak* Br. 38/04

402(3) Zakona o obveznim odnosima, gde postoji referenca na fizičku ili pravnu osobu „koja kao prodavatelj djeluje u okviru svoje gospodarske ili profesionalne djelatnosti". Pored male izmene u formulaciji, ova definicija odgovara definiciji prodavca propisane u članu 1(2)(c) Direktive 99/44.

Zakoni drugih zemalja članica koriste izraz „trgovac". Na osnovu člana 3 (14) albanskog Zakona o zaštiti potrošača, „trgovac" označava svako fizičko ili pravno lice koje deluje u svrhe koje se odnose na njegovu komercijalnu aktivnost, zanimanje, poslovanje, zanat ili profesiju i svako ko deluje u ime ili ispred nekog trgovca. Trgovac se definiše u članu 1 (5) Zakona o zaštiti potrošača Bosne i Hercegovine kao „svako lice koje, direktno ili kao posrednik, prodaje proizvode ili pruža usluge potrošaču". Kao i u slučaju pojma potrošača, definicija je sužena na „prodaju proizvoda ili pružanje usluga", što generalno smanjuje područje primene Zakona o zaštiti potrošača. Član 14. Nacrta Zakona o obligacionim odnosima Bosne i Hercegovine se odnosi na 'privrednika', kojeg definiše kao 'fizički ili pravni subjekt koji u vreme zaključivanja pravnog posla deluje u vršenju[314] svoje privredne ili samostalne profesionalne djelatnosti"[315]. Ova definicija isključuje predugovorne situacije iz područja svoje primene. Pod članom 2 (3) srpskog Zakona o zaštiti potrošača, trgovac je društvo, preduzeće, drugi pravni subjekt ili preduzetnik, kada prodaje proizvode ili pruža usluge potrošaču[316]. Makedonski Zakon o zaštiti potrošača definiše trgovca kao „svako fizičko ili pravno lice koje, u toku obavljanja svojih aktivnosti, direktno zadovoljava potrebe građana za proizvodima i uslugama[317].

Na osnovu crnogorskog Zakona o zaštiti potrošača trgovac je „lice koje prodaje proizvode ili pruža usluge potrošačima". Ova definicija podrazumeva pravna ili fizička lica i indirektno sugeriše da ugovor ne mora da bude zaključen u okviru njegovog zanimanja, poslovanja ili profesije. Štaviše, transponovanje odredbi o potrošačima u crnogorsko pravo se oslanja na odredbe crnogorskog Zakona o unutrašnjoj trgovini, gde bi upućivanje na taj pravni akt proširilo područje primene izraza trgovac[318].

4. Definicija „robe široke potrošnje"

Nijedna od odredbi zemalja učesnica o potrošačima ne sadrži definiciju o robi široke potrošnje koja odgovara članu 1 (2) b Direktive 99/44. Trenutna situacija bi bila promenjena usvajanjem srpskog Nacrta predloga novog zakona o zaštiti potrošača, koji definiše robu kao svaku materijalnu pokretnu stvar, izuzev: (a) robe koje se prodaje po izvršnom postupku ili na neki drugi način po sili zakona; (b) vode i gasa kada nisu namenjeni za prodaju u ograničenoj ili određenoj količini; i (c) struje.

Roba široke potrošnje, uključujući robu koja se koristi u kontekstu pružanja neke usluge, će na osnovu člana 3(7) i člana 29(1) albanskog Zakona o zaštiti potrošača označavati svaku pokretnu stvar koja je namenjena za potrošače ili koju će verovatno upotrebljavati potrošači, koja će pod razumno predvidljivim okolnostima, biti korištena od potrošača čak i ako im

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[314] "Deluje u vršenju" je neuspešna formulacija i na bosanskom jeziku.

[315] Član 15. Nacrta Zakona o obligacionim odnosima Bosne i Hercegovine iz 2006. je sadržavao istu definiciju, ali se odnosio na "preduzetnika".

[316] Poglavlje I srpskog Nacrta Predloga novog Zakona o zaštiti potrošača definiše trgovca kao svako fizičko ili pravno lice koje, u ugovorima obuhvaćenim ovim zakonom, deluje u svrhe koje se odnose na njegovo zanimanje, posao, zanat, ili profesiju, i svako ko deluje u ime ili ispred trgovca.

[317] Slična definicija je data u članu 2 Zakona o trgovini, *Sl. list RMak* Br. 16/04, 128/06, 63/07, 88/08, 159/08, 20/09 i 105/09.

[318] Član 6 Zakona o unutrašnjoj trgovini, *Sl. list RCG* Br. 49/08.

nije namijenjena, i isporučena je ili učinjena dostupnom, bilo uz naknadu ili ne, u okviru neke ekonomske aktivnosti, bez obzira da li je nova, korišćena ili prerađena.

U Bosni i Hercegovini potrošač se definiše kao lica „koje kupuje, pribavlja ili koristi proizvode ili usluge“, dok roba na osnovu člana 1(9) Zakona o zaštiti potrošača obuhvata „proizvode i nepokretnu imovinu“. Shodno tome, proizvodi mogu da se shvate kao da obuhvataju samo pokretnu imovinu, što takođe vodi ka smanjenju područja primene celog Zakona o zaštiti potrošača. Uprkos tome, čak i Poglavlja Zakona o zaštiti potrošača Bosne i Hercegovine koji se u svom naslovu jasno ograničavaju na „proizvode i usluge“, sadrže odredbe u vezi sa „robama i uslugama“. Izrazi „robe i usluge“ i „proizvodi i usluge“ se koriste kao sinonimi u više navrata[319]. Poglavlje III o prodaji proizvoda se odnosi samo na proizvode, dok se Poglavlje IV u vezi sa „garancijama za proizvode“ protivno svom naslovu odnosi na robu. Upitno je da li se upotreba izraza „roba“ ili „proizvodi“ u odredbama Zakona o zaštiti potrošača Bosne i Hercegovine zasniva na volji zakonodavca da isključi nepokretnu imovinu iz područja primene ove odredbe korišćenjem izraza „proizvodi“.

Propisi hrvatskog Zakona o obveznim odnosima o odgovornosti prodavca za materijalne nedostatke stvari se mogu primeniti na ugovore o kupoprodaji i na sve druge naplatne ugovore. Zbog toga je hrvatski zakonodavac smatrao da nema potrebe za izričitim transponovanjem definicije Direktive o potrošačkoj robi, jer iste odredbe se mogu primeniti ne samo na potrošačku robu već i na sve druge predmete kupoprodaje (na primer usluge i nekretnine). Na osnovu odredaba Zakona o obveznim odnosima, predmet kupoprodaje mogu biti stvari, prava i imovina.

Makedonski Zakon o zaštiti potrošača ne definiše „robu široke potrošnje“. Taj zakon sadrži definiciju ‘proizvoda’ koja glasi: „Proizvod“ je svaki predmet bez obzira na nivo njegove obrađenosti, namenjen da bude ponuđen potrošačima[320]“. Član 165 (b) makedonskog Zakona o obligacionim odnosima, u smislu tog Zakona, definiše „proizvod“ kao pokretni predmet, kao i nezavisan predmet ugrađen u neki pokretan ili nepokretan predmet, uključujući struju i druge vrste energije. Shodno tome, postojeća definicija predstavlja značajnu varijaciju od definicije date u Direktivi.

Određena izuzimanja navedena u članu 1(2)(b) Direktive 99/44 po pitanju roba prodatih putem ovršnog postupka ili na neki drugi način po sili zakona i voda i gas kada nisu dati u prodaju u ograničenoj ili određenoj količini nisu transponovana ni u jednoj od zemalja učesnica. Međutim, član 409. hrvatskog Zakona o obveznim odnosima reguliše da će odgovornost za materijalne nedostatke biti isključena kod prisilne javne prodaje. Štaviše, opšta odredba o „stvari“ reguliše da stvar mora da bude u prometu i da će ugovor o kupoprodaji stvari koja je *extra commercium* biti ništavan i da se posebni propisi primenjuju na prodaju stvari čiji je promet ograničen (član 380(1) i (2) hrvatskog Zakona o obveznim odnosima).

a. Isključivanje robe prodate na javnoj aukciji iz pojma „roba široke potrošnje“ član 1 paragraf (3))

Nijedna od zemalja učesnica nije izričito isključila „polovnu robu prodatu na javnoj aukciji gde potrošači imaju priliku da lično prisustvuju prodaji“ iz definicije „robe široke potrošnje“.

U Makedoniji pojam prodaje na javnim aukcijama se odnosi na obaveze prodavca da označi cene tamo gde se po zakonu predviđa da prodavac nije u obavezi da se pridržava na-

[319] Videti primer člana 49. Zakona o zaštiti potrošača u vezi sa ugovorima o prodaji na daljinu. Član 49.(1) definiše obavezu trgovca da isporuči “proizvod ili uslugu” u roku od 15 dana od naloga potrošača. Sledeći stav, međutim, definiše posledice neisporučivanja “robe ili usluga”.

[320] Član 4, pasus 5, Zakona o zaštiti potrošača, *Sl. list RMak* Br. 38/04.

značenih maloprodajnih cena i uslova prodaje, u slučaju javne i aukcijske prodaje, prodaje umetničkih radova i antikviteta, ili za proizvode kupljene u toku nuđenja određenih usluga. Roba prodata na javnim aukcijama je takođe isključena iz primene odredbi koje se odnose na ugovore o prodaji na daljinu. Treba zaključiti da roba prodata na javnim aukcijama treba da se smatra isključenom iz robe široke potrošnje na osnovu makedonskog zakona.

Crnogorske odredbe o prodaji robe za vreme prinudne javne prodaje, iz Zakona o obligacionim odnosima[321] takođe su važne za ovo pitanje. Naime, nasuprot opštem pravilu o saobraznosti, vlasnik čija roba se prodaje na prinudnoj javnoj prodaji neće se smatrati odgovornim za nedostatke iste. Ipak, ova odredba ne pokriva situaciju dobrovoljne prodaje na aukcijama.

5. Definicija 'prodaje'

Zemlje učesnice daju definiciju prodaje samo u njihovom opšte primenjivom Zakonu o obligacionim odnosima. Sa gotovo istom formulacijom član 376. (1) hrvatskog Zakona o obveznim odnosima, član 454. Zakona o obligacionim odnosima Bosne i Hercegovine i Srbije, član 705. Građanskog zakonika Albanije i član 442.(1) makedonskog Zakona o obligacionim odnosima predviđaju da se ugovorom o prodaji prodavac obavezuje da isporuči kupcu stvar koju on prodaje kupcu tako da kupac stiče pravo vlasništva, i kupac je u obavezi da plati cenu prodavcu.

Nijedna od zemalja učesnica nije izričito transponovala član 1. (4) Direktive 99/44. Međutim, u Hrvatskoj ovoj odredbi je nađen ekvivalent u članu 357. (1) Zakona o obveznim odnosima. Ta odredba predviđa da kod naplatnog ugovora svaki ugovaratelj odgovara za materijalne nedostatke svog ispunjenja. To podrazumijeva ne samo prodavca već i izvođača kod ugovora o djelu. U Bosni i Hercegovini odgovornost za materijalne nedostatke se reguliše u dva uzastopna člana sa gotovo istom formulacijom (članovi 18. i 19. Zakona o zaštiti potrošača), jedan od njih se odnosi na proizvode u ugovorima o prodaji a drugi na pružanje usluga. Dodatno, u Bosni i Hercegovini i Srbiji, član 600. njihovih Zakona o obligacionim odnosima navodi da ugovorom o pružanju usluga isporučilac preuzima obavezu da izvrši određeni posao, kao što je proizvodnja ili popravka nekog predmeta, ili da izvrši neki fizički ili intelektualni posao i slično, dok kupac usluga preuzima obavezu da mu zauzvrat plati novčanu naknadu. Crnogorski Zakon o zaštiti potrošača koristi „prenošenja na potrošače" kao izraz za prodaju roba i pružanje usluga potrošačima kao krajnjim korisnicima, i davanje uzoraka robe. Pored toga, već dati pojam trgovca i dalji slučajevi proširenja po crnogorskom Zakonu o unutrašnjoj trgovini podstiče efekte da će te dodatne transakcije biti takođe obuhvaćene u praksi.

III. Instrumenti zaštite potrošača

1. Saobraznost sa ugovorom

a. Uopšteno o uslovu „saobraznosti sa ugovorom" (član 2)

aa. Zahtev za isporučivanje robe u skladu sa ugovorom

Albanija je doslovno transponovala član 2 (1) Direktive 99/44, navodeći da prodavac mora da isporučuje robu potrošačima koja je usaglašena sa ugovorom o prodaji[322]. Na osnovu člana 15 srpskog Zakona o zaštiti potrošača, prodavac ili davaoc usluge će biti u obavezi da isporuče potrošaču proizvod ili uslugu kvaliteta koji je propisan ili naveden u ugovoru.

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[321] Član 495 Zakona o obligacionim odnosima, *Sl. list RCG* Br. 47/08.
[322] Član 29 (2) Zakona o zaštiti potrošača *Sl. list RAl* br. 61/08.

U ostalim zemljama učesnicama, zahtev za isporučivanje usaglašenih roba proističe iz odgovornosti trgovca za materijalne nedostatke (Bosna i Hercegovina[323], Hrvatska[324]) ili opšte odredbe o izvršenju dogovorenih obaveza (Makedonija[325], Crna Gora[326]).

bb. Pretpostavka saobraznosti

Albanija je jedina zemlja učesnica koja u svom Zakonu o zaštiti potrošača pozitivno definiše kriterijume za pretpostavku saobraznosti[327]. Zakoni o obligacionim odnosima svih ostalih zemalja učesnica sadrže listu slučajeva kada postoji materijalni nedostatak[328] (Bosna i Hercegovina, Hrvatska, Makedonija, Crna Gora i Srbija), suprotno modelu člana 2 (2) Direktive 99/44, koji definiše kriterijume saobraznosti robe sa ugovorom. Gore navedene odredbe nisu propisane kao zakonske pretpostavke.

Makedonski Zakon o zaštiti potrošača dodatno definiše kada će se smatrati da neki proizvod ima nedostatak i kada usaglašenost treba da se pretpostavi. Članom 42 (1) makedonskog Zakona o zaštiti potrošača, proizvod ima nedostatak kada ne ispunjava opšte obaveze o bezbednosti i ne pruža bezbednost koju neko lice ima pravo da očekuje, uzimajući u obzir sve okolnosti, kao što su: na osnovu prezentacije proizvoda; svrha za koju se sa razlogom očekuje da će se proizvod koristiti; vreme kada je proizvod plasiran na tržište; i kada ne ispunjava opštu obavezu saobraznosti ili ugovorne obaveze.

cc. Kriterijumi za pretpostavku saobraznosti (član 2 paragraf (2) sl. (a)-(d) generalno)

U zemljama naslednicama bivše Jugoslavije kriterijumi za materijalne nedostatke dati u članu 479. jugoslovenskog Zakona o obligacionim odnosima su ostali isti u Bosni i Hercegovini, Srbiji i Makedoniji[329], dok su ih Hrvatska[330] i Crna Gora[331] dopunili koristeći potpuno istu formulaciju.

Na osnovu člana 479. jugoslovenskog Zakona o obligacionim odnosima (još uvek važećim u Bosni i Hercegovini i Srbiji[332], sada član 467 makedonskog Zakona o obligacionim odnosima) materijalni nedostatak postoji: 1) ako stvar nema potrebna svojstva za njenu redovnu upotrebu ili za promet; 2) ako stvar nema potrebna svojstva za naročitu upotrebu za koju

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[323] Član 18 Zakona o zaštiti potrošača, *Sl. list BiH* br. 25/06; Videti takođe članove 478 i 456 Zakona o obligacionim odnosima Bosne i Hercegovine i Republike Srpske, OG SFRJ No. 29/78, 39/85, 46/85, 45/89, 57/89, *Sl. List Republike Bosne I Hercegovine*, 2/29, 13/93, 13/94 *Sl. list Federacije Bosne i Hercegovine,* br. 29/03, *Sl. list Republike Srpske* br. 17/93, 57/98, 39/03, 74/04.

[324] Članovi 357. i 400. Zakona o obveznim odnosima, *NN* br. 35/05, 41/08.

[325] Članovi 10 i 11 Zakona o obligacionim odnosima, *Sl. list RMak* Br. 18/01.

[326] Član 12 Zakona o zaštiti potrošača, *Sl. list RCG* Br. 26/07.

[327] Član 29(3) Zakona o zaštiti potrošača, *Sl. list RAl* br. 61/08.

[328] Član 467 Zakona o obligacionim odnosima, *Sl. list RMak* br. 18/01; član 401. Zakona o obveznim odnosima, *NN* br. 35/05, 41/08; član 479 Zakona o obligacionim odnosima Bosne i Hercegovine i Srbije, *Sl. list SFRJ* br. 29/78, 39/85, 46/85, 45/89, 57/89; član 487 Zakona o obligacionim odnosima, *Sl. list RCG* br. 47/08.

[329] Član 467. Zakona o obligacionim odnosima *Sl. list RMak* Br. 18/01.

[330] Član 401. Zakona o obveznim odnosima, *NN* br. 35/05, 41/08.

[331] Član 487. Zakona o obligacionim odnosima, *Sl. list RCG* Br. 47/08.

[332] Po srpskom Nacrtu predloga novog zakona o zaštiti potrošača, pretpostaviće se da je isporučena roba u saglasnosti sa ugovorom ako ispunjava sledeće uslove: (a) slaže se sa opisom koga je dao trgovac i poseduje kvalitete koje je trgovac prezentovao potrošaču kao uzorak ili model; (b) podesna je za svaku konkretnu upotrebu za koju je potrebna potrošaču i koja je bila poznata ili je morala biti poznata trgovcu u vreme zaključivanja ugovora; (c) podesna je za svrhe u koje se roba iste vrste obično koristi; ili (d) pokazuje kvalitet i učinak koji su normalni za robu iste vrste i koje potrošač može sa razlogom da očekuje,

je kupac nabavlja, a koja je bila poznata prodavcu, ili mu je morala biti poznata; 3) ako stvar nema svojstva i odlike koje su izričito ili prećutno ugovorene, odnosno propisane; 4) kad je prodavac predao stvar koja nije saobrazna uzorku ili modelu, osim ako su uzorak ili model pokazani samo radi obaveštenja. Kako poređenje člana 479 jugoslovenskog Zakona o obligacionim odnosima sa članom 2 (2) Direktive 99/44 pokazuje, te odredbe se blago razlikuju: Član 479 (2) jugoslovenskog Zakona o obligacionim odnosima isključuje uzorke koji su pokazani samo radi obaveštenja, koji nisu isključeni članom 2 (2) (a) Direktive 99/44; član 2 (2) (b) Direktive obuhvata samo određene svrhe roba o kojima su se dogovorili potrošač i prodavac, dok član 479 (2) jugoslovenskog Zakona o obligacionim odnosima dodatno predviđa zaštitu u slučajevima kada je prodavcu trebala da bude poznata posebna svrha za koju kupac namerava da koristi robu; konačno, jugoslovenski Zakon o obligacionim odnosima ne predviđa zaštitu u slučajevima opisanim u članu 2 (2) (d) Direktive 99/44[333].

Temeljem člana 401 (1) hrvatskog Zakona o obveznim odnosima i člana 487 (1) crnogorskog Zakona o obligacionim odnosima koji imaju istu formulaciju, nedostatak postoji: 1) ako stvar nema potrebna svojstva za svoju redovnu upotrebu ili za promet; 2) ako stvar nema potrebna svojstva za posebnu upotrebu za koju je kupac nabavlja, a koja je bila poznata prodavcu ili mu je morala biti poznata; 3) ako stvar nema svojstva i odlike koje su izrijekom ili prešutno ugovorene, odnosno propisane; 4) kad je prodavac predao stvar koja nije jednaka uzorku ili modelu, osim ako su uzorak ili model pokazani samo radi obavesti; 5) ako stvar nema svojstva koja inače postoje kod drugih stvari iste vrste i koja je kupac mogao opravdano da očekuje prema naravi stvari, posebno uzimajući u obzir javne izjave prodavca, proizvođača i njihovih predstavnika o svojstvima stvari (reklame, označavanje stvari i dr.); 6) ako je stvar nepravilno montirana pod uslovom da je usluga montaže uključena u ispunjenje ugovora o prodaji; 7) ako je nepravilna montaža posledica nedostataka u uputama za montažu. Iako kriterijumi iz člana 2(2) Direktive 99/44 na jednoj strani i člana 401 (1) hrvatskog Zakona o obveznim odnosima i člana 487 crnogorskog Zakona o obligacionim odnosima na drugoj strani se generalno poklapaju, ima i nekih razlika. Na primer, pod članom 2(2) Direktive 99/44 prihvata se da je potrošačka roba sukladna ugovoru ako odgovara određenoj svrsi za koju ju potrošač traži i sa kojom je on „upoznao prodavca" u vreme zaključenja ugovora i „koju je prodavac prihvatio". Član 401 (1) tačka 2) hrvatskog Zakona o obveznim odnosima i član 487 (1) tačka (2) crnogorskog Zakona o obligacionim odnosima nude viši nivo zaštite

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imajući u vidu vrstu robe i sve javne izjave o određenim karakteristikama robe koje je dao trgovac, proizvođač, posebno u reklamiranju ili na oznakama.

Po srpskom Nacrtu predloga, nesaobraznost pružene usluge sa ugovorom postoji: (1) ako je usluga u suprotnosti sa podacima koje je trgovac dao kada je reklamirao uslugu, ili drugačije pre zaključenja ugovora; na sadržaj usluge, ili na njeno izvršenje, ili na druge okolnosti koje se odnose na kvalitet ili korišćenje usluge; (2) ako je usluga u suprotnosti sa podacima koje je trgovac davao tokom pružanja usluge, ako se može smatrati da su takvi podaci imali uticaj na odluke potrošača; (3) ako usluga nije podesna za određenu svrhu za koju je potrošaču potrebna, i za koju je trgovac znao ili je morao da zna u vreme zaključenja ugovora; (4) ako usluga nije podesna za svrhe za koju su usluge iste vrste normalno potrebne; ili (5) ako usluga ne odgovara razumnim očekivanjima, imajući u vidu vrstu usluge i sve javne izjave o određenim karakteristikama usluge koje je dao trgovac, posebno u reklamiranju.

[333] Član 536. Nacrta Zakona o obligacionim odnosima Bosne i Hercegovine iz 2010, koji najviše odgovara aktualnom članu 479. Zakona o obligacionim odnosima Bosne i Hercegovine, transponuje član 2 (2) Direktive 99/44 u svom stavu 1(d). Tako, materijalni nedostatak postoji kada nekoj stvari nedostaju kvaliteti koje potrošači mogu da očekuju usled javnih izjava prodavca ili proizvođača, posebno u reklamiranju ili na oznakama, osim ako ta izjava nije bila poznata niti je morala biti poznata prodavcu, bila je propisno promenjena u trenutku zaključenja ugovora ili nije mogla da utiče na odluku za zaključenje ugovora.

propisujući da je određena svrha „bila poznata prodavcu ili mu je morala biti poznata“. Konačno, postoji odredba u članu 5 (4) hrvatskog Zakona o zaštiti potrošača koja predviđa da „nedostatak na proizvodu, odnosno obavljenoj usluzi, kada je to nužno, dokazuje se vještačenjem u za to ovlaštenim ustanovama ili uz pomoć ovlaštenog sudskog vještaka, a troškove vještačenja snosi potrošač ili trgovac, ovisno o rezultatu vještačenja“. Crna Gora je takođe preko Zakona o zaštiti potrošača utvrdila dodatne faktore za saobraznost kao što su tačna mera ili količina robe, odgovarajuća ambalaža u skladu sa vrstom i karakteristikama robe, propisan ili dogovoren kvalitet, a ako kvalitet nije propisan ili dogovoren – standardan kvalitet robe ili usluga, način određivanja ili obračuna cene itd[334].

Na osnovu člana 29 (3) albanskog Zakona o zaštiti potrošača, kao jedine odredbe zemalja članica koja pozitivno definiše kriterijume za saobraznost, za robu široke potrošnje se pretpostavlja da je u skladu sa ugovorom ako: 1) odgovara opisu koga je dao prodavac i poseduje kvalitete robe koju je prodavac nudio potrošaču kao uzorak ili model; 2) je podobna za bilo koju određenu upotrebu za koju je potrošač traži i koju je obznanio prodavcu u vreme zaključenja ugovora i koju je prodavac prihvatio; 3) je podobna za svrhe u koje se roba iste vrste normalno koristi; 4) pokazuje svojstva i učinak koji su normalni za robu iste vrste i koje potrošač može razumno da očekuje, s obzirom na vrstu robe i uzimajući u obzir javne izjave o posebnim svojstvima robe koje je dao prodavac, proizvođač ili njegov predstavnik, posebno u reklamiranju ili na oznakama.

dd. Vreme u kome se saobraznost procenjuje

U zemljama naslednicama bivše Jugoslavije odredbe jugoslovenskog Zakona o obligacionim odnosima, po pitanju vremena u kojem se saobraznost procenjuje, još uvek su važeće. Član 478 Zakona o obligacionim odnosima Bosne i Hercegovine i Srbije, član 400 (1) hrvatskog Zakona o obveznim odnosima, član 486. crnogorskog Zakona o obligacionim odnosima i član 466 makedonskog Zakona o obligacionim odnosima predviđaju da će prodavac biti odgovoran za materijalne nedostatke stvari u trenutku prelaska rizika na kupca. Momenat prelaska rizika se određuje članom 456 Zakona o obligacionim odnosima Bosne i Hercegovine i Srbije, članom 444 makedonskog Zakona o obligacionim odnosima, članom 378 (1) hrvatskog Zakona o obveznim odnosima i članom 464 crnogorskog Zakona o obligacionim odnosima, kao momenat isporuke te stvari, i stoga je u saglasnosti sa članom 2 (1) Direktive 99/44[335]. Albanija nije transponovala ovu odredbu u svoj Zakon o zaštiti potrošača.

b. Javne izjave i izuzimanja (član 2 paragraf (2) (d) i član 2 paragraf (4))

Pod članom 480 (3) Zakona o obligacionim odnosima Bosne i Hercegovine[336] i Srbije[337], kao i članom 467 (3) makedonskog Zakona o obligacionim odnosima prodavac će biti odgovoran za nedostatke koji su mogli biti lako uočeni od strane kupca, ako je izjavio da je roba

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[334] Članovi 12 i 16 Zakona o zaštiti potrošača, *Sl. list RCG* Br. 26/07.

[335] Na osnovu člana 513 (3) Nacrta Zakona o obligacionim odnosima Bosne i Hercegovine iz 2010., odredbe ovog člana, koje odgovaraju članu 456 bosansko-hercegovačkog Zakona o obligacionim odnosima, koje se odnose na trenutak prelaska rizika, ne mogu se promeniti na štetu potrošača.

[336] Kako je gore opisano, član 536 (4) Nacrta Zakona o obligacionim odnosima Bosne i Hercegovine bi preneo član 2 (2) d i član 2 (4) Direktive 99/44.

[337] Po srpskom Nacrtu predloga novog zakona o zaštiti potrošača, trgovac neće biti obavezan javnim izjavama ako pokaže da postoji jedna od sledećih situacija: (a) on nije bio, i nije sa razlogom mogao da bude, svestan dotične izjave; (b) u vreme zaključenja ugovora ta izjava je bila ispravljena; (c) ta izjava nije mogla da utiče na odluku o kupovini robe. Dalje, po Nacrtu predloga, pružena usluga nije u saglasnosti sa

bez ikakvih nedostataka ili da ima određena svojstva ili odlike. Te odredbe su dopunjene u članu 487 (1) tačka 5 i (2) crnogorskog Zakona o obligacionim odnosima i članu 401 (1) tačka 5 i članu 401 (2) hrvatskog Zakona o obveznim odnosima, gde su član 2 (2) d i član 2 (4) Direktive 99/44 doslovno transponovani. Jedini izuzetak je da član 2 (4) Direktive 99/44 predviđa da prodavac neće biti obavezan javnim izjavama ako pokaže da on nije bio, i „nije sa razlogom mogao biti svestan predmetne izjave", dok član 401 (2) hrvatskog Zakona o obveznim odnosima i član 487 (2) crnogorskog Zakona o obligacionim odnosima koriste izraz „nije znao niti morao znati za te izjave".

Makedonski Zakon o zaštiti potrošača u članu 42 (2), četvrti pasus, posebno se odnosi na javne izjave kao jedan od kriterijuma kojima se procenjuje saobraznost, međutim on ne isključuje izuzimanja predviđena u članu 2 (4) Direktive. Albanija nije transponovala član 2 (2) d i član 2 (4) u svoj Zakon o zaštiti potrošača.

c. Isključenje kad je potrošač svestan nedostatka saobraznosti (član 2 paragraf (3))

Član 29 (5) albanskog Zakona o zaštiti potrošača je doslovno transponovao član 2 (3) Direktive 99/44, navodeći da će se smatrati da nesaobraznost ne postoji u svrhu ovog člana, ako je, u vreme kada je ugovor bio zaključen, potrošač bio svestan, ili razumno nije mogao biti nesvestan nesaobraznosti, ili ako nesaobraznost potiče iz materijala koje je isporučio potrošač. U svim ostalim zemljama učesnicama, još uvek se primenjuju propisi jugoslovenskog Zakona o obligacionim odnosima iz 1978[338], gde prodavac nije odgovoran za nedostatke ako su isti bili poznati kupcu u vreme zaključenja ugovora ili ako je bilo nemoguće da oni njemu ostanu nepoznati[339]. Smatraće se da nedostaci nisu ostali nepoznati kupcu ako su oni mogli biti lako uočeni običnim pregledom robe od strane brižljive osobe kao kupca, sa prosečnim znanjem i iskustvom karakterističnim za osobu iste profesije[340]. Međutim, prodavac će biti odgovoran za nedostatke, koji su mogli biti lako uočeni od strane kupca, ako je izjavio da roba nema nedostataka ili da ima određena svojstva ili odlike[341].

Shodno tome, uz izuzetak nekih terminoloških razlika, zakoni zemalja učesnica sadrže odredbu koja odgovara članu 2 (3) Direktive 99/44.

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ugovorom, ako je u suprotnosti sa podacima datim prilikom marketinga usluge, ili drugačije pre zaključenja ugovora, od strane lica osim trgovca na prethodnom nivou lanca nabavke, ili u ime trgovca. Međutim, trgovac neće biti odgovoran za nesaobraznost, ako su ti podaci na vreme jasno korigovani, ili ako on niti je znao niti je mogao znati za date podatke.

[338] Član 468 makedonskog Zakona o obligacionim odnosima; član 480 Zakona o obligacionim odnosima Bosne i Hercegovine i Srbije; član 488 crnogorskog Zakona o obligacionim odnosima; član 402. hrvatskog Zakona o obveznim odnosima.

[339] U državama bivše Jugoslavije, osim Hrvatske koja je promenila sledeće ograničenje, ova odredba isključuje samo odgovornost prodavca za nedostatke za koje je kupac znao ili za koje nije mogao da ne zna, u slučajevima kada neka stvar nema kvalitete potrebne za njenu redovnu upotrebu ili promet ili ako nekoj stvari nedostaju svojstva i odlike koji su izričito ili prešutno ugovorene, odnosno propisane.

[340] Na osnovu člana 402 (3) hrvatskog Zakona o obveznim odnosima ta odredba koja se odnosi na „prosečno znanje i iskustvo" se ne odnosi na B2C ugovore..

[341] Po srpskom Nacrtu predloga za novi zakon o zaštiti potrošača, neće biti nesaobraznosti ako, u vreme kada je ugovor zaključen, potrošač je znao, ili je logično trebao da zna, o nesaobraznosti; ili ako nesaobraznost potiče iz materijala koje je nabavio potrošač. Trgovac će biti odgovoran za nesaobraznost koju je potrošač mogao lako da uoči, da je trgovac objavio da je roba u saglasnosti sa ugovorom.

d. Odredba o robi koja treba da se instalira (član 2 paragraf (5))

Član 2 (5) Direktive 99/44 je transponovan u član 401 (6) i (7) hrvatskog Zakona o obveznim odnosima i član 487 (6) i (7) crnogorskog Zakona o obligacionim obavezama. Jedina razlika koje su Hrvatska i Crna Gora napravile kada su transponovale ovu odredbu odnosi se na upotrebljene izraze „stvar" umesto „roba široke potrošnje" i „kupac" umesto „potrošač". To je međutim adekvatno jer te odredbe o odgovornosti prodavca za materijalne nedostatke se primenjuju na sve ugovore o prodaji. Član 2 (5) Direktive 99/44 je doslovno transponovan u član 29 (4) albanskog Zakona o zaštiti potrošača.

Bosna i Hercegovina, Makedonija i Srbija nisu transponovale ovu odredbu o robi koja treba da se instalira. Član 56. srpskog Zakona o zaštiti potrošača propisuje samo da tehnička uputstva, uputstva za upotrebu i deklaracija moraju da budu u pisanoj formi i na jeziku koji je u zvaničnoj upotrebi u Republici Srbiji. Makedonski Zakon o zaštiti potrošača utvrđuje obavezu prodavca da obezbedi potrošaču propisana dokumenta i dokumenta koja je pripremio proizvođač u svrhe lakše i bezbedne upotrebe proizvoda (deklaracija, garancija, tehničko uputstvo, uputstvo za montažu, uputstvo za upotrebu, spisak ovlašćenih servisa itd.), kako se definiše u članu 21. tog Zakona, istinita, jasna, čitljiva i razumljiva, napisana na makedonskom jeziku i ćiriličnom pismu, što ne isključuje dodatno korišćenje drugih jezika u isto vreme i znakova jasno čitljivih za potrošača. Član 2 (5) Direktive 99/44 je transponovan u srpski Nacrt predloga novog zakona o zaštiti potrošača i Nacrt zakona o obligacionim odnosima Bosne i Hercegovine.

2. Prava potrošača u slučajevima nesaobraznosti

a. Uopšteno o pravima potrošača u slučajevima nesaobraznosti (član 3.)

Član 3. Direktive predviđa pravna sredstva koja će biti na raspolaganju potrošaču kada postoji nesaobraznost robe. Nacionalno zakonodavstvo svih zemalja učesnica predviđa pravna sredstva u slučajevima nesaobraznosti.

Po albanskom zakonu, u slučaju nesaobraznosti, potrošač će imati pravo da mu se roba besplatno dovede u stanje koje je u skladu sa ugovorom putem popravke ili zamene, ili da se načini odgovarajuće smanjenje cene ili da se raskine ugovor u vezi sa tom robom (član 31(3) Zakona o zaštiti potrošača)[342].

Po članu 18 bosansko-hercegovačkog Zakona o zaštiti potrošača[343], potrošač ima pravo na popravku, zamenu i raskid ugovora, bez redukovanja na slučajeve nesaobraznosti koja nije neznatna.

U Hrvatskoj prava potrošača su transponovana u član 410. Zakona o obveznim odnosima[344] i u članu 5 (2) Zakona o zaštiti potrošača[345]. U Crnoj Gori, izbor potrošača je između popravke i zamene, međutim, kada je to nemoguće, ili ne može biti izvedeno u nekom razumnom vremenu ili bez većih neprijatnosti za potrošača, moguće je tražiti smanjenje cene ili (u slučaju veće neusaglašenosti) raskid ugovora.

U Makedoniji, ovo pitanje se reguliše i Zakonom o obligacionim odnosima[346] i Zakonom o zaštiti potrošača (član 43)[347]. Na osnovu Zakona o obligacionim odnosima Makedoni-

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[342] Zakon o zaštiti potrošača od 17.04.2008., *Sl. list RAl* br. 61/08.
[343] Zakon o zaštiti potrošača Bosne i Hercegovine, *Sl. glasnik BiH* br. 25/06.
[344] Zakon o obveznim odnosima, *NN* br. 35/05, 41/08.
[345] Zakon o zaštiti potrošača, *NN* br. 79/07, 125/07, 79/09, 89/09, 133/09.
[346] Zakon o obligacionim odnosima, *Sl. list RMak* br. 18/01, 4/02, 5/03, 84/08, 81/09 i 161/09.
[347] Zakon o zaštiti potrošača, *Sl. list RMak* br. 38/04, 77/07, i 103/08.

je, generalno kupac (kako se pravila odnose na sve ugovore o prodaji), u slučajevima nedostataka kupljene robe ima pravo da: 1) zahteva od prodavca da otkloni nedostatak ili da mu isporuči drugi proizvod bez nedostatka (izvršenje ugovora); 2) zahteva smanjenje cene; 3) zamenu proizvoda odgovarajućim proizvodom iste robne marke, tipa, industrijskog dizajna, ili oznake o poreklu ili geografske oznake proizvoda; 4) uz odgovarajuće smanjenje ili povećanje maloprodajne cene; 5) raskid ugovora, vraćanje plaćenog iznosa i nadoknadu pretrpljene štete. Taj zahtev može da načini potrošač, po vlastitom izboru, nadležnom inspekcijskom organu ili trgovcu ili distributeru, u mestu gde je proizvod kupljen ili u mestu prebivališta potrošača. U slučaju kada potrošač kupi namirnice sa nedostatkom, trgovac je u obavezi da načini zamenu sa proizvodom odgovarajućeg kvaliteta ili da vrati plaćeni iznos potrošaču, pod uslovom da su nedostaci otkriveni u okviru navedenog roka trajanja u kome proizvod može da se upotrebljava.

Po članu 34. srpskog Zakona o zaštiti potrošača[348], potrošač ima pravo da uloži žalbu u slučaju nesaobraznosti i na osnovu te žalbe ima pravo na pravna sredstva.

aa. Implementacija pravnih sredstava

Pravna sredstva propisana u Direktivi (član 3) su transponovana u nacionalno zakonodavstvo proučenih zemalja, u Zakon o zaštiti potrošača i Zakon o obligacionim odnosima, ili u oba; sa određenim varijacijama.

bb. Izbor potrošača između pravnih sredstava

Po albanskom Zakonu o zaštiti potrošača potrošač ima pravo na: 1) popravku, 2) zamenu; 3) odgovarajuće smanjenje cene; 4) raskid ugovora.

U Bosni i Hercegovini, član 18. Zakona o zaštiti potrošača predviđa slobodu izbora između pravnih sredstava, bez mogućnosti smanjenja cene. Odredbe bosansko-hercegovačkog Zakona o obligacionim odnosima[349], koje nisu ograničene na B2C ugovore, zahtevaju da kupac prvo traži ispunjenje (popravku ili zamenu), a u slučajevima da je prodavac imao razumno vreme za izvršenje popravke ili zamene, daju pravo na smanjenje cene ili raskid ugovora.

Član 410. hrvatskog Zakona o obveznim odnosima ostavlja potrošaču izbor između sledećih pravnih sredstava: 1) zahtevati od prodavca da nedostatak ukloni; ili 2) zahtevati od prodavca da mu preda drugu stvar bez nedostatka; ili 3) zahtevati sniženje cene; ili 4) izjaviti da raskida ugovor. Povrh toga, prema Zakonu o obveznim odnosima u svakom od tih slučajeva kupac ima pravo i na popravljanje štete prema općim pravilima o odgovornosti za štetu, uključujući i štetu koju je zbog nedostatka stvari pretrpio na drugim svojim dobrima. Odredbe člana 412 (1) i člana 413 Zakona o obveznim odnosima vode ka zaključku da kupac može prvenstveno i alternativno upotrebiti prva tri pravna sredstva a pravo na raskid ugovora samo kada ne uspe sa svojim zahtevom za ispunjenje ugovora, uz određene izuzetke u članu 412 (2, 3) Zakona o obveznim odnosima. Činjenica da potrošač ima izbor između upotrebe pravnih sredstava se međutim potvrđuje članom 5 (2) Zakona o zaštiti potrošača, koji predviđa da je

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[348] Zakon o zaštiti potrošača iz 2005 *Sl. list RS* br. 79/05.

[349] Od raspada Jugoslavije savezni Zakon o obligacionim odnosima je putem sukcesije ostao da se primenjuje u dve malo različite verzije u svakom entitetu Bosne i Hercegovine, kao Zakon o obligacionim odnosima Republike Srpske i Zakon o obligacionim odnosima Federacije Bosne i Hercegovine. Pošto se odredbe relevantne za ovu analizu ne razlikuju, u cilju veće jasnoće ovaj tekst će se odnositi samo na „Zakon o obligacionim odnosima Bosne i Hercegovine; *Sl. list SFRJ* br. 29/78, 39/85, 46/85, 45/89, 57/89 i *Sl. list Republike Srpske* br. 17/93, 57/98, 39/03, 74/04, *Sl. list Republike Bosne i Hercegovine* br. 2/92, 13/93, 13/94 i *Sl. list Federacije Bosne i Hercegovine* br. 29/03.

u skladu s odredbama Zakona o obveznim odnosima o odgovornosti za materijalne nedostatke stvari, trgovac dužan, „prema izboru potrošača“, ukloniti nedostatak na proizvodu, predati drugi proizvod bez nedostatka, sniziti cenu ili vratiti plaćeni iznos za proizvod, te ispuniti i druge obveze propisane tim odredbama.

U Makedoniji, Zakon o obligacionim odnosima i Zakon o zaštiti potrošača postavlja drugačija pravila po pitanju izbora 'potrošača' između pravnih sredstava. Zakonom o obligacionim odnosima (članovi 476-488) ugovorna strana (ne obavezno potrošač jer reguliše sve ugovore) ima pravo prvo da zahteva da ugovor bude izvršen (otklanjanje nedostatka ili isporuka drugog proizvoda bez nedostatka). Ako ugovor ne bude izvršen u dodatnom periodu datom za izvršenje kupac ima pravo da odustane od ugovora. Zakon ne navodi kada kupac može da traži smanjenje cene. Zakon o obligacionim odnosima navodi da kupac može da održi taj ugovor čak iako postoje osnove za njegov raskid; tako da se može zaključiti da je to slučaj kada smanjenje cene treba da se traži. Zaštita koju pruža Zakon o zaštiti potrošača, na drugoj strani, ostavlja potrošaču slobodu izbora između pravnih sredstava. Taj Zakon, međutim, predviđa zvaničan zahtev za korištenje tih prava: članom 45, paragraf 1, u cilju korištenja svojih prava potrošač je u obavezi da priloži fiskalni račun za proizvod ili jasno vidljivu čitljivu pisanu priznanicu, a za proizvode koji imaju garantni rok, takođe i potvrdu o garanciji ili neki drugi dokument koji zamenjuje garanciju. U Crnoj Gori, na osnovu člana 25. Zakona o zaštiti potrošača[350], potrošač ima slobodu izbora između sva četiri pravna sredstva. To je u suprotnosti sa rešenjima datim u opštem zakonodavstvu o prodaji, jer tamo je hijerarhija (to jest: održavanje ugovora) prvi izbor koji mora da se sledi (član 497. i 498. Zakona o obligacionim odnosima)[351]. Situacija je slična u Srbiji, gde potrošač ima pravo da se žali u odnosu na proizvod ili uslugu za koje je izdata garancija, u vezi sa nedostacima koji se pojave u roku od šest meseci nakon datuma nabavljanja tog proizvoda ili usluge. Po članu 35. Zakona o zaštiti potrošača, ako je takva žalba uložena usled nedostatka u proizvodu, potrošač će imati pravo: 1) da mu se proizvod koji je kupio zameni novim proizvodom, to jest proizvodom odgovarajuće robne marke (modela, tipa), ili 2) da mu se iznos plaćen za taj proizvod refundira, u iznosu maloprodajne cene za takav proizvod na dan refundiranja, ili 3) da se nedostaci na proizvodu otklone. Ako je takva žalba uložena zbog nedostatka u vršenju usluge, potrošač će imati pravo: 1) da nedostatak bude otklonjen, ili 2) da mu se refundira iznos koji je platio, ili 3) na smanjenje cene u srazmeri sa nedostatkom u pruženoj usluzi. Ako pretrpi štetu uzrokovanu proizvodom sa nedostatkom ili neizvršenjem usluge, ili izvršenjem usluge sa nedostatkom, potrošač može da zahteva nadoknadu. Potrošač može da iskoristi gore navedena prava pod uslovom da nedostatak nije uzrokovan njegovom greškom. Zakon o obligacionim odnosima uspostavlja hijerarhiju dostupnih pravnih sredstava (član 488-490 tj član 618-620) kojim potrošač najpre mora da traži izvršenje ugovora pa ako prodavac/davaoc usluge to ne izvrši, onda da zahteva raskid ugovora.

b. Kriterijum „nesrazmernosti“ (član 3 paragraf (3))

Član 3 (3) Direktive 99/44 primenjuje faktor srazmernosti u razmatranju toga da li je neko određeno pravno sredstvo dostupno.

Albansko zakonodavstvo (član 31 (4) Zakona o zaštiti potrošača) omogućuje potrošaču da zahteva da prodavac popravi robu ili može da traži da je prodavac zameni, u svakom slučaju besplatno, osim ako je to nemoguće ili nesrazmerno. Neko pravno sredstvo će se smatra-

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[350] *Sl. list RCG* Br. 26/07

[351] Zakon o obligacionim odnosima Crne Gore *Sl. list RCG* Br. 47/08.

ti nesrazmernim ako nameće troškove prodavcu koji, u poređenju sa alternativnim pravnim sredstvom, su nerazumni, imajući u vidu: i) vrednost koju bi roba imala da nema nesukladnosti, ii) značaj nesukladnosti, i iii) da li bi alternativno pravno sredstvo moglo biti ispunjeno bez veće nepogodnosti za potrošača, uzimajući u obzir vrstu robe i svrhu za koju je potrošaču roba bila potrebna.

Kriterijum nesrazmernosti, kako je dato u članu 3. (3) Direktive 99/44 nije transponovan u zakonodavstvo Bosne i Hercegovine, ni u Zakon o zaštiti potrošača ni u bosansko-hercegovački Zakon o obligacionim odnosima. Međutim, princip srazmernosti je opšti princip koji proističe iz načela savesnosti i poštenja navedenog u članu 12. bosansko-hercegovačkog Zakona o obligacionim odnosima, koji generalno daje mogućnost tumačenja člana 18. Zakona o zaštiti potrošača ili 488. Zakona o obligacionim odnosima u svetlu odredbi člana 3 (3) Direktive 99/44. Situacija je slična u Hrvatskoj. Odredba Zakona o obveznim odnosima o odgovornosti prodavca za materijalne nedostatke ne predviđa kriterij srazmernosti za određivanje da li je neko određeno pravno sredstvo dostupno. Međutim, isti rezultat može da se postigne tumačenjem pravila o materijalnim nedostacima u skladu sa načelom savjesnosti i poštenja. Temeljem člana 4. Zakona o obveznim odnosima „u zasnivanju obveznih odnosa i ostvarivanju prava i obveza iz tih odnosa sudionici su dužni pridržavati se načela savjesnosti i poštenja". Isti princip savjesnosti i poštenja, kako se predviđa u makedonskom Zakonu o obligacionim odnosima će se primeniti kada se kriterijum srazmernosti uzima u razmatranje. U Crnoj Gori nema transponovanja ispitivanja srazmernosti, što odgovara rezultatu uređivanja pravnih sredstava bez hijerarhijskog reda[352].

Trenutno nema transponovanja ispitivanja srazmernosti u srpskom zakonodavstvu. Po nacrtu predloga, kada usluge nisu u saglasnosti sa ugovorom, potrošač ima pravo: (a) da nesaobraznost bude otklonjena izvršenjem u skladu sa prvobitnim nalogom, (b) na smanjenje cene, i (c) na raskid ugovora. Potrošač ima pravo da izabere između tih opcija. Ako trgovac ne ispoštuje zahtev potrošača da otkloni nesaobraznost izvršenjem u skladu sa prvobitnim nalogom, potrošač ima pravo da isto takvo izvršenje ostvari na drugom mestu, o trošku trgovca. Trgovac je u obavezi da bez odlaganja nadoknadi troškove izvršenja ostvarenog na drugom mestu. U svim drugim aspektima, odredbe budućeg srpskog zakona o zaštiti potrošača koje se odnose na obavezu trgovca u vezi nesaobraznosti isporučene robe pod ugovorima o prodaji, primenjivaće se shodno odgovornosti trgovca za nesaobraznost pruženih usluga u ugovorima za pružanje usluga.

aa. Nemogućnost

Pravila o nemogućnosti kako su data u Direktivi 99/44 nisu transponovana u Zakon o zaštiti potrošača Albanije. U odgovarajućim slučajevima primenjivaće se opšta pravila Građanskog zakonika.

U Hrvatskoj, po pitanju nemogućnosti, mogu sa primeniti pravila iz člana 269. i 270. Zakona o obveznim odnosima. Na osnovu tih pravila „činidba mora biti moguća" kako bi nastala ugovorna obaveza. To je takođe u skladu sa članom 8 (2) Direktive 99/44, koja predviđa da se mogu propisati ili zadržati striktnije odredbe, koje su u skladu s Ugovorom u oblasti koju pokriva ova Direktiva, da bi obezbedile viši nivo zaštite potrošača.

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[352] Interesantno je primetiti da je redovna praksa sudova u slučajevima nesaobraznosti pod Zakonom o obligacionim odnosima bila da ako je popravka nemoguća, ili nije opravdana, prodavac je u obavezi da obezbedi kupcu drugu stvar bez nedostataka, drugim rečima kupac može da zahteva drugu stvar, ako nedostatak ne može da se popravi ili je njegova popravka ekonomski neopravdana.

Član 18. Zakona o zaštiti potrošača Bosne i Hercegovine se ne poziva na nemogućnost izvršenja. Na osnovu člana 490. (2) bosansko-hercegovačkog Zakona o obligacionim odnosima kupac može da raskine ugovor čak i bez dopuštanja naknadnog vremenskog roka, koji je u svim drugim slučajevima neophodan, ako kupac, nakon što je obavešten o nedostacima, obavesti potrošača o svojoj nameri da ne izvrši ugovor ili ako okolnosti određenog slučaja ne učine očiglednim da prodavac neće biti u stanju da izvrši ugovor čak ni u naknadnom vremenskom roku.

U Makedoniji, u slučaju nemogućnosti primenjuju se opšta pravila o nemogućnosti izvršenja kako je definisano u Zakonu o obligacionim odnosima (član 126–127).

Imajući u vidu činjenicu da u Crnoj Gori potrošač ima na početku slobodu izbora između sva četiri pravna sredstva, nijedan od njih nije ograničen na osnovu nemogućnosti.

Interesantno je da u slučaju da potrošač izabere popravku ili zamenu, i trgovac prihvati njegovu primedbu (poziv na pravno sredstvo), pomoćna primena Zakona o obligacionim odnosima bi aktivirala primenu „razumnog" vremena za izvršenje ugovora (dovođenje robe u saobraznost). U ovom trenutku opšte zakonodavtsvo o prodaji predviđa da kada okolnosti određenog slučaja naznače bez sumnje da prodavac neće biti u stanju da izvrši ugovor čak ni u naknadnom vremenskom roku, ugovor može da se raskine.

U Srbiji nema *per se* implementacije pravila o nemogućnosti. Treba napomenuti da pod Nacrtom predloga, kada trgovac dokaže da je otklanjanje nesaobraznosti popravkom ili zamenom nezakonito, nemoguće ili bi trgovcu napravilo nesrazmerni napor, potrošač može da izabere da se smanji cena ili raskine ugovor. Napor trgovca je nesrazmeran ako mu stvara troškove koji, u poređenju sa smanjenjem cene ili raskidom ugovora, su preveliki, imajući u vidu vrednost robe da nije bilo nesaobraznosti i značaj nesaobraznosti.

c. „Besplatno" (član 3 paragraf (4))

U članu 31 (4,b) albanskog Zakona o zaštiti potrošača izraz „besplatno" u tački 3 i 4 se odnosi na neophodne troškove načinjene za dovođenje robe u stanje sukladnosti, posebno troškovi pošte, rada i materijala.

Pod članom 410 (4) Zakona o obveznim odnosima Hrvatske „troškove otklanjanja nedostatka i predaje druge stvari bez nedostatka snosi prodavatelj".

U Bosni i Hercegovini uslov „besplatno" nije transponovan u nacionalno zakonodavstvo.

Makedonski Zakon o obligacionim odnosima ne navodi eksplicitno da su popravka ili zamena „besplatni" za kupca u opštim pravilima odgovornosti za materijalne nedostatke. On međutim navodi, da je popravka ili zamena obaveza prodavca koja treba da se shvati da će biti izvršena o njegovom trošku. Pored toga, član 493. (u okviru poglavlja o garanciji za pravilno funkcionisanje stvari) objašnjava da je trgovac tj. proizvođač u obavezi da o svom trošku pošalje robu u mesto gde treba da se popravi ili zameni, kao i da vrati kupcu popravljenu tj zamenjenu robu. U toku popravke/zamene prodavac snosi rizik za oštećenja ili uništenje proizvoda. U Zakonu o zaštiti potrošača (član 43, paragraf 1, prvi pasus) se jasno navodi da potrošač ima pravo na besplatnu popravku ili zamenu robe sa nedostacima. Član 45., paragraf 4 Zakona o zaštiti potrošača predviđa da će isporuku proizvoda obimnijih od 1 m^3 ili težih od deset kila u slučaju popravke, procene, zamene ili vraćanja potrošaču, trgovac izvršiti besplatno. U slučaju neizvršenja ove obaveze i u slučajevima kada u mestu boravišta potrošača nema trgovca ili proizvođača, isporuku i povratak proizvoda može da izvrši sam potrošač. U tom slučaju trgovac je u obavezi da nadoknadi neophodne troškove koji se odnose na isporuku i vraćanje proizvoda. Slično tome, član 22, paragraf 5 Zakona o zaštiti potrošača predviđa da troškovi za materijal, rezervne delove, rad, transfer i transport proizvoda koji nastanu u to-

ku otklanjanja nedostataka ili zamene proizvoda novim proizvodom na osnovu garancije, će biti na teret davaoca garancije.

U Crnoj Gori, pravno sredstvo potrošača u slučaju nesaobraznosti mora da bude dato besplatno, i prodavac mora da snosi troškove pošte, rada i materijala, kao i ostale relevantne troškove. Zakon o zaštiti potrošača ne formuliše uslov „besplatno", ali Zakon o obligacionim odnosima to čini. Ipak, potonji ne sadrži definiciju izraza „besplatno", već samo predviđa da troškove za dovođenje robe u stanje saobraznosti (popravka ili zamena) snosi prodavac[353]. Nema sumnje da bi u praksi to podrazumevalo sve povezane troškove – na primer kao one u Direktivi.

U Srbiji, Zakon o zaštiti potrošača iz 2005, nema izričito pravilo o troškovima za popravku ili zamenu. Isto važi za Zakon o obligacionim odnosima. Pored toga, po članu 497. Zakona o obligacionim odnosima, raskid ugovora usled nedostataka u robi će imati efekat raskida ugovora usled neizvršenja jedne od strana. Kupac će dugovati prodavcu nadoknadu za koristi od robe koju je imao neko vreme, čak iako nije u stanju da vrati robu ili deo robe, a ugovor je raskinut[354].

d. Vremenski rokovi za odgovornost prodavca

aa. Vremenski rok od dve godine

Član 5(1) Direktive 99/44 predviđa da je prodavac odgovoran za nesaobraznost koja se pojavi u roku od dve godine od isporuke.

Član 30 (1) Zakona o zaštiti potrošača Albanije predviđa da će se prodavac smatrati odgovornim kada nesaobraznost postane očigledna u roku od dve godine od isporuke robe.

Bosansko-hercegovački Zakon o obligacionim odnosima tradicionalno pravi razliku između vidljivih i skrivenih nedostataka. U istom smislu, član 18. (2) Zakona o zaštiti potrošača je primenio član 5 (1) Direktive određivanjem perioda od osam dana za upotrebu pravnih sredstava datih u članu 18 (1) Zakona o zaštiti potrošača u slučaju vidljivih nedostataka, i dve godine od isporuke u slučaju skrivenih nedostatka. Na osnovu bosansko-hercegovačkog Zakona o obligacionim odnosima, pravna sredstva data u članu 488. bosansko-hercegovačkog Zakona o obligacionim odnosima mogu da se iskoriste u roku od šest meseci u slučaju skrivenih nedostataka.

U Hrvatskoj, član 5 (1) Direktive 99/44 je transponovan u član 404 (2) Zakona o obveznim odnosima, koji predviđa da prodavac ne odgovara za nedostatke koji se pokažu pošto proteknu dve godine od predaje stvari, a kod trgovačkog ugovora šest meseci. Međutim, član 404 (4) Zakona o obveznim odnosima predviđa da se ti rokovi mogu produžiti ugovorom. Dalje, član 407. Zakona o obveznim odnosima predviđa da kupac ne gubi pravo da se pozove na neki nedostatak i kad nije ispunio svoju obvezu pregleda stvari bez odgađanja, ili obvezu da u određenom roku obavesti prodavca o postojanju nedostatka, a i kad se nedostatak pokazao tek nakon proteka dve godine, odnosno kod trgovačkih ugovora šest meseci od predaje stvari, ako je taj nedostatak bio poznat prodavcu ili mu nije mogao ostati nepoznat. Takođe

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[353] Član 496. paragraf 4 Zakona o obligacionim odnosima.

[354] Po Nacrtu predloga, potrošač će imati pravo da mu se nesaobraznost ispravi potpuno besplatno. Pored njegovog prava da mu se nesaobraznost ispravi popravkom ili zamenom, ili da se smanji cena, ili raskine ugovor; potrošač će imati pravo da traži obeštećenje za svaki gubitak koji je posledica nesaobraznosti, pod opštim uslovima o odgovornosti za štetu. Po Nacrtu predloga, u odnosu na komercijalne garancije, trgovac ili proizvođač će snositi troškove transporta robe u cilju njene popravke ili zamene, kao i troškove slanja popravljene ili zamenjene robe nazad potrošaču. Trgovac ili proizvođač će snositi rizik za gubitak ili oštećenje robe za vreme gore navedenog perioda.

postoji dvogodišnji rok u članu 422 (1) Zakona o obveznim odnosima protekom kojeg se gase sva prava kupca[355].

U makedonskom zakonodavstvu nema tačnog transponovanja pravila o „dvogodišnjem roku". Članom 488. Zakona o obligacionim odnosima, kupac, koji je na vreme obavestio prodavca o postojanju nedostatka (nesaobraznosti) gubi svoja prava u roku od jedne godine, računajući od dana kada je poslato obaveštenje, osim ako je prevarom prodavca kupac sprečen od upražnjavanja svojih prava. Kupac koji je na vreme obavestio prodavca može nakon isteka tog roka, zahtevati smanjenje cene ili obeštećenje kao prigovor na zahtev prodavca za plaćanje cene, pod uslovom da kupac još nije izvršio plaćanje. Članom 46. Zakona o zaštiti potrošača, potrošač ima pravo da ispostavi zahteve po pitanju svojih prava u slučaju nesaobraznosti ako su nedostaci na proizvodu otkriveni u garantnom roku, ili u okviru perioda kada je proizvod mogao da se koristi, određenog od strane proizvođača. Za proizvode bez određenog garantnog roka, potrošač ima pravo da proizvođaču ispostavi zahteve, ako su otkriveni u roku od šest meseci od isporuke proizvoda, osim ako duži rokovi nisu predviđeni ugovorom ili nekim drugim zakonom. Zahtevi ne mogu da se ispostave u odnosu na proizvode čiji nedostaci su otkriveni nakon roka trajanja, ili nakon perioda u kome je proizvod mogao da se upotrebljava. Rokovi, dati u ovom članu, počinju da teku od dana kada je proizvod isporučen potrošaču, a ako ne mogu biti utvrđeni, od datuma proizvodnje. Biće obavezno da se navedu rokovi trajanja za proizvode čije upotrebne osobine mogu da se pogoršaju nakon određenog perioda (netrajni proizvodi) i koji mogu predstavljati opasnost po život i zdravlje ili imovinu potrošača i okruženja i prirode (namirnice, kozmetički proizvodi, lekovi, hemijski proizvodi za zadovoljenje potreba stanovništva itd.). Rokovi upotrebe će početi da teku od datuma proizvodnje.

U Crnoj Gori takođe nema tačnog transponovanja dvogodišnjeg perioda. Umesto toga, opšte pravilo je da su prava dostupna pod uslovom da potrošač uloži žalbu odmah nakon što postane svestan nesaobraznosti (nedostatka) proizvoda a najkasnije šest meseci nakon preuzimanja proizvoda. U slučaju pogrešne cene konačan datum je tri dana od datuma plaćanja fakture, dok je za javne servise rok za cenu osam dana (član 23 (1, 3, 4) Zakona o zaštiti potrošača). Povrh toga, Zakon o obligacionim odnosima dalje uređuje ovaj predmet i predviđa da će prava kupca (blagovremeno obaveštavanje prodavca o postojanju nedostatka) biti izgubljena nakon isteka jedne godine, računajući od dana saopštavanja tog obaveštenja prodavcu. Taj period može da se produži samo u slučaju da je kupac bio sprečen da koristi svoja prava obmanom od strane prodavca (član 508. (1) Zakona o obligacionim odnosima).

U Srbiji, po članu 34. Zakona o zaštiti potrošača, potrošač će imati pravo da uloži žalbu o nesaobraznosti, u roku od šest meseci od datuma kada je stekao proizvod ili uslugu za koju je izdata garancija. Ovlašćeno lice će odlučiti o žalbi istog dana kada se uloži, a najkasnije osam dana od dana kada je žalba uložena.

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[355] Član 422 (1) Zakona o obveznim odnosima: „Prava kupca koji je pravodobno obavijestio prodavatelja o postojanju nedostatka gase se nakon isteka dvije godine, računajući od dana odašiljanja obavijesti prodavatelju, osim ako je prodavateljevom prijevarom kupac bio spriječen da ih ostvaruje". Ali postoji izuzetak predviđen u članu 422 (2) Zakona o obveznim odnosima: „(2) Međutim, kupac koji je pravodobno obavijestio prodavatelja o postojanju nedostataka može nakon proteka ovoga roka, ako još nije isplatio cijenu, zahtijevati da se cijena snizi ili da mu se naknadi šteta, kao prigovor protiv prodavateljeva zahtjeva da mu se isplati cijena". Županijski sud u Varaždinu, Gž. 1074/08–2 od 4.08. 2008. je odlučio da „kupac je iznimno ovlašten i nakon proteka prekluzivnog roka od dvije godine, ukoliko nije isplatio kupoprodajnu cijenu, zahtijevati da se ugovorena cijena snizi ili da mu se naknadi šteta zbog materijalnih nedostataka, na način da u parnici istakne prigovor protiv zahtjeva prodavatelja da mu isplati ugovorenu cijenu(...)"..

Rokovi koji su propisani u srpskom Zakonu o obligacionim odnosima su neprihvatljivo kratki iz perspektive Direktive o prodaji robe široke potrošnje, posebno imajući u vidu razliku koja je napravljena između vidljivih i neprimetnih nedostataka. Prodavac neće biti odgovoran za nedostatke koji se pojave šest meseci posle isporuke robe, osim ako duži rok nije predviđen. Kada se neispravna roba popravi, zameni, ili delimično zameni, onda rok počinje da teče od isporuke popravljene, zamenjene ili delimično zamenjene robe. Obaveštenje kupca o nedostatku u robi će obuhvatiti detaljan opis neispravnosti i poziv upućen prodavcu da pregleda taj predmet. Ako obaveštenje o nedostatku, inače blagovremeno poslato prodavcu od strane kupca preporučenom poštom, telegramom ili na neki drugi pouzdan način, zakasni ili uopšte ne dođe do prodavca, smatraće se da je kupac izvršio svoju dužnost da obavesti prodavca. Treba očekivati da će se situacija popraviti nakon usvajanja novog Zakona o zaštiti potrošača. Po Nacrtu predloga, trgovac će biti odgovoran za nesaobraznost ako nesaobraznost postane očigledna u roku od dve godine od vremena kada je rizik prešao na potrošača. Duži rok može da se predvidi. U slučaju manje popravke, garantni rok će se produžiti za vreme u kome je potrošač bio sprečen da koristi robu. U slučaju ozbiljne popravke ili zamene, garantni rok će početi da teče ispočetka od vremena kada je potrošač ili neko treće lice osim prevoznika i označeno od strane potrošača steklo materijalni posed nad zamenjenom robom.

bb. Opcija: smanjeni rok za polovnu robu

Opcija za smanjenje „dvogodišnjeg perioda“, propisana u članu 7(1) Direktive nije transponovana u zakonodavstvo Albanije, Bosne i Hercegovine, Makedonije, Crne Gore i Srbije.

U Hrvatskoj, član 404 (3) Zakona o obveznim odnosima propisuje da „kod prodaje rabljenih stvari ugovorne strane mogu ugovoriti rok od jedne godine, a kod trgovačkih ugovora i kraći rok“. Ponovo, član 404 (4) Zakona o obveznim odnosima predviđa da taj rok može da se produži ugovorom.

Zemlje učesnice koje koriste opciju iz člana 7(1)	Zemlje učesnice koje ne koriste opciju iz člana 7(1)
HR	AL, BiH, MAK, CG, SRB

cc. Opcija: obaveza obaveštavanja o nesaobraznosti u roku od 2 meseca

Član 5. paragraf (2) Direktive daje zemljama članicama opciju da predvide da potrošač mora da obavesti prodavca o nesaobraznosti u roku od dva meseca od datuma kada je potrošač to otkrio.

Ta opcija nije transponovana u zakonodavstvo Albanije.

U Bosni i Hercegovini transponovana je u član 19. (3) Zakona o zaštiti potrošača.

U Hrvatskoj je transponovana u član 403. (4) Zakona o obveznim odnosima, prema kojem kod potrošačkih ugovora potrošač kao kupac nije obvezan pregledati stvar niti je dati na pregled, ali je obvezan obavijestiti prodavca o postojanju vidljivih nedostataka u roku od dva meseca od dana kad je otkrio nedostatak, a najkasnije u roku od dve godine od prelaska rizika na potrošača. Slična odredba koja se tiče svih drugih ugovora o prodaji je predviđena u članu 404 Zakona o obveznim odnosima. Prema toj odredbi, kad se nakon primitka stvari od strane kupca pokaže da stvar ima neki nedostatak koji se nije mogao otkriti uobičajenim pregledom prilikom preuzimanja stvari, kupac je dužan, pod prijetnjom gubitka prava, o tom nedostatku obavestiti prodavca u roku od dva meseca računajući od dana kad je nedostatak otkrio, a kod trgovačkog ugovora – bez odgađanja.

Obaveza obaveštavanja o nesaobraznosti se različito reguliše u makedonskom zakonodavstvu. Kupac je u obavezi da obavesti prodavca o uočenim nedostacima što je pre moguće

ali najkasnije za osam dana. Ako se inspekcija izvrši u prisustvu obe strane obaveštenje treba izvršiti odmah (član 469, paragraf 1 i 2 Zakona o obligacionim odnosima). U slučaju da su nedostaci skriveni kupac treba da obavesti prodavca u roku od osam dana od kada je postao svestan nedostatka, a najkasnije šest meseci od dana prijema proizvoda (član 470 Zakona o obligacionim odnosima). Ovo pitanje je slično regulisano u Crnoj Gori. Rok za obaveštenje počinje odmah nakon saznanja o nesaobraznosti (nedostatku) proizvoda i traje najduže šest meseci nakon preuzimanja proizvoda. Dovoljno je poslati pisanu izjavu[356] o tome pre isteka tog perioda. Kao što je ranije rečeno, u slučaju pogrešne cene konačan datum je tri dana od datuma plaćanja fakture, dok je za javne usluge rok za cenu osam dana od dana primanja fakture[357].

Po članu 481-485 srpskog Zakona o obligacionim odnosima, kupac će biti u obavezi da pregleda robu na uobičajen način, ili da preda da se pregleda što je pre moguće u redovnom sledu događaja, i da obavesti prodavca o svim vidljivim nedostacima, u roku od osam dana, a u slučaju komercijalnih ugovora – bez odlaganja. U suprotnom slučaju, kupac će izgubiti prava koja se odnose na vidljive nedostatke. Nakon pregleda robe u prisustvu obeju strana, kupac će odmah obavestiti prodavca o svojim primedbama po pitanju vidljivih nedostataka. U suprotnom slučaju, kupac će izgubiti svoja prava u odnosu na vidljive nedostatke. U slučaju skrivenih nedostataka (nedostaci koji se ne mogu otkriti običnim pregledom), kupac je u obavezi da obavesti prodavca o njihovom postojanju u roku od osam dana od otkrića, u suprotnom slučaju, kupac će izgubiti svoja prava u odnosu na skrivene nedostatke.

Zemlje uč. koje koriste opciju obaveštavanja	Zemlje uč. koje ne koriste opciju obaveštavanja
BiH, HR, CG, MAK, SRB (sa varijacijom)	AL

dd. Opcija: suspenzija dvogodišnjeg perioda

Opcija za suspenziju dvogodišnjeg perioda nije transponovana u zakonodavstvo Albanije i Bosne i Hercegovine.

Zakonima o obligacionim odnosima u Hrvatskoj (član 405. Zakona o obveznim odnosima), Makedoniji (član 472. Zakona o obligacionim odnosima), Crnoj Gori (član 491. Zakona o obligacionim odnosima) i Srbiji (član 483. Zakona o obligacionim odnosima), kada je usled nedostatka došlo do popravke robe, isporuka drugog proizvoda (zamena), zamena delova itd., propisani rokovi za obaveštenje počinju od dana isporuke popravljene robe, isporuke druge robe, ili izvršene zamene delova. Pored ovog pravila u makedonskom Zakonu o zaštiti potrošača (član 48, paragraf 3 i 4) u slučaju otklanjanja nedostatka proizvoda, garantni rok se produžava za period u kome proizvod nije bio korišćen. Taj period će se računati od dana zahteva potrošača za otklanjanje tog nedostatka. U slučaju otklanjanja nedostatka zamenom robe koja je montirana ili koja je komponenta proizvoda koji ima određeni garantni rok, garantni rok za novu robu koja je montirana ili komponenta robe počinje da teče od dana kada je roba isporučena potrošaču.

ee. Pretpostavka nesaobraznosti tokom prvih 6 meseci

Pretpostavka iz člana 5(3) Direktive 99/44 je transponovana u albanski Zakon o zaštiti potrošača gde član 30 (2) predviđa da osim ako se drugačije ne dokaže, svaka nesaobraznost koja postane očevidna, u periodu od šest meseci od isporuke robe, smatraće se da je postoja-

[356] Član 492. paragraf 2 Zakona o obligacionim odnosima.
[357] Član 26. paragraf 1, 3 i 4 Zakona o zaštiti potrošača.

la u vreme isporuke, osim ako ta pretpostavka nije kompatibilna sa vrstom robe ili vrstom nesaobraznosti. U zakonodavstvu Bosne i Hercegovine, član 5 (3) Direktive 99/44 nije transponovan[358].

U Hrvatskoj prema članu 400 (3) Zakona o obveznim odnosima se predmnijeva da je nedostatak koji se pojavio u roku od šest meseci od prelaska rizika postojao u vrijeme prelaska rizika, osim ako prodavac ne dokaže suprotno ili suprotno proizlazi iz naravi stvari ili naravi nedostatka.

Članom 470. makedonskog Zakona o obligacionim odnosima, u slučaju skrivenih nedostataka (nedostaci koji nisu mogli biti uočeni redovnim pregledom tokom isporuke robe), kupac je u obavezi da obavesti prodavca u roku od osam dana od otkrivanja nedostatka, sa time da je to u roku šest meseci nakon kupovine robe, osim ako se strane nisu dogovorile o dužem roku. Taj rok ne zavisi od vrste robe ili vrste nesaobraznosti. Može se zaključiti da je ovo pravilo primenjeno u makedonskom zakonodavstvu.

Crna Gora generalno ispunjava zahtev dat u članu 5(3) Direktive 99/44. Tu, period za upražnjavanje pravnih sredstava ne može biti duži od šest meseci od preuzimanja proizvoda (isporuke proizvoda). Ali Crna Gora ne navodi ograničenje formulisano u članu 5 (3) Direktive da se pretpostavka ne primenjuje tamo gde bi to bilo nekompatibilno sa vrstom robe ili vrstom nesaobraznosti.

Po članu 34. srpskog Zakona o zaštiti potrošača iz 2005, potrošač će imati pravo na žalbu po pitanju proizvoda ili usluge za koje je izdata garancija, u slučaju nedostataka koji se pojave u roku od šest meseci nakon dana dobijanja tog proizvoda ili usluge. Srpski Zakon o obligacionim odnosima (član 481-485) predviđa rokove za obaveštavanje prodavca i ispostavljanje zahteva kako je predviđeno zakonom tj. u slučaju otkrivenih nedostataka u roku od 8 dana i 6 meseci, osim ako se drugačije ne usaglasi za skrivene nedostatke[359].

e. Nema raskida za 'manju' nesaobraznost (član 3 paragraf 6))

Potrošač neće imati pravo na raskid ugovora u slučaju manje nesaobraznosti u Albaniji (član 31 (7) Zakona o zaštiti potrošača), Hrvatskoj (član 410 (3) Zakona o obveznim odnosima), Makedoniji (član 466(3) Zakona o obligacionim odnosima i član 22(2) Zakona o zaštiti potrošača), Crnoj Gori (član 486(3) Zakona o obligacionim odnosima), Srbiji i Bosni i Hercegovini (član 478 i 629 Zakona o obligacionim odnosima).

Zakon o zaštiti potrošača Bosne i Hercegovine ne isključuje raskid u slučaju neznatne nesaobraznosti stoga pruža viši nivo zaštite potrošača.

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[358] U Bosni i Hercegovini ova pretpostavka je transponovana samo u član 539 Nacrta Zakona o obligacionim odnosima od 2010.

[359] U Srbiji, po Nacrtu predloga, trgovac će biti odgovoran prema potrošaču za svaku nesaobraznost koja postoji u vreme kada rizik prelazi na potrošača. Trgovac će biti odgovoran za svaku nesaobraznost koja se pojavi nakon što je rizik prešao na potrošača, ako su uzroci nesaobraznosti postojali pre prelaska rizika. Osim ako se ne dokaže drugačije, svaka nesaobraznost koja postane vidljiva u roku od šest meseci od vremena kada je rizik prešao na potrošača, pretpostavljaće se da je postojala u to vreme osim ako je ta pretpostavka nespojiva sa vrstom robe i **vrstom nesaobraznosti**. Dalje, po Nacrtu predloga, rizik od slučajnog gubitka ili oštećenja robe će preći na potrošača kada on ili neko treće lice osim prevoznika i naznačeno od strane potrošača, stekne materijalni posed nad robom. Rizik neće preći na potrošača ako je on raskinuo ugovor usled nesaobraznosti u isporučenoj robi, ili ako je tražio zamenu robe. Ako potrošač ili neko treće lice osim prevoznika i naznačeno od strane potrošača, nije preduzeo razumne postupke da stekne materijalni posed nad robom, rizik će preći na potrošača u vreme kada je isporuka dogovorena između strana ili, u slučaju da se strane nisu dogovorile o datumu isporuke, trideset dana nakon datuma zaključenja ugovora.

f. Raskid i naknada za period upotrebe

Alineja 15 navodi da zemlje učesnice mogu da predvide da kada potrošač ima pravo na nadoknadu kupovne cene, odbitak može da se načini koji uzima u obzir period u kome je potrošač koristio robu od vremena kada mu je isporučena.

Ova opcija ne postoji u albanskom Zakonu o zaštiti potrošača. Međutim, Građanski zakonik u članu 742. sadrži opštu obavezu prodavca i kupca da vrate ono što su primili za vreme izvršenja ugovora, navodeći da „*U slučaju raskida ugovora, prodavac mora da vrati plaćenu cenu i plati kupcu troškove i plaćanja koja zahteva zakon. Kupac mora da vrati stvar ako nije izgubljena ili uništena kao posledica svojih nedostataka*“, dok član 744. posebno obrađuje pitanje odbitka. U drugoj rečenici, propisan je kriterijum za odbitak: „*Ako umanjena vrednost ili šteta dođe kao rezultat postupka kupca, gornji iznos mora da se umanji za profit koga je kupac ostvario, osim kako je propisano u članu 640*“[360].

U Bosni i Hercegovini, postojanje ove opcije se povlači iz analize efekata raskida ugovora. Naime, na osnovu člana 497. bosansko-hercegovačkog Zakona o obligacionim odnosima raskid ugovora zbog nedostatka stvari će imati isti efekat kao i raskid dvostranih ugovora zbog neispunjenja. Efekti raskida zbog neizvršenja su dati u članu 132. (4) bosansko-hercegovačkog Zakona o obligacionim odnosima koji navodi da „svaka strana duguje drugoj strani nadoknadu za koristi koje je uživala u međuvremenu“ . Isti slučaj je u Hrvatskoj (član 419. (1) u vezi sa članom 368. Zakona o obveznim odnosima), Makedoniji (član 121. u vezi sa članom 485. Zakona o obligacionim odnosima), Crnoj Gori (član 127.(4) u vezi sa članom 505. Zakona o obligacionim odnosima), Srbiji (član 497. Zakona o obligacionim odnosima).

g. Obračun smanjenja cene

Albanski zakon predviđa da potrošač može da zahteva odgovarajuće smanjenje cene ili da ugovor bude raskinut ako potrošač nema pravo ni na popravku ni na zamenu, ili ako prodavac nije izvršio popravku ili zamenu.

U Bosni i Hercegovini, na osnovu člana 498. bosansko-hercegovačkog Zakona o obligacionim odnosima cena će biti smanjena u skladu sa srazmerom vrednosti stvari sa nedostatkom u vreme zaključenja ugovora. Na osnovu tog pristupa, cena će biti smanjena u istom odnosu kao i vrednost robe kako je isporučena u odnosu na vrednost koju bi imala da je bila u skladu sa ugovorom. Isti princip je primenjen u Hrvatskoj (član 420 Zakona o obveznim odnosima) gde dodatno na taj iznos prodavac je u obavezi da plati kamatu za period od plaćanja da refundiranja[361].

Slična odredba postoji u makedonskom Zakonu o obligacionim odnosima (član 486) koji je na određeni način dopunjen članom 49. Zakona o zaštiti potrošača, koji predviđa pravila koja će se primeniti u slučajevima kada je bilo promene u ceni od vremena kupovine do vremena zahteva. Naime, u slučajevima povećanja cene proizvoda revizija cene će biti načinjena, uzimajući u obzir cenu proizvoda u vreme ispostavljanja zahteva, a u slučaju da se cena proizvoda u međuvremenu smanjila, onda će u obzir biti uzeta cena proizvoda u vreme kupovine. Takođe, u crnogorskom Zakonu o obligacionim odnosima smanjenje cene će biti izvršeno u skladu sa odnosom između vrednosti robe bez nedostataka, i vrednosti robe sa nedostacima, u vreme zaključenja ugovora. U Srbiji, to se reguliše i Zakonom o zaštiti potrošača i Zakonom o obligacionim odnosima. Odredbe Zakona o obligacionim odnosima (članovi 498 i 621) su iste kao i u Bosni i Hercegovini, Hrvatskoj, Makedoniji i Crnoj Gori, dok po članu

[360] Član 640. albanskog Građanskog zakonika predviđa nadoknadu štete.
[361] Vrhovni sud Republike Hrvatske (VSRH) Rev 2458/90 od 13.02.1991.

35 Zakona o zaštiti potrošača, to može biti iznos maloprodajne cene takvog proizvoda na dan refundiranja; a u slučaju usluga, povraćaj iznosa koji je plaćen, ili smanjenje cene u srazmeri sa nedostatkom u usluzi koja je pružena. Nema posebne odredbe Zakona o zaštiti potrošača koja se odnosi na obračun smanjenja cene – nasuprot vraćanju maloprodajne cene proizvoda.

3. Garancije

Odredbe o garancijama u članu 6. Direktive zahtevaju da garancije moraju biti pravno obavezujuće, da su date određene informacije, i da garancije ostaju obavezujuće čak i kada pravila iz ovog člana nisu ispunjena.

U albanskom zakonodavstvu (član 32. Zakona o zaštiti potrošača) nijedna ugovorna izjava o garanciji neće lišiti potrošača od prava koje ima po članu 30., 31. i 32. Zakona o zaštiti potrošača. Zakon predviđa više pravila koja se odnose na garanciju kao što su: da je prodavac dužan popuniti garanciju i dati je potrošaču; garancija će biti data potrošaču na albanskom jeziku, napisana na običnom i razumljivom jeziku, i sadržavaće potrebne podatke – naziv robe i usluga, ime i adresa davaoca garancije, rok i teritorijalni domet garancije.

U Bosni i Hercegovini, Zakon o zaštiti potrošača reguliše „garancije za proizvode ili usluge“ u svojim članovima 25-27 bez direktnog pozivanja na sadržaj odredbi člana 6 Direktive 99/44. Naime, po članu 250 Zakona o zaštiti potrošača prodavac je odgovoran za materijalne nedostatke robe koji postoje u vreme isporuke, bez obzira da li on zna za tu činjenicu. Članovi 26 i 27 predviđaju zaštitu potrošača za „tehnički složene proizvode“, davanjem garantnog roka od tri godine za neke uređaje i pet godina za druge tehnički složene proizvode i postavljaju pravila za popravku takvih proizvoda, rezervne delove, i licencirani servis. Bosansko-hercegovački Zakon o obligacionim odnosima sadrži pravila o garancijama za „tehničku robu“, navodeći u članu 501(2) da se „ovim pravilima ne dira u pravila o odgovornosti prodavca za nedostatke stvari“. Međutim, bosansko-hercegovački Zakon o obligacionim odnosima ne predviđa da garancija ne utiče na ta pravila, kako je propisano u članu 6 (2) Direktive 99/44. Ostale odredbe član 6 Direktive 99/44 takođe nisu implementirane u bosansko-hercegovačkom Zakonu o obligacionim odnosima. Članovi 501-507 predviđaju pravo potrošača na ‘besplatnu’ popravku neispravnog proizvoda, sve do restitucije, smanjenja cene, zamene i raskida ugovora u toku garantnog roka.

Član 5 (5) hrvatskog Zakona o zaštiti potrošača predviđa da ako trgovac ili proizvođač da jamstvo za ispravnost prodatog proizvoda dužan je ispuniti obveze propisane odredbama Zakona o obveznim odnosima o jamstvu za ispravnost prodane stvari kao i obveze preuzete jamstvom. Uslov iz člana 6. Direktive 99/44 je ispravno transponovan u član 423. Zakona o obveznim odnosima. Obavezujuća priroda garancije sledi iz člana 423 (1) i (2) Zakona o obveznim odnosima[362]. Temeljem člana 423 (3) Zakona o obveznim odnosima „jamstvo obvezuje pod uvjetima pod kojima je dano bez obzira na oblik u kojem je dano (jamstveni list, usmena izjava, popratno reklamiranje i sl.), ali je kupac ovlašten zahtijevati da mu jamstvo bude izdano u pisanom obliku ili u nekom drugom, njemu dostupnom, trajnom mediju“. Od-

[362] Član 423 (1) Zakona o obveznim odnosima: „Ako proizvođač jamči za ispravnost stvari u tijeku određenog vremena, računajući od njezine predaje kupcu, kupac može, ako stvar nije ispravna, zahtijevati kako od prodavatelja tako i od proizvođača, da stvar popravi u razumnom roku ili, ako to ne učini, da mu umjesto nje preda ispravnu stvar“. Član 423 (2) Zakona o obveznim odnosima: „Ako prodavatelj jamči za ispravnost stvari u tijeku određenog vremena, računajući od njezine predaje kupcu, kupac može, ako stvar nije ispravna, zahtijevati od prodavatelja da stvar popravi u razumnom roku ili, ako to ne učini, da mu umjesto nje preda ispravnu stvar.“

redbe o garanciji ne isključuju primjenu pravila o odgovornosti prodavca za nedostatke stvari (član 423 (4) Zakona o obveznim odnosima). U jamstvu moraju biti navedena prava iz jamstva koja pripadaju kupcu, te jasno navedeno da jamstvo ne utiče na ostala prava koja pripadaju kupcu po drugim pravnim osnovama (član 423 (5) Zakona o obveznim odnosima). Prema članu 423 (6) Zakona o obveznim odnosima „jamstvo mora sadržavati pojedinosti koje su potrebne kupcu za ostvarivanje njegovih prava, a posebno trajanje jamstva i teritorijalno područje važenja, te ime, odnosno naziv i adresu osobe koja je izdala jamstvo". I konačno, član 423(7) Zakona o obveznim odnosima predviđa da neispunjenje obveza iz člana 423 (5) i (6) Zakona o obveznim odnosima ne utječe na valjanost jamstva. Opcija opisana u članu 6 (4) Direktive 99/44 nije upotrebljena.

U Makedoniji, postojeće odredbe o garanciji su veoma slične onima datim u Direktivi. Zakon o obligacionim odnosima predviđa, generalno, izdavanje garancija za pravilno funkcionisanje takozvane tehničke robe, pravila kada prodavac garantuje, koji su rokovi i koja su prava kupca (član 489-495). Po pitanju rokova, Zakon o obligacionim odnosima navodi da je minimalan garantni rok jedna godina a maksimalan rok za popravku robe sa nedostacima 45 dana. Zakon o zaštiti potrošača, u članu 22., reguliše detaljno pitanje garancija. Trgovac će biti u obavezi, u skladu sa tehničkim propisima koji navode proizvode za koje proizvođač, uvoznik, ili predstavnik strane firme mora da izda garanciju za kvalitet ili pravilno funkcionisanje proizvoda, dokument za način upotrebe proizvoda, da obezbedi servis za održavanje i popravku i snabdevanje rezervnim delovima u garantnom roku. Trgovac je u obavezi barem u roku od pet godina od datuma proizvodnje proizvoda ali ne manje od dve godine od roka trajanja garancije proizvoda, da obezbedi rezervne delove. U dogovoru sa potrošačem proizvod može da se servisira najviše tri puta u garantnom roku i ako proizvod nije popravljen, potrošač ima pravo da traži od trgovca da zameni proizvod drugim proizvodom iste vrste koji pravilno funkcioniše i ili da vrati iznos plaćen za kupljeni proizvod. Kao u Zakonu o obligacionim odnosima (član 466(3)), potrošač nema pravo da traži zamenu proizvoda ili vraćanje plaćenog iznosa ako je nedostatak koji se servisira minimalan ili ne utiče na kvalitet i učinak osnovnih funkcija proizvoda. U odnosu na odredbu člana 6 (1) Direktive, Zakon o zaštiti potrošača predviđa da je proizvođač u obavezi da poštuje obaveze iz potvrde o garanciji. Po pitanju zahteva o sadržaju i dejstvu garancije definisane u članu 6 (2) Direktive, Zakon o zaštiti potrošača predviđa da garancija treba da uključi: firmu ili poslovno ime i sedište davaoca garancije; podatke o identifikaciji proizvoda; izjavu o garanciji i uslovima garancije; rok trajanja garancije; rok u kome je trgovac obavezan da postupi na zahtev korisnika garancije i da otkloni nedostatke i kvarove na proizvodu; firmu ili poslovno ime i sedište trgovačke kompanije ili drugog pravnog ili fizičkog lica koje je izvršilo prodaju na malo proizvoda, datum prodaje, pečat i potpis ovlašćenog službenika i izjavu da potrošač ima zakonska prava koja proističu iz nacionalnog zakonodavstva koje reguliše prodaju proizvoda, i da na ta prava garancija neće uticati. Po pitanju zahteva člana 6(3) i člana 6(4) Direktive, Zakonom o zaštiti potrošača je predviđeno da sva dokumentacija koja se odnosi na funkcionisanje proizvoda treba da bude napisana jasno i čitljivo, na makedonskom jeziku i ćiriličnom pismu, što ne isključuje mogućnost dodatne istovremene upotrebe drugih jezika, kao i znakova lako razumljivih za potrošača. Članom 489.(5) Zakona o obligacionim odnosima, neizvršenje obaveza koje se odnose na garanciju ne utiče na važenje garancije što je u skladu sa članom 6(5) Direktive.

Odredbe o garanciji kako je dato u Direktivi, generalno su implementirane u Crnoj Gori u vrlo sličnoj formi. Međutim, crnogorski Zakon o zaštiti potrošača je takođe otišao izvan nekih zahteva Direktive posebno u informacionom sadržaju garancije jer je proširio spisak (npr. podaci za identifikaciju proizvoda i podaci o kupovini; datum isporuke proizvoda potrošaču; prava potrošača na osnovu garancije; ostali podaci u skladu sa zakonom kao i navodi iz

reklamnog materijala). Zahtev za uvođenje pozivanja na zakonska prava potrošača nedostaje samo na prvi pogled, ali tumačenje člana 20, paragraf 1, tačka 11) se odnosi na slučaj takozvane „tehničke robe“ a član 509 paragraf 3 Zakona o obligacionim odnosima sadrži odredbu identičnu Direktivi. Što se tiče uslova da garancije moraju da budu pravno obavezujuće, Zakon o zaštiti potrošača sadrži istu odredbu, mada sa drugačijim tekstom (član 19 (2)). Isti zakon definiše potvrdu o garanciji kao dokument koji prati robu i sadrži podatke propisane zakonom što jasno znači da mora da bude u pisanoj formi, bez obzira da li je obavezna ili dobrovoljna (član 19(1); u tom stepenu član 82. Zakona o zaštiti potrošača je takođe od značaja. Jezik koji je u zvaničnoj upotrebi u Crnoj Gori je obavezan, dok druge forme trajnih medijuma nisu date kao opcija. Dalje, potrošač će imati prava koja proističu iz garancije bez obzira da li je trgovac isporučio potvrdu o garanciji u pisanoj formi, u kom slučaju teret dokazivanja da je garancija isporučena je na trgovcu (član 19(3)). Po pitanju pravnih sredstava pod garancijom, hijerarhija potrošačevih pravnih sredstava (član 21 Zakona o zaštiti potrošača u vezi sa članom 510 Zakona o obligacionim odnosima) odgovara onoj u Direktivi. Održavanje ugovora je prva opcija (popravka robe), i samo tad kada popravka nije izvršena u razumnom vremenu raskid ugovora postaje opcija. Međutim, potrošač ne može da upražnjava svoja prava ako je nesaobraznost proizvoda izazvana greškom potrošača ili ako ju je ispravljalo neovlašćeno lice (član 22(2) Zakona o zaštiti potrošača).

Garancije regulišu Zakon o zaštiti potrošača i Zakon o obligacionim odnosima i u Srbiji takođe. Naime, član 21 Zakona o zaštiti potrošača se odnosi na zakon o ugovorima u odnosu na komercijalne garancije („Davaoc garancije će biti u obavezi da obezbedi servisiranje proizvoda potrošaču, u skladu sa zakonom o ugovoru.“). Po Zakonu o obligacionim odnosima (član 501 et seq) ako prodavac tehničke robe preda kupcu pisanu garanciju koju je izdao proizvođač za pravilno funkcionisanje u okviru određenog roka, računajući od trenutka isporuke robe kupcu, kupac može, ako roba ne funkcioniše ispravno, da traži i od proizvođača i od prodavca da poprave robu u razumnom roku, ili, bez toga, da je zameni onom koja funkcioniše ispravno. Ta pravila su, bez štete po odgovornost prodavca, za nesaobraznost robe. Kupac može da traži bilo od prodavca bilo od proizvođača da popravi ili zameni tehničku robu u okviru garantnog roka, bez obzira na trenutak kada se pojavilo neispravno funkcionisanje. On će imati pravo na nadoknadu zbog činjenice da nije bio u mogućnosti da upotrebljava robu od trenutka kada je tražio popravku ili zamenu pa do njenog izvršenja. Ako prodavac ne izvrši popravku ili zamenu robe u nekom razumnom roku, kupac može da raskine ugovor ili smanji cenu i traži odštetu. Prava kupca u odnosu na proizvođača prestaju jednu godinu nakon dana kada je tražio da prodavac izvrši popravku ili zamenu robe.

4. Pravo na nadoknadu

Po albanskom Zakonu o zaštiti potrošača trajanje zakonske garancije će biti automatski produženo nakon popravke radi pokrivanja budućeg ponovnog pojavljivanja istog nedostatka. U tom slučaju, potrošač će imati pravo za traži zamenu umesto druge popravke (član 31 (5) Zakona o zaštiti potrošača). Rok za žalbu i popravku se dodaje na garantni rok (član 31(8) Zakona o zaštiti potrošača).

U Bosni i Hercegovini, Hrvatskoj, Makedoniji, Crnoj Gori i Srbiji zahtevi iz člana 4. Direktive 99/44 su ispunjeni pod odredbama Zakona o obligacionim odnosima za ugovornu i vanugovornu odgovornost za štetu.

5. Prinudna priroda odredbi

Albanski Zakon o zaštiti potrošača (član 31(1, 2)) predviđa da je prodavac u obavezi da prihvati reklamacije za robu u svakom mestu gde se njegova aktivnost obavlja ili gde je zastu-

pljena, osim kada je drugo lice ovlašćeno za popravku robe. Prodavac će odmah ili u roku od tri radna dana odlučiti o prihvatanju reklamacije. Nesaobraznost sa odredbama o skladnosti sa ugovorom se smatra administrativnim prestupom i sankcioniše se novčanom kaznom od 100 000 Leka (oko 730 Evra)[363].

Član 7(1) Direktive 99/44 je implementiran u veoma sličnoj formi u Zakonima o obligacionim odnosima u Bosni i Hercegovini (član 486(2) Zakona o obligacionom odnosima), Hrvatskoj (član 408(2) Zakona o obveznim odnosima), Makedoniji (član 474 Zakona o obligacionim odnosima) i Srbiji (član 489 Zakona o obligacionim odnosima) koji predviđaju da će odredba ugovora o ograničenju ili isključenju odgovornosti za nedostatke stvari biti ništavna ako je prodavac bio svestan nedostatka i nije obavestio kupca o tome, i takođe kada je prodavac nametnuo takvu odredbu koristeći svoj monopolistički položaj. Odredbe u vezi sa time postoje u zakonima o zaštiti potrošača ovih zemalja takođe. Naime, zakonodavstvo o zaštiti potrošača predviđa da potrošač ne može da se odrekne, niti da bude lišen datih prava (član 2. Zakona o zaštiti potrošača Bosne i Hercegovine, član 6. (1) hrvatskog Zakona o zaštiti potrošača, član 65. makedonskog Zakona o zaštiti potrošača, i Nacrt predloga u Srbiji). Crnogorski Zakon o zaštiti potrošača predviđa, u okviru opšte odredbe date pod „opštim principima za upražnjavanje prava potrošača“ (član 5(1)), da potrošač ne može da se odrekne prava datih u tom Zakonu, tako da će svaki uslov ugovora koji isključuje ili ograničava prava potrošača biti ništavan i nevažeći.

Član 7(2) Direktive 99/44 koji se odnosi na konflikt zakona biće obrađen u Delu 3 C (Međunarodno privatno pravo u potrošačkim ugovorima).

IV. Upotreba odredbe o minimalnoj harmonizaciji (član 8 paragraf (2))

1. Viši nivo zaštite potrošača

Kada se posmatra odredba člana 8 Direktive i nacionalno zakonodavstvo posmatranih zemalja može se zaključiti da su se sve one oslonile na njega u cilju obezbeđenja višeg nivoa zaštite potrošača, ili u svojim zakonima o zaštiti potrošača, ili u vezi tih zakona sa zakonima o obligacionim odnosima.

a. Područje primene

Proširenja opsega zaštite koja pruža nacionalno zakonodavstvo mogu se videti u različitim aspektima. Albanski Zakon o zaštiti potrošača (član 33.) predviđa takođe i obaveze posle prodaje: „Proizvođači i prodavci moraju da obezbede rezervne delove potrebne za održavanje i popravku proizvoda u okviru garantnog roka, bilo zakonski ili po ugovoru“. U Bosni i Hercegovini Zakon o zaštiti potrošača može da dopusti tumačenje da nepokretnosti spadaju u područje primene njegovih pravila po pitanju materijalnih nedostataka dok Zakon o obligacionim odnosima predviđa viši nivo zaštite potrošača po pitanju njegovog područja primene, pošto se primenjuje na ugovore B2C, B2B, i P2P. Pored toga činjenica da ograničena definicija „robe široke potrošnje“ u članu 1(2)(b) Direktive 99/44 nije transponovana, vodi ka posledici da će odgovarajuće odredbe biti primenjive takođe na sve druge predmete prodaje (na primer usluge i nekretnine). Isto se odnosi na Hrvatsku, Makedoniju, Crnu Goru i Srbiju. Dalje, u Hrvatskoj nema izričitog isključenja specifičnih isključenja navedenih u članu 1(2)(b) Direktive 99/44, naime glede vode i gasa kad nisu stavljeni na prodaju u točno određenom vo-

[363] Videti član 57/2b Zakona o zaštiti potrošača.

lumenu ili količini, dok u Crnoj Gori Zakon o zaštiti potrošača osim definicije „potrošača“ uključuje definiciju grupe potrošača.

aa. Obaveza proizvođača

U Albaniji obaveza proizvođača proističe iz odredbe člana 33. Zakona o zaštiti potrošača koja predviđa da proizvođači i prodavci moraju da obezbede rezervne delove potrebne za održavanje i popravku proizvoda u garantnom roku, bilo zakonski ili po ugovoru.

Zakonodavstvo u Bosni i Hercegovini (član 26 i 27 Zakona o zaštiti potrošača, član 501–507 Zakona o obligacionim odnosima), Hrvatskoj (član 401 (3) i članovi 423–424 Zakona o obveznim odnosima) i Makedoniji (član 489-490 Zakona o obligacionim odnosima i član 22 Zakona o zaštiti potrošača) daje prava potrošačima naspram prodavca i proizvođača po pitanju garancije (izdate kao garantni list).

U Crnoj Gori, po Zakonu o zaštiti potrošača, samo je trgovac odgovoran za nesaobraznost robe, osim ako drugačije nije propisano zakonom ili potrošačkim ugovorom, dok po pitanju garancije, opšte pravilo Zakona o zaštiti potrošača je da „davaoc garancije“ može da bude proizvođač, distributer, ili trgovac gde će isti biti u obavezi da, u skladu sa zakonom i tehničkim propisima (obavezne garancije), ispuni obaveze date u garanciji. Ista situacija je i u Srbiji (član 501 et seq. Zakona o obligacionim odnosima, član 21 Zakona o zaštiti potrošača).

b. Zahtev saobraznosti

Po pitanju zahteva Direktive za saobraznosti treba zaključiti da su ga sve zemlje transponovale sa određenom varijacijom.

Zakon o zaštiti potrošača Albanije (član 29 (3)) daje definiciju saobraznosti proizvoda.

U Bosni i Hercegovini, član 479 (4) Zakona o obligacionim odnosima isključuje uzorke koji su pokazani samo radi informacije (koji nisu isključeni u članu 2(2) Direktive 99/44), dok član 479(2) Zakona o obligacionim odnosima dodatno pruža zaštitu u slučajevima kada je prodavac trebao da zna o određenoj svrsi za koju kupac namerava da koristi robu (član 2(2)(b) Direktive 99/44 obuhvata samo određene svrhe robe o kojima su se saglasili potrošač i prodavac). Zakon o zaštiti potrošača nije transponovao redukovanje na nesaobraznosti koje nisu neznatne.

Hrvatsko zakonodavstvo daje veći nivo zaštite potrošača u članu 401 (1) tačka 2) Zakona o obveznim odnosima navodeći da će nedostatak postojati ako stvar nema potrebna svojstva za posebnu upotrebu za koju je kupac nabavlja, a koja je „bila poznata prodavatelju ili mu je morala biti poznata“. Dalja zaštita je data kroz transponovanje odredbe Direktive o robi koja treba da se montira (član 2 (5) Direktive 99/44) na listi kriterijuma u članu 401(6) i (7) Zakona o obveznim odnosima.

U Makedoniji određeno proširenje može da se nađe određivanjem obaveze za trgovca da proda ili obezbedi potrošaču proizvode ili usluge takvog kvaliteta i kvantiteta koji je u potpunosti u saglasnosti sa utvrđenim tehničkim zahtevima i propisima, sa propisanim standardima, normama i uslovima datim u ugovoru, navedenim uslovima, kao i informacije date od strane trgovca po pitanju proizvoda ili usluge (član 36 Zakona o zaštiti potrošača) i pravo na zamenu namirnica. Pored toga, pravilo koje postoji u Zakonu o obligacionim odnosima da će prodavac biti odgovoran za nedostatke koji su bili očigledni ali je prodavac tvrdio da nema nedostataka, predstavlja viši nivo zaštite. Obaveza predviđena za trgovca da potrošaču obezbedi određenu dokumentaciju (priručnici, uputstva itd) kao i pravila o sadržaju potvrde o garanciji, i pravila o njihovoj formi (uslovi u vezi načina na koji treba da budu napisane i jezika) predstavljaju određeno proširenje.

Crnogorski Zakon o zaštiti potrošača, zajedno sa uslovima koji se nalaze u opštem zakonodavstvu o prodaji, dodao je nove faktore za zahtev za saobraznost, kao što su: tačne mere

ili količina robe; odgovarajuća ambalaža u skladu sa vrstom i karakteristikama robe; propisan ili dogovoren kvalitet, a ako kvalitet nije propisan ili dogovoren – uobičajen kvalitet roba i usluga; način za utvrđivanje ili kalkulaciju cene. Takođe, trgovac mora da preda potrošaču propisana dokumenta (potvrdu, tehničko uputstvo, uputstvo za korišćenje, itd.), kao i dokumenta koja je dao proizvođač, u skladu sa tehničkim i drugim propisima. U odnosu na ono što je prethodno rečeno, u slučaju tehničkog priručnika, treba napomenuti da je zahtev člana 82. Zakona o zaštiti potrošača da dokumenta o proizvodu moraju biti napisana na jeziku u zvaničnoj upotrebi u Crnoj Gori, što ako ne bude urađeno može da bude protumačeno kao nesaobraznost. Potonje je posebno tačno u slučaju uputstva za instaliranje i nekorektne instalacije koja iz toga proistekne.

Pravima potrošača takođe pripada pravilo da će trgovac biti odgovoran za nedostatke, koju su mogli biti lako uočeni od strane kupca, ako je izjavio da je roba bez nedostataka ili da ima određene osobine ili karakteristike (član 488(3) Zakona o obligacionim odnosima).

Srpski Zakon o zaštiti potrošača ne sadrži definiciju o saobraznosti, dok član 479 Zakona o obligacionim odnosima definiše materijalni nedostatak u robi (a ne saobraznost robe sa ugovorom) i u svakom slučaju, Zakon o obligacionim odnosima ne uzima u obzir javne izjave[364].

c. Pravna sredstva

Nacionalno zakonodavstvo proučavanih zemalja predviđa ista pravna sredstva kao Direktiva.

U Albaniji potrošač može da izabere između popravke, zamene, odgovarajućeg smanjenja cene ili raskida ugovora.

Član 18. Zakona o zaštiti potrošača Bosne i Hercegovine predviđa slobodu izbora potrošača između pravnih sredstava.

U Hrvatskoj Zakon o obveznim odnosima utvrđuje određenu hijerarhiju pravnih sredstava, međutim, Zakon o zaštiti potrošača kao *lex specialis* predviđa da potrošač ima izbor između pravnih sredstava temeljem odredaba Zakona o obveznim odnosima koje se odnose na odgovornost za materijalne nedostatke stvari. Zakon o obveznim odnosima ide opet izvan odredbe Direktive 99/44 dajući kupcu pravo na popravljanje štete prema opštim pravilima o odgovornosti za štetu uključujući štetu izazvanu materijalnim nedostatkom stvari na njegovoj drugoj imovini (član 410(2) Zakona o obveznim odnosima). Situacija je ista u Makedoniji i Srbiji[365].

U Crnoj Gori sva četiri pravna sredstva su na raspolaganju po vlastitom izboru potrošača i odmah po pojavljivanju nesaobraznosti. Potrošač ima takođe pravo da traži odštetu, i dodatno (i nezavisno od prethodnog).

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[364] Nacrt predloga nudi viši nivo zaštite potrošača, jer propisuje da će roba biti u saglasnosti sa ugovorom ako je podesna za određenu svrhu za koju je potrošač traži i koja je poznata ili je morala biti poznata trgovcu u vreme formiranja ugovora. Ovo pravilo je nešto šire od zahteva Direktive da je roba podesna za određenu svrhu za koju je potrošač traži i koju je obznanio prodavcu u vreme formiranja ugovora i koju je prodavac prihvatio. Pored toga, Nacrt predloga sadrži pravilo o nepravilnom instaliranju robe.

[365] Nacrt predloga daje potrošaču punu slobodu izbora između pravnih sredstava. Potrošač ima pravo da traži od trgovca da ispravi nesaobraznost bilo popravkom ili zamenom, u skladu sa izborom potrošača. Ako se trgovac ogluši o zahtev potrošača da ispravi nesaobraznost popravkom ili zamenom, u skladu sa izborom potrošača, potrošač ima pravo da popravi ili kupi istu robu na drugom mestu, o trošku trgovca. Trgovac je u obavezi da bez odlaganja nadoknadi troškove popravke ili kupovine za zamenu na drugom mestu.

d. Rokovi

U Albaniji prodavac će se smatrati odgovornim kada nesaobraznost postane vidljiva u roku od dve godine od isporuke robe.

U Bosni i Hercegovini potrošač ima pravo da se pozove na nedostatak u roku od šest meseci od isporuke, osim kada je prodavac znao ili nije mogao da ne zna za taj nedostatak, kada to pravo ne ističe nakon 6 meseci.

U Hrvatskoj je implementiran dvogodišnji period (član 404 (2) Zakona o obveznim odnosima i početna tačka za opšti rok trajanja odgovornosti je trenutak odašiljanja obavesti prodavcu o nesaobraznosti (član 422 (1) Zakona o obveznim odnosima). Međutim, kupac ne gubi pravo da se pozove na nedostatak čak i kada se taj nedostatak pojavi dve godine od isporuke predmeta, ako je taj nedostatak bio poznat prodavcu ili mu nije mogao ostati nepoznat (član 407 Zakona o obveznim odnosima). Zakon o obveznim odnosima suspenduje taj dvogodišnji period dok se roba popravlja ili zamenjuje (član 405. Zakona o obveznim odnosima).

Navođenjem roka za davanje obaveštenja i rokova za popravku i/ili zamenu robe kao obaveze trgovca makedonsko zakonodavstvo na određeni način pruža viši nivo zaštite potrošača.

U Crnoj Gori, opšte pravilo je da su prava dostupna pod uslovom da potrošač uloži reklamaciju odmah nakon što postane svestan nesaobraznosti (nedostatka) proizvoda a najkasnije šest meseci nakon preuzimanja proizvoda. Zakon o obligacionim odnosima dalje uređuje ovaj predmet i predviđa da prava kupca koji blagovremeno obavesti prodavca o postojanju nedostatka će biti izgubljena nakon isteka jedne godine, računajući od dana prenošenja obaveštenja prodavcu. Taj rok može da se produži samo u slučaju da je kupac bio sprečen od korišćenja svojih prava zbog prodavčeve obmane. U odnosu na suspenziju rokova u slučaju popravke, zamene i sličnog Zakon o obligacionim odnosima (član 491) predviđa da će predmetni rokovi počinjati od trenutka isporuke popravljene robe, isporuke druge robe, zamene rezervnih delova, i slično.

Slično tome, u Srbiji Zakon o zaštiti potrošača propisuje rok od šest meseci od dana kupovine. Zakon o obligacionim odnosima sadrži veoma kratak rok od osam dana od otkrića da kupac obavesti prodavca o otkrivenim nedostacima; ako se ne iskoristi to pravo je izgubljeno. Ako kupac na vreme obavesti prodavca o postojećim nedostacima u robi, njegova prava ističu jednu godinu nakon obaveštenja, osim kada prodavac prevari kupca da ne koristi ta prava[366].

e. Garancije

Nacionalno zakonodavstvo po pitanju garancija u zemljama učesnicama je približno Direktivi i u nekim slučajevima ide ispred njenih zahteva. Hrvatski Zakon o obveznim odnosima (član 425.) predviđa produženje garantnog roka za trajanje popravke tj. njeno obnavljanje u slučaju zamene ili bitne popravke. Ista situacija postoji u makedonskom Zakonu o obligacionim odnosima (član 491), gde je dodatno garantni rok postavljen na minimum jednu godinu (član 490). Princip produženja/obnavljanja garantnog roka postoji takođe u Crnoj Gori (član 511(2)) gde će pored toga potrošač imati prava koja proističu iz garancije bez obzira da li je trgovac isporučio potvrdu o garanciji u pisanoj formi, u kom slučaju je teret dokazivanja da je garancija isporučena na trgovcu (član 19(3) Zakona o zaštiti potrošača); potrošač će imati pravo na nadoknadu štete za period u kome nije mogao da upotrebljava robu od trenutka

[366] Nacrt predloga određuje dvogodišnji period koji počinje od prelaska rizika; i ne propisuje da potrošač mora da obavesti prodavca o nesaobraznosti u roku od dva meseca od datuma kada je otkrio tu nesaobraznost kako bi imao koristi od svojih prava.

traženja popravke ili zamene do njihovog izvršenja; ako, usled neispravnog funkcionisanja roba bude zamenjena ili potpuno popravljena, garantni rok će početi da teče ispočetka od dana zamene, ili vraćanja popravljenog predmeta (član 510(2) Zakona o obligacionim odnosima).

Po članu 483 srpskog Zakona o obligacionim odnosima, ako, usled nedostatka, roba bude popravljena, druga roba bude isporučena, delovi budu zamenjeni, i slično, rok počinje da teče od trenutka isporuke popravljene robe, isporuke druge robe, zamene rezervnih delova, i slično[367].

V. Opšti komentari o adekvatnosti primene Direktive

1. Teškoće za vreme procesa transponovanja

Analiza pokazuje sledeću situaciju:

• Albanski zakonodavac je napravio doslovno transponovanje Direktive, izostavljajući neke odredbe.

• U Bosni i Hercegovini glavna primena Direktive je planirana za reformu Zakona o obligacionim odnosima koja tek treba da se sprovede. Kako je gore opisano, Zakon o zaštiti potrošača je samo delimično transponovao odredbe iz Direktive 99/44, oslanjajući se na zaštitu datu u bosansko-hercegovačkom Zakonu o obligacionim odnosima. Reforma već postojećih odredbi u bosansko-hercegovačkom Zakonu o obligacionim odnosima bi bila mnogo lakša nego usvajanja potpuno novih propisa u Zakonu o zaštiti potrošača. Usvajanjem Zakona o obligacionim odnosima 2010 većina problema koji su se desili u procesu transponovanja bila bi rešena.

• U Hrvatskoj nije bilo posebnih teškoća u transponovanju Direktive 99/44 u Zakon o obveznim odnosima. Glavni izazov je bio kako da se uklope već postojeća pravila o prodaji sa određenim pravilima iz Direktive 99/44[368].

• Makedonski zakonodavac se susreo sa teškoćama u pravljenju razlike između odgovornosti za proizvode sa nedostacima i odgovornosti za štete od neispravnih proizvoda tj. u transponovanju Direktive 99/44 i Direktive 85/374/EEC, izmijenjene Direktivom 1999/34/EC, u Zakonu o zaštiti potrošača, jer su obe vrste odgovornosti regulisane u istom poglavlju Zakona bez jasne razlike između te dve vrste odgovornosti. Zakon o zaštiti potrošača ne sledi pravilo utvrđeno Zakonom o obligacionim odnosima o hijerarhiji pravnih sredstava i ne obuhvata ispitivanje srazmernosti koje postoji u Direktivi.

• U Crnoj Gori zakonodavac nije transponovao ispitivanje srazmernosti, što odgovara uređivanju pravnih sredstava bez hijerarhije.

• Srpski zakonodavac je dao nacrt potpuno novih odredbi i stavio ih u poseban zakon o zaštiti potrošača; međutim, treba definisati odnos između odredbi građanskog kodeksa i odredbi posebnog zakona o zaštiti potrošača[369].

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[367] Po Nacrtu predloga, u slučaju manje popravke, garantni rok će se produžiti za vreme u kome je potrošač bio sprečen da koristi robu. U slučaju veće popravke ili zamene, garantni rok će početi da teče ispočetka od vremena kada potrošač ili neko treće lice osim prevoznika i koje je naznačio potrošač, stekne materijalni posed nad zamenjenom robom.

[368] *Petrić Silvija,* Odgovornost za materijalne nedostatke stvari prema novom Zakonu o obveznim, Zbornik PFR, Vol. 27, br. 1, 2006, str. 98.

[369] Nacrt predloga sadrži sledeću normu: „U slučaju konflikta ovog zakona sa drugim zakonima, ovaj zakon (to jest: budući zakon o zaštiti potrošača) ima preimućstvo."

2. Praznine u Direktivi

Analiza same Direktive je otkrila da je Direktiva 99/44 ostavila određen broj pitanja bez odgovora i njene eventualne dopune bi trebalo da regulišu:

• Definiciju 'robe', a posebno status softvera i ostalih digitalnih proizvoda po pitanju definicije;

• Pojašnjenje kriterijuma srazmernosti u Direktivi;

• Pregled robe;

• Rokove za obaveštenje o vidljivim i skrivenim nedostacima;

• Garanciju za obezbeđivanje rezervnih delova i usluga posle prodaje (i u garantnom i u vangarantnom roku) takođe treba navesti;

• Uslove pod kojima potrošač može da koristi pravna sredstva;

• Dopunsku odgovornost proizvođača;

• Pitanje obavezne garancije proizvođača.

VI. Kratak pregled

Pre transponovanja Direktive 99/44 nacionalni zakoni zemalja učesnica su sadržavali odredbe u okviru svojih Zakona o obligacionim odnosima/Građanskog zakonika koje regulišu prodaju robe, koji su bili primenjivi na sve vrste ugovora a ne samo na potrošačke ugovore. Sve zemlje učesnice su barem delimično transponovale odredbe Direktive 99/44 u njihove Zakone o zaštiti potrošača, dok su samo neke od njih, dodatno ili većinski, transponovale Direktivu u njihov opšte primenjivi Zakon o obligacionim odnosima (Makedonija, Hrvatska, Crna Gora). Odredbe Zakona o obligacionim odnosima zemalja učesnica, uključujući one koje se odnose na odgovornost za saobraznost sa ugovorom, odnose se na transakcije B2B, B2C i P2P. Dalje, one sadrže posebne odredbe o odgovornosti isporučioca za saobraznost pruženih usluga sa ugovorom o pružanju usluga. Transponovanje Direktive 99/44 u hrvatski Zakon o obveznim odnosima takođe je za rezultat imalo stvaranje nekih posebnih pravila koji su primenjivi samo na potrošačke transakcije. Nijedna od odredbi zemalja učesnica ne sadrži definiciju robe široke potrošnje koja odgovara članu 1(2)(b) Direktive 99/44. Zemlje učesnice daju definiciju prodaje samo u okviru njihovih opšte primenjivih Zakona o obligacionim odnosima, uz skoro istu formulaciju da je po ugovoru o prodaji prodavac u obavezi da kupcu preda prodanu stvar tako da kupac na njoj stekne pravo vlasništva, dok je kupac u obavezi da prodavcu plati cenu. Albanija i Srbija su transponovale član 2(1) Direktive 99/44 navodeći da prodavac mora da isporuči robu potrošaču koja je u saglasnosti sa ugovorom o prodaji. U drugim zemljama učesnicama, uslov za isporuku usaglašene robe proističe iz odgovornosti trgovca za materijalne nedostatke (Bosna i Hercegovina, Hrvatska) ili opšte odredbe o izvršenju obaveza kako je dogovoreno (Makedonija, Crna Gora). Albanija je jedina zemlja učesnica koja u svom Zakonu o zaštiti potrošača pozitivno definiše kriterijume za pretpostavku saobraznosti isporučene robe sa ugovorom. Zakon o obligacionim odnosima svih drugih zemalja učesnica sadrži spisak slučajeva kada materijalni nedostaci postoje a nisu propisani kao zakonske pretpostavke (Bosna i Hercegovina, Hrvatska, Makedonija, Crna Gora i Srbija), nasuprot modelu člana 2(2) Direktive 99/44, koji definiše kriterijume za saobraznost robe sa ugovorom. Albanija je doslovno transponovala član 2(3) Direktive 99/44 u svoj Zakon o zaštiti potrošača, navodeći da se neće smatrati neusaglašenošću u svrhe ovog člana ako je, u vreme kada je ugovor bio zaključen potrošač znao ili razumno nije mogao ne znati za ovu nesaobraznost, ili ako nesaobraznost vodi poreklo iz materijala koga je nabavio potrošač. U svim ostalim zemljama učesnicama, nepromenjena pravila sa zajedničkim poreklom iz jugoslovenskog Zakona o obligacionim odnosima iz 1978. još uvek se primenjuju, gde prodavac nije od-

govoran za nedostatke ako su oni bili poznati kupcu u trenutku zaključivanja ugovora ili ako je bilo nemoguće da oni ostanu njemu nepoznati. Nacionalno zakonodavstvo svih zemalja učesnica predviđa pravna sredstva koja su na raspolaganju potrošačima kada postoji nesaobraznost robe, kako je dato u članu 3 Direktive 99/44. Ona mogu da se nađu u Zakonu o zaštiti potrošača ili u Zakonu o obligacionim odnosima, ili u oba, sa određenim izmenama. Što se tiče izbora potrošača između pravnih sredstava, nacionalno zakonodavstvo u oblasti zaštite potrošača predviđa slobodu izbora između tih sredstava, sa ili bez nametanja formalnih uslova za njihovo upražnjavanje u svim zemljama osim u Crnoj Gori gde postoji jasna hijerarhija. Zakoni o obligacionim odnosima u Bosni i Hercegovini, Hrvatskoj, Srbiji i Makedoniji, međutim, kada regulišu pravna sredstva, koja se između ostalog odnose na sve transakcije, daju redosled kojim ona mogu da se upražnjavaju. Kada se razmatra dostupnost određenog pravnog sredstva član 3 (3) Direktive 99/44 zahteva da se u obzir uzme princip srazmernosti. Ova odredba je transponovana doslovce iz Direktive samo u zakonodavstvu Albanije. Međutim, princip savjesnosti i poštenja na kojem obaveze treba da se zasnivaju kako je propisano zakonima Bosne i Hercegovine, Hrvatske, Srbije, Makedonije i Crne Gore vodi ka tumačenju pravila o odgovornosti za nesaobraznost u istom značenju koja imaju ona iz Direktive 99/44. U proučenim zemljama nema sličnog modela kada se dođe do transponovanja pravila o nemogućnosti propisanim u članu 3 paragraf (3) Direktive 99/44. Nema transpozicije u albanskom zakonodavstvu, dok u Bosni i Hercegovini, Hrvatskoj, Srbiji, Makedoniji i Crnoj Gori primenom pravila o nemogućnosti ispunjenja, mogu se postići isti rezultati kao što je propisano Direktivom 99/44. Nacionalni propisi u okviru značenja „besplatno“ kako je uređeno u članu 3 paragraf (4) Direktive 99/44, sa nekim razlikama u tekstu postoje u zakonodavstvu svih proučavanih zemalja. Član 5 (1) Direktive 99/44 navodi da je prodavac odgovoran za nesaobraznost koja se pojavi u roku od 2 godine od isporuke. Nacionalno zakonodavstvo proučavanih zemalja se razlikuje. U Albaniji, Bosni i Hercegovini i Hrvatskoj taj rok je 2 godine, dok je u Makedoniji i Crnoj Gori 1 godina. U Srbiji taj period je 6 meseci. Treba napomenuti da nacionalno zakonodavstvo Bosne i Hercegovine, Hrvatske, Srbije, Makedonije i Crne Gore pravi razliku između vidljivih i skrivenih nedostataka i daje različite rokove u okviru perioda odgovornosti kada potrošač može da iskoristi pravna sredstva u zavisnosti od vrste nedostatka. Opcija da se smanji dvogodišnji period dat u članu 7 (1) Direktive 99/44 je transponovana samo u zakonodavstvu Hrvatske. Opcija da se predvidi da potrošač mora da obavesti prodavca o nesaobraznosti u roku od 2 meseca od dana kada je potrošač to otkrio kako je dato u članu 5 paragraf (2) Direktive 99/44 nije iskorištena samo u Albaniji. Opcija za suspenziju dvogodišnjeg perioda nije transponovana u zakonodavstvo Albanije i Bosne i Hercegovine. Sve zemlje osim Bosne i Hercegovine generalno usvajaju pravila o pretpostavci nesaobraznosti u prvih 6 meseci iz člana 5 (3) Direktive 99/44. Potrošač neće imati pravo na raskid ugovora u slučaju manje nesaobraznosti kako je propisano u članu 3 paragraf (6) Direktive 99/44 u svim zemljama osim u Bosni i Hercegovini. Navod iz Alineje 15 da se za slučaj kada potrošač ima pravo na povrat kupovne cene može predvidjeti odbijanje na račun upotrebe robe od strane potrošača od vremena isporuke, može se naći u pravilima o efektima raskida ugovora koje uređuje opšte ugovorno pravo zemalja. Proučene zemlje, mada sa nekim izmenama, generalno ispunjavaju uslov člana 6 Direktive 99/44. Uslov člana 4 Direktive 99/44 je transponovan u potrošačko zakonodavstvo Albanije, dok u Bosni i Hercegovini, Hrvatskoj, Srbiji, Makedoniji i Crnoj Gori to pitanje je regulisano u odredbama zakona o obligacionim odnosima za ugovornu i vanugovornu odgovornost za štetu. Član 7 (1) Direktive 99/44 je transponovan u okviru svog značenja u svim zemljama. Nacionalno zakonodavstvo svih proučavanih zemalja se oslonilo na odredbu člana 8 Direktive 99/44 u cilju obezbeđivanja višeg nivoa zaštite potrošača, ili u njihovim zakonima o zaštiti potrošača ili u vezi tih zakona sa zakonom o obligacionim odnosima.

3. deo:
BUDUĆNOST POTROŠAČKOG UGOVORNOG PRAVA U EVROPSKOJ UNIJI I ZEMLJAMA UČESNICAMA

A. PREGLED PREDLOGA KOMISIJE O „DIREKTIVI EVROPSKOG PARLAMENTA I SAVETA O PRAVIMA POTROŠAČA“

Emilia Čikara

I. Uvod

Dana 8. oktobra 2008., Komisija je objavila svoj Predlog „Direktive Evropskog Parlamenta i Saveta o pravima potrošača“[370]. Ova horizontalna direktiva, koja se zasniva na potpunoj ciljanoj harmonizaciji treba da promeni i sjedini sadržaj Direktive 85/577, Direktive 93/13, Direktive 97/7 i Direktive 99/44 i istovremeno ukine te direktive. Taj predlog je u savjetodavnom Memorandumu opravdan činjenicom da je princip minimalne harmonizacije doveo do rascepkanog regulatornog okvira širom Evrope, a „koji uzrokuje značajne troškove usaglašavanja biznisu koji želi trgovati prekogranično“ s jedne strane i rezultira niskim nivoom poverenja potrošača u prekograničnu kupovinu s druge strane[371]. Predložena Direktiva će se odnositi na ugovore o prodaji i uslugama zaključene između trgovca i potrošača[372], dok su ugovori o finansijskim uslugama isključeni, osim za određene ugovore zaključene izvan poslovnih prostorija trgovca, određene nepravične odredbe ugovora i određene opšte odredbe[373].

II. Struktura

Predlog je podeljen u sedam poglavlja. Poglavlje I. daje zajedničke definicije pojmova „potrošač“, „trgovac“, „ugovor o prodaji“ i 17 drugih definicija (član 2.). Ono takođe reguliše princip potpune harmonizacije (član 4.). Poglavlje II. se odnosi na obaveze pružanja predugovornih informacija u svim ugovorima o prodaji i pružanju usluga zaključenim između potrošača i trgovca. Posebne obveze pružanja informacija i pravo na odustanak za ugovore sklopljene na daljinu i ugovore sklopljene izvan poslovnih prostorija trgovca regulisani su u Poglavlju III. (član 8.). Za ugovore sklopljene izvan poslovnih prostorija trgovca postoji standardni obrazac za odustanak u Aneksu I (B) Predloga koji mora da bude uključen u narudžbenicu trgovca. Poglavlje IV. sadrži odredbe koje su propisane u Direktivi 99/44 i Poglavlje V. odredbe koje su regulisane u Direktivi 93/13. Poglavlje V. prati Aneks II, koji sadrži takozvanu „crnu listu“ nepravičnih ugovornih odredbi, i Aneks III, koji reguliše uslove ugovora za

[370] COM(2008) 614 final.
[371] *Ibid*., 2.
[372] Član 3 Predloga.
[373] Član 3 (2) Predloga.

koje se presumira da su nepravični. Poglavlje VI. sadrži između ostalog odredbe o transponovanju Direktive i Poglavlje VII. završne odredbe.

III. Ciljana potpuna harmonizacija

Temeljem člana 4. Predloga zemlje članice ne smeju zadržati ili propisati u svojem nacionalnom pravu, odredbe koje odstupaju od onih propisanih u ovoj Direktivi, uključujući manje ili više striktne odredbe da se obezbedi različit nivo zaštite potrošača. Iako Predlog navodi da se ova horizontalna Direktiva zasniva na potpunoj ciljanoj harmonizaciji[374], pregled Predloga otkriva da se skoro kod svih mera radi o potpunoj harmonizaciji[375]. Za razliku od dosadašnjih direktiva za zaštitu potrošača, koje su se zasnivale na principu minimalne harmonizacije i dozvoljavale zemljama članicama da usvajaju ili zadržavaju povoljnije odredbe za zaštitu potrošača na području koje su pokrivale, nova Direktiva zabranjuje odstupanja u transponovanju.

IV. Definicije

Mnoge zajedničke definicije regulisane u Poglavlju I. Predloga su promenjene i proširene kako bi obuhvatile širok opseg transakcija. Na primer, definicije „ugovora o prodaji"[376], „ugovora o uslugama[377]", i „ugovora o prodaji na daljinu" pokrivaju većinu svih potrošačkih transakcija[378]. Član 2(6) Predloga uvodi novu i pojednostavljenu definiciju za „ugovore o prodaji na daljinu" kao svaki ugovor o prodaji robe ili pružanju usluga gde trgovac, u svrhu zaključenja ugovora, isključivo koristi jedno ili više sredstava daljinske komunikacije. Na osnovu člana 2(8) Predloga „ugovor izvan poslovnih prostorija" je svaki ugovor o prodaji robe ili pružanju usluga sklopljen izvan poslovnih prostorija trgovca uz istovremeno fizičko prisustvo trgovca i potrošača ili svaki ugovor o prodaji robe ili pružanju usluga ponudu za sklapanje kojega je dao potrošač u istim okolnostima. Ugovori izvan poslovnih prostorija postoje čak i ako je ugovor o prodaji robe ili pružanju usluga zaključen u poslovnim prostorijama trgovca ali su pregovori vođeni izvan poslovnih prostorija trgovca[379], a poslovne prostorije obuhvataju i pijačnu tezgu i štand na sajmu gde trgovac obavlja svoju aktivnost na redovnoj ili privremenoj bazi[380]. Član 2(18) Predloga zamenjuje izraz „garancija" kako se upotrebljava u Direktivi 99/44 sa izrazom „komercijalna garancija". Međutim, definicija je ostala slična, osim izbacivanja jednog dela definicije, to jest „dana bez dodatnih troškova". Ova nova formulacija vodi ka uključivanju garancije koja može biti kupljena („proširene garancije"). Pojam „potrošača" je promenjen i uključuje svrhe koje su izvan njegovog „zanata" kao i uobičajeno izvan „zanimanja, posla ili profesije" u tekućim direktivama o zaštiti potrošača[381]. Pred-

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[374] COM(2008) 614 final, str. 4,5.

[375] Opšti izuzetak od potpune harmonizacije je sadržan u članu 3 (1) Predloga, koji definiše polje primene, naime ugovore o prodaji robe i ugovore o pružanju usluga koji se sklapaju između trgovaca i potrošača. Odstupanje od ovog opšteg pravila je dozvoljeno u nekim drugim odredbama koje se odnose na pravo država članica, na primer u članu 6 (2) Predloga na osnovu koga će se posledice bilo koje povrede obveze pružanja informacija (član 5) određivati u skladu sa mjerodavnim nacionalnim pravom.

[376] Član 2 (3) Predloga.

[377] Član 2 (5) Predloga.

[378] C. Twigg-Flesner, D. Metcalfe, The proposed Consumer Rights Directive – less haste, more thought?, *European Review of Contract Law* 2009, *http://ssrn.com/abstract=1345783*, poslednja poseta 19.2.2010, 2.

[379] Član 2 (8) Predloga.

[380] Član 2 (9) Predloga.

log koristi izraz „trgovac“ i zamenjuje sve različite izraze koji se koriste u aktuelnim direktivama, kao što su „isporučilac“, „prodavac“, „trgovac“ ili „prodavac ili isporučilac“. „Trgovac“ se definiše kao fizičko ili pravno lice koje „deluje u svrhu koja se odnosi na njegovo zanimanje, posao, zanat ili profesiju“, uz dodatu referencu „svako ko deluje u ime i za račun trgovca“[382].

V. Obaveze pružanja informacija

Potrošačkim informacijama se bavi Poglavlje II. (član 5. do 7. Predloga). Član 5 (1) Predloga propisuje obvezu trgovca na pružanje općih informacija, osim ako su one već očigledne iz konteksta. Te informacije se odnose na primer na glavne karakteristike proizvoda, adresu i identitet trgovca, cenu i uslove plaćanja, isporuku, izvršenje ugovora, itd., i jednom pružene one postaju deo ugovora[383]. Član 7. Predloga reguliše posebne uslove za pružanje informacija za posrednike. Pored obveze pružanja općih informacija iz Poglavlja II., Poglavlje III. predviđa u svom članu 9. obveze pružanja posebnih informacija za ugovore sklopljene na daljinu i ugovore sklopljene izvan poslovnih prostorija trgovca, kao što su informacije o načinu plaćanja, isporuci i izvršenju ugovora, o uslovima i procedurama za ostvarivanje prava na odustanak, o poslovnoj adresi trgovca na koju potrošači mogu da upućuju reklamacije itd. Glede ugovora sklopljenih izvan poslovnih prostorija trgovca, te informacije će se davati u narudžbenici (član 10. Predloga) dok će kod ugovora sklopljenih na daljinu, biti pružene ili načinjene dostupnim potrošaču pre zaključenja ugovora (član 11. Predloga).

VI. Pravo na odustanak

Članovi 12. do 19. Predloga regulišu pravo na odustanak za ugovore sklopljene na daljinu i ugovore sklopljene poslovnih prostorija trgovca. Za razliku od roka od sedam dana propisanog u aktualnim direktivama, rok za odustanak se produžava na 14 dana. Što se tiče ugovora sklopljenih izvan poslovnih prostorija trgovca rok za odustanak počinje teći kada potrošač potpiše narudžbenicu ili, u odgovarajućim okolnostima, kada je primio njenu kopiju na drugom trajnom medijumu, a za ugovore sklopljene na daljinu počinje teći kada je potrošač došao u materijalni posed robe ili u slučaju pružanja usluga od dana zaključenja ugovora[384]. Međutim, ako trgovac nije potrošaču dao informaciju o pravu na odustanak, rok za odustanak ističe tri meseca nakon što je trgovac u potpunosti izvršio ostale ugovorne obaveze[385]. Kada ostvaruje svoje pravo na odustanak potrošač mora „da obavesti trgovca o svojoj odluci o odustanku na nekom trajnom medijumu“, bilo svojim rečima, ili koristeći standardni obrazac za odustanak iz Aneksa I (B)[386]. Nikakvi drugi formalni zahtevi ne mogu se dodati na standardni obrazac za odustanak. Glede ugovora o prodaji na daljinu zaključenih putem interneta, trgovac može dodatno omogućiti potrošaču da elektronskim putem popuni i preda standardni obrazac za odustanak na website-u trgovca u kom slučaju će trgovac poslati potrošaču potvrdu o prijemu tog odustanka. Ostvarenje prava na odustanak će imati učinak prestanka obaveza ugovornih strana[387]. Nakon odustanka, trgovac mora da nadoknadi svako plaćanje primlje-

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[381] Član 2 (1) Predloga.
[382] Član 2 (2) Predloga.
[383] Član 5 (3) Predloga.
[384] Član 12 (2) Predloga.
[385] Član 13 Predloga.
[386] Član 14 Predloga.
[387] Član 15 Predloga.

no od potrošača u roku od 30 dana, ali može da sačeka dok potrošač vrati robu[388]. U slučaju odustanka potrošač je u obavezi da vrati robu trgovcu u roku od 14 dana od dana kada je saopćio svoj odustanak, osim ako trgovac ponudi da pokupi robu. Potrošaču se mogu naplatiti samo direktni troškovi za vraćanje robe i može biti odgovoran samo za umanjenu vrednost robe kao posledice rukovanja robom na način drukčiji od onog koji je nužan za osiguranje prirode i funkcionisanja robe. Ako trgovac nije pravilno obavestio potrošača o njegovom pravu na odustanak, potrošač neće biti uopšte odgovoran. Potrošač neće snositi troškove za usluge koje su u potpunosti ili delimično pružene tokom trajanja roka za odustanak kada za ugovor vrijedi pravo na odustanak[389]. Niz izuzetaka od prava na odustanak je regulisano u članu 19. Predloga i mogu se podeliti u izuzetke koji se odnose na ugovore o prodaji na daljinu (član 19(1))[390] i izuzetke koji se odnose na ugovore sklopljene izvan poslovnih prostorija trgovca (član 19(2)). Član 20. Predloga isključuje primenu celog Poglavlja III. u odnosu na određene ugovore prodaje na daljinu i ugovore sklopljene izvan poslovnih prostorija trgovca.

VII. Ugovori o prodaji

Poglavlje IV. reguliše ostala prava potrošača specifična za ugovore o prodaji i obuhvata, uz važne modifikacije, odredbe sadržane u Direktivi 99/44. Dok su većina važnih odredbi o sukladnosti, o prodavčevoj objektivnoj odgovornosti za nesukladnost, o kriterijumima za ocenjivanje nesukladnosti, o pravnim sredstvima i o komercijalnim garancijama, preuzete, uvedene su i određene nove odredbe[391]. Temeljem člana 21. Predloga ovo Poglavlje se primenjuje na ugovore o prodaji, a u slučaju ugovora kombinovane svrhe čiji predmet predstavljaju i robe i usluge, ovo se Poglavlje primjenjuje samo na robu. Primjenjuje se i na ugovore za isporuku robe koja se tek mora izraditi ili proizvesti. Međutim, Poglavlje se ne odnosi na zamjenske delove koje trgovac zameni prilikom otklanjanja nedostatka sukladnosti robe popravkom prema članu 26. Predloga. Takođe države članice mogu da odaberu da ne primene odredbe ovog Poglavlja na prodaju polovne robe na javnim aukcijama. Predlog uvodi nove odredbe o isporuci i prelasku rizika u članovima 22 i 23. Trgovac isporučuje robu prenosom materijalnog poseda na potrošača ili na neko treće lice različito od prevoznika i označeno od potrošača, u roku od maksimum trideset dana od zaključenja ugovora[392]. Kada trgovac ne ispuni svoju obavezu isporuke, potrošač ima pravo na nadoknadu svakog plaćenog iznosa u roku od 7 dana od datuma određenog za isporuku[393]. Na osnovu člana 23 (1) predloga „rizik od gubitka ili oštećenja robe prelazi na potrošača kada on ili treće lice, različito od prevoznika i označeno od strane potrošača stekne materijalni posed robe“. Ako potrošač ili neko treće lice, različito od prevoznika, označeno od strane potrošača ne preduzme razumne mere u svrhu preuzimanja materijalnog poseda nad robom, rizik će preći na potrošača u vreme isporuke koje je dogovoreno između ugovornih strana[394]. Drugu novinu predstavlja različit pristup Predloga u odnosu na pravna sredstva potrošača u slučaju nesukladnosti. Iako lista pravnih sredstava ostaje suštinski ista i obuhvata popravku ili zamenu, smanjenje cene i raskid ugovo-

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[388] Član 2 (16) Predloga.

[389] Član 17 Predloga.

[390] Na pr. na osnovu člana 19 (1) lit. a) Predloga kada pružanje usluge počinje za vreme trajanja roka za odustanak uz saglasnost potrošača, ne postoji pravo na odustanak.

[391] H.-W. Micklitz, N. Reich, “Crónica de una muerte anunciada: The Commission proposal for a ‘Direktiva on consumer rights”, *Common Market Law Review*, 46/2009., str. 501.

[392] Član 22 (1) Predloga.

[393] Član 22 (2) Predloga.

[394] Član 23 (2) Predloga.

ra, član 26 (2) Predloga daje „trgovcu“ pravo da izabere između popravke i zamene. Potrošač može da izabere pravna sredstva samo pod ograničenim uslovima u članu 26(3) i (4) Predloga[395]. Ako trgovac dokaže da je otklanjanje nesukladnosti popravkom ili zamenom nezakonito, nemoguće ili nesrazmerno, potrošač može da izabere između smanjenja cene i raskida ugovora[396]. Međutim, potrošač može da raskine ugovor samo ako nesukladnost nije neznatna. Za razliku od Direktive 99/44, Predlog jasno reguliše u svom članu 27(2) da potrošač može da traži naknadu štete za svaki gubitak koji nije ispravljen u skladu sa članom 26 o pravnim sredstvima. Važna promena se odnosi na rokove, gde novi član 28(4) Predloga nameće obvezu potrošaču da obavesti trgovca o nesukladnosti u roku od 2 meseca od otkrivanja.

VIII. Ugovorne odredbe

Poglavlje V. Predloga uključuje odredbe sadržane u Direktivi 93/13.[397] Na osnovu člana 30(1) Predloga, Poglavlje V. se odnosi na odredbe ugovora koje je unapred sastavio trgovac ili neko treće lice, na koje je potrošač pristao a da nije imao mogućnost da utiče na njihov sadržaj, posebno na unaprijed formulirane standardne ugovore. Ako je potrošač imao mogućnost uticanja na neke od njih, Poglavlje V. se još uvek odnosi na ostale odredbe ugovora koji čine deo ugovora[398]. Član 31. Predloga uvodi nove zahteve za transparentnost, pod kojima ugovorne odredbe moraju, između ostalog, biti „dostupne potrošaču na način koji mu daje stvarnu mogućnost da se upozna sa njima pre sklapanja ugovora“.[399] Takođe, trgovcu je potrebna saglasnost potrošača po pitanju svakog dodatnog plaćanja povrh plaćanja predviđenog za glavnu ugovornu obavezu trgovca. Ako trgovac koristi standardne opcije tražeći od potrošača da odbije u cilju izbegavanja dodatnog plaćanja, potrošač ima pravo na nadoknadu ovog plaćanja[400]. Isključenja prethodno sadržana u članu 4 (2) Direktive 93/13 su sada regulisana u članu 32 (3) Predloga, koji glavni predmet ugovora i adekvatnost cijene isključuje od ocjene poštenja. Prema članu 37 Predloga potrošač neće biti obavezan ugovornim odredbama koje su nepoštene, pri čemu se ugovorne odredbe propisane na „crnoj listi“ u Aneksu II smatraju nepoštenima u svim okolnostima (član 34.), a ugovorne odredbe propisane „sivom listom“ u Aneksu III, se smatraju nepoštenima osim ako je trgovac dokazao da su ugovorne odredbe poštene (član 35.). Lista u Aneksu III Predloga je veoma slična listi iz Aneksa Direktive 93/13. Međutim, ima nekoliko manjih promena i nekoliko odredaba za koje je prethodno postojala oboriva presumcija da su nepoštene unete su na „crnu listu“ u Aneksu II Predloga.

IX. Zaključci

Predlog Komisije o Direktivi o pravima potrošača predstavlja važan deo zakonodavstva, koji pokušava da razvije koherentan set pravila u evropskom potrošačkom ugovornom pravu. Uvođenje jedinstvenih zajedničkih definicija, pravila o obavezama pružanja informacija i centralno regulisanje prava na odustanak za ugovore sklopljene na daljinu i ugovore sklopljene izvan poslovnih prostorija trgovca treba da utiču na aktuelnu fragmentisanost regu-

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[395] Član 3 (5) Direktive 99/44 je zamenjen članom 26 (4) Predloga, na osnovu koga potrošač može pribeći svakom pravnom sredstvu koje je na raspolaganju prema paragrafu 1, kada postoji jedna od posebnih situacija, na pr: kada trgovac nije otklonio nesukladnost u razumnom roku.

[396] Član 26 (3) Predloga.

[397] Članovi 30 do 39 Predloga.

[398] Član 30 (2) Predloga.

[399] Član 31 (2) Predloga.

[400] Član 31 (3) Predloga.

lative u ovoj oblasti i tako doprinesu pravnoj sigurnosti potrošača. Međutim, izuzev ovih poboljšanja i nekih dodatnih pravila, Predlog uglavnom ponavlja sadržaj aktuelnih direktiva o zaštiti potrošača. Glavnu razliku predstavlja prelaz sa principa minimalne na princip potpune harmonizacije. Primena ovog principa će značiti postizanje višeg nivoa zaštite potrošača s jedne strane, i smanjenje postojećeg nivoa zaštite potrošača u pojedinačnim državama s druge strane. Dok je potpuna harmonizacija pogodna za odredbe o odustanku i o obvezama pružanja posebnih informacija, ona nije odgovarajuća za odredbe o pravnim sredstvima u ugovorima o prodaji i za odredbe o crnoj i sivoj listi nepoštenih ugovornih odredbi. Zaključno, iako Predlog treba da bude poboljšan i revidiran od strane evropskog zakonodavca, on nesumnjivo predstavlja dobru polaznu tačku za budućnost koherentnog evropskog potrošačkog ugovornog prava.[401]

[401] Ta diskusija je nedavno nastavljena objavljivanjem Zelene knjige (Green Paper) Komisije o opcijama politike za napredovanje ka Evropskom ugovornom pravu za potrošače i biznis, COM(2010) od 1. jula 2010. Svrha te Zelene knjige je da utvrdi opcije o tome kako da se ojača unutrašnje tržište EU napretkom u oblasti Evropskog ugovornog prava, i da se pokrenu javne konsultacije da bi se dobila opredeljenja i gledišta od relevantnih interesnih grupa. U tu svrhu Komisija je okupila ekspertsku grupu koja proučava izvodljivost i upotrebljivost instrumenta Evropskog ugovornog prava i koja će pomoći Komisiji u izboru određenih delova Nacrta zajedničkog referentnog okvira koji se direktno ili indirektno odnose na ugovorno pravo. Taj instrument može da varira od neobavezujućeg do obavezujućeg, zavisno od ponuđenih opcija, gde Opcija 1. završava objavljivanjem rezultata ekspertske grupe, Opcija 2. predviđa usvajanje zvaničnog „instrumentarijuma“ za EU zakonodavca, Opcija 3. se zasniva na dodavanju instrumenta Evropskog ugovornog prava Preporuci Komisije upućenoj državama članicama i Opcija 4. predviđa usvajanje Uredbe koja utvrđuje opcioni instrument Evropskog ugovornog prava u svakoj državi članici. Dalje, Opcija 5. preporučuje usvajanje Direktive o Evropskom ugovornom pravu, koja će harmonizirati nacionalno ugovorno pravo na osnovi minimalnih zajedničkih standarda. Na suprot tome Opcija 6. predviđa usvajanje Uredbe koja utvrđuje Evropsko ugovorno pravo, dok Opcija 7. sugeriše usvajanje Uredbe koja utvrđuje Evropski građanski zakonik. U zavisnosti od rezultata konsultacija, koje će teći od 1.7.2010 do 31.1.2011, Komisija će predložiti daljnje delovanje do 2012.

B. TRANSPONOVANJE PREDLOŽENE DIREKTIVE O PRAVIMA POTROŠAČA U NACIONALNE ZAKONE ZEMALJA UČESNICA

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I. Zajednički problemi u vezi sa transponovanjem predložene Direktive o pravima potrošača

Postoje brojni praktični problemi koji mogu da nastanu u procesu implementacije predložene Direktive u nacionalna prava i država članica i država učesnica. Potpuna harmonizacija će iskomplikovati integrisanje odredbi Direktive u njihov opšti sistem ugovornog prava. U prenošenju aktuelnih direktiva o zaštiti potrošača mnoge zemlje učesnice su upotrebile klauzulu minimalne harmonizacije kako bi povećale nivo zaštite potrošača. Kao posledica principa potpune harmonizacije na kome se zasniva predložena Direktiva, te zemlje će sada biti prisiljene da smanje svoj nacionalni nivo zaštite potrošača u određenim aspektima potpuno harmonizovanim predloženom Direktivom. Na kraju to može da dovede do paradoksalnog rezultata, gde će odredbe nacionalnog opšteg ugovornog prava date države biti povoljnije od posebnih pravila za zaštitu potrošača. Na primer, u transponovanju obveze pružanja informacija iz Predloga Direktive, nacionalni zakonodavac neće moći da uvede ili zadrži nikakav zahtev za dodatnim informacijama za trgovca u vezi sa ugovorom o prodaji robe ili ugovorom o pružanju usluga zaključenim sa potrošačem. Još jedan važan problem se odnosi na zakonodavnu tehniku, koja će se primeniti u transponovanju ove horizontalne direktive. Iako se od zemalja učesnica ne zahteva da doslovno kopiraju Direktivu, ona će najverovatnije biti implementirana doslovno kako bi se izbegle nepotrebne greške i previdi. Konačno, zemlje učesnice će morati da odgovore na pitanje od velike važnosti, to jest kako i gde implementirati predloženu Direktivu: u okviru postojećih građanskih zakona ili potrošačkih zakona[402]. Za neke od zemalja učesnica transponovanje predložene Direktive može čak da predstavlja motiv za reformu njihovog nacionalnog građanskog prava.

II. Transponovanje predložene Direktive o pravima potrošača u nacionalno pravo zemalja učesnica

1. Transponovanje predložene Direktive o pravima potrošača u albansko pravo

Albanski zakonodavac je usvajanjem posebnog Zakona o zaštiti potrošača već napravio izbor da ostavi prava potrošača izvan Građanskog zakonika. Taj pristup je mogao da bude nametnut iz više razloga. Jedan od glavnih razloga je možda bio nedostatak vremena. Pošto je bio pod obavezom Sporazuma o stabilizaciji i pridruženju da približi i harmonizuje zakonodavstvo sa evropskim *acquis* i želeći da garantuje politiku aktivne zaštite potrošača u kratkom vremenu[403],

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[402] H. Schulte–Nölke, "The transposition of European consumer Direktivas into the national laws of the EU–Member States", *Tijdschrift voor Consumentenrecht en handelspraktijken*, 4/2009., str. 133.

[403] Sporazum o stabilizaciji i pridruživanju između Evropskih Zajednica i njihovih država članica, sa jedne strane, i Republike Albanije, sa druge strane, koji je potpisan 12. juna 2006., stupio je na snagu 1. aprila 2009., u svom članu 6, pasus 5 glasi: „Tokom pete godine nakon datuma stupanja na snagu ovog Sporazuma, Savet za stabilizaciju i pridruživanje će oceniti napredak koji je načinila Albanija, i odlučiće da je taj napredak dovoljan za prelaz u drugu fazu u cilju postizanja punog pridruživanja...",
http://ec.europa.eu/enlargement/pdf/albania/st08164.06_en.pdf, poslednja poseta 30 April 2010.

bez sumnje albanski zakonodavac bi odabrao najkraći i najlakši način da pristupi problemima potrošača. Sa druge strane, usvajanje jednog zasebnog zakona je model koji su već ponudile mnoge zemlje članice, i stoga se čini kao prihvatljiv pristup rešavanja pitanja zaštite potrošača i ispunjavanja evropskih standarda, što je izgleda bila glavna briga vlade i zakonodavca. Pored toga, imajući u vidu da je evropsko potrošačko pravo tekući proces, izmena jednog posebnog zakona čini se boljom i razumnijom nego izmena Građanskog zakonika.

Što se tiče transponovanja predložene Direktive, koja zahteva horizontalnu potpunu harmonizaciju, vrlo je predvidivo da će albanski zakonodavac izmeniti postojeći Zakon o zaštiti potrošača iz 2008. Princip maksimalne harmonizacije će dovoljno olakšati rad na nacrtu od strane odgovornih ministarstava, jer će oni doslovno usvojiti pristup transponovanja. Ali može se takođe doći do zaključka da će transponovanje predložene Direktive predstavljati najbolju mogućnost za usvajanje „velikog rešenja" transponovanja prava potrošača u Građanski zakonik. Ta mogućnost može čak da se iskoristi kao opravdanje za reviziju i poboljšanje sistematizacije i harmonizacije celog Građanskog zakonika, izbegavanjem do sada uočenih sistemskih nedoslednosti. Još jedan argument u korist transponovanja predloga Direktive u Građanski zakonik je da tu već postoji takvo iskustvo u Albaniji. Na primer, Direktiva 85/374 o odgovornosti za proizvod je transponovana u Građanski zakonik[404] od njegovog usvajanja 1994. godine, isto se obistinilo za pravo na odustanak u slučaju prodaje od vrata do vrata[405] ili nekih nepravičnih uslova[406], koji se u stvari mogu primeniti na svaku ugovornu stranu. To „veliko rešenje" u svakom slučaju bi zahtevalo veoma jaku volju svih zainteresovanih strana.

Međutim, čini se da je verovatniji pristup izmena Zakona o zaštiti potrošača. Ta mogućnost još uvek predstavlja priliku da se postigne barem unutrašnja harmonizacija posebnih odredbi o potrošačkim ugovorima sa opštim ugovornim pravom uređenim u Građanskom zakoniku, sa ciljem da se Zakon o zaštiti potrošača načini efikasnijim i primenjivijim.

2. Transponovanje predložene Direktive o pravima potrošača u bosansko-hercegovačko pravo

U Bosni i Hercegovini horizontalna direktiva o zaštiti potrošača sa pristupom maksimalne harmonizacije verovatno može da se transponuje samo u okviru zasebnog Zakona o zaštiti potrošača. Najvažniji razlozi su političke prirode, imajući u vidu da u pravnoj oblasti koji se tako brzo menja kao što je Evropsko pravo zaštite potrošača, direktiva koja sjedinjuje većinu odredbi u ovoj oblasti neće moći da se transponuje u jedan zakon kada politička volja za njegovo usvajanje nedostaje više od jedne decenije. Naime, Nacrt zakona o obligacionim odnosima Bosne i Hercegovine iz 2006, koji je transponovao ništa manje od trinaest direktiva o potrošačima, i Nacrt zakona o obligacionim odnosima iz 2010., koga je usvojio Savet Ministara kao Predlog Zakona o obligacionim odnosima i koji je transponovao sedam Direktiva, oba nisu prošla zakonodavnu proceduru jer politički predstavnici entiteta nisu mogli da se slože da li je Bosni i Hercegovini Zakon o obligacionim odnosima potreban na nivou entiteta ili države. Zakon o zaštiti potrošača koji je usvojen na državnom nivou 2002 godine[407] i koji je zamenjen novim Zakonom o zaštiti potrošača u 2006[408] nije imao nikakvih problema te vrste. Time je odgovoreno samo na pitanje politički mogućeg transponovanja. Kada se traži najbolji način za transponovanje, mora se uzeti u obzir da Zakon o zaštiti potrošača, iako je prvi

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[404] Èlan 628 et seq., Albanski građanski zakonik, *Sl. list RAl* br. 11/94.
[405] Èlan 672, Albanski građanski zakonik
[406] Èlan 686, Albanski građanski zakonik
[407] Zakon o zaštiti potrošača *Sl. glasnik BiH* Br. 17/02.
[408] Zakon o zaštiti potrošača, *Sl. glasnik BiH* Br. 25/06.

put usvojen pre osam godina, nije stekao gotovo nikakav značaj u praksi. Duga tradicija odredbi o obligacionim odnosima sadržana u Zakonu o obligacionim odnosima je nadvladala primenljivost Zakona o zaštiti potrošača kao *lex specialis* u slučaju potrošačkih ugovora. Na osnovu člana 1(2) Zakona o zaštiti potrošača u slučaju sumnje ili kolizije odredbi tog zakona i drugog pravnog izvora kao što je Zakon o obligacionim odnosima, onaj koji pruža „viši nivo zaštite potrošača" će biti primenjen. Neizvesno je da li bi takva odredba bila u koliziji sa pristupom maksimalne harmonizacije horizontalne direktive. Shodno tome, samo doslovno transponovanje u poseban pravni akt čini se mogućim, ali niti bi doprinelo bližoj povezanosti između Zakona o obligacionim odnosima i zaštiti potrošača, što je od velike važnosti za razvoj u ovoj oblasti prava generalno, niti većoj primeni u praksi.

3. Transponovanje predložene Direktive o pravima potrošača u hrvatsko pravo

Odgovor na pitanje gde transponovati predloženu Direktivu o pravima potrošača je veoma složen i zavisi od više faktora. Na početku procesa približavanja nacionalnog ugovornog prava sa *acquis*, hrvatski zakonodavac je pokušao da sačuva tradicionalni sistem i vrednosti Zakona o obveznim odnosima od čestih izmena usvajanjem specijalnog i zasebnog Zakona o zaštiti potrošača. Većina direktiva o zaštiti potrošača, između ostalih Direktive 85/577, 93/13, i 97/7, su transponovane u Zakon o zaštiti potrošača. Osim ako Zakonom o zaštiti potrošača kao *lex specialis*-om nije drukčije određeno, na obveznopravne odnose između potrošača i trgovca primijenit će se odredbe Zakona o obveznim odnosima kao *lex generalis*-a.[409] Nakon usvajanja novog Zakona o obveznim odnosima u 2005. godini, hrvatski zakonodavac je odlučio da transponovanje tri direktive o zaštiti potrošača, to jest Direktive 85/374, 90/314 i 99/44 iskoristi za modernizaciju postojećih odredbi Zakona o obveznim odnosima.[410] Konačno, u implementaciji Direktive 2008/48, hrvatski zakonodavac je odlučio da usvoji poseban Zakon o potrošačkom kreditiranju[411] kao *lex specialissima* u odnosu na Zakon o zaštiti potrošača. Opisana pravna situacija komplikuje predviđanje o mogućim načinima transponovanja predložene Direktive o pravima potrošača. Poduhvat hrvatskog zakonodavca neće zavisiti samo od pitanja sadržajne naravi već i od pitanja političke i praktične prirode. Na primer, transponovanje direktive zavisi i od vremenskog roka u kome ministarstva koja vrše pripremu treba da ispune dužnost transponovanja. Pošto se pravo potrošača smatra posebnim privatnim pravom u odnosu na opšte građansko pravo, može se pretpostaviti da će se transponovanje izvršiti u okviru Zakona o zaštiti potrošača. Glavni problem bi bilo transponovanje predložene Direktive u odnosu na odredbe Direktive 99/44, od kojih su neke transponovane izvan obaveze (supererogatory) u Zakon o obveznim odnosima kako bi pokrile ne samo B2C, već i B2B i C2C ugovore o prodaji. Pošto je Predlog ograničen na B2C ugovorni odnos, taj način transponovanja neće biti moguć. Konačno, iako transponovanje predložene Direktive treba da predstavlja priliku da se potrošačko pravo približi opštem ugovornom pravu, čini se da transponovanje u okviru posebnog potrošačkog zakona, na primer hrvatskog Zakona o zaštiti potrošača više odgovara cilju predložene direktive.

4. Transponovanje predložene Direktive o pravima potrošača u makedonsko pravo

Makedonski Zakon o obligacionim odnosima[412], usvojen u 2001 godini na osnovu fundamentalnih principa Zakona o obligacionim odnosima SFR Jugoslavije, je zakonodavan akt

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[409] Član 2 (2) Zakona o zaštiti potrošača, *NN* br. 79/07, 125/07, 79/09, 89/09, 133/09.

[410] Zakon o obveznim odnosima, *NN* br. 35/05, 41/08.

[411] Zakon o potrošačkom kreditiranju, *NN* br. 75/09.

[412] Zakon o obligacionim odnosima, *Sl. list RMak* Br. 18/2001, 4/2002, 5/2003, 84/2008, 81/2009 i 161/2009.

koji na neki način služi kao Zakonik o obligacionim odnosima. Zakonodavac je u okviru Zakona o obligacionim odnosima usvojio tradicionalni sistem i metod regulisanja obligacionih odnosa, tako da su specifičnosti potrošačkih odnosa regulisane Zakonom o zaštiti potrošača[413] kao *lex specialis*[414].

Izmene načinjene u Zakonu o obligacionim odnosima u 2008. godini su načinjene između ostalog da obezbede odgovarajuće transponovanje Direktive 85/374, Direktive 93/13, Direktive 99/34 i Direktive 99/44. Zakon o zaštiti potrošača kako je opisan u Delu I ovog Izvoda je generalno približan postojećim direktivama u oblasti zaštite potrošača.

Nacionalni program usvajanja *Acquis Communautaire*[415] predviđa, za drugu polovinu 2010, izmene Zakona o zaštiti potrošača, tako da se u potpunosti približi Direktivi 2005/29/EC i Direktivi 98/27/EC. Usvajanjem Zakona o marketingu na daljinu potrošačkih finansijskih usluga predviđeno je transponovanje Direktive 2002/65/EC u nacionalno zakonodavstvo. Takođe se planiraju izmene relevantnog zakonodavstva u oblasti bezbednosti namirnica, NPAA takođe predviđa kao jedan od kratkoročnih prioriteta usvajanje Zakona o praćenju tržišta, koji treba da obezbedi pravni okvir za osnivanje koordinacionog tela koje će pratiti ispunjenje zakonskih uslova za obezbeđivanje visokih standarda između ostalog i zaštite potrošača.

Iako odgovarajući programi i planovi za usvajanje *Acquis Communitaire* ne predviđaju nikakve druge zakonodavne aktivnosti u oblasti zaštite potrošača, eventualno usvajanje predložene Direktive o pravima potrošača će uticati na nacionalno zakonodavstvo usled stalne obaveze države da svoje zakonodavstvo približava zakonodavstvu Evropske Unije. Međutim, kako će taj proces biti izvršen je pitanje koje će zahtevati ozbiljno razmatranje. Prateći postojeći pristup u regulisanju specifičnih pitanja o zaštiti potrošača putem *lex specialis*, za očekivati je da će glavni metod transponovanja biti izmenama Zakona o zaštiti potrošača ili eventualno usvajanjem novog zakona. Bez obzira na to, treba očekivati da će biti kontrolisano kako (predložena) Direktiva o pravima potrošača generalno utiče na ugovorne odnose tako da se razmotre izmene Zakona o obligacionim odnosima.

5. Transponovanje predložene Direktive o pravima potrošača u crnogorsko pravo

Crna Gora ostaje verna pristupu da većina direktiva o zaštiti potrošača treba da se transponuje u poseban zakon o zaštiti potrošača, dok će neke od njih biti transponovane u drugo generalno ili specifično zakonodavstvo. To je način na koji će u 2011 godini biti pokrenuta velika intervencija i, umesto izmena, planira se da ceo novi tekst Zakona o zaštiti potrošača bude pripremljen i usvojen.

U odnosu na predloženu Direktivu o pravima potrošača, opšte mišljenje u Crnoj Gori je da takav horizontalni instrument može da ponudi mogućnost za rešavanje važnih potrošačkih prava i obezbeđivanje njihove konzistencije, dok u isto vreme može da doprinese pojednostavljivanju određenih pravila i podigne svest potrošača o njihovim pravima. Međutim, istovremeno, utisak je da s obzirom da je u pitanju maksimalna harmonizacija da može da ograniči praktične vrednosti koje potrošač uživa pod starim *acquis* režimom i smanji nivo zaštite u situacijama gde su zemlje učesnice imale slobodu da postave striktnija pravila.

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[413] Zakon o zaštiti potrošača, *Sl. list RMak* Br. 38/2004, 77/2007 i 103/2008.

[414] Članom 2. paragraf 2 Zakona o zaštiti potrošača, o ugovornim i drugim obligacionim odnosima o trgovini robe i usluga primenjivaće se odredbe Zakona o obligacionim odnosima, osim ako se drugačije na navede u Zakonu o zaštiti potrošača.

[415] Nacionalni program za usvajanje Acquis Communautaire, Revizija 2009, poglavlje 3.28; http://www.sep.gov.mk/content/Dokumenti/EN/00%20NATIONAL%20PROGRAMME%20FOR%20ADOPTION%20OF%20THE%20ACQUIS%20COMMUNAUTAIRE%202009.pdf

Između ostalog, u praksi to znači da još uvek treba posmatrati kako će izgledati odnos između zakonodavstva o zaštiti potrošača i opšteg ugovornog prava kada Predlog Direktive o pravima potrošača postane deo crnogorske obaveze predviđene Poglavljem VI „Približavanje zakona, primena zakona i pravila konkurentnosti“, i članom 72 SAA. To se između ostalog odnosi na razmatranja kako izbeći situaciju gde bi odredbe crnogorskog opšteg ugovornog zakona bile povoljnije potrošačima od posebnih pravila o zaštiti potrošača, jer prvi osim B2B, C2C i P2P ugovora se mogu primeniti i na B2C.

U svakom slučaju Crna Gora kao zemlja koja je već predala zvanične odgovore na Upitnik za pripremu Mišljenja o prijavi za članstvo, koja čeka na status kandidata, i harmonizacija zakonodavstva u prioritetnoj oblasti kao što je zaštita potrošača će biti izazovna ali je obavezna i može se postići.

6. Transponovanje Predloga Direktive o pravima potrošača u srpsko pravo

Usvajanjem okvirnog Zakona o zaštiti potrošača iz 2005. godine, srpski zakonodavac je pokušao, bez naročitog uspeha, da u srpsko pravo transponuje pojedine potrošačke direktive.[416] Činjenica što zakon uređuje neka pitanja na koja se odnose i potrošačke direktive, ne znači da je on sa tim direktivama usklađen. Odredbe Zakona o zaštiti potrošača koje se mogu svrstati u domen ugovornog prava reflektuju sasvim površna znanja o postojanju i sadržini osnovnih principa evropskog potrošačkog prava.

Nema indicija da bi moglo da dođe do izmena i dopuna Zakona o obligacionim odnosima[417] u cilju transponovanja u srpsko pravo bilo koje evropske potrošačke direktive.[418]

Ideje o načinu na koji bi trebalo poboljšati Zakon o obligacionim odnosima uglavnom su inspirisane *Skicom za zakonik o obligacijama i ugovorima*. Reč je o nacrtu zakona koji je napisao, i 1969. godine objavio, profesor Mihailo Konstantinović, osnivač Beogradske škole građanskog prava. Jugoslovenski Zakon o obligacionim odnosima rađen je po ugledu na Skicu. Komisija za izradu građanskog zakonika razmatra usvajanje upravo onih pravila iz Skice koja je 1978. godine izostavio jugoslovenski zakonodavac. Pored toga, Komisija razmatra prihvatanje određenih rešenja domaće sudske prakse i uporednog prava. Međutim, u izveštajima Komisije nema traga o uzimanju potrošačkih direktiva u obzir.

Međutim, u vreme pisanja ovog teksta (jun 2010. godine), srpsko Ministarstvo trgovine i usluga, kao ministarstvo nadležno za poslove zaštite potrošača, okončalo je rad na Nacrtu zakona o zaštiti potrošača, koji bi trebalo da uđe u zakonodavnu proceduru tokom jeseni 2010. godine. Nacrt ima za cilj transponovanje evropskih potrošačkih direktiva i harmonizaciju srpskog prava sa pravom Evropske unije u oblasti zaštite potrošača. Tokom rada na pomenutom Nacrtu uzeta su u obzir rešenja sadržana u Predlogu Direktive o pravima potrošača.[419]

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[416] Zakon o zaštiti potrošača, Sl. glasnik RS 79/05.

[417] Zakon o obligacionim odnosima, Službeni list SFRJ br. 29/78, 39/85, 45/89 – odluka USJ i 57/89, Službeni list SRJ No. 31/93, 22/99, 23/99, 35/99 i 44/99, Službeni list SCG br. 1/03 – Ustavna povelja.

[418] Cf. Vlada Republike Srbije. Komisija za izradu Građanskog zakonika, Rad na izradi Građanskog zakonika. Izveštaj Komisije sa otvorenim pitanjima, Pravni život, Tom III, 11/2007, 5–407. Komisija za izradu Građanskog zakonika, Prednacrt. Građanski zakonik Republike Srbije. Druga knjiga. Obligacioni odnosi, Vlada Republike Srbije, Beograd 2009, 1-451.

[419] Predlog Komisije za Direktivu o pravima potrošača, COM(2008) 614/3.

C. MEĐUNARODNO PRIVATNO PRAVO U POTROŠAČKIM UGOVORIMA

Zlatan Meškić

Zaštita potrošača u međunarodnom privatnom pravu Evropske Unije većinski je zasnovana na članu 6., Regulative Rim I[420], članovima 15.-17. Regulative Brisel I[421] i kolizionim normama nove generacije potrošačkih direktiva[422]. Sa jedne strane međusobno usaglašeni Rim I i Brisel I obezbeđuju zaštitu potrošača propisujući nadležnost sudova države članice koja je domicilna za potrošača, neovisno o činjenici da li je potrošač tužitelj ili tuženi, koji onda primenjuju domaće pravo[423]. U cilju obezbeđenja prekogranične zaštite potrošača, član 15. Regulative Brisel I i član 6. Regulative Rim I sadrže zajednički minimalni uslov, da profesionalac usmerava svoje aktivnosti prema državi prebivališta/redovnog boravišta potrošača, a ugovor spada u područje tih aktivnosti. Sa druge strane kolizione norme potrošačkih direktiva imaju za cilj da obezbede primenljivost nacionalnih odredbi koje transponuju direktive kada postoji „bliska veza" sa teritorijom (jedne ili više) država članica, a potrošački ugovor sadrži odredbu o izboru prava u korist države koja nije članica. Pošto te odredbe pokušavaju da garantuju nivo zaštite potrošača koga predviđaju direktive naspram pretpostavljenog nižeg nivoa zaštite u državama koje nisu članice, njihovo transponovanje u zakone država koje učestvuju u ovom projektu će dobiti smisao kada države učesnice postanu članice EU. Njihova obaveza da transponuju kolizione norme iz potrošačkih direktiva takođe zavisi od budućnosti „horizontalne direktive". U „Direktivi Evropskog Parlamenta i Saveta o pravima potrošača"[424] nema kolizionih normi a nova direktiva sa konceptom „maksimalne harmonizacije" će na osnovu svog člana 47. ukinuti četiri direktive koje su bile predmet ove analize. To bi rešilo tekuće diskusije o hijerarhiji normi između transponovanih kolizionih normi iz direktiva i regulative Rim I. Trenutno na osnovu člana 23. regulative Rim I kolizione norme iz direktiva imaju prioritet nad odredbama iz Rima I[425].

Regulative Rim I i Brisel I ne moraju da se transponuju pošto će one postati direktno primenljive čim države učesnice postanu članice EU. Međutim, njihova primena je već moguća

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[420] Regulativa (EZ) br. 593/2008 Evropskog Parlamenta i Saveta od 17. juna 2008. o mjerodavnom pravu za ugovorne obaveze (Rim I), *Sl. list EU* L 177/6, 04/07/2008, str. 6-16.

[421] Regulativa Saveta (EZ) br. 44/2001 od 22. decembra 2000. o nadležnosti, priznavanju i izvršenju presuda u građanskim i trgovačkim stvarima, *Sl. list EU* L 12, 16/01/2001, str. 1-23.

[422] Član 6 (2) Direktive Savjeta 93/13/EEZ od 5. aprila 1993., o nepravičnim uslovima u potrošačkim ugovorima, *Sl. list EU L* 095, 21/04/1993, str. 29-34; član 12 (2) Direktive 97/7/EZ Evropskog Parlamenta i Saveta od 20. maja 1997. o zaštiti potrošača u pogledu ugovora na daljinu, *Sl. list EU* L 144, 04/06/1997, str. 19-27, izmijenjene Direktivom 2002/65/EZ, Direktivom 2005/29/EZ, Direktivom 2007/64/EZ; član 7 (2) Direktive 1999/44/EZ Evropskog Parlamenta i Saveta od 25. maja 1999. o određenim aspektima prodaje robe široke potrošnje i povezanim garancijama, *Sl. list EU* L 171, 07/07/1999, str. 12-16.

[423] Ova tvrdnja je istinita u slučajevima gde se koncept „domicila" korišćenog u Regulativi Brisel I preklapa sa manje zahtevnim konceptom „redovno boravište" upotrebljenog u Regulativi Rim I. Vidi M. Stanivuković, "Ugovori sa potrošačima sa inostranim elementom – merodavno pravo i nadležnost", *Zbornik radova Dvadeset godina Zakona o Međunarodnom privatnom pravu*, Pravni fakultet Univerziteta u Nišu, Niš 2004, 251.

[424] COM(2008) 614 final.

[425] Takva hijerarhija je oštro kritikovana u pravnoj nauci, jer kolizione norme Direktiva imaju za cilj samo da obezbede primenu potrošačkog prava jedne od država članica, bez utvrđivanja mjerodavnog prava. Pored toga, većina država članica je različito transponovala te odredbe i time ugrozila pravnu sigurnost stvorenu Rimskom Konvencijom; vidi E. Jayme, "Zum Stand des IPR in Europa", *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)*, 1996, 65.

u tim državama. Brisel I može samo da utvrdi nadležnost sudova država članica EU, inače bi prekršio međunarodno javno pravo mešanjem u suverena prava trećih zemalja.[426] Bez obzira na to, u slučajevima kada je tuženom domicilna država članica EU, na osnovu presude *Owusu*[427], Brisel I se primenjuje čak kada su činjenice slučaja povezane sa samo jednom državom članicom i jednom ili više država koje nisu članice. Shodno tome na osnovu člana 16. Brisela I potrošač sa državljanstvom jedne od zemalja koje učestvuju u ovoj analizi može pokrenuti postupak pred sudovima države članice koja mu je domicilna. [428] *Prorogatio fori* koji odstupa od nadležnosti određene članom 16. Brisela I može da se zaključi samo *post litem natan*. U tim slučajevima na osnovu člana 6. (1) Rima I, primenilo bi se pravo države potrošačevog redovnog boravišta, bez obzira na činjenicu da li se nalazi na teritoriji države članice EU ili ne. Kada potrošač ima redovno boravište na teritoriji jedne od država članice, na osnovu člana 6. (2) Rima I odredba o izboru prava u korist jedne od država koja učestvuje u ovoj analizi bi se primenila u meri u kojoj pruža viši nivo zaštite potrošača nego „unutrašnji" prinudni propisi države potrošačevog redovnog boravišta. Kada ugovor ne spada u područje primene člana 6. Rima I, na osnovu člana 3. (3) i (4) Rima I u slučaju kada svi elementi situacije nalaze u državi članici, njeni „unutrašnji" prinudni propisi se primenjuju bez obzira na odredbu o izboru prava u korist prava druge države (članice ili nečlanice).[429] Novi razvoj naveden u presudi Evropskog Suda Pravde *Ingmar* dodatno sugeriše da neke nacionalne odredbe o zaštiti potrošača koje transponuju potrošačke direktive mogu da se smatraju za „međunarodne" prinudne propise i primenjuju bez obzira na mjerodavno pravo određeno Rimom I[430]. Odredbe o zaštiti potrošača većine država učesnica ovog projekta se jasno deklarišu kao (barem) „unutrašnji" prinudni propisi[431]. Članovi 6. (2) Rima I i 3. (3) i (4) Rima I samo obezbeđuju primenu prinudnih propisa država članica EU.

Države učesnice su već uložile puno truda da reformišu njihove kodifikacije Međunarodnog privatnog prava, koje su većim delom stare tri decenije ili više i ne sadrže odredbe o zaštiti potrošača[432]. Jedan od najvažnijih motiva za reformu je bio da usklade odredbe njihovog Međunarodnog privatnog prava sa gore opisanim Pravom EU. Makedonija je još uvek jedina

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[426] S. Leible, "Internationales Vertragsrecht, die Arbeiten an einer Rom I-Verordnung und der Europäische Vertragsgerichtsstand", *IPRax*, 2006, 370.

[427] Vidi Sud EU, 1. mart 2005., C-281/02 – *Andrew Owusu v N.B. Jackson, trading as 'Villa Holidays Bal-Inn Villas', Mammee Bay Resorts Ltd, Mammee Bay Club Ltd, The Enchanted Garden Resorts & Spa Ltd, Consulting Services Ltd, Town & Country Resorts Ltd* [2005] ECR I-01383, para. (26); Ova odluka je doneta o području primene Briselske Konvencije (Konvencija od 27. septembra 1968. o nadležnosti i izvršenju presuda u građanskim i trgovačkim stvarima) koja je zamenjena Briselom I.

[428] K. Sajko, *Međunarodno privatno pravo*, Narodne novine, Zagreb, 2009., str. 412.

[429] Formulacija člana 3. (4) Rima I sugeriše da u harmonizovanim oblastima Ugovornog prava EU, kao što je pravo potrošačkih ugovora, te odredbe deluju kao nacionalni prinudni propisi države (u ovom slučaju EU) i uključene su u ugovore bez obzira na izbor prava. Ta odredba imala je za cilj zamenu kolizionih normi Direktiva o zaštiti potrošača.

[430] Sud EU, 9. Novembar 2001., C-381/98 – *Ingmar GB Ltd and Eaton Leonard Technologies Inc.* [2000] ECR I-09305; See Z. Meškić, "Kolizione norme za zaštitu potrošača u direktivama Evropske zajednice i Uredbi Rim I – novi izazov za ZRSZ, Zbornik Pravnog fakulteta Sveučilišta u Rijeci", 2/2009, 1017.

[431] Član 5 (1) crnogorskog Zakona o zaštiti potrošača, *Sl. list RCG* br. 26/07; član 4. hrvatskog Zakona o zaštiti potrošača, *NN* br. 79/07, 125/07, 79/09, 89/09, 133/09; član 2 Zakona o zaštiti potrošača Bosne i Hercegovine, *Sl. glasnik BiH* br. 17/02.

[432] Albanski zakon o uživanju građanskih prava od strane stranaca i primeni stranog prava, *Sl. list Ral* br. 3920/64; Većina zemalja naslednica bivše Jugoslavije još uvek primenjuje skoro nepromenjenu verziju jugoslovenskog Zakonika o Međunarodnom privatnom pravu, to jest Zakon o rešavanju sukoba zakona sa propisima drugih zemalja u određenim odnosima, *Sl. list SFRJ* br. 43/82 i 72/82.

od država učesnica koja može da prezentuje rezultat svog procesa reformi, to jest makedonski Zakon o Međunarodnom privatnom pravu iz 2007.[433] Član 25. makedonskog Zakona o Međunarodnom privatnom pravu reguliše potrošačke ugovore i većinski je usaglašen sa članom 5. Rimske konvencije,[434] jer Regulativa Rim I nije bila usvojena u vreme njegove pripreme. U drugim državama učesnicama revizija je još uvek u toku i zbog toga se o njoj neće diskutovati[435]. Bosna i Hercegovina je jedina država koja ne razmatra reviziju svog zakona međunarodnog privatnog prava jer bi to moglo da ima za rezultat usvajanje dva različita Zakona o međunarodnom privatnom pravu, usvojena na nivou entiteta, i time uzrokuje dodatnu koliziju zakona.

[433] Zakonik o međunarodnom privatnom pravu Republike Makedonije, *Sl. list Mac* br. 87; Prevod na nemački Ch. Jessel-Holst, IPRax 2008, 158.

[434] Konvencija o mjerodavnom pravu za ugovorne obaveze otvorena za potpisivanje u Rimu 19. juna 1980., *Sl. list EU L 266*, 09/10/1980, *str. 1 –19.*

[435] Na primer u Hrvatskoj već u 2001., grupa profesora je izradila "Teze za Međunarodno privatno pravo" koje treba da se koriste kao osnova za Nacrt novog Međunarodnog privatnog prava Hrvatske (videti K. Sajko, H. Sikirić, V. Bouček, D. Babić, N. Tepeš, *Teze za Zakon o Međunarodnom privatnom pravu*, Izvori hrvatskog i europskog međunarodnog privatnog prava, Informator, Zagreb, 2001., str. 255-340); Videti E. Čikara, *Gegenwart und Zukunft der Verbraucherkreditverträge in der EU und in Kroatien*, LIT Verlag, Wien (*et al.*), 2010.

4. deo:
SPISAK SKRAĆENICA I BIBLIOGRAFIJA

Dodatak A: SPISAK SKRAĆENICA

Al	Albanija
BiH	Bosna i Hercegovina
BNZOO	Nacrt zakona o obligacionim odnosima Bosne i Hercegovine
br.	Broj
B2B	Između privrednih subjekata (*business-to-business*)
B2C	Između privrednih subjekata i potrošača (*business-to-consumer*)
BZOO	Zakon o obligacionim odnosima Bosne i Hercegovine
cca.	cirka (otprilike; oko)
CG	Crna Gora
čl.	Član
ECU	Evropska novčana jedinica
ed.	Urednik
ESP	Sud pravde Evropskih zajednica, koji je Lisabonskim ugovorom promenio ime u Sud pravde Evropske unije
et al.	et alia (i drugi)
et. seq.	et sequentes (i sledeći)
EU	Evropska unija
EUR	Evro
EZ	Evropske zajednice
FN	Fusnota
GTZ	Nemačko društvo za tehničku saradnju - GTZ d.o.o. (Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH)
HR	Hrvatska
HRK	Hrvatska kuna
HZOO	Zakon o obveznim odnosima (Hrvatske)
i.e.	id est (odnosno)
IES	Izveštaji Evropskog suda

itd. (etc.)	I tako dalje (et cetera)
infra	Ispod
IPRax	Praxis des Internationalen Privat- und Verfahrensrechts
JIE	Jugoistočna Evropa
lit.	litera (slovo)
M	Makedonija
MFI	mikrofinansijske institucije
MS	međunarodni sporazumi
npr. (e.g.)	na primer (exempli gratia)
NVO	nevladine organizacije
NZOO	Nacrt zakona o obligacionim odnosima (Bosne i Hercegovine)
P2P	između javnih i privatnih subjekata (Public to Private)
RAl	Republika Albanija
RCG	Republika Crna Gora
ref.	Upućivanje
RH	Republika Hrvatska
RM	Republika Makedonija
RS	Republika Srbija
SFRJ	Socijalistička Federativna Republika Jugoslavija
Sl.list	Službeni list
SRB	Srbija
SRJ	Savezna Republika Jugoslavija
SSP	Sporazum o stabilizaciji i pridruživanju
st.	Stav
str.	Strana (strane)
supra	Iznad
v.	Protiv
Vol.	Tom
VSRH	Vrhovni sud Republike Hrvatske
VTSRH	Visoki trgovački sud Republike Hrvatske
ZKI	Zakon o kreditnim institucijama
ZOO	Zakon o obligacionim odnosima
ZZP	Zakon o zaštiti potrošača

Dodatak B: BIBLIOGRAFIJA

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Konvencija o mjerodavnom pravu za ugovorne obaveze otvorena za potpisivanje u Rimu 19.06.1980., *Sl.list L 266*, 09/10/1980, *str. 0001 – 0019*

Direktiva Saveta br. 85/577/EEZ od 20.12.1985. za zaštitu potrošača u pogledu ugovora sklopljenih van poslovnih prostorija, *Sl.list L 372*, 31.12.1985, *str. 0031 – 0033*

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Direktiva Saveta (EZ) br. 44/2001 od 22.12.2000. o nadležnosti i priznavanju i izvršenju presuda u građanskim i trgovačkim stvarima, *Sl.list L 012*, 16/01/2001, *str. 0001 – 0023*

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Direktiva Evropskog parlamenta i Saveta 1999/44/EZ od 25.05.1999. godine, o određenim aspektima prodaje robe široke potrošnje i pratećim garancijama, *Sl.list L 171*, 07/07/1999, *str. 0012– 0016*

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Predlog Direktive Evropskog parlamenta i Saveta o potrošačkim pravima, COM(2008) 614 final

Uredba Evropskog parlamenta i Saveta (EZ) br. 593/2008 od 17.06.2008. o pravu merodavnom za ugovorne obaveze (Rim I), *Sl.list L 177/6*, 04/07/2008., *str. 0006-0016*

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– Presuda ESP od 16.05.1989, u predmetu C-382/87 – *R. Buet i SARL Educational Business Services protiv Ministère Public* [1989] ECR I-01235

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Sporazum u stabilizaciji i pridruživanju između Republike Albanije, s jedne strane, i Evropskih zajednica i njihovih država članica, s druge strane, - Zakon o potvrđivanju br. 9590 od 27.07.2006 - *Međunarodni sporazumi Republike Albanije Sl.list R. Albanije br.* 87/06

Odluka Saveta ministara „Nacionalni akcioni plan u vezi sprovođenja Sporazuma o stabilizaciji i pridruživanju" br. 463 od 05.07.2006, *Sl.list R. Albanije br*. 80/06

Odluka Saveta ministara „O usvajanju međusektorske strategije za zaštitu potrošača i nadzor nad tržištem, za period 2007-2013" br. 797 od, 14.11.2007, *Sl.list R. Albanije br*. 171/07

Bosna i Hercegovina:

Zakon o rešavanju sukobu zakona sa propisima drugih zemalja u određenim odnosima, *Sl.list SFRJ br*. 43/82 i 72/82, *Sl.glasnik BiH br*. 2/92 i 13/94

Zakon o zaštiti potrošača 2002, *Sl.glasnik BiH br*. 17/02

Zakon o zaštiti potrošača 2006, *Sl.glasnik BiH br*. 25/06

Zakon o obligacionim odnosima Federacije Bosne i Hercegovine, *Sl.list SFRJ br*. 29/78, 39/85, 46/85, 45/89, 57/89, *Sl.list Republike Bosne i Hercegovine*, 2/92, 13/93, 13/94 i *Sl.glasnik Federacije Bosne i Hercegovine*, *br*. 29/03

Zakon o obligacionim odnosima Republike Srpske, *Sl.list SFRJ*, *br*. 29/78, 39/85, 46/85, 45/89, 57/89 i *Sl.glasnik Republke Srpske*, *br*. 17/93, 57/98, 39/03, 74/04

Zakon o elektronskom pravnom i poslovnom prometu, *Sl.glasnik BiH br*. 88/07

Zakon o elektronskom potpisu, *Sl.glasnik BiH br*. 91/06

Zakon o opštoj bezbednosti proizvoda, *Sl.glasnik BiH br*. 102/09

Zakon o nadzoru nad tržištem u Bosni i Hercegovini, *Sl.glasnik BiH br*. 45/04, 44/07 i 102/09

Sporazum o stabilizaciji i pridruživanju između Bosne i Hercegovine, s jedne strane, i Evropskih zajednica i njihovih država članica, s druge strane, Sl. glasnik - *Međunarodni sporazumi Bosne i Hercegovine, b*r. 5/08.

Hrvatska:

Zakon o pravu na pristup informacijama, *NN br.* 172/03

Zakon o elektroničkoj trgovini, *NN br.* 173/03, 67/08, 36/09

Zakon o pružanju usluga u turizmu, *NN br.* 68/07

Zakon o rješavanju sukoba zakona s propisima drugih zemalja u određenim odnosima, *Sl.list SFRJ br*. 43/82 i 72/82, *NN br.* 53/91 i 88/01

Zakon o konačnosti namire u platnim sustavima i sustavima za namiru financijskih instrumenata, *NN br.* 117/08

Zakon o obveznim odnosima, *NN br.* 35/05, 41/08

Zakon o potrošačkom kreditiranju, *NN br.* 75/09

Zakon o zaštiti potrošača, *NN br.* 79/07, 125/07, 79/09, 89/09, 133/09

Zakon o zaštiti potrošača, *NN br.* 96/03

Zakon o kreditnim institucijama, *NN br.* 117/08, 74/09, 153/09

Zakon o elektroničkim komunikacijama**,** *NN br.* 73/08

Zakon o institucijama za elektronički novac**,** *NN br.* 117/08, 74/09

Zakon o elektroničkom potpisu, *NN br.* 10/02, 80/08

Zakon o deviznom poslovanju**,** *NN br.* 96/03, 140/05, 132/06, 150/08, 92/09, 153/09

Zakon o općoj sigurnosti proizvoda, *NN br.* 30/09

Uredba o određivanju osoba ovlaštenih za pokretanje postupka radi zaštite kolektivnih interesa potrošača, *NN br.* 124/09

Uredba o određivanju pravnih osoba ovlaštenih za podnošenje tužbe u vezi sa zabranom korištenja nepoštenih ugovornih odredaba u potrošačkim ugovorima, *NN br.* 41/08

Pravilnik o minimalnim tehničkim uvjetima za poslovne prostorije u kojima se obavlja trgovina i posredovanje u trgovini i uvjetima za prodaju robe izvan prostorija, *NN br.* 37/98, 73/02, 153/02, 12/06

Sporazum o stabilizaciji i pridruživanju između Republike Hrvatske i Evropskih zajednica i njihovih država članica, *NN MU* br. 14/01

Zakon o Državnom inspektoratu, *NN br.* 116/08, 123/08

Zakon o trgovini, *NN br.* 87/08, 96/08, 116/08

Zakon o obveznim odnosima, *NN br.* 53/91, 73/91, 111/93, 3/94, 107/95, 7/96, 91/96, 112/99, 88/01, kojim je preuzet jugoslovenski Zakon o obveznim odnosima, *Sl list SFRJ br*. 29/78, 39/85, 46/85, 45/89, 57/89, putem Zakona o preuzimanju Zakona o obveznim odnosima, *NN br.* 53/91

Makedonija:

Zakon o rešavanju sukoba zakona sa propisima drugih zemalja u određenim odnosima, *Sl.list SFRJ br*. 43/82 i 72/82, *Sl.list RM br.* 52/1991

Zakon o međunarodnom privatnom pravu, *Sl.list RM br. 87/2007*

Zakon o zaštiti potrošača 2000, *Sl.list RM br.* 63/2000 i 4/2002

Zakon o zaštiti potrošača 2004, *Sl.list RM br.* 38/2004, 77/2007 i 103/08

Zakon o obligacionim odnosima, *Sl.list RM br*. 18/2001, 4/2002, 5/2003, 84/2008., 81/2009. i 161/2009

Zakon o zaštiti potrošača u ugovorima o potrošačkim kreditima, *Sl.list RM br. 63/2007*

Zakon o elektronskoj trgovini, *Sl.list RM br. 133/2007*

Zakon o podacima u elektronskoj formi i o elektronskom potpisu, *Sl.list RM br.* 34/2001, 6/2002 i 98/2008

Zakon o trgovini, *Sl.list RM br.* 16/2004, 128/2006, 63/2007, 88/2008, 159/2008, 20/2009, 99/2009 i 105/2009

Zakon o lizingu, *Sl.list RM br.* 4/2002; 49/2003; 13/2006; 88/2008

Zakon o državnom tržišnom inspektoratu, *Sl.list RM br.* 24/2007 i 81/2007

Zakon o bezbednosti proizvoda, *Sl.list RM br.* 33/2006 i 63/2007

Program za zaštitu potrošača Vlade Republike Makedonije za 2009 - 2010, *br.* 33/2009 i 5/2010

Sporazum o stabilizaciji i pridruživanju između Republike Makedonije, s jedne strane, i Evropskih zajednica i njihovih država članica, s druge strane, Sl.list - *Međunarodni sporazumi Republike Makedonije, br 28*/01

Crna Gora:

Ustav Crne Gore, *Sl.list CG br. 01/07*

Sporazum o stabilizaciji i pridruživanju između Evropskih zajednica i njihovih država članica, s jedne strane, i Republike Crne Gore, s druge strane, Sl.list CG *br* 07/07

Zakon o zaštiti potrošača, *Sl.list RCG br.* 26/07

Zakon o obligacionim odnosima, *Sl.list CG br* 47/08

Zakon o spoljnoj trgovini, *Sl.list RCG br.* 49/08

Zakon o elektronskom potpisu, *Sl.list RCG br. 84/04*

Zakon o elektronskim komunikacijama, *Sl.list CG b*r. *50/08*

Zakon o inspekcijskom nadzoru, *Sl.list RCG br. 39/03 i Sl.list CG b. 76/09*

Zakon o izvršnom postupku, *Sl.list RCG br. 23/04*

Zakon o rešavanju sukobu zakona sa propisima drugih zemalja u određenim odnosima, *Sl.list SFRJ br*. 43/82 i 72/82, *Sl.list SRJ* br. 46/96, i *Sl.list RCG br. 06/02*

Zakon o bankama, *Sl.list CG br. 17/08*

Zakon o lekovima, *Sl.list RCG br. 80/04 i Sl.list CG br. 18/08*

Zakon o obligacionim odnosima i osnovama svojinsko-pravnih odnosa u vazdušnom saobraćaju, *Sl.list SRJ br. 12/98 i 15/98*

Zakon o privrednim društvima, *Sl.list RCG br. 6/02 i Sl.list CG br. 17/07 i 80/08.+*

Zakon o opštoj bezbednosti proizvoda, *Sl.list CG br. 48/08*

Zakon o tehničkim zahtevima za proizvode i ocenjivanju usaglašenosti proizvoda s propisanim zahtevima, *Sl.list CG br.14/08*

Uredba o zahtevima za organizaciju javne i aukcijske prodaje, *Sl.list CG br*. *01/10*

Pravilnik o arbitražnom odboru za rešavanje potrošačkih sporova, *Sl.list CG br*. *28/08*

Zakon o obligacionim odnosima, *Sl.list SFRJ br*. 29/78, 39/85, 57/89 i *Sl.list SRJ br*. 31/93

Zakon o zaštiti potrošača, *Sl.list SRJ br*. 37/02

Zakon o trgovini, *Sl.list SRJ br*. 46/90

Zakon o trgovini, *Sl.list SRJ br*. 32/93, 50/93, 41/94, 29/96

Srbija:

Ustav Republike Srbije, Sl. glasnik RS 83/06

Zakon o obligacionim odnosima, Sl. list SFRJ br. 29/78, 39/85, 45/89 – odluka USJ i 57/89, Sl. list SRJ No. 31/93, 22/99, 23/99, 35/99 i 44/99, Sl. list SCG br. 1/03 – Ustavna povelja

Zakon o zaštiti potrošača, Sl. glasnik RS 79/05

Nacrt zakona o zaštiti potrošača, Ministarstvo trgovine i usluga Republike Srbije, http://www.mtu.gov.rs/cms/?page_id=362, preuzeto 25.08.2010

Zakon o rešavanju sukoba zakona sa propisima drugih zemalja u određenim odnosima, Sl. list SFRJ br. 43/82 i 72/82, Sl. list SRJ br. 46/96

Zakon o zaštiti potrošača, Sl. list SRJ br. 37/02

Zakon o turizmu, Sl. glasnik RS br. 36/09

Zakon o odgovornosti proizvođača stvari sa nedostatkom, Sl. glasnik RS br. 101/05

Zakon o elektronskom potpisu, Sl. glasnik RS br. 135/04

Zakon o elektronskoj trgovini, Sl. glasnik RS br. 41/09

Zakon o opštoj bezbednosti proizvoda, Sl. glasnik RS br. 41/09

Zakon o telekomunikacijama, Sl. glasnik RS br. 44/03, 36/06

Zakon o zaštiti podataka o ličnosti, Sl. glasnik RS br. 97/08

4. Nacionalna sudska praksa u zemljama učesnicama:

Albanija:

U Albaniji ne postoji sudska praksa u vezi potrošača i ZZP. U rešavanju sporova sudovi se pre opredeljuju za korišćenje opšteg obligacionog prava nego ZZP.

Bosna i Hercegovina:

Ustavni sud Bosne i Hercegovine, AP-1385/06, 26.06.2007, *Sl.glasnik BiH br*. 60/05 (potrošački ugovori)

Izveštaj Federalne uprave za inspekcijske poslove (potrošački kredit), 22.06.2009., *http://www.fuzip.gov.ba/doc/odnosi_s_javnoscu/saopstenje%20banke%2022.06.2009.pdf*, poslednja poseta 15.02.2010.

Hrvatska:

Županijski sud u Varaždinu, Gž. 1074/08–2 od 4.08. 2008. (prodaja robe)

Županijski sud u Varaždinu, Gž. 1052/08–2 od 12.06.2008. (potrošački kredit)

Viši trgovački sud Republike Hrvatske (VTSRH), Pž 2222/92 od 27.04.1993 (nepoštene ugovorne odredbe)

Odluka Agencije za zaštitu tržišnog natjecanja, UP/I 030-02/2004-01/66, *NN br*. 135/05 (zaštita kolektivnih interesa potrošača)

Vrhovni sud Republike Hrvatske (VSRH), Rev 2458/90 od 13.02.1991. (prodaja robe)

Makedonija:

Nema podataka o sudskim odlukama koje su Vrhovni ili Upravni sud donosili na osnovu postojećeg Zakona o zaštiti potrošača. Na građanske sporove koji bi se mogli uvrstiti u potrošačke sporove Vrhovni sud primenjuje Zakon o obligacionim odnosima kao i posebne sektorske zakone.

Crna Gora:

Vrhovni sud RCG, Rev. 252/87, od 29.04.1987. (prodaja robe široke potrošnje, javne izjave)

Vrhovni sud RCG, Rev. 346/93 od 29.06.1993. (prodaja robe široke potrošnje, pravo na nadoknadu)

Vrhovni sud RCG, Rev. 220/93 od 09.12.1993. (pravo na odštetu)

Savezni sud SRJ, Gsz. 19/94 od 24.11.1994. (nepravične ugovorne odredbe, posledice po ugovor u celini)

Vrhovni sud RCG, Rev. 299/03 od 23.11.2006. (prodaja robe široke potrošnje, zahtevi saobraznosti u slučaju nepokretne imovine)

Vrhovni sud RCG, Rev. 29/06, od 28.02.2007. (prodaja robe široke potrošnje, zahtevi saobraznosti u slučaju usluga)

Arbitražni odbor za vansudsko rešavanje potrošačkih sporova, Protokol o sporazumnom rešenju spora, od 13.05.2009. (prodaja robe široke potrošnje, zahtevi saobraznosti)

Arbitražni odbor za vansudsko rešavanje potrošačkih sporova, Protokol o sporazumnom rešenju spora, od 04.11.2009. (prodaja robe široke potrošnje, zahtevi saobraznosti)

Srbija:

U domenu ugovornog prava praktično nema sudske prakse koja bi se oslanjala na važeći Zakon o zaštiti potrošača. U sporovima o postojanju i sadržini onih ugovora koji bi se mogli kvalifikovati kao potrošački i dalje se primenjuje Zakon o obligacionim odnosima.

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