



SMJERNICE ZA USAGLAŠAVANJE POTROŠAČKOG ZAKONODAVSTVA CRNE GORE

GUIDELINES FOR HARMONISATION OF MONTENEGRIN CONSUMER LEGISLATION

Autori:

Marko Baretić

Damir Kaufman

Marijana Lončar Velkova

Jadranka Dabović-Anastasovska

Aleš Galič



A project co-funded by The European Union

giz



Federal Ministry
for Economic Cooperation
and Development

A project implemented by
Deutsche Gesellschaft für Internationale
Zusammenarbeit (GIZ) GmbH

**Smjernice za usaglašavanje potrošačkog
zakonodavstva Crne Gore**

**Guidelines for harmonisation of Montenegrin
consumer legislation**

Podgorica, novembar 2011.

Naslov / Title:

Smjernice za usaglašavanje potrošačkog zakonodavstva Crne Gore
Guidelines for harmonisation of Montenegrin consumer legislation

Autori / Authors:

prof. dr. sc. Marko Baretić
mr.sc. Damir Kaufman
mr. Marijana Lončar Velkova
prof. dr. Jadranka Dabović-Anastasovska
prof. dr. Aleš Galič

Izdavač / Publisher:

Pristupanje unutrašnjem tržištu (Komponente I i II) – AIM Projekat
Accession to Internal Market (Components I and II) – AIM Project
Omladinskih brigada 1
81000 Podgorica, Crna Gora - Montenegro
T: +382 (0)78 103 675
F: +382 (0)78 103 625
W: www.aim.org.me

Za izdavača / For publisher:

Vitomir Fister

Urednik / Editor:

Zvezdana Oluić

Prevod / Translation:

Kaća Rajović

Štampa / Printed by:

M.A.S. Code, Podgorica.

Tiraž / Copies:

100

Mjesto i datum izrade / Place and Date of creating:

Podgorica, novembar 2011.

Ovaj projekat je kofinansiran od strane Evropske unije i implementiran od strane Njemačke organizacije za međunarodnu saradnju (GIZ) GmbH.

This project is co-funded by the European Union and implemented by Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH.

Ova publikacija je napravljena uz pomoć Evropske unije. Sadržaj ove publikacije je isključiva odgovornost AIM projekta i ni na koji način ne odražava stavove Evropske unije.

This publication has been produced with the assistance of the European Union. The contents of this publication are the sole responsibility of the AIM Project and can in no way be taken to reflect the views of the European Union.

© European Communities, 2011

Reproduction is authorised provided that source is acknowledged.



*Accession to Internal Market (Components I and II) - AIM Project
Co-funded by the European Union*

Evropska unija je sastavljena od 27 država članica koje su odlučile da postepeno povežu svoja znanja, resurse i sudbine. Zajedno, tokom perioda proširenja od više od 50 godina, one su izgradile zonu stabilnosti, demokratije i održivog razvoja uz zadržavanje kulturnih različitosti, tolerancije i individualnih sloboda.

Evropska unija je posvećena dijeljenju svojih dostignuća i svojih vrijednosti sa zemljama i narodima izvan njenih granica.

The European Union is made up of 27 Member States who have decided to gradually link together their know-how, resources and destinies. Together, during a period of enlargement of more than 50 years, they have built a zone of stability, democracy and sustainable development whilst maintaining cultural diversity, tolerance and individual freedoms.

The European Union is committed to sharing its achievements and its values with countries and peoples beyond its borders.

NAPOMENA:

Predmetni dokument predstavlja odraz dosadašnjeg rada eksperata AIM projekta na zakonodavnoj podršci u oblasti zaštite potrošača u Crnoj Gori. Kao takav, on najvećim dijelom predstavlja odraz nalaza tabela usklađenosti pripremljenih za izabrane djelove potrošačkog acquisa.

Dodatno, AIM projekat je, na skupu održanom u Miločeru 15. i 16. decembra 2010. godine, na osnovu diskusije i aktivnog učešća prisutnih, utvrdio konačnu verziju ovog dokumenta kao osnove za dalji rad na izradi novog crnogorskog zakonodavnog okvira za zaštitu potrošača.

NOTE:

The current document reflects the work done so far by experts of AIM project on legislative support in the field of consumer protection in Montenegro. As such, it mostly reflects the findings of prepared compliance tables for selected parts of consumer acquis.

In addition, the AIM project has, at a meeting in Milocer held on 15 and 16 December 2010 and based on discussions and active participation of all participants, established the final version of this document as a basis for further work on the new Montenegrin legal framework for Consumer Protection.

SADRŽAJ

1 Uvod	15
2 Opšte preporuke za preuzimanje potrošačkog <i>acquisa</i>	16
2.1. Sistem harmonizacije	16
2.1.1. Direktive minimalnog/maksimalnog pristupa harmonizaciji	18
2.2. Način prenošenja direktiva	19
2.2.1. Potreba cjelovitog prenošenja direktiva	19
2.2.2. Pojmovi i definicije u potrošačkim direktivama	20
2.2.3. Uopštavanje pojedinačnih pravila	21
2.3. Javnopravna i privatnopravna ovlašćenja	22
2.4. Sistem označavanja usklađenosti nacionalnog propisa	22
2.5. Opšte preporuke	23
3 Preporuke za preuzimanje izabranih propisa potrošačkog <i>acquisa</i>	25
3.1. Direktiva 85/577/EEZ (ugovori zaključeni izvan poslovnih prostorija trgovca)	25
3.1.1. Navodi Tabela usklađenosti	25
3.1.2. Presude Suda pravde EU	27
3.1.3. Praktične preporuke	28
3.2. Direktiva 90/314/EEZ (paket putovanja, paket vikendi i paket ture)	29
3.2.1. Navodi Tabela usklađenosti	29
3.2.2. Presude Suda pravde EU	32
3.2.3. Praktične preporuke	34
3.3. Direktiva 93/13/EEZ (nepoštene odredbe u potrošačkim ugovorima)	35
3.3.1. Navodi Tabela usklađenosti	35
3.3.2. Presude Suda pravde EU	37
3.3.3. Praktične preporuke	38
3.4. Direktiva 97/7/EZ (ugovori na daljinu)	38
3.4.1. Navodi Tabela usklađenosti	38
3.4.2. Presude Suda pravde EU	40
3.4.3. Praktične preporuke	41
3.5. Direktiva 98/6/EZ (isticanje cijena ponuđenih proizvoda)	41
3.5.1. Navodi Tabela usklađenosti	41
3.5.2. Presude Suda pravde EU	43
3.5.3. Praktične preporuke	43
3.6. Direktiva 99/44/EZ (neki aspekti prodaje potrošačke robe i pratećih garancija)	44
3.6.1. Navodi Tabela usklađenosti	44
3.6.2. Presude Suda pravde EU	47
3.6.3. Praktične preporuke	47
3.7. Direktiva 2005/29/EZ (nepoštena poslovna praksa)	48
3.7.1. Navodi Tabela usklađenosti	48
3.7.2. Presude Suda pravde EU	51
3.7.3. Praktične preporuke	52
3.8. Direktiva 2006/114/EZ (obmanjujuće i upoređujuće oglašavanje)	53
3.8.1. Navodi Tabela usklađenosti	53
3.8.2. Presude Suda pravde EU	55
3.8.3. Praktične preporuke	56
3.9. Direktiva 2008/48/EZ (ugovori o potrošačkim kreditima)	57
3.9.1. Navodi Tabela usklađenosti	57
3.9.2. Presude Suda pravde EU	57
3.9.3. Praktične preporuke	57
3.10. Direktiva 2008/122/EZ (pojedini aspekti ugovora o vremenski podijeljenom korišćenju (timeshare), dugotrajnom turističkom proizvodu, preprodaji i razmjeni)	58
3.10.1. Navodi Tabela usklađenosti	58
3.10.2. Presude Suda pravde EU	61
3.10.3. Praktične preporuke	61
3.11. Direktiva 2009/22/EZ (sudske i upravne zabrane za zaštitu interesa potrošača)	61
3.11.1. Navodi Tabela usklađenosti	61
3.11.2. Presude Suda pravde EU	64
3.11.3. Praktične preporuke	64

4 Preporuke za preuzimanje dodatnih propisa potrošačkog <i>acquisa</i>	65
4.1. Direktiva 2002/65/EZ (pružanje finansijskih usluga na daljinu)	65
4.1.1. Bitni elementi preuzimanja	65
4.1.2. Presude Suda pravde EU	66
4.1.3. Praktične preporuke	66
4.2. Preporuke Komisije 98/257/EZ i 2001/310/EZ	66
4.2.1. Bitni elementi preuzimanja	66
4.2.2. Presude Suda pravde EU	68
4.2.3. Praktične preporuke	69
Dodatak A: Radni materijal	70
Literatura	73

CONTENTS

1 Introduction	79
2 General recommendations for transposition of consumer acquis	80
2.1. Harmonisation system	80
2.1.1. Directives of minimum/maximum harmonisation approach	82
2.2. Method of transposition of directives	83
2.2.1. Requirement of full transposition of directives	83
2.2.2. Terms and definitions in consumer directives	84
2.2.3. Generalisation of individual rules	85
2.3. Powers under public law and civil law	86
2.4. System of denoting compliance of national law	86
2.5. General recommendations	87
3 Recommendations for transposition of selected pieces of consumer legislation	89
3.1. Directive 85/577/EEC (contracts negotiated away from business premises)	89
3.1.1. Table of Correspondence references	89
3.1.2. Judgments of the Court of Justice of the European Union	91
3.1.3. Practical recommendations	92
3.2. Directive 90/314/EEC (package travel, package holidays and package tours)	93
3.2.1. Table of Correspondence references	93
3.2.2. Judgments of the Court of Justice of the European Union	97
3.2.3. Practical recommendations	98
3.3. Directive 93/13/EEC (unfair terms in consumer contracts)	99
3.3.1. Table of Correspondence references	99
3.3.2. Judgments of the Court of Justice of the European Union	101
3.3.3. Practical recommendations	102
3.4. Directive 97/7/EC (distance contracts)	103
3.4.1. Table of Correspondence references	103
3.4.2. Judgments of the Court of Justice of the European Union	105
3.4.3. Practical recommendations	105
3.5. Directive 98/6/EC (indication of the prices of products offered to consumers)	106
3.5.1. Table of Correspondence references	106
3.5.2. Judgments of the Court of Justice of the European Union	108
3.5.3. Practical recommendations	108
3.6. Directive 99/44/EC (certain aspects of the sale of consumer goods and associated guarantees)	108
3.6.1. Table of Correspondence references	108
3.6.2. Judgments of the Court of Justice of the European Union	112
3.6.3. Practical recommendations	112
3.7. Directive 2005/29/EC (unfair commercial practices)	113
3.7.1. Table of Correspondence references	113
3.7.2. Judgments of the Court of Justice of the European Union	116
3.7.3. Practical recommendations	117
3.8. Directive 2006/114/EC (misleading and comparative advertising)	118
3.8.1. Table of Correspondence references	118
3.8.2. Judgments of the Court of Justice of the European Union	121
3.8.3. Practical recommendations	122
3.9. Directive 2008/48/EC (credit agreements for consumers)	122
3.9.1. Table of Correspondence references	122
3.9.2. Judgments of the Court of Justice of the European Union	123
3.9.3. Practical recommendations	123
3.10. Directive 2008/122/EC (certain aspects of timeshare, long-term holiday product, resale and exchange contracts)	123
3.10.1. Table of Correspondence references	123
3.10.2. Judgments of the Court of Justice of the European Union	126
3.10.3. Practical recommendations	126
3.11. Directive 2009/22/EC (injunctions for the protection of consumers' interests)	127

3.11.1. Table of Correspondence references	127
3.11.2. Judgments of the Court of Justice of the European Union	130
3.11.3. Practical recommendations	130
4 Recommendations for transposition of additional pieces of consumer legislation	132
4.1. Directive 2002/65/EC (distance marketing of financial services)	132
4.1.1. Important elements of transposition	132
4.1.2. Judgments of the Court of Justice of the European Union	132
4.1.3. Practical recommendations	133
4.2. Commission Recommendations 98/257/EC and 2001/310/EC	133
4.2.1. Important elements of transposition	133
4.2.2. Judgments of the Court of Justice of the European Union	135
4.2.3. Practical recommendations	136
Annex A: Working material	137
Bibliography	140

**Smjernice za usaglašavanje potrošačkog
zakonodavstva Crne Gore**

1 UVOD

Harmonizacija crnogorskog zakonodavstva s *acquisem* jedna je od osnovnih dužnosti Crne Gore u procesu pridruživanja Evropskoj uniji (u daljem tekstu: EU). Naravno, ta se dužnost odnosi i na harmonizaciju crnogorskog zakonodavstva s evropskim u oblasti zaštite potrošača. Tokom proteklih decenija u okviru Evropske unije donesen je niz direktiva kojima se uređuje zaštita potrošača, a čija bi pravila trebalo da nađu svoje mjesto u crnogorskom zakonodavstvu. Prilikom prenošenja direktiva Evropske unije iz oblasti zaštite potrošača u crnogorsko zakonodavstvo potrebno je izvršiti sljedeće predradnje:

- a) utvrditi oblasti zaštite potrošača koje su uređene pojedinim direktivama Evropske unije,
- b) definisati sistem prenošenja direktiva Evropske unije iz oblasti zaštite potrošača u crnogorsko zakonodavstvo,
- c) definisati način prenošenja direktiva Evropske unije iz oblasti zaštite potrošača u crnogorsko zakonodavstvo.

Analitičkim pregledom obuhvaćeni su sljedeći instrumenti Evropske unije:

- Direktiva 85/577/EEZ (ugovori zaključeni izvan poslovnih prostorija trgovca),
- Direktiva 90/314/EEZ (paket putovanja, paket vikendi i paket ture),
- Direktiva 93/13/EEZ (nepoštene odredbe u potrošačkim ugovorima),
- Direktiva 97/7/EZ (ugovori na daljinu),
- Direktiva 98/6/EZ (isticanje cijena ponuđenih proizvoda),
- Direktiva 99/44/EZ (neki aspekti prodaje potrošačke robe i pratećih garancija),
- Direktiva 2002/65/EZ (pružanje finansijskih usluga na daljinu),
- Direktiva 2005/29/EZ (nepoštena poslovna praksa),
- Direktiva 2006/114/EEZ (obmanjujuće i upoređujuće oglašavanje),
- Direktiva 2008/48/EZ (ugovori o potrošačkim kreditima),
- Direktiva 2009/22/EZ (sudske i upravne zabrane za zaštitu interesa potrošača),
- Preporuka Komisije 98/257/EZ,
- Preporuka Komisije 2001/310/EZ.

Pravila svih navedenih direktiva morala bi naći svoje mjesto u crnogorskom zakonodavstvu. Međutim, kojim će se sistemom i na koji način te direktive prenijeti u crnogorsko zakonodavstvo, zavisi prvenstveno od odluke Crne Gore.

U pogledu sistema prenošenja direktiva Evropske unije iz oblasti zaštite potrošača u crnogorsko zakonodavstvo, potrebno je prethodno donijeti odluku o tome hoće li se, načelno raznorodna, pravila o zaštiti potrošača predviđena pojedinim direktivama prenijeti u crnogorsko zakonodavstvo putem jednog ili više zakona. Nadalje, ako bi se donijela odluka o tome da se direktive Evropske unije iz oblasti zaštite potrošača prenesu u crnogorsko zakonodavstvo kroz više zakona, potrebno je nadalje definisati kojim će se zakonima prenijeti pojedine direktive, dakle hoće li se te direktive prenijeti u neke već postojeće zakone ili će se, radi njihovog prenošenja, donositi novi, do sada nepostojeći zakoni. Konačno, u kontekstu definisanja sistema prenošenja direktiva Evropske unije iz oblasti zaštite potrošača u crnogorsko zakonodavstvo, potrebno je prethodno utvrditi koja će tijela biti nadležna za nadzor nad sprovođenjem donesenih pravila u praksi.

U pogledu načina prenošenja direktiva Evropske unije iz oblasti zaštite potrošača u crnogorsko zakonodavstvo, potrebno je prethodno donijeti odluku o tome hoće li se crnogorskim zakonodavstvom za potrošače predvidjeti veći nivo zaštite od onog predviđenog pojedinim direktivama, a imajući u vidu činjenicu da je određenim brojem tih direktiva predviđeno načelo minimalne harmonizacije. Nadalje, potrebno je u tom kontekstu odlučiti hoće li se prilikom prenošenja pojedinih direktiva u crnogorsko zakonodavstvo primijeniti određeni sistem uopštavanja materije uređene pojedinim direktivama.

O pojedinim aspektima harmonizacije crnogorskog zakonodavstva s evropskim biće više govora u narednom poglavlju.

2 OPŠTE PREPORUKE ZA PREUZIMANJE POTROŠAČKOG ACQUISIA

2.1. Sistem harmonizacije

Sporazumom o stabilizaciji i pridruživanju Crna Gora se obavezala da harmonizuje svoje pravo s *acquisem*. U skladu s tom obavezom, pravila zaštite potrošača predviđena pojedinim direktivama Evropske unije moraju se prenijeti u crnogorsko zakonodavstvo. Međutim, Crna Gora samostalno odlučuje o tome kojim će sistemom prenošenja preuzeti pojedine direktive Evropske unije u crnogorsko zakonodavstvo.

S aspekta transparentnosti pravila zaštite potrošača, preporučljivo je da se pravila pojedinih direktiva za zaštitu potrošača prenesu jednim propisom. No, ima li se na umu broj, a pogotovo heterogenost pravila sadržanih u pojedinim direktivama, taj je sistem harmonizacije teško ostvariv.

Zbog toga predlažemo da materija zaštite potrošača bude uređena kroz nekoliko zakona. Osnov pravnog uređenja zaštite potrošača predstavljao bi Zakon o zaštiti potrošača (u daljem tekstu: ZZP). Tim bi se propisom uredili opšti principi zaštite potrošača, organizaciona struktura zaštite potrošača, kao i neki obligacioni odnosi u koje ulaze potrošači. Takav je sistem prenošenja, uostalom, u Crnoj Gori predviđen već i sada, budući da važeći Zakon o zaštiti potrošača uređuje sva tri naznačena aspekta zaštite potrošača. Ostale oblasti zaštite potrošača, pogotovo zaštita zdravlja i bezbjednosti potrošača, bile bi uređene posebnim propisima.

Pri tom treba voditi računa o činjenici da je personalno područje primjene pojedinih direktiva Evropske unije iz oblasti zaštite potrošača, pogotovo onih kojima se uređuju obligacioni odnosi, vrlo različito, što bi trebalo uzeti u obzir prilikom donošenja odluke o tome koje će se direktive prenijeti Zakonom o zaštiti potrošača, a koje nekim drugim zakonima. Tako se, na primjer, Direktiva o paket aranžmanima odnosi na svakog putnika, bez obzira uzima li putnik paket aranžman u privatne ili poslovne svrhe. Nadalje, Direktiva o odgovornosti za neispravne proizvode primjenjuje se na svakog oštećenog, bez obzira da li je oštećeni bio u ulozi potrošača ili ne. Dakle, navedene direktive, iako formacijski spadaju u oblast zaštite potrošača, pružaju zaštitu mnogo širem krugu lica nego što je to slučaj s ostalim direktivama koje uređuju zaštitu potrošača. Njima su predviđena opšta zaštitna pravila pa bi ih, radi ispravnog prenošenja, bilo potrebno preuzeti opštim propisom koji se odnosi na sva lica, a ne parcijalnim propisom kojim se uređuje zaštita samo tačno određene grupe stanovništva, kao što je to slučaj sa Zakonom o zaštiti potrošača. Zbog toga bi bilo poželjno da se navedene direktive prenesu u crnogorsko zakonodavstvo Zakonom o obligacionim odnosima ili, eventualno, nekim drugim opštim propisom (npr. Zakonom o turizmu – u pogledu Direktive o paket putovanjima, paket vikendima i paket turama). Nadalje, pravila nekih direktiva, iako se personalnim područjem primjene odnose isključivo na potrošače, dosljednije je prenijeti kao opšta pravila kojima se zaštita pruža svakome, a ne samo potrošačima. Takva su, na primjer, pravila Direktive o određenim aspektima prodaje potrošačke robe i pratećim garancijama kojima se uređuje tzv. odgovornost za materijalne nedostatke, a koja su u velikom broju država članica Evropske unije prihvaćena kao opšta pravila. Zbog toga bi pravila i te Direktive bilo oportuno prenijeti u crnogorsko zakonodavstvo Zakonom o obligacionim odnosima (u daljem tekstu: ZOO).

U skladu s navedenim, prilikom donošenja odluke o tome koje će se direktive prenijeti Zakonom o zaštiti potrošača, prvenstveno bi trebalo voditi računa o tome da u njega budu ugrađene one direktive koje se odnose na osnovna prava zaštite potrošača (npr. označavanje proizvoda i cijene proizvoda, nepoštene poslovne prakse), direktive kojima se uređuje sistem zaštite prava potrošača (npr. *injunction* direktiva), kao i direktive kojima se uređuju pojedini aspekti obligacionih odnosa u koje ulazi potrošač (npr. prodaja na daljinu, prodaja izvan poslovnih prostorija, nepoštene odredbe u potrošačkim ugovorima, *timeshare* ugovori, potrošački krediti itd.), a kojima se specifična zaštita u tim odnosima pruža isključivo potrošačima, a ne i ostalim učesnicima u tim odnosima.

U crnogorskom zakonodavstvu pravna je materija po pravilu raspoređena u određene propise po principu *rationae materiae*, s obzirom na materiju koja se pojedinim propisima uređuje. S druge strane, postojećim Zakonom o zaštiti potrošača, kao i budućim Zakonom o zaštiti potrošača, relevantna materija bila bi uređena po principu *rationae personae*, s obzirom na lice čija se zaštita tim propisima uređuje. Dakle, predloženi koncept Zakona o zaštiti potrošača nomotehnički bi se razlikovao od uobičajenih nomotehničkih pravila u Crnoj Gori. Međutim, predložena nomotehnička struktura u velikoj je mjeri određena specifičnostima direktiva Evropske unije u oblasti zaštite potrošača i potrebom da se pravila iz tih direktiva transparentno prenesu u crnogorsko zakonodavstvo. Naime, veliki broj direktiva iz oblasti zaštite potrošača sadrži i javnopravna i privatnopravna pravila, kao i materijalnopravna i procesnopravna pravila. Kada bi se pravila tih direktiva prenijela u crnogorsko zakonodavstvo po principu *rationae materiae*, bilo bi ih potrebno rasporediti u veliki broj različitih zakona, čime bi došlo do sveobuhvatne atomizacije pravila zaštite potrošača i, posljedično, do njihove netransparentnosti. Naime, potrošači moraju relativno lako doći do informacije u kojim su situacijama i na koji način zaštićeni u tržišnim odnosima. U tom smislu, pravila o zaštiti potrošača moraju biti transparentna, a to će biti moguće jedino ako je većina pravila - koja uređuju određeni tržišni odnos i koja su kao takva uređena jednom direktivom - predviđena na jednom mjestu, u jednom zakonu.

Iz razloga koji će biti detaljnije objašnjeni u nastavku, smatramo kako bi umjesto izmjena i dopuna postojećeg Zakona o zaštiti potrošača trebalo pristupiti izradi novog Zakona o zaštiti potrošača. Međutim, iz razloga koji su gore navedeni, smatramo da bi pritom trebalo u većoj mjeri zadržati strukturu obrade materije zaštite potrošača koja je predviđena sadašnjim Zakonom o zaštiti potrošača.

Uz opisanu strukturu, Zakon o zaštiti potrošača imaće vrlo specifičnu pravnu prirodu. Naime, u kontekstu opštih načela zaštite potrošača, te organizacione strukture zaštite potrošača, taj će zakon predstavljati opšti propis (*lex generalis*). S druge strane, u kontekstu obligacionih odnosa koji se uređuju tim zakonom, on će predstavljati poseban propis (*lex specialis*) u odnosu na Zakon o obligacionim odnosima koji u materiji obligacionih odnosa predstavlja opšti propis (*lex generalis*). Osim toga, prilikom prenošenja direktiva iz oblasti zaštite potrošača u crnogorsko zakonodavstvo potrebno je voditi računa o gore pomenutoj činjenici da će Zakon o zaštiti potrošača uređivati određene odnose po principu *rationae personae*. To, međutim, otvara opasnost da neki drugi zakon, kojim su uređeni određeni odnosi, a koji je sačinjen po principu *rationae materiae*, ujedno sadrži i određena pravila o zaštiti potrošača. Na primjer, Zakon o unutrašnjoj trgovini, Zakon o bankama itd. mogli bi sadržati i određena pravila kojima se štite potrošači, odnosno određena pravila kojima se štite svi, pa time i potrošači. Ako bi pravila tih zakona kojima je predviđena zaštita potrošača bila sadržajno različita od pravila koja će biti predviđena Zakonom o zaštiti potrošača, pravila tih zakona trebalo bi staviti van snage, kako se ne bi dovela u pitanje primjena pravila Zakona o zaštiti potrošača. Naime, ako bi ti drugi zakoni sadržali neka posebna pravila o zaštiti potrošača u oblasti koju uređuju (npr. ako bi Zakon o bankama sadržao posebna pravila o zaštiti potrošača u obavljanju bankarskih poslova), pravila tih zakona bi u odnosu na pravila Zakona o zaštiti potrošača predstavljala posebna pravila (*lex specialis*) koja bi derogirala primjenu pravila Zakona o zaštiti potrošača. Na taj način, i pored činjenice da bi Zakon o zaštiti potrošača sadržajno odgovarao pojedinim direktivama, crnogorsko zakonodavstvo ne bi bilo usklađeno s evropskim. O ovom bi problemu trebalo voditi računa i u pogledu ostalih zakona kojima će se prenijeti pojedine direktive. Tako, na primjer, ako se Direktiva o paket putovanjima, paket vikendima i paket turama prenese Zakonom o turizmu, a ne Zakonom o obligacionim odnosima, mora se obezbijediti da sva pravila predviđena tom direktivom budu uvrštena u Zakon o turizmu, a ne da jedan dio tih pravila bude predviđen Zakonom o turizmu, a drugi Zakonom o obligacionim odnosima. Naime, u dijelu u kojem bi Zakon o turizmu uređivao ugovor o paket aranžmanu, taj bi Zakon predstavljao *lex specialis* u odnosu na Zakon o obligacionim odnosima, te bi time derogirao pravila Zakona o obligacionim odnosima kojima se uređuje ista materija.

Konačno, potrebno je naglasiti da, pored donošenja potrebnih harmonizacijskih propisa, puna harmonizacija nacionalnog prava s evropskim podrazumijeva i efikasno sprovođenje donesenih zakona. Zbog toga je Zakonom o zaštiti potrošača potrebno predvidjeti jasna, precizna i transparentna pravila kojima bi se odredilo koja bi tijela državne uprave bila

nadležna za nadzor nad sprovođenjem tog zakona. Budući da u tom kontekstu pravila Evropske unije pružaju državama članicama priličnu slobodu, Crna Gora bi načelno bila slobodna dati nadzor nad sprovođenjem tog zakona u nadležnost već postojećim tijelima državne uprave ili, eventualno, u tu svrhu oformiti neka nova tijela. Pri tom je, međutim, potrebno voditi računa o tome da će vjerovatno, zbog heterogenosti materije koja se tim zakonom obrađuje, nadležnost za nadzor nad sprovođenjem Zakona biti potrebno raspodijeliti na više tijela državne uprave. U svakom slučaju, ta bi tijela morala biti organizaciono, kadrovski i stručno osposobljena kako bi nadzor nad sprovođenjem Zakona bio efikasan.

2.1.1. Direktive minimalnog/maksimalnog pristupa harmonizaciji

Direktivama iz oblasti zaštite potrošača po pravilu je prihvaćen tzv. koncept minimalne harmonizacije, što znači da je tim pravilima predviđen minimalan nivo zaštite koji mora postojati u svim državama članicama Evropske unije, s tim da pojedine države članice, prenoseći te direktive, mogu zadržati ili predvidjeti i veći nivo zaštite od onog predviđenog direktivom. No, pri tom moraju voditi računa o tome da te jače zaštitne mjere moraju biti u skladu s Ugovorom o Evropskoj uniji i Ugovorom o funkcionisanju Evropske unije, što konkretno znači da se tim jačim zaštitnim mjerama ne smiju ugrožavati ostale politike Evropske unije (npr. osnovne slobode).

S druge strane, kod direktiva nove generacije kojima se uređuje zaštita potrošača, primijećen je trend prelaska s koncepta minimalne harmonizacije na koncept maksimalne harmonizacije. To znači da u pogledu materije koja je uređena tim direktivama države članice ne mogu predvidjeti veći nivo zaštite od onog predviđenog direktivom, osim u onim elementima tog uređenja kod kojih je pojedinom direktivom to izričito dopušteno.

O ovim bi specifičnostima evropskog prava trebalo voditi računa prilikom definisanja sadržaja novog Zakona o zaštiti potrošača. Dakle, prilikom prenošenja svake pojedine direktive, potrebno je prethodno utvrditi da li je riječ o direktivi minimalne ili maksimalne harmonizacije. Pri tom je važno naglasiti da se ponekad to neće moći utvrditi iz samog teksta direktive, već će biti potrebno konsultovati relevantnu sudsku praksu Suda pravde Evropske unije (u daljem tekstu: SP EU) kojom je taj sud odlučivao o pravnoj prirodi pojedinih direktiva. Nadalje, ako se u pojedinom slučaju utvrdi da pojedina direktiva predviđa koncept maksimalne harmonizacije, prilikom njenog prenošenja ne bi se smjeli predvidjeti jači zaštitni mehanizmi od onih predviđenih tom direktivom, osim ako to izričito ne dopušta sama direktiva. Ako se, s druge strane, u pojedinom slučaju utvrdi da pojedina direktiva predviđa koncept minimalne harmonizacije, potrebno je odlučiti da li treba u oblasti koja je obuhvaćena tom direktivom potrošačima u Crnoj Gori omogućiti veći nivo zaštite od onog minimuma koji je predviđen tom direktivom. Pri tom je, međutim, potrebno voditi računa o dva problema: prvo, o činjenici da se jačim zaštitnim mehanizmima mogu ugroziti ostale politike Evropske unije (prvenstveno, osnovne slobode) te drugo, da ponekad određena rješenja koja na prvi pogled daju potrošaču veći nivo zaštite, zapravo mogu dovesti do smanjenja zaštite potrošača. Zbog toga, ako se prilikom prenošenja pojedinih direktiva minimalne harmonizacije potrošačima želi dati veći nivo zaštite od minimuma predviđenog direktivom, prethodno je potrebno konsultovati relevantnu sudsku praksu Suda pravde Evropske unije, kako bi se utvrdilo da li je u konkretnom slučaju prihvatanje jačih zaštitnih mehanizama dopušteno ili ne.

Prilikom analitičkog pregleda postojećeg zakonodavstva Crne Gore u oblasti zaštite potrošača, uočeno je da je u određenim situacijama crnogorski zakonodavac iskoristio mogućnosti koje nudi koncept minimalne harmonizacije, te da je za potrošača propisao veći nivo zaštite od minimuma predviđenog pojedinom direktivom. Međutim, tom je prilikom takođe uočeno da je sudskom praksom Suda pravde Evropske unije u pojedinim slučajevima utvrđeno da jači zaštitni mehanizmi koji sadržajno odgovaraju onima koje je prihvatio crnogorski zakonodavac nijesu dopušteni.

2.2. Način prenošenja direktiva

Kako bi se osiguralo da pojedine direktive budu u potpunosti i ispravno prenijete u crnogorsko zakonodavstvo, prilikom definisanja teksta Zakona o zaštiti potrošača potrebno je voditi računa o nekoliko faktora: 1. o potrebi cjelovitog prenošenja direktiva, 2. o potrebi preciznog i potpunog definisanja osnovnih pojmova u potrošačkom zakonodavstvu, te 3. o potrebi (mogućnosti) uopštavanja pojedinačnih rješenja predviđenih pojedinim direktivama.

O navedenim aspektima načina prenošenja direktiva iz oblasti zaštite potrošača potrebno je voditi računa naročito u kontekstu predstojećih pregovora o pristupanju između Crne Gore i Evropske unije. Naime, novom generacijom pristupnih ugovora (tzv. Sporazuma o stabilizaciji i pridruživanju) države kandidati preuzimaju obavezu da u potpunosti usklade svoje zakonodavstvo s *acquisem* i to do trenutka ulaska države kandidata u Evropsku uniju. Pri tom, kao što to pokazuje iskustvo Republike Hrvatske, države kandidati podvrgnute su izuzetno detaljnoj analizi stepena usklađenosti njenog zakonodavstva s *acquisem*, pa se već i u fazi pregovora o članstvu u Evropskoj uniji od države kandidata očekuje da potpuno i ispravno prenesu čitav *acquis* u pojedinoj oblasti. Dakle, da bi uspješno završila pregovore u poglavlju zaštite potrošača, Crna Gora će morati da dokaže da je njeno zakonodavstvo u potpunosti usklađeno sa svakim segmentom potrošačkog *acquisa*.

2.2.1. Potreba cjelovitog prenošenja direktiva

Na osnovu Ugovora o funkcionisanju Evropske unije (član 288 stav 3), direktive su obavezujuće u pogledu rezultata koji se njima želi postići, no državama članicama ostavlja se sloboda izbora forme i metode postizanja tog cilja. Načelno, dakle, direktive bi trebalo da na opšti način određuju određeni cilj koji se želi postići, a države članice bi trebalo da budu u potpunosti slobodne da odrede način i metod postizanja tog cilja. Potrebno je, međutim, naglasiti da u oblasti zaštite potrošača direktive, po pravilu ne sadrže opšti opis cilja koji se pojedinicima od njih želi postići, već sadrže vrlo precizna i detaljna pojedinačna pravila kojima će se doći do željenog cilja. Pri takvom stanju stvari, direktive iz oblasti zaštite potrošača vrlo se često ne mogu prenijeti nikako drukčije nego potpunim preuzimanjem sadržaja pojedinih pravila iz tih direktiva u nacionalno zakonodavstvo.

Pri tom je, međutim, potrebno naglasiti da se prenošenje pravila iz pojedinih direktiva nikako ne bi smjelo svesti na nekritičko prepisivanje pojedinih pravila direktive. Potrebno je voditi računa o činjenici da jednom kada budu prenijeta u nacionalno zakonodavstvo, pravila preuzeta iz pojedinih direktiva ne smiju predstavljati „strano tijelo“ u nacionalnom pravnom poretku, već moraju činiti dosljedan i koherentan dio nacionalnog pravnog poretka. Naime, ponekad pojedine direktive u sebi sadrže neke nepravne termine i institute, koji nijesu poznati u pojedinim nacionalnim pravnim porecima. Na taj se način pojedinim direktivama nastoji opisati cilj koji se njima želi postići, a prilikom prenošenja tih odredaba u nacionalno zakonodavstvo, treba u nacionalnom pravnom poretku pronaći odgovarajući institut kojim se dolazi do cilja opisanog u direktivi. Tako, na primjer, Direktiva o nepoštenim odredbama u potrošačkim ugovorima navodi da države članice moraju obezbijediti uslove kako nepoštene odredbe potrošačkih ugovora ne bi imale uticaja na potrošača. Riječ je, dakle, o nepravnom terminu, kojim se htio opisati krajnji cilj koji se tom direktivom želio postići. Prenoseći tu direktivu, crnogorski je zakonodavac zauzeo ispravan stav da se u crnogorskom zakonodavstvu taj cilj predviđen Direktivom može postići upotrebom instituta ništavosti ugovora, pa je Zakonom o zaštiti potrošača (član 66 stav 1) propisao da će nepoštena ugovorna odredba potrošačkog ugovora biti ništavna.

Nadalje, potrebno je voditi računa o činjenici da direktive obavezuju cijelim svojim sadržajem, tako da ispravno prenošenje pojedine direktive nalaže da se supstancijalna pravila predviđena tim direktivama preuzmu u cjelosti. Dakle, države članice ne mogu izabrati iz direktive pojedina pravila koja će prenijeti, već moraju preuzeti sva supstancijalna pravila predviđena pojedinom direktivom.

Evidentno je da se nastojalo da se važećim Zakonom o zaštiti potrošača u crnogorsko zakonodavstvo prenese niz direktiva iz oblasti zaštite potrošača. No, prilikom analitičkog

pregleda crnogorskog zakonodavstva u oblasti zaštite potrošača, uočeno je da u pojedinim segmentima crnogorskim zakonodavstvom nijesu preuzeta sva pravila pojedinih direktiva, odnosno da pojedina pravila direktiva nijesu preuzeta u potpunosti. U tom smislu, smatramo da će radi potpune harmonizacije crnogorskog zakonodavstva s pojedinim direktivama Evropske unije u oblasti zaštite potrošača biti potrebno izvršiti određene intervencije u postojećem zakonodavstvu, a u cilju postizanja potpunijeg i preciznijeg zakonskog uređenja. Pri tom, zbog broja očekivanih intervencija i potrebe postizanja zadovoljavajućeg nivoa transparentnosti tog uređenja, smatramo da bi, umjesto izmjena i dopuna postojećeg Zakona o zaštiti potrošača, trebalo pristupiti izradi novog zakona u toj oblasti.

2.2.2. Pojmovi i definicije u potrošačkim direktivama

Kao što je već naglašeno u prethodnim tačkama, direktivama u oblasti zaštite potrošača predviđena su vrlo precizna i detaljna pojedinačna pravna pravila. To se, naročito, odnosi na neke osnovne pojmove i definicije u oblasti zaštite potrošača. Pri tom je izuzetno važno da ti pojmovi i te definicije u nacionalnom zakonodavstvu budu sadržajno usklađeni s pravilima pojedinih direktiva. Naravno, odstupanje od sadržaja pojmova i definicija predviđenih pojedinim direktivama biće moguće ako je to dopušteno pojedinom direktivom, pogotovo ako pojedina direktiva sadrži princip minimalne harmonizacije, pa je, radi povećane zaštite potrošača, dopušteno odstupiti od pravila te direktive. No, u takvim je situacijama potrebno prethodno donijeti odluku da li se želi i da li je oportuno crnogorskim potrošačima u pojedinim segmentima obezbijediti veći nivo zaštite od onog koji predviđa pojedina direktiva. Naime, prilikom definisanja zakonskog okvira zaštite potrošača, pored opravdanih interesa potrošača, trebalo bi voditi računa i o opravdanim interesima trgovaca, ali i pravnog poretka i pravne sigurnosti uopšte. U tom smislu, ne bi trebalo insistirati na većem nivou zaštite potrošača u onim segmentima u kojima će to dovesti do nesrazmjernog pogoršanja položaja trgovaca.

Osim toga, potrebno je voditi računa o činjenici da pojedini termini korišćeni u pojedinim direktivama nemaju odgovarajući prevod u crnogorskom jeziku, odnosno da crnogorsko zakonodavstvo ne poznaje pravne institute koji su označeni tim terminima. U takvim će situacijama biti potrebno pronaći (možda i osmisliti) odgovarajuće crnogorske termine. Pritom je potrebno voditi računa o tome da ne dođe do terminološke konfuzije, odnosno da se ne koriste crnogorski termini koji jezički odgovaraju terminima iz pojedinih direktiva, ali koji sadržajno ne odgovaraju institutima koji se kriju iza tih termina. Na primjer, Direktiva 97/7/EZ i Direktiva 2002/65/EZ koriste termin „distancioni“ ugovori. Pritom, međutim, u crnogorskom zakonodavstvu ne bi trebalo koristiti termin „distancioni ugovori“ i „distanciono zaključivanje ugovora“, već termine „ugovori na daljinu“ i „zaključivanje ugovora na daljinu“, budući da se termin „distanciono zaključivanje ugovora“ u postojećoj crnogorskoj pravnoj terminologiji koristi za označavanje određenih metoda zaključenja ugovora koje ne odgovaraju onome što uređuju navedene direktive.

Ako se pristupi uopštavanju, odnosno ujednačavanju pojedinih pojmova i definicija iz potrošačkih direktiva (o čemu će biti više riječi u narednoj tački), treba voditi računa o tome da je potrebno obezbijediti da jedinstveni pojmovi i definicije predviđene nacionalnim zakonodavstvom sadržajno odgovaraju tim pojmovima i definicijama u svim direktivama. To je naročito važno u kontekstu činjenice da sve veći broj direktiva usvaja princip maksimalne harmonizacije, pa nacionalnim zakonodavstvom nije moguće predvidjeti veći nivo zaštite od onog predviđenog takvom direktivom. U tom smislu, ako bi se crnogorskim zakonodavstvom predvidio neki jedinstven pojam ili neka jedinstvena definicija koja je koncipirana šire nego u pojedinim direktivama (npr. definicija pojma „trgovac“), moglo bi se dogoditi da bi takvo pravilo nacionalnog zakonodavstva bilo u skladu s pojedinom direktivom kojom se usvaja princip minimalne harmonizacije, ali da bi istovremeno taj pojam bio u neskladu s pojedinom direktivom koja usvaja princip maksimalne harmonizacije.

Prilikom analitičkog pregleda postojećeg crnogorskog zakonodavstva u oblasti zaštite potrošača, uočeno je da pojedini (uglavnom uopšteni) pojmovi i definicije do određene mjere odstupaju od tih pojmova i definicija predviđenih pojedinim direktivama. Pri tom, takvo stanje stvari je po pravilu zadovoljavajuće u pogledu onih direktiva kojima se usvaja princip minimalne harmonizacije, ali je zato sporno u pogledu onih direktiva kojima je usvojen princip maksimalne harmonizacije. Nadalje, analitičkim je pregledom uočeno da ponekad pojedini

osnovni pojmovi i definicije nijesu preuzeti u crnogorsko zakonodavstvo u cjelini, što dovodi do nesklada između crnogorskog zakonodavstva i pravila predviđenih pojedinim direktivama. Zbog toga bi u novom zakonskom uređenju zaštite potrošača trebalo preciznije i sveobuhvatnije odrediti neke osnovne pojmove i definicije tog uređenja.

2.2.3. Uopštavanje pojedinačnih pravila

Još uvijek velik broj direktiva u oblasti zaštite potrošača predstavlja tzv. direktive vertikalnog pristupa, što znači da se njima uređuje zaštita potrošača u tačno određenoj oblasti, u tačno određenim tržišnim odnosima. Tako je, na primjer, Direktivom o potrošačkim kreditima potrošačima pružena zaštita samo prilikom zaključivanja te vrste ugovora. Direktivom o prodaji izvan poslovnih prostorija trgovca i Direktivom o prodaji na daljinu uređena je zaštita potrošača samo kod tih načina zaključivanja ugovora. Pri takvom stanju stvari, učestalo se događa da velik broj direktiva nanovo definiše iste pojmove i institute. Tako, na primjer, velika većina direktiva u oblasti zaštite potrošača sadrži sopstvene definicije pojma „potrošač“ i pojma „trgovac“. Nadalje, određeni broj direktiva sadrži ista prava za potrošača (tako, na primjer, Direktiva o prodaji izvan poslovnih prostorija trgovca, Direktiva o prodaji na daljinu te Direktiva o *timeshareu*, predviđaju za potrošača pravo na jednostrani raskid ugovora (*right of withdrawal*)). Pri takvom stanju stvari, oportuno je, prilikom izrade novog zakonskog uređenja zaštite potrošača, pristupiti svojevrsnom uopštavanju osnovnih pojmova, definicija i potencijalno, pojedinih prava potrošača, kao što je to, uostalom, učinjeno i važećim Zakonom o zaštiti potrošača.

Pri tom bi, međutim, trebalo voditi računa o sljedećem. Prvo, osnovni pojmovi *acquisa*, poput pojma „potrošač“ ili „trgovac“, još uvijek su prilično nedosljedno uređeni u pojedinim direktivama. Tako se događa da se definicije tih pojmova, predviđene pojedinom direktivom, u većoj ili manjoj mjeri razlikuju od definicija istih pojmova predviđenih nekom drugom direktivom. Stoga, ako se crnogorskim zakonodavstvom žele predvidjeti jedinstvene definicije tih pojmova, mora se voditi računa o tome da se prihvati definicija koja će biti dovoljno široka da obuhvati sve definicije istog pojma, predviđene svim direktivama koje se prenose. Drugo, ako se razmišlja o tome da se određeni instituti ili prava potrošača predviđena samo određenim direktivama podignu na rang opštih pravila, koja bi trebalo da se primjenjuju u svim odnosima u kojima učestvuju potrošači, treba voditi računa o tome da se time ne naruši dosljednost pravnog poretka i pravna sigurnost. Dakle, prilikom donošenja takvih odluka, osim o opravdanim interesima potrošača, moralo bi se voditi računa i o opravdanim interesima trgovaca, ali i pravnog prometa i njegove sigurnosti uopšte. Na primjer, pojedinim je direktivama predviđeno pravo potrošača na jednostrani raskid ugovora. To pravo nije opšte pravo koje potrošaču pripada u svakoj situaciji, već pojedinačno pravo koje potrošaču pripada samo u određenim situacijama navedenim u pojedinim direktivama. Načelno, moglo bi se razmišljati o tome da se to pravo na jednostrani raskid ugovora da potrošaču u svakoj situaciji. No, time bi se pravna sigurnost mogla značajno narušiti jer u svakom potrošačkom obligaciono-pravnom odnosu neko vrijeme ne bi bilo sigurno hoće li zaključeni ugovor opstati ili će ga, koristeći to svoje pravo, potrošač raskinuti, što može imati vrlo negativne posljedice po pravnu sigurnost. Ipak, određen nivo uopštavanja moguć je i u pogledu ovog specifičnog prava potrošača. Naime, pojedinim je direktivama za potrošača predviđeno pravo na jednostrani raskid ugovora u različitom trajanju. Stoga bi se, radi dosljednosti sistema i jednostavnosti primjene, moglo pristupiti ujednačavanju trajanja tog prava. Naravno, dužina roka za korišćenje tog prava mora biti takva da zadovoljava zahtjeve svih direktiva kojima je to pravo predviđeno.

U skladu s navedenim, prilikom definisanja pravila crnogorskog zakonodavstva u oblasti zaštite potrošača, trebalo bi voditi računa o potrebi uopštavanja pojedinih instituta i pojmova. Pri tom bi, međutim, odluku o tome hoće li se u pojedinim segmentima pristupiti uopštavanju materije trebalo donijeti na osnovu prethodne analize da li je u svakom konkretnom slučaju takvo uopštavanje dopušteno, te da li je, s aspekta zaštite pravne sigurnosti, ono oportuno.

2.3. Javnopravna i privatnopravna ovlaštenja

Pojedinim direktivama predviđeni su različiti mehanizmi zaštite potrošača. Tako je, na primjer, velikim brojem direktiva predviđen poseban mehanizam zaštite potrošača putem tzv. sudskih i upravnih zabrana tj. zahtjeva za propuštanje (*injunctons*) kojima se ostvaruje zaštita kolektivnih prava potrošača, odnosno kojima se, na osnovu zahtjeva udruženja za zaštitu potrošača i drugih zainteresovanih lica, pojedinim trgovcima ili grupama trgovaca nalaže prestanak određenog ponašanja kojim se krše prava potrošača. Države članice dužne su da predvide efikasan sistem zaštite kolektivnih interesa potrošača, no pri tom imaju slobodu izbora da li će se ta zaštita pružati u upravnom ili sudskom postupku. U tom smislu, u Crnoj Gori će biti potrebno donijeti odluku o tome da li će se kolektivna zaštita potrošača ostvarivati u upravnom ili sudskom postupku ili, eventualno, paralelno kroz obje vrste postupka. Prilikom donošenja te odluke, trebalo bi voditi računa o tome da predviđeni mehanizam mora biti efikasan, što znači da bi trebalo izabrati onaj put zaštite koji omogućava brzu, efikasnu i pouzdanu zaštitu kolektivnih interesa potrošača.

Osim toga, kako pravila pojedinih direktiva predviđaju niz javnopravnih i privatnopravnih pravila, prilikom prenošenja tih direktiva u crnogorsko zakonodavstvo, mora se voditi računa o tome da ne dođe do preklapanja nadležnosti između upravne (inspekcijske) i sudske instance. Naime, zavisno od konkretnog segmenta zaštite potrošača, različita tijela javne vlasti mogu biti nadležna za pružanje određenog tipa zaštite potrošačima. Tako, na primjer, nadzor nad poštovanjem javnopravnih pravila vrše inspekcijski organi. S druge strane, o urednom ispunjenju ugovornih obaveza odlučuju sudovi. Dakle, zakonskim uređenjem potrebno je obezbijediti jasnu podjelu nadležnosti u pogledu kontrole ispunjavanja pojedinih pravila zaštite potrošača.

2.4. Sistem označavanja usklađenosti nacionalnog propisa

Izradom zakona kojim se prenose pojedine direktive Evropske unije, proces harmonizacije se ne završava. Naime, države članice (a time i države kandidati) imaju obavezu tzv. interpretativne harmonizacije, odnosno obavezu da tumače pravila nacionalnog zakonodavstva u skladu s ciljem direktive koja je tim pravilima prenijeta u nacionalno zakonodavstvo. Ta tzv. *favour conventionis* metoda tumačenja zakonodavstva često zahtijeva od onoga ko tumači određeno pravilo nacionalnog prava da konsultuje relevantnu sudsku praksu Suda pravde Evropske unije kojom je taj sud tumačio pojedina pravila iz pojedinih direktiva. Da bi oni koji primjenjuju nacionalno zakonodavstvo koje je harmonizovano s pojedinim direktivama Evropske unije, te oni koji ga tumače mogli primijeniti navedenu metodu tumačenja, moraju pouzdano znati da je određenim pravilom nacionalnog zakonodavstva prenijeta određena direktiva. Zbog toga se pojedinim direktivama od država članica zahtijeva da na odgovarajući način obznanе da je pojedinim nacionalnim propisima prenijeta pojedina direktiva Evropske unije. Na koji će se način to učiniti, načelno je ostavljeno na volju državama članicama. Međutim, prihvaćeni sistem mora biti transparentan i mora omogućiti da se svi koji primjenjuju i tumače domaće zakone na primjeren način mogu informisati o tome da li je nekim domaćim propisom prenijeta neka direktiva Evropske unije.

Smatramo da bi najprimjereniji način označavanja usklađenosti nacionalnih propisa s određenom direktivom Evropske unije bio taj da se u prelaznim i završnim odredbama nekog zakona navedu direktive koje su tim zakonom prenijete. U tom smislu, bilo bi preporučljivo da se u prelaznim i završnim odredbama Zakona o zaštiti potrošača izričito navedu direktive koje će tim zakonom biti prenijete u crnogorski pravni poredak. Naravno, to nije prepreka da se u Crnoj Gori prihvati ili osmisli neki drugi način označavanja usklađenosti nacionalnih propisa sa određenom direktivom.

Radi obezbjeđivanja transparentnosti evropskog prava prenijetog u domaće zakonodavstvo, svakako bi trebalo nastojati da pravila pojedine direktive Evropske unije budu prenijeta u crnogorsko zakonodavstvo jednim zakonom. Dakle, po pravilu trebalo bi izbjegavati prenošenja pravila pojedine direktive kroz više zakona. Samo izuzetno, kad za to postoje zaista opravdani razlozi, pravila pojedine direktive mogla bi biti prenijeta kroz više zakona.

2.5. Opšte preporuke

U skladu s navedenim, u kontekstu harmonizacije crnogorskog zakonodavstva s *acquisem* u oblasti zaštite potrošača, dajemo sljedeće opšte preporuke:

1. Trebalo bi pristupiti izradi novog Zakona o zaštiti potrošača.

Zbog opsega izmjena koje je potrebno izvršiti u postojećem zakonodavstvu kako bi se ono u potpunosti harmonizovalo s relevantnim direktivama Evropske unije, smatramo da je ispravnije pristupiti izradi novog Zakona o zaštiti potrošača, a ne izmjenama i dopunama važećeg Zakona. Pri tom, novim bi zakonom u najvećoj mogućoj mjeri trebalo zadržati strukturu važećeg Zakona o zaštiti potrošača, što znači da bi i novim Zakonom o zaštiti potrošača trebalo da budu uređeni opšti principi zaštite potrošača, organizaciona struktura zaštite potrošača, te neki obligacioni odnosi u koje ulaze potrošači.

2. Novim Zakonom o zaštiti potrošača trebalo bi prenijeti u crnogorsko zakonodavstvo sljedeće instrumente: Direktivu 85/577/EEZ (ugovori zaključeni izvan poslovnih prostorija trgovca), Direktivu 93/13/EEZ (nepoštene odredbe u potrošačkim ugovorima), Direktivu 97/7/EZ (ugovori na daljinu), Direktivu 98/6/EZ (isticanje cijena ponuđenih proizvoda), Direktivu 2002/65/EZ (pružanje finansijskih usluga na daljinu), Direktivu 2005/29/EZ (nepoštena poslovna praksa), Direktivu 2009/22/EZ (sudske i upravne zabrane za zaštitu interesa potrošača), Preporuku Komisije 98/257/EZ, Preporuku Komisije 2001/310/EZ.

Eventualno, ako bi za to postojali opravdani razlozi, neki od navedenih instrumenata mogli bi se prenijeti nekim drugim, bilo već postojećim, bilo novim zakonima. Na primjer, budući da je materija potrošačkih kredita, pogotovo u kontekstu nadzora nad finansijskim tržištem, do određene mjere specifična, možda bi se moglo razmišljati o prenošenju Direktive 2008/48/EZ (ugovori o potrošačkim kreditima) posebnim zakonom.

3. One direktive kojima se pruža zaštita širem krugu ljudi (npr. Direktiva o paket putovanjima, paket vikendima i paket turama, te Direktiva o odgovornosti za neispravan proizvod), kao i one direktive koje bi se, uprkos činjenici da se njima uređuje isključivo zaštita potrošača, mogle prihvatiti kao opšta pravila (npr. Direktiva o određenim aspektima prodaje potrošačke robe i pratećih garancija) trebalo bi prenijeti opštim propisima i to bilo Zakonom o obligacionim odnosima ili eventualno nekim drugim zakonima (npr. Zakonom o turizmu u pogledu direktive o turističkim paket aranžmanima). Budući da ne uređuje odnose između trgovaca i potrošača, već dominantno međusobne odnose između trgovaca, Direktivu 2006/114/EZ (obmanjujuće i upoređujuće oglašavanje) trebalo bi prenijeti nekim od zakona kojima se odnosi u trgovini određuju na uopšten način. Pritom, budući da navedena direktiva, između ostalog, uređuje i zaštitu potrošača od upoređujućeg oglašavanje, potrebno je donijeti odluku hoće li se taj segment ove materije urediti ZZP-om ili zakonom u kojem će ova materija biti integralno uređena.

4. Trebalo bi osigurati da pojedina direktiva bude u cjelini prenijeta jednim zakonom.

Na taj bi se način osigurala primjerena transparentnost pravila zaštite potrošača i omogućila lakša primjena tih propisa u praksi te bi se, s druge strane, izbjegla mogućnost da se pojedini zakoni kojima se prenose različita pravila iste direktive međusobno derogiraju. Izuzetno, u slučajevima kad se ocijeni da je to neophodno, pravila jedne direktive mogla bi biti prenijeta kroz različite zakone.

5. Sva supstancijalna pravila pojedinih direktiva moraju se u crnogorsko zakonodavstvo prenijeti u cjelini.

Dakle, prilikom prenošenja pojedinih direktiva ne bi trebalo prihvatati samo neka, već sva pravila predviđena direktivom.

- 6. Pojedini instituti, pojmovi i definicije predviđeni pojedinim direktivama moraju se prenijeti u crnogorsko zakonodavstvo ispravno, tačno, precizno i potpuno.**
- 7. Prilikom prenošenja pojedinih direktiva u crnogorsko zakonodavstvo, mora se donijeti odluka o tome hoće li se i u kojim segmentima potrošačima pružiti veći nivo zaštite.**

Pri tom treba prethodno utvrditi da li je u konkretnom segmentu pružanje većeg nivoa zaštite dopušteno, odnosno da li je u konkretnom slučaju riječ o direktivi minimalne harmonizacije. Osim toga, ako se u konkretnom slučaju dođe do zaključka da se radi o direktivi minimalne harmonizacije, analizom pravila te direktive, kao i analizom relevantne sudske prakse Suda pravde Evropske unije treba utvrditi da li je željeno povećanje nivoa zaštite dopušteno, te da li je ono oportuno s aspekta očuvanja pravne sigurnosti i primjerene zaštite svih zainteresovanih strana.

- 8. Pri izradi Zakona o zaštiti potrošača, u mjeri u kojoj je to oportuno, trebalo bi pristupiti ujednačavanju instituta i pravila koja su predviđena različitim direktivama.**

Ovo ujednačavanje naročito će doći do izražaja prilikom definisanja osnovnih pojmova, poput pojmova „potrošač“, „trgovac“ itd., koji se koriste u različitim direktivama, a koje bi trebalo jedinstveno koristiti u cijelom Zakonu o zaštiti potrošača.

Pri tom treba voditi računa o tome da su pojedinim direktivama isti pojmovi različito definisani, te da je kod ove vrste ujednačavanja potrebno izabrati pojam, ili definiciju, koji je dovoljno širok da njime budu obuhvaćene sve definicije tog pojma predviđene pojedinim direktivama.

Nadalje, može se razmišljati o ujednačavanju ili uopštavanju pojedinih pravila predviđenih različitim direktivama. No, toj bi vrsti ujednačavanja trebalo pristupiti jedino ako se, na osnovu svih relevantnih okolnosti, ocijeni da je to oportuno.

- 9. Zakonom o zaštiti potrošača trebalo bi razraditi jasnu podjelu nadležnosti u pogledu nadzora nad sprovođenjem tog zakona.**

Pri tom bi trebalo voditi računa o tome da ne dođe do preklapanja nadležnosti između pojedinih tijela javne vlasti, kao i o tome da ne dođe do preklapanja kontrole javnopravnih i privatnopravnih aspekata zaštite potrošača.

- 10. Trebalo bi osmisliti sistem označavanja usklađenosti crnogorskog zakonodavstva s pojedinim direktivama Evropske unije.**

Smatramo da se taj cilj najjednostavnije može postići na način da se u prelaznim i završnim odredbama zakona precizno navede koje su direktive Evropske unije prenijete tim zakonom.

3 PREPORUKE ZA PREUZIMANJE IZABRANIH PROPISA POTROŠAČKOG ACQUIS

3.1. Direktiva 85/577/EEZ (ugovori zaključeni izvan poslovnih prostorija trgovca)

3.1.1. Navodi Tabela usklađenosti

Analitičkim pregledom crnogorskog zakonodavstva utvrđeno je da se nastojalo da se u Crnoj Gori ova direktiva prenese Zakonom o zaštiti potrošača. Pri tom je utvrđeno da crnogorsko zakonodavstvo u značajnoj mjeri ispunjava zahtjeve predviđene ovom direktivom. Ipak, uočena su određena odstupanja od Direktive koja se sastoje bilo u nepreuzimanju određenih rješenja predviđenih Direktivom, bilo u nedovoljno preciznom ili jasnom zakonskom uređenju, čime se dovodi u pitanje ispravnost prenošenja ove direktive.

Odstupanja crnogorskog zakonodavstva od Direktive uočena su u sljedećim elementima:

1. Prilikom definisanja područja djelovanja pravila o prodaji izvan poslovnih prostorija trgovca, Zakonom o zaštiti potrošača predviđeno je da se ta pravila, između ostalog, odnose na slučajeve prodaje na javnom mjestu, dok istovremeno Zakonom nije predviđeno da se ta pravila primjenjuju i u slučaju ekskurzije organizovane od strane trgovca. Načelno, proširivanje područja primjene tih pravila i na prodaju na javnom mjestu bilo bi u skladu s Direktivom, budući da se time potrošačima pruža viši stepen zaštite. No, izostavljanje iz Zakona situacija u kojima se proizvodi prodaju na ekskurzijama organizovanim od strane trgovaca znači da crnogorsko pravo u tom segmentu ne pruža potrošačima onaj stepen zaštite koji predviđa Direktiva, pa je u tom segmentu crnogorsko zakonodavstvo neusklađeno s evropskim.
2. Članom 49 Zakona o zaštiti potrošača određeno je da se trgovac mora potrošaču predstaviti ovlašćenjem za zaključenje ugovora. Prije svega, nije jasno o kakvom se ovlašćenju radi, a pogotovo, koje su pravne posljedice činjenice da se trgovac potrošaču nije legitimisao tim ovlašćenjem, odnosno da to ovlašćenje uopšte nema. Ovo je naročito važno zbog toga što prema Direktivi, potrošač ima pravo na zaštitu predviđenu tom direktivom bez obzira na to je li ili nije trgovac ovlašćen za taj vid trgovine. Dakle, ako bi se ispostavilo da tržišna inspekcija neće kontrolisati djelatnost onih trgovaca koji se služe ovim vidom trgovine, a nemaju odgovarajuće ovlašćenje, time bi potrošači u Crnoj Gori bili manje zaštićeni nego potrošači u EU.
3. Zakon o zaštiti potrošača ne sadrži odredbe koje bi odgovarale odredbama člana 1 st. 3 i 4 Direktive, kojima je određeno da će se pravila te direktive odnositi i na ugovore u pogledu kojih je, u situacijama sličnim onima opisanim u prethodnim stavovima istog člana, potrošač dao ponudu za zaključivanje ugovora i to bez obzira da li je potrošač vezan tom ponudom ili ne. Na taj način, potrošačima je u crnogorskom zakonodavstvu pružen manji stepen zaštite nego što je to predviđeno Direktivom.
4. Definicija trgovca predviđena Zakonom o zaštiti potrošača u značajnoj mjeri odudara od definicije tog pojma u Direktivi. Prije svega, iz Zakona o zaštiti potrošača proizilazi da se pojam trgovca odnosi samo na lice koje zaključuje ugovor o kupoprodaji i ugovor o usluzi, a ne i na lica koja zaključuju ostale vrste ugovora (npr. ugovor o lizingu, ugovor o ortakluku - v. C-215/08), dok je, s druge strane, u Direktivi navedeno da se trgovcem smatra svako lice koje na tržištu djeluje u profesionalne svrhe, dakle koje zaključuje bilo koju vrstu ugovora. Nadalje, iz Zakona o zaštiti potrošača proizilazi da se trgovcem smatra samo ono lice koje zaista zaključuje ugovor, dok iz Direktive proizilazi da se trgovcem smatra svako lice koje djeluje na tržištu, bez obzira hoće li ili ne u konkretnom slučaju zaključiti ugovor. Konačno, za razliku od Direktive,

Zakonom o zaštiti potrošača nije predviđeno da se trgovcem smatra i lice koje djeluje u ime ili za račun trgovca. Iz navedenog proizilazi da je područje primjene pravila Zakona o zaštiti potrošača o prodaji izvan poslovnih prostorija uže od područja primjene pravila Direktive, te da su time potrošači u Crnoj Gori manje zaštićeni nego što bi trebalo da budu po Direktivi.

5. Direktiva propisuje da se njene odredbe ne odnose na ugovore o kupoprodaji hrane, pića i ostale robe namijenjene za svakodnevnu upotrebu u domaćinstvu koji se dobavljaju putem redovnog dostavljača. S druge strane, Zakon o zaštiti potrošača određuje da se njegove odredbe o prodaji izvan poslovnih prostorija trgovca ne odnose na periodičnu dostavu hrane i pića, te ostale robe namijenjene svakodnevnoj upotrebi u domaćinstvu. Dakle, dok se na osnovu Direktive, njena pravila neće primjenjivati samo na one ugovore kod kojih se navedeni artikli dostavljaju putem redovnog dostavljača, na osnovu Zakona o zaštiti potrošača njegove se odredbe neće primjenjivati ni na jedan ugovor o kupoprodaji navedenih artikala, bez obzira dostavljaju li se putem redovnog dostavljača ili ne. Na taj način, područje isključenja pravila Zakona o zaštiti potrošača šire je od područja isključenja pravila Direktive, što znači da su u tom segmentu potrošači u Crnoj Gori manje zaštićeni nego što je to predviđeno Direktivom.
6. Direktiva predviđa da se njene odredbe neće primjenjivati na ugovore zaključene na osnovu kataloga trgovca ako je kupac imao mogućnost da ga pročita bez prisustva predstavnika trgovca, ako je predviđeno da će na osnovu tog ugovora ili nekog kasnije zaključenog ugovora trgovac i potrošač ostati u trajnijoj vezi i ako je i u katalogu i u ugovoru potrošač jasno obaviješten o svom pravu na jednostrani raskid ugovora. Za razliku od Direktive, Zakon o zaštiti potrošača predviđa da se njegove odredbe o prodaji izvan poslovnih prostorija trgovca neće primjenjivati ako je potrošač imao mogućnost da pročita katalog, na osnovu kojeg je ugovor zaključen, bez prisustva ovlaštenog predstavnika trgovca. Na taj način potrošači bi mogli biti dovedeni u lošiji položaj u odnosu na ono što propisuje Direktiva jer bi, u slučaju da je potrošač pročitao katalog u prisustvu predstavnika trgovca, trgovci mogli da tvrde da nije bila riječ o njegovom ovlaštenom predstavniku, pa da, stoga, odredbe Zakona o prodaji izvan poslovnih prostorija ne bi trebalo primjenjivati na tu situaciju. Nadalje, Zakonom o zaštiti potrošača predviđeno je da se njegove odredbe o prodaji izvan poslovnih prostorija trgovca neće primjenjivati ako je katalogom i ugovorom predviđen nastavak bilo kakvog poslovnog odnosa između trgovca i potrošača, dok Direktiva propisuje da se njene odredbe neće primjenjivati samo ako je katalogom i ugovorom predviđen nastavak zaključenog ugovora ili sljedećeg ugovora. Na taj način, područje isključenja pravila Zakona o zaštiti potrošača šire je nego područje isključenja pravila Direktive, što znači da su u tom segmentu potrošači u Crnoj Gori manje zaštićeni nego što je to predviđeno Direktivom. Konačno, u odredbi člana 54 stav 4 tačka 4 pogrešno je upućeno na član 50, umjesto na član 51 Zakona.
7. Direktiva određuje da je trgovac dužan da potrošaču preda pisano obavještenje o njegovom pravu na jednostrani raskid ugovora. Zakonom o zaštiti potrošača predviđeno je da to obavještenje mora biti dato u pisanoj ili elektronskoj formi. Kako Zakon ne predviđa ko ima pravo da odluči o tome u kojoj će formi to obavještenje biti dato, proizilazi da bi trgovac to mogao sam odlučiti, što znači da bi se mogao služiti isključivo elektronskom formom, čime bi bila ugrožena pozicija potrošača koji se ne služe kompjuterima, kao što su starije osobe. Nadalje, dok u pogledu ovog obavještenja Direktiva stavlja naglasak na pravo potrošača na raskid ugovora pa određuje da je trgovac dužan da obavijesti potrošača o tom njegovom pravu, Zakon o zaštiti potrošača određuje da je u tom obavještenju trgovac dužan da obavijesti potrošača o svim važnim elementima ugovora. U tom smislu, postoji opasnost da bi obavještenje o pravu na raskid ugovora moglo biti „sakriveno“ u mnoštvu informacija o ostalim elementima ugovora, što bi moglo negativno uticati na sposobnost prosječnog potrošača da pravilno bude obaviješten o svom pravu na raskid ugovora.
8. Direktiva sadrži posebno pravilo kojim se određuje u kojem trenutku obavještenje o pravu na raskid ugovora mora biti dostavljeno potrošaču pa tako navodi da je, u

slučaju kada je potrošač inicirao zaključivanje ugovora, to trenutak kad je potrošač stavio ponudu. Kako Zakon o zaštiti potrošača uopšte ne uređuje situaciju u kojoj potrošač inicira zaključivanje ugovora, tako taj zakon ne predviđa posebno pravilo o roku u kojem obavještenje o pravu na raskid ugovora mora biti dostavljeno potrošaču u situacijama kada potrošač inicira zaključivanje ugovora.

9. Na osnovu Direktive, u slučaju kada koristi svoje pravo na jednostrani raskid ugovora, potrošač mora raskinuti ugovor pisanim obavještenjem u roku propisanom Direktivom. Pritom, Direktivom je propisano da će se smatrati da je raskid učinjen na vrijeme ako je obavještenje poslato u roku propisanom Direktivom. To pravilo nije preuzeto Zakonom o zaštiti potrošača čime se stvara neizvjesnost oko toga hoće li za raskid ugovora biti dovoljno da je obavještenje o raskidu poslato u okviru roka ili je potrebno da obavještenje u tom roku pristigne trgovcu, u kojem bi slučaju potrošači u Crnoj Gori bili stavljeni u nepovoljniji položaj u odnosu na ono što propisuje Direktiva.
10. Članom 52 Zakona o zaštiti potrošača predviđeno je da potrošač neće imati pravo da jednostrano raskine ugovor zaključen izvan poslovnih prostorija trgovca u svim onim situacijama u kojima nema pravo da jednostrano raskine ugovor koji je zaključen na daljinu. Kako Direktiva ne predviđa takvo isključenje, proizilazi da su rješenjem iz člana 52 Zakona o zaštiti potrošača potrošači u Crnoj Gori stavljeni u nepovoljniji položaj u odnosu na ono što propisuje Direktiva.

3.1.2. Presude Suda pravde EU

Sud pravde Evropske unije u nekoliko je navrata odlučivao bilo o interpretaciji bilo o implementaciji ove direktive u pojedinim državama članicama. U kontekstu ispravne implementacije ove direktive, od naročite su važnosti sljedeće presude:

Presuda od 14. marta 1991. godine u predmetu C-361/89 *Di Pinto* [1991] Zbirka sudskih odluka str. I-01189

U ovoj je presudi Sud, između ostalog, zauzeo stav da Direktiva ne sprječava države članice da zaštitu koja je njome predviđena za potrošače proširi i na trgovce.

Presuda od 22. aprila 1999. godine u predmetu C-423/97 *Travel Vac SL protiv Manuel José Antelm Sanchis* [1999] Zbirka sudskih odluka str. I-02195

U ovoj je presudi Sud, između ostalog, zauzeo stav da potrošač nije dužan dokazivati da je bio pod uticajem trgovca, odnosno da je bio izmanipulisan od strane trgovca, kako bi imao pravo na jednostrani raskid ugovora. Isto tako, ovom je presudom Sud zauzeo stav da Direktiva ne sprječava države članice da svojim zakonodavstvom propišu kako za jednostrani raskid ugovora od strane potrošača nije potrebna nikakva forma, obrazlažući to tvrdnjom da time potrošači nijesu dovedeni u nepovoljniji položaj, budući da je neformalni raskid ugovora za potrošača manje zahtjevan od pisane forme. Tumačeći ovu odluku Suda, moglo bi se zaključiti da države članice ne bi smjele propisivati formu jednostranog raskida ugovora koja bi bila nepovoljnija za potrošača od pisane forme propisane Direktivom.

Presuda od 13. decembra 2001. godine u predmetu C-481/99 *Georg Heininger i Helga Heininger protiv Bayerische Hypo- und Vereinsbank AG* [2001] Zbirka sudskih odluka str. I-09945

U ovoj je presudi Sud, između ostalog, zauzeo stav da Direktiva sprječava države članice da svojim zakonodavstvom propišu kako se u slučaju da potrošaču nije dostavljeno obavještenje o njegovom pravu na raskid ugovora, pravo potrošača na jednostrani raskid ugovora ograničava na rok od godinu dana od dana zaključivanja ugovora. Ovom je presudom, dakle, Sud utvrdio da u slučaju kada potrošaču nije dostavljeno obavještenje o njegovom pravu na raskid ugovora, pravo potrošača na raskid ne može biti vremenski ograničeno.

Presuda od 25. oktobra 2005. godine u predmetu C-229/04 *Crailsheimer Volksbank eG protiv Klaus Conrads i drugih* [2005] Zbirka sudskih odluka str. I-09273

U ovoj je presudi Sud, između ostalog, zauzeo stav da se Direktiva mora tumačiti na način koji ne omogućava trgovcu da, u situaciji kada je ugovor zaključen putem trećeg lica koje je radilo u njegovo ime ili za njegov račun, izbjegne primjenu Direktive pozivajući se na činjenicu da mu nije bilo poznato da je ugovor zaključen izvan poslovnih prostorija.

Presuda od 10. aprila 2008. godine u predmetu C-412/06 *Annelore Hamilton protiv Volksbank Filder eG* [2008] Zbirka sudskih odluka str. I-2383

U ovoj je presudi Sud, između ostalog, zauzeo stav da Direktiva ne sprječava države članice da u svom zakonodavstvu predvide kako će, u slučaju kada mu je dostavljeno neuredno obavještenje o pravu na raskid ugovora, potrošač imati pravo da raskine ugovor o dugotrajnom kreditu najkasnije u roku od mjesec dana nakon što ugovorne strane ispune ugovor u cjelini.

Presuda od 15. aprila 2010. godine u predmetu C-215/08 *E. Friz GmbH protiv Carsten von der Heyden*

U ovoj je presudi Sud, između ostalog, zauzeo stav da se Direktiva odnosi i na ugovore o ortakluku, koji su zaključeni izvan poslovnih prostorija trgovca, ako osnovna svrha ugovora nije bila pristupanje ortakluku, već investiranje kapitala.

Presuda od 17. decembra 2009. godine u predmetu C-227/08 *Eva Martín Martín protiv EDP Editores SL*

U ovoj je presudi Sud, između ostalog, zauzeo stav da Direktiva ne sprječava države članice da u svom zakonodavstvu predvide kako će, u slučaju da potrošaču nije dostavljeno obavještenje o njegovom pravu na jednostrani raskid ugovora, nacionalni sud moći po službenoj dužnosti utvrditi ništavost ugovora, čak ako se tokom postupka potrošač nije pozivao na tu okolnost.

3.1.3. Praktične preporuke

1. Uskladiti područje primjene pravila Zakona o zaštiti potrošača u pogledu ugovora zaključenih izvan poslovnih prostorija trgovca sa zahtjevima Direktive. U tom smislu, treba propisati da se ta pravila Zakona odnose i na ugovore koji su zaključeni na ekskurziji koju je organizovao trgovac. Pritom, moglo bi se zadržati rješenje važećeg Zakona o zaštiti potrošača prema kojem bi se ta pravila odnosila i na ugovore zaključene na javnom mjestu budući da se takvim rješenjem potrošačima pruža više zaštite od onoga što je predviđeno Direktivom, No, pritom bi trebalo preciznije definisati pojam "javnog mjesta".
2. Preciznije definisati ulogu "ovlašćenja trgovca za zaključivanje ugovora" koje je predviđeno članom 49 Zakona o zaštiti potrošača, te definisati posljedice nepredodjenja takvog ovlašćenja.
3. Saglasno članu 1 st. 3 i 4 Direktive, Zakonom o zaštiti potrošača predvidjeti da se njegova pravila odnose i na situacije u kojima je potrošač predložio zaključivanje ugovora izvan poslovnih prostorija trgovca, bez obzira da li je pritom vezan svojom ponudom ili ne.
4. Uskladiti definiciju trgovca s definicijom tog pojma iz Direktive, a pogotovo propisati da se trgovcem smatra i lice koje radi u ime ili za račun trgovca.
5. Preciznije urediti isključenje pravila Zakona o ugovorima zaključenim izvan poslovnih prostorija trgovca koje se odnosi na periodičnu dostavu hrane i pića u domaćinstvo i to u skladu s Direktivom.
6. Preciznije urediti isključenje pravila Zakona o ugovorima zaključenim izvan poslovnih prostorija trgovca koje se odnosi na prodaju putem kataloga i to u skladu s Direktivom.

7. Preciznije urediti pravila Zakona o ugovorima zaključenim izvan poslovnih prostorija trgovca koja se odnose na dužnost trgovca da dostavi potrošaču obavještenje o pravu na raskid ugovora i to u skladu s Direktivom.
8. Saglasno Direktivi, predvidjeti da u slučajevima kada je zaključivanje ugovora inicirao potrošač, rok za dostavljanje obavještenja o pravu potrošača na jednostrani raskid ugovora počinje da teče od trenutka kad je potrošač stavio ponudu.
9. Saglasno Direktivi, propisati da će se smatrati da je obavještenje potrošača o raskidu ugovora pravovremeno ako je poslato u okviru rokova koje propisuje Zakon o zaštiti potrošača.
10. Staviti van snage pravilo iz člana 52 važećeg Zakona o zaštiti potrošača.
11. Saglasno presudi Suda u predmetu C-423/97, propisati da potrošač ima pravo da jednostrano raskine ugovor bez obzira na razloge koji su ga naveli na to.
12. Saglasno presudi Suda u predmetu C-481/99 propisati da u slučaju da potrošaču nije dostavljeno obavještenje o pravu na raskid, njegovo pravo na raskid neće biti vremenski ograničeno.

3.2. Direktiva 90/314/EEZ (paket putovanja, paket vikendi i paket ture)

3.2.1. Navodi Tabela usklađenosti

Analizom zakonodavstva utvrđeno je da se u Crnoj Gori ova direktiva prenosi Zakonom o turizmu i Zakonom o obligacionim odnosima. Crnogorsko zakonodavstvo u pogledu ove direktive ima određeni stepen usklađenosti, ali postoje odstupanja.

Odstupanja crnogorskog zakonodavstva od Direktive uočena su u sljedećim elementima:

1. Zakon o turizmu nije u potpunosti usaglašen sa definicijom paket aranžmana prema Direktivi.

Zakon o turizmu definiše da je turistički paket aranžman unaprijed utvrđena kombinacija najmanje dvije ponuđene pojedinačne usluge, koje se sastoje od prevoza, smještaja i drugih turističkih ili ugostiteljskih usluga koje čine cjelinu, a pružaju se u vremenu dužem od 24 sata ili uključuju barem jedno noćenje i prodaju se po ukupnoj unaprijed utvrđenoj cijeni. Direktiva je u definiciji turističkog paket aranžmana preciznija, budući da navodi da odvojeno iskazivanje različitih komponenti istog aranžmana ne oslobađa organizatora ili distributera od obaveza po pravilima Direktive.

2. Nacionalno zakonodavstvo nije u potpunosti usaglašeno sa definicijom organizatora putovanja prema Direktivi.

Direktiva definiše da je „organizator“ lice koje, ne samo ponekad, organizuje aranžmane, prodaje ih ili ih nudi na prodaju, neposredno ili preko distributera. Zakon o turizmu pojam organizatora sa jedne strane vezuje za turističke agencije istovremeno dajući mogućnost da se neke specifične organizacije pojave kao organizatori putovanja. Zakon o obligacionim odnosima ne daje definiciju organizatora. Prema ovome postoji odstupanje u pogledu usaglašenosti.

3. Nacionalno zakonodavstvo nije u potpunosti usaglašeno sa definicijom distributera (posrednika) prema Direktivi.

Prema Direktivi „distributer“ je lice koje prodaje ili nudi na prodaju aranžmane koje je osmislio organizator. Nacionalno zakonodavstvo izostavlja pojam „nudi na prodaju“, zatim određuje da distributer može da prodaje i nudi samo aranžmane za koje ima zaključen ugovor i korišćena terminologija nije u saglasnosti sa Zakonom o obligacionim odnosima.

4. Nacionalno zakonodavstvo nije u potpunosti usaglašeno sa definicijom „potrošač“ (putnik) prema Direktivi.

Direktiva definiše „potrošača“ (putnika) kao lice koje uzima ili je saglasno da uzme aranžman („glavni ugovarač“), ili bilo koje lice za čiji se račun glavni ugovarač saglasi da kupi aranžman („drugi korisnici“) ili neko drugo lice kome glavni ugovarač ili neko od korisnika ustupi aranžman („primalac“). Zakon o turizmu definiše da je putnik „lice koje kupuje ili je saglasno

da kupi turistički paket aranžman ili drugu turističku uslugu, kao i lice za čiji račun ili u čije ime se pribavlja turistička usluga ili bilo koje lice na koje se prenese pravo korišćenja turističkog paket aranžmana ili usluge". U prvom dijelu (glavni ugovarač i drugi korisnik) definicija je usklađena. Ali, u krajnjem dijelu definicije Zakon o turizmu koristi termin „prenos prava korišćenja“ dok Direktiva koristi termin „ustupanje aranžmana“. Razlika koja se javlja je značajna zato što postoji različiti pravni režim kod ustupanja ugovora i prenosa prava (cesije).

5. Nacionalno zakonodavstvo nije u potpunosti usaglašeno sa definicijom „ugovora“ prema Direktivi.

Prema Direktivi „ugovor“ je sporazum koji povezuje potrošača sa organizatorom i/ili distributerom. Zakon o turizmu ugovor vezuje samo za organizatora putovanja. Dodatno, Zakon o turizmu (član 29 stav 2) određuje da ugovor treba sačiniti u skladu sa zakonom kojim se uređuju obligacioni odnosi, iako istovremeno i sam (u članu 31) daje pravila o sadržaju ugovora. Treba istaći da je po svojoj prirodi materija koja se odnosi na ugovor o putovanju materija koja se uređuje Zakonom o obligacionim odnosima. Postojanje dualiteta pravnog režima ne ide u prilog pravnoj sigurnosti i zaštiti potrošača. Osim toga, kod takvog se dualnog uređenja pojavljuje problem mogućnosti primjene oba zakonska uređenja. Naime, ako su pojedini aspekti ugovora o organizovanju putovanja uređeni Zakonom o turizmu, a pojedini aspekti tog ugovora Zakonom o obligacionim odnosima, tada ne postoji mogućnost paralelne primjene oba zakonska uređenja, već bi Zakon o turizmu, kao *lex specialis*, derogirao primjenu Zakona o obligacionim odnosima, kao *lex generalis*. Pri takvom bi stanju stvari trebalo zaključiti da zapravo crnogorsko zakonodavstvo nije usklađeno s Direktivom u svim onim aspektima koji su uređeni Zakonom o obligacionim odnosima.

6. Nacionalno zakonodavstvo nije u potpunosti usaglašeno sa pravilima Direktive u pogledu sadržaja informacija koje se odnose na ugovor.

Dok Direktiva određuje da nijedan informativni materijal koji organizator i/ili distributer daje potrošaču, kao ni cijena aranžmana ni svi drugi uslovi koji se odnose na ugovor, ne smiju sadržati obmanjujuće (*misleading*) informacije, u Zakonu o obligacionim odnosima informacije se prije svega vezuju za reklamni materijal, a ne i ostale informativne materijale koje bi organizator mogao dati potrošaču, sa jedne strane, dok Zakon o turizmu uređuje sadržaj informacija na nepotpun način. Naime Zakon o turizmu sasvim ispravno predviđa da informativni materijal ne smije da sadrži netačne informacije, ali ne predviđa situaciju kada je informacija tačna ali dovodi u zabludu (obmanjuje) prosječnog potrošača.

7. Nacionalno zakonodavstvo nije u potpunosti usaglašeno sa pravilima Direktive u pogledu vremena dostavljanja informacija o vizama i zdravstvenim uslovima.

Zakon o obligacionim odnosima nije precizan da informacije o zdravstvenim uslovima i vizama treba dostaviti prije zaključenja ugovora, kako to određuje Direktiva.

8. Nacionalno zakonodavstvo nije u potpunosti usaglašeno sa pravilima Direktive u vezi lokalnih predstavnika organizatora i/ili distributera, odnosno o ostvarivanju kontakta sa organizatorom i/ili distributerom.

Direktiva predviđa da organizator i/ili distributer potrošaču pravovremeno, prije početka putovanja, pruži informacije koje se odnose na lokalnog predstavnika, precizirajući sadržaj tih informacija. I Zakon o obligacionim odnosima i Zakon o turizmu predviđaju dostavljanje informacija o lokalnom predstavniku, ali ne preciziraju detalje informacija u smislu Direktive. Dodatno, prema Direktivi, u slučajevima kada ne postoje predstavnici organizatora ili distributera ili lokalne agencije, potrošač u svakom slučaju mora da dobije broj koji može koristiti u slučaju prijekne potrebe, ili informaciju koja će mu omogućiti kontakt sa organizatorom i/ili distributerom. Ova odredba nije prenesena u nacionalno zakonodavstvo.

9. Nacionalno zakonodavstvo nije usaglašeno sa pravilima Direktive o sadržaju ugovora o paket aranžmanima.

Direktiva precizira sadržaj ugovora o putovanju. Nacionalno zakonodavstvo Crne Gore uvodi dvojni režim ugovora, regulišući tu materiju i Zakonom o obligacionim odnosima i Zakonom o turizmu. Pri tome Zakon o turizmu, iako upućuje na Zakon o obligacionim odnosima, i sam sadrži pravila o ugovoru. Ovakav dualitet ne ide u prilog zaštiti potrošača. Dodatno, lista elemenata ugovora određena u zakonodavstvu nije u saglasnosti sa Direktivom. Naime,

Zakon o turizmu i Zakon o obligacionim odnosima na različit način uređuju pitanje obaveznog sadržaja ugovora.

10. Nacionalno zakonodavstvo nije usaglašeno sa pravilima Direktive o ugovornim uslovima i načinu dostavljanja informacija o ugovornim uslovima.

Nacionalno zakonodavstvo ne sadrži sva pravila Direktive koja se odnose na formu ugovora i na način dostavljanja informacija. Naime istim nije propisano, kao što je predviđeno Direktivom, da uslovi ugovora mogu biti dostavljeni i u drugoj formi a ne samo u pisanoj, da informacije treba da budu i razumljive i dostupne i da putniku treba dostaviti kopiju ugovornih uslova.

11. Nacionalno zakonodavstvo nije usaglašeno sa pravilima Direktive koja se odnose na rezervacije i zaključenje ugovora u posljednjem trenutku.

Direktiva predviđa da pravila koja se odnose na uslove ugovora ne isključuju mogućnost da se u posljednjem trenutku izvrši rezervacija ili zaključi ugovor. Ovo pravilo ne postoji u nacionalnom zakonodavstvu. Činjenica da ovo nije navedeno u zakonodavstvu može se tumačiti da se time potrošaču pruža veći stepen zaštite, što Direktiva dozvoljava. Ipak, imajući u vidu i uobičajenu praksu zakašnjelih rezervacija i zaključenja ugovora u posljednjem trenutku, interese tržišta i potrebu da potrošaču informacije o njegovim pravima budu lako dostupne, ova odredba Direktive treba da bude jasno navedena u zakonodavstvu.

12. Nacionalno zakonodavstvo nije usaglašeno sa pravilima direktive koja se odnose na ustupanje ugovora o putovanju.

Direktiva predviđa jasna pravila da se putnikom može smatrati lice kome je putovanje ustupljeno od strane glavnog ugovarača kao i uslove tog ustupanja. Nasuprot tome, nacionalno zakonodavstvo govori o prenosu prava na korišćenje aranžmana (cesija). Direktiva isto tako predviđa solidarnu odgovornost primalaca i ustupilaca, kako bi zaštitila organizatora/distributera od situacije da ne može da naplati dug od putnika kome je glavni ugovarač ustupio ugovor. Ova situacija nije predviđena nacionalnim zakonodavstvom.

13. Nacionalno zakonodavstvo nije usaglašeno sa pravilima Direktive u pogledu promjena cijene paket aranžmana.

Direktiva sadrži jasne odredbe koje uređuju kada je moguća promjena cijene. Dok Direktiva utvrđuje da se mogućnost promjena cijene mora navesti u ugovoru, Zakon o obligacionim odnosima to locira u potvrdu o putovanju. Bez obzira na to što je potvrda o putovanju sastavni dio ugovora, potrebno je ipak zbog postojanja potpune usaglašenosti urediti ovo pitanje prema Direktivi. Ugovor isto tako, prema zahtjevima Direktive treba da sadrži metod obračuna promjene cijene, kao i slučaj promjene cijene zbog promjene troškova prevoza, uključujući cijene goriva. Ovo pitanje nije uređeno nacionalnim zakonodavstvom.

14. Nacionalno zakonodavstvo nije usklađeno sa Direktivom u pogledu prava i obaveza organizatora i putnika u situacijama kada je prije početka putovanja organizator prinuđen da promijeni bilo koji od osnovnih uslova.

Prema Direktivi, ako organizator zaključi da je prije polaska prinuđen da znatno promijeni bilo koji od osnovnih uslova, kao što je cijena, mora o tome što prije da obavijesti potrošača, kako bi mu omogućio da donese odgovarajuću odluku, a naročito da: ili odustane od ugovora bez plaćanja penala, ili prihvati ispravku ugovora u kojoj su navedene promjene i njihov uticaj na cijenu. Potrošač će, što je prije moguće, obavijestiti organizatora ili distributera o svojoj odluci. Iako bi se primjenom pravila o promjeni ugovora usljed promijenjenih okolnosti moglo zaključiti da je ova odredba Direktive u cjelini prenesena u nacionalno zakonodavstvo, treba imati u vidu da je postupak izmjene ugovora kod promijenjenih okolnosti daleko komplikovaniji od onog koji je utvrđen Direktivom i da ovakvo tumačenje ne ide u prilog potrošaču: Zakon o obligacionim odnosima predviđa samo slučaj promjene cijene iznad 10%, ali ne uključuje obavezu izvještavanja u najkraćem mogućem roku.

15. Nacionalno zakonodavstvo nije u potpunosti usklađeno sa Direktivom u pogledu prava potrošača koji odustane od ugovora ako organizator promijeni uslove putovanja.

Direktiva uređuje da ako potrošač odustane od ugovora zbog toga što je organizator prinuđen da prije polaska znatno promijeni bilo koji od osnovnih uslova, kao što je cijena, ili zato što je,

iz bilo kog razloga, koji nije nastao krivicom potrošača, organizator otkazao aranžman prije dogovorenog dana polaska, potrošač će imati pravo da: (a) prihvati zamjenu za aranžman istog ili višeg kvaliteta, ako je organizator i/ili distributer u stanju da mu to ponudi (ako je aranžman koji mu se nudi nižeg kvaliteta, organizator će potrošaču vratiti razliku u cijeni); (b) povрати, što je prije moguće, cijelu sumu koju je uplatio po ugovoru. Pravo na prihvatanje zamjene aranžmana, pod uslovima utvrđenim Direktivom, uopšte nije predviđeno nacionalnim zakonodavstvom, dok pravo povraćaja cijele sume koju je uplatio po ugovoru postoji, ali nije precizirano da organizator to treba da uradi u najkraćem mogućem roku.

16. Nacionalno zakonodavstvo nije usklađeno sa Direktivom u pogledu prava potrošača (putnika) na adekvatan prevoz do mjesta polaska, ili uz saglasnost potrošača, na neko mjesto, kada nije moguće da se naprave alternativni aranžmani, ili ih potrošač ne prihvata iz opravdanih razloga u slučajevima promjene aranžmana nakon polaska.

Direktiva propisuje niz prava potrošača kada, poslije polaska, značajan dio ugovorenih usluga nije pružen, ili organizator shvata da neće biti u mogućnosti da pruži značajan dio predviđenih usluga. Nacionalno zakonodavstvo daje i širu listu prava ali ta lista ne sadrži pravo, predviđeno Direktivom, da ako je nemoguće da se naprave alternativni aranžmani, ili ih potrošač ne prihvata iz opravdanih razloga, organizator će, gdje je to prikladno, obezbijediti potrošaču, bez dodatnih troškova, adekvatan prevoz do mjesta polaska, ili uz saglasnost potrošača, na neko drugo mjesto za povratak, i ondje gdje je to prikladno, obeštetiće potrošača.

17. Nacionalno zakonodavstvo nije usklađeno sa Direktivom u pogledu prava na hitnu pomoć od organizatora i/ili distributera potrošaču koji se suoči sa teškoćama koje se ne mogu pripisati organizatoru i/ili distributeru.

Direktiva propisuje da u slučajevima propusta koji rezultiraju nastankom štete za potrošača, zbog neizvršenja ili neurednog izvršenja ugovora, a koji se mogu pripisati nekom trećem licu, koje nije u vezi sa pružanjem ugovorenih usluga, i kao takvi su nepredvidivi i neizbježni, odnosno ako su ovakvi propusti posljedica više sile (prema definiciji iz Direktive), ili zbog događaja koji organizator i/ili distributer ili davalac usluga, čak uz svu dužnu pažnju, nije mogao predvidjeti, niti spriječiti; od organizatora i/ili distributera, kao ugovorne strane, zahtijeva se da pruži hitnu pomoć potrošaču koji se suoči sa teškoćama. Ova obaveza organizatora i/ili distributera odnosno pravo potrošača nijesu predviđeni nacionalnim zakonodavstvom.

18. Nacionalno zakonodavstvo nije usklađeno sa Direktivom u pogledu obaveze organizatora i/ili distributera, ili njihovog lokalnog predstavnika, ako postoji, da odmah ulože napore da se nađe odgovarajuće rješenje u slučaju žalbe.

Direktiva predviđa da u slučaju žalbe, organizator i/ili distributer, ili njihov lokalni predstavnik, ako postoji, mora odmah da uloži napore da nađe odgovarajuće rješenje. Ovakva odredba ne postoji u nacionalnom zakonodavstvu.

19. Nije jasno omogućava li postojeće crnogorsko zakonodavstvo da putnik kojem ugovor nije uopšte ispunjen ili mu je neuredno ispunjen zahtijeva od organizatora naknadu nematerijalne štete.

U presudi u predmetu C-168/00, SP EU zauzeo je stav da se Direktiva mora tumačiti na način da u slučaju neispunjenja ili neurednog ispunjenja ugovora o organizovanju putovanja, putnik, u načelu, ima pravo da zahtijeva i naknadu nematerijalne štete.

3.2.2. Presude Suda pravde EU

Presuda od 8. oktobra 1996. godine u spojenim predmetima C-178/94, C-179/94, C-188/94, C-189/94 i C-190/94 *Erich Dillenkofer, Christian Erdmann, Hans-Jürgen Schulte, Anke Heuer, Werner, Ursula i Trosten Knor protiv Republike Njemačke* [1996] Zbirka sudskih odluka str. I-04845

Prema presudi neuspjeh da se direktiva prenese u nacionalno zakonodavstvo daje pravo naknade štete fizičkim licima koja su pretrpjela štetu ako rezultati koji su predviđeni direktivom daju fizičkim licima pravo čiji sadržaj može da se identifikuje i postoji uzročna veza između povrede obaveze države i pretrpljenog gubitka i štete.

Isto tako, rezultati predviđeni članom 7 Direktive, daju prava putnicima koja garantuju povraćaj plaćenog i njihovog vraćanja u mjesto polaska u slučaju insolventnosti organizatora, dok se sadržaj tih prava lako može identifikovati.

Član 7 prema presudi treba da se interpretira tako da dato obezbjeđenje, bez obzira na formu, obavezuje organizatora da ga poštuje i da država članica ne smije da ne prenese Direktivu na osnovu presude nacionalnog vrhovnog suda.

Prema presudi, Direktiva ne obavezuje države članice da usvoje zakonodavstvo koje štiti putnike u slučaju njihove sopstvene nemarnosti. U slučajevima kada Direktiva nije prenesena u određenom roku, nacionalni sud države članice može zahtijevati da se dokaže da je oštećeno lice pokazalo dovoljno pažnje da izbjegne ili da spriječi nastajanje štete.

Presuda od 14. maja 1998. godine u predmetu C-364/96 Verein für Konsumenteninformation protiv Österreichische Kreditversicherungs AG [1998] Zbirka sudskih odluka str. I-02949

Prema presudi, član 7 Direktive treba tumačiti tako da obuhvata, kao osigurane slučajeve, i situaciju kada je putnik koji je platio aranžman, obavezan da ponovo plati hotelijeru za smještaj kako bi mogao da otputuje zbog insolventnosti organizatora.

Presuda od 1. decembra 1998. godine u predmetu C-410/96 Krivični postupak protiv André Ambry [1998] Zbirka sudskih odluka str. I-07875

Prema presudi treba tumačiti da član 7 u vezi sa članom 8 propisuje obavezu stvaranja nacionalnog pravila u pogledu osiguranja kao minimalnu obavezu, te da države mogu odrediti da ne samo što osiguranje postoji, već treba da bude i odmah dostupno za plaćanje ako je to potrebno za vraćanje u mjesto polaska, ali pod uslovom da je u skladu sa Ugovorom o EU, naročito članom 59. Smatraće se da je u suprotnosti sa pravom EU odredba nacionalnog zakonodavstva kojom se zahtijeva da, u slučaju da osiguranje pruža kreditna institucija ili osiguravajuće društvo iz druge države članice, davalac garancije mora zaključiti ugovor sa kreditnom institucijom ili osiguravajućim društvom koje ima sjedište na nacionalnoj teritoriji.

Presuda od 15. juna 1999. godine u predmetu C-140/97 Walter Rechberger, Renate Greindl, Hermann Hofmeister i drugi protiv Republike Austrije [1999] Zbirka sudskih odluka str. I-03499

Prema presudi, član 7 Direktive primjenjuje se čak i ako naknada koju je kupac dužan da plati ne odgovara ukupnoj vrijednosti paketa ili se odnosi samo na jedan njegov dio. Drugo, ne postoji osnov u tekstu Direktive za ograničavanje njenog djelokruga što se tiče paketa koji se nude potencijalno neograničenom broju potrošača i bilo bi protivno svrsi Direktive da se to učini. Konačno, činjenica da je utvrđeno da reklamna kampanja po dnevnim novinama koja se sastoji u ponudi nagradnog putovanja nije u skladu s nacionalnim pravom konkurencije, ne može spriječiti da ta putovanja predstavljaju paket putovanja u smislu Direktive.

Osiguranje propisano članom 7 Direktive mora pokriti sve ugovore za paket aranžmane koji su zaključeni od datuma pristupanja Evropskoj uniji. Član 7 nije ispravno prenesen u nacionalno pravo, gdje nacionalno zakonodavstvo ne zahtijeva djelotvornu garanciju za povraćaj svega što je plaćeno kao i za repatrijaciju u slučaju insolventnosti organizatora putovanja.

Prema presudi, kad je jednom uspostavljena neposredna uzročna veza, ne može se isključiti odgovornost države članice za povredu člana 7 Direktive zbog nepromišljenog ponašanja organizatora putovanja ili pojavu izuzetnih ili nepredviđenih događaja, budući da te okolnosti nijesu takve da bi spriječile postojanje neposredne uzročne veze.

Presuda od 12. marta 2002. godine u predmetu C-168/00 Simone Leitner protiv TUI Deutschland GmbH & Co. KG [2002] Zbirka sudskih odluka str. I-02631

Prema presudi, član 5 Direktive 90/314/EZ mora se tumačiti da u principu dodjeljuje pravo potrošaču na naknadu nematerijalne štete koja proizilazi iz neispunjenja ili nepotpunog ispunjenja usluga koje čine paket aranžman.

Presuda od 30. aprila 2002. godine u premetu C-400/00 Club-Tour, Viagens e Turismo SA protiv Alberto Carlos Lobo Gonçalves Garrido, i Club Med Viages Lda [2002] Zbirka sudskih odluka str. I-04051

Prema presudi, pojam „paket“ koji se koristi u članu 2 stav 1 Direktive 90/314/EEZ, mora se tumačiti tako da uključuje putovanje u organizaciji turističkih agencija, na zahtjev i u skladu sa specifikacijama potrošača ili ograničene grupe potrošača. Prema definiciji paketa iz člana 2 stav 1 Direktive, koji je osmišljen između ostalog radi zaštite potrošača koji kupuju paket aranžmane, dovoljno je ako, prvo, kombinacija turističkih usluga koje prodaje putnička agencija po jedinstvenoj cijeni uključuje dvije od tri usluge iz tog stava i, drugo, da usluga pokriva razdoblje od više od 24 sata ili uključuje noćenje. Ne postoji ništa u toj definiciji što sugerira da se putovanje organizovano na zahtjev i u skladu sa specifikacijama potrošača ili određene grupe potrošača ne može smatrati paket aranžmanom u smislu ove direktive. To tumačenje je pojačano Direktivom, koja propisuje da su među elementima koje treba uključiti u ugovor obuhvaćen Direktivom i posebni zahtjevi koje je potrošač dao organizatoru ili posredniku prilikom izrade rezervacije, a koja su oba prihvatili.

S obzirom na to da definicija paketa iz člana 2 stav 1 Direktive 90/314/EEZ uključuje putovanje organizovano u skladu sa specifikacijama potrošača, termin unaprijed dogovorena kombinacija koji se koristi u toj odredbi nužno pokriva slučajeve gdje je kombinacija turističkih usluga rezultat želje izražene od strane potrošača sve do trenutka kada stranke postignu dogovor i zaključe ugovor. Pojam unaprijed dogovorena kombinacija koji se koristi u članu 2 stav 1 Direktive 90/314/EEZ mora se tumačiti na način da obuhvata kombinacije turističkih usluga koje su sačinjene u vrijeme kada je ugovor zaključen između putničke agencije i potrošača.

3.2.3. Praktične preporuke

Na osnovu navedenog, dajemo sljedeće praktične preporuke:

1. Zakon o turizmu treba dopuniti kako bi se definicije „paket aranžman“, „organizator putovanja“, „distributer“ (posrednik), „potrošač“ (putnik), „ugovor“ usaglasile sa odredbama Direktive i presude SP EU u predmetu C-400/00.
2. Nacionalno zakonodavstvo treba dopuniti tako da predviđa zabranu dostave obmanjujućih informacija (informacija koje dovode u zabludu potrošače).
3. Nacionalno zakonodavstvo treba precizirati tako da određuje da informacije o vizama i zdravstvenim uslovima treba dostaviti prije zaključenja ugovora.
4. Nacionalno zakonodavstvo treba dopuniti tako da predviđa obavezu da se daju precizni i detaljni podaci o lokalnim predstavnicima organizatora i/ili distributera odnosno način ostvarivanja kontakta sa organizatorom i/ili distributerom.
5. Nacionalno zakonodavstvo ima dualitet u uređivanju ugovora o paket aranžmanima. Po svojoj prirodi ovo je materija za Zakon o obligacionim odnosima i sva pravila treba da budu sadržana u ovom zakonu. Međutim, ako nije moguće promijeniti ovaj zakon, onda Zakon o turizmu treba da na isti način kao i Zakon o obligacionim odnosima, odnosno Direktiva, uredi pitanje obaveznog sadržaja ugovora.
6. Precizirati odredbe nacionalnog zakonodavstva u vezi pravila ugovornih uslova i načinu dostavljanja informacija o ugovornim uslovima, odnosno predvidjeti da uslovi ugovora mogu biti dostavljeni i u drugoj formi a ne samo u pisanoj, da informacije o ugovornim uslovima treba da budu i razumljive i dostupne i da putniku treba dostaviti kopiju ugovornih uslova.
7. U nacionalnom zakonodavstvu treba precizirati da odredbe o informisanju o ugovornim uslovima ne sprečavaju rezervacije i zaključenje ugovora u posljednjem trenutku.
8. Nacionalno zakonodavstvo treba jasno da predvidi da je moguće ustupanje ugovora a ne cesija prava i da će primalac i ustupilac solidarno odgovarati organizatoru i/ili distributeru.

9. Treba precizirati u nacionalnom zakonodavstvu uslove za promjenu cijene kao i slučajeve kada je moguća promjena cijene.
10. Nacionalno zakonodavstvo treba promijeniti tako da predviđa prava i obaveze organizatora i putnika u situacijama kada je prije početka putovanja organizator prinuđen da promijeni bilo koji od osnovnih uslova koji su predviđeni Direktivom.
11. Precizirati u Zakonu o obligacionim odnosima, da u saglasnosti sa presudom u predmetu C-168/00, potrošač, u načelu, ima pravo i na nematerijalnu štetu u slučaju neispunjenja ugovora.
12. Nacionalno zakonodavstvo treba promijeniti tako da precizno odredi prava potrošača koji odustane od ugovora ako organizator promijeni uslove putovanja a naročito uvrstiti pravo na adekvatan prevoz do mjesta polaska, ili uz saglasnost potrošača, na neko drugo mjesto za povratak, kada nije moguće da se naprave alternativni aranžmani, ili ih potrošač ne prihvata iz opravdanih razloga u slučajevima promjene aranžmana nakon polaska.
13. Nacionalno zakonodavstvo treba da se dopuni tako da predvidi obavezu organizatora i/ili distributera da pruži hitnu pomoć potrošaču koji se suoči sa teškoćama koje se ne mogu pripisati organizatoru i/ili distributeru, kao i obavezu organizatora i/ili distributera, ili njihovog lokalnog predstavnika ako postoji, da moraju odmah da ulože napore da nađu odgovarajuće rješenje u slučaju žalbe.

3.3. Direktiva 93/13/EEZ (nepoštene odredbe u potrošačkim ugovorima)

3.3.1. Navodi Tabela usklađenosti

Analitičkim pregledom crnogorskog zakonodavstva utvrđeno je da se u Crnoj Gori nastojalo da se ova direktiva prenese Zakonom o zaštiti potrošača. Pri tom je utvrđeno da crnogorsko zakonodavstvo u značajnoj mjeri ispunjava zahtjeve predviđene ovom direktivom. Ipak, uočena su određena odstupanja od Direktive koja se sastoje bilo u nepreuzimanju određenih rješenja predviđenih Direktivom, bilo u nedovoljno preciznom ili jasnom zakonskom uređenju, čime se dovodi u pitanje ispravnost prenošenja ove direktive.

Odstupanja crnogorskog zakonodavstva od Direktive uočena su u sljedećim elementima:

1. Za razliku od Direktive, Zakonom o zaštiti potrošača nije predviđeno da se pravila tog zakona o nepoštenim ugovornim odredbama neće primjenjivati na one ugovorne odredbe koje sadržajno odgovaraju kogentnim zakonskim odredbama, odnosno koje odražavaju pravila i principe međunarodnih konvencija, pogotovo u sektoru transporta.

Iako se, na prvi pogled, ovakvim zakonskim rješenjem potrošačima pruža veća zaštita, što bi načelno bilo dopušteno na osnovu člana 8 Direktive, sporno je da li je takvo rješenje u skladu s Ugovorom o Evropskoj uniji. Osim toga, javlja se pitanje oportunitosti ovakvog rješenja. Naime, pretpostavlja se da kogentna zakonska pravila i pravila međunarodnih konvencija ne sadrže nepoštena rješenja, pa se ovakvim zakonskim rješenjem posredno otvara mogućnost osporavanja kogentnih zakonskih pravila i pravila međunarodnih konvencija.

2. Definicije potrošača i trgovca u Zakonu o zaštiti potrošača ne odgovaraju u potpunosti definicijama tih pojmova iz Direktive.

Dok je iz Direktive sasvim jasno da se potrošačem smatra bilo koje fizičko lice koje u neprofesionalne svrhe zaključuje bilo koju vrstu ugovora, iz Zakona o zaštiti potrošača proizilazilo bi da se potrošačem smatra samo ono fizičko lice koje u neprofesionalne svrhe zaključuje ugovor o kupoprodaji. Isto se može reći i u kontekstu zakonske definicije trgovca. U tom smislu, nije jasno jesu li odredbama tog zakona o nepoštenim ugovornim odredbama obuhvaćene sve vrste ugovora ili samo neke vrste. Time Zakon o zaštiti potrošača ne zadovoljava zahtjev da zakonsko uređenje ove materije bude dovoljno precizno i jasno (v. presudu u predmetu C-478/99).

3. Dok Direktiva određuje da će se nepoštenom smatrati samo ona ugovorna odredba koja, između ostalog, dovodi do **značajne** neravnoteže u pravima i obavezama

ugovornih strana na štetu potrošača, Zakonom je predviđeno da će za ocjenu određene ugovorne odredbe nepoštenom biti dovoljan bilo koji stepen neravnoteže u pravima i obavezama ugovornih strana na štetu potrošača.

Iako predviđeno zakonsko rješenje potrošačima pruža veću zaštitu od onoga što predviđa Direktiva, pa je time ono u skladu sa zahtjevima Direktive, postavlja se pitanje da li je takvo rješenje oportuno s aspekta pravne sigurnosti. Naime, prema sadašnjem zakonskom rješenju, mogla bi se osporavati valjanost bilo koje ugovorne odredbe pa čak i kada ta odredba dovodi do sasvim neznatne neravnoteže u pravima i obavezama ugovornih strana.

4. Zakonom o zaštiti potrošača nije predviđeno pravilo Direktive kojim se, čak i u situacijama kada se utvrdi da se o pojedinim odredbama ugovora pojedinačno pregovaralo, dopušta mogućnost da se procjenjuje dopuštenost ostatka ugovora ako cjelokupna procjena ugovora sugerije kako je riječ o unaprijed sastavljenom ugovoru.

Izostavljanjem odredbe ovog sadržaja, Crna Gora u ovom dijelu nije ispravno prenijela Direktivu. Naime, bez navedenog pravila, sama činjenica da se o pojedinoj odredbi ugovora pojedinačno pregovaralo, onemogućavala bi potrošaču da osporava ostatak ugovora o kojem se nije pojedinačno pregovaralo.

5. Zakonom o zaštiti potrošača nije preuzeto pravilo Direktive kojim se određuje koje će okolnosti sud uzimati u obzir prilikom procjene da li je određena ugovorna odredba nepoštena.

S jedne strane, time zakonsko uređenje nije dovoljno precizno i jasno, što je protivno zahtjevima koje postavlja Direktiva (v. C-478/99) a, s druge strane, time se otvara mogućnost da, usljed nepostojanja ujednačenih kriterijuma, sudska praksa u Crnoj Gori prosuđuje dopuštenost ugovornih odredaba po kriterijumima koji su različiti od evropskih.

6. Za razliku od Direktive, Zakon o zaštiti potrošača ne predviđa da se neće moći prosuđivati nepoštenost ugovornih odredaba o predmetu i cijeni, ako su te odredbe jasno napisane.

Iako se ovakvim rješenjem potrošačima pruža veći stepen zaštite, što je dopušteno na osnovu člana 8 Direktive, postavlja se pitanje oportuniteti ovakvog rješenja s aspekta pravne sigurnosti. Naime, opravdano se može očekivati da će se prosječno pažljiv potrošač informisati o bitnim elementima ugovora, pa da mu u tom smislu nije potrebna posebna zaštita. Osim toga, kada je riječ o bitnim elementima ugovora, ne bi trebalo bez važnog razloga ograničavati slobodu ugovaranja. Postojećim zakonskim rješenjem, kao da se potrošači štite od njih samih.

7. Za razliku od Direktive koja predviđa da se tzv. *contra preferentem* metoda tumačenja ugovora neće primjenjivati u postupcima kolektivne zaštite potrošača, Zakon o zaštiti potrošača omogućava primjenu te metode tumačenja i u tim postupcima. Osim toga, dok je Direktivom predviđeno da će se, u slučajevima u kojima je ta metoda tumačenja ugovora dopuštena, prihvatiti ono tumačenje koje je najpovoljnije za potrošača, Zakonom o zaštiti potrošača predviđeno je da će se prihvatiti ono tumačenje koje je povoljnije za potrošača.

Ovakvo rješenje nije u skladu s presudom u predmetu C-70/03, iz čega proizilazi da u ovom segmentu Crna Gora nije ispravno prenijela ovu direktivu.

8. Crna Gora nije preuzela pravilo Direktive kojim se određuje da se ugovorna odredba o izboru mjerodavnog prava neće uzeti u obzir ako je izabranim mjerodavnim pravom predviđen niži stepen zaštite potrošača od onog koji predviđa Direktiva.

Ovakvim zakonskim rješenjem potrošači u Crnoj Gori stavljaju se u nepovoljni položaj u odnosu na Direktivu, iz čega proizilazi da u ovom segmentu Crna Gora nije ispravno prenijela ovu direktivu.

9. Zakonom o zaštiti potrošača nije jasno određeno da se postupci kolektivne zaštite potrošača u segmentu nepoštenih ugovornih odredaba protiv udruženja trgovaca mogu pokretati čak i u situaciji kada preporučena nepoštena ugovorna odredba još nije bila primijenjena u praksi.

Iz toga proizilazi da u ovom segmentu crnogorsko zakonodavstvo nije dovoljno precizno i jasno, što je protivno zahtjevima utvrđenim presudom u predmetu C-372/99.

10. Iz Zakona o zaštiti potrošača nije vidljivo da se prilikom stupanja na snagu tog zakona javnost uputila na to da je tim zakonom prenijeta ova direktiva. Zbog toga proizilazi da Crna Gora u ovom segmentu nije ispravno prenijela Direktivu.

11. Iako je Zakonom o zaštiti potrošača predviđena indikativna lista nepoštenih ugovornih odredaba, pojedine odredbe sadržane u toj listi sadržajno ne odgovaraju u potpunosti aneksu Direktive.

3.3.2. Presude Suda pravde EU

Sud pravde Evropske unije u više je navrata odlučivao bilo o interpretaciji bilo o implementaciji ove direktive u pojedinim državama članicama. U kontekstu ispravne implementacije ove direktive, od naročite su važnosti sljedeće presude:

Presuda od 24. januara 2002. godine u predmetu C-372/99 Komisija evropskih zajednica protiv Republike Italije [2002] Zbirka sudskih odluka str. I-00819

U ovoj je presudi Sud odlučio da Italija nije ispravno implementirala ovu direktivu i to zato što nije jasno propisala da se tzv. tužba za zaštitu kolektivnih interesa potrošača može podići i protiv organizacija trgovaca koje preporučuju korišćenje određene nepošteno ugovorne odredbe pa čak i u situacijama kada preporučena odredba još nije bila iskorišćena u pojedinom ugovoru. Iz navedene je presude očigledno da su pravilima o zabrani nepoštenih odredaba u potrošačkom ugovoru obuhvaćene ne samo one ugovorne odredbe koje se zaista i koriste, već i one koje bi se potencijalno mogle koristiti.

Presuda od 7. maja 2002. godine u predmetu C-478/99 Komisija evropskih zajednica protiv Kraljevine Švedske [2002] Zbirka sudskih odluka str. I-04147

U ovoj je presudi Sud zauzeo sljedeće stavove:

- da je svaka država članica dužna da usvoji sve mjere predviđene Direktivom koje su potrebne da bi se osigurala puna efikasnost uspostavljenog sistema, te da je potrebno da uspostavljeno uređenje bude dovoljno precizno i jasno kako bi pojedinci mogli biti u potpunosti upoznati sa svojim pravima,
- da je lista nepoštenih odredaba utvrđena aneksom Direktive samo indikativna, te da iz toga proizilazi da je moguće da neke odredbe navedene u toj listi u konkretnom slučaju ipak ne budu ocijenjene nepoštenima, te da je isto tako moguće da nepoštenima budu ocijenjene i neke ugovorne odredbe koje nijesu sadržane u toj listi, te da ta lista ne daje potrošačima više prava od onoga što je predviđeno čl. 3 do 7 Direktive,
- da je predviđena lista nepoštenih ugovornih odredaba vrijedan izvor informacija potrošačima, te da, i pored činjenice da ona ne mora biti nužno inkorporirana u zakonski akt kojim se implementira Direktiva, ona mora biti objavljena na način koji osigurava da javnost bude upoznata s njom.

Presuda od 9. septembra 2004. godine u predmetu C-70/03 Komisija evropskih zajednica protiv Kraljevine Španije [2004] Zbirka sudskih odluka str. I-07999

U ovoj je presudi Sud odlučio da je Španija propustila da ispravno implementira Direktivu i to zato što nije predvidjela da se *contra preferentem* metoda tumačenja neće primjenjivati u postupcima kolektivne zaštite pokrenutim protiv pojedinog trgovca ili grupe trgovaca.

U ovom postupku Španija je tvrdila da je proširenjem *contra preferentem* metode tumačenja i na postupke kolektivne zaštite potrošača potrošačima pružena veća zaštita, što je dopušteno ako se ima na umu da je u konkretnom slučaju riječ o direktivi minimalne harmonizacije. Sud je, s druge strane, zauzeo stav da se takvim rješenjem potrošači stavljaju u nepovoljniji položaj zato što se u postupcima kolektivne zaštite ne pruža konkretna, već apstraktna zaštita.

U navedenoj je presudi Sud takođe zauzeo stav da je Španija propustila da ispravno implementira Direktivu zato što nije predvidjela da potrošačima ne može biti uskraćena zaštita predviđena Direktivom na osnovu izbora mjerodavnog prava.

3.3.3. Praktične preporuke

Na osnovu navedenog, dajemo sljedeće praktične preporuke:

1. Zakonski propisati da se pravila o nepoštenim odredbama u potrošačkim ugovorima ne odnose na ugovorne odredbe kojima se preuzimaju kogentne zakonske norme i pravila međunarodnih konvencija.
2. Preciznije zakonski definisati pojmove „potrošača“ i „trgovca“, kako bi oni odgovarali definiciji tih pojmova iz Direktive.
3. Propisati da će ugovorna odredba biti nepoštena jedino ako dovede do značajne neravnoteže u pravima i obavezama ugovornih strana na štetu potrošača.
4. Propisati da je čak i u situacijama kada se o određenoj ugovornoj odredbi pojedinačno pregovaralo dopušteno procjenjivati dopuštenost ostalih odredaba tog ugovora.
5. Saglasno Direktivi, predvidjeti zakonsko pravilo kojim će se odrediti o kojim je okolnostima sud dužan da vodi računa prilikom donošenja odluke o tome da li je određena ugovorna odredba nepoštena.
6. Saglasno Direktivi, zakonski propisati da se neće moći procjenjivati dopuštenost ugovornih odredaba o predmetu i cijeni.
7. Saglasno Direktivi, zakonski propisati da se *contra preferentem* metoda tumačenja ugovora ne primjenjuje u postupcima kolektivne zaštite potrošača.
8. Saglasno Direktivi, zakonski propisati da se ugovorna odredba o izboru mjerodavnog prava neće uzimati u obzir ako je izabranim pravom potrošaču pružen niži nivo zaštite od onoga koji je propisan crnogorskim zakonodavstvom.
9. Zakonski propisati da je postupak kolektivne zaštite potrošača protiv udruženja trgovaca moguće pokrenuti i u pogledu ugovorne odredbe koja je tek preporučena, a ne nužno i iskorišćena u praksi.
10. U prelaznim i završnim odredbama Zakona navesti da se tim zakonom preuzima ova direktiva.
11. Saglasno Direktivi, preciznije definisati indikativnu listu nepoštenih ugovornih odredaba.

3.4. Direktiva 97/7/EZ (ugovori na daljinu)

3.4.1. Navodi Tabela usklađenosti

Analitičkim pregledom crnogorskog zakonodavstva utvrđeno je da se u Crnoj Gori po pravilu nastojalo da se ova direktiva prenese Zakonom o zaštiti potrošača, dok su neki elementi, naročito definicije, dati u nekim posebnim propisima, kao što su Zakon o elektronskim komunikacijama i Zakon o elektronskim medijima. Pri tom je utvrđeno da crnogorsko zakonodavstvo u značajnoj mjeri ispunjava zahtjeve predviđene ovom direktivom. Ipak, uočena su određena odstupanja od Direktive koja se sastoje bilo u nepreuzimanju određenih rješenja predviđenih Direktivom, bilo u nedovoljno preciznom ili jasnom zakonskom uređenju, čime se dovodi u pitanje ispravnost prenošenja ove direktive.

Odstupanja crnogorskog zakonodavstva od Direktive uočena su u sljedećim elementima:

1. Definicija trgovca u Zakonu o zaštiti potrošača nije u potpunosti usklađena s definicijom tog pojma u Direktivi. S jedne strane, zakonska definicija tog pojma šira je od definicije predviđene Direktivom jer Zakon o zaštiti potrošača dopušta da se trgovcem smatra svako lice koje prodaje robu ili pruža usluge potrošačima, bez obzira čini li to u okviru svoje profesionalne djelatnosti. To je odstupanje, međutim, dopušteno jer potrošačima pruža veću zaštitu. No, Zakon o zaštiti potrošača navodi da se trgovcem smatra lice koje prodaje robu ili pruža usluge potrošačima. Pritom, iz te

definicije nije jasno odnosi li se ona i na neke specifične proizvode, kao što je npr. lizing.

2. Lista sredstava komunikacije na daljinu u Zakonu o zaštiti potrošača do određene se mjere razlikuje od liste tih sredstava predviđene Direktivom. Dok Direktiva govori o adresiranim i neadresiranim štampanim materijalima, Zakon o zaštiti potrošača govori samo o štampanim materijalima. Nadalje, dok Direktiva govori o telefonu sa i bez ljudske intervencije, Zakon o zaštiti potrošača govori samo o telefonu. Dakle, pojedina su sredstva komunikacije na daljinu Direktivom preciznije određena nego što je to učinjeno u Zakonu o zaštiti potrošača. Konačno, Zakon o zaštiti potrošača ne predviđa u toj listi videofon i videotekst, kao što to čini Direktiva.
3. Definicija operatora sredstva komunikacije na daljinu nije predviđena Zakonom o zaštiti potrošača, već Zakonom o elektronskim komunikacijama i Zakonom o elektronskim medijima. No, definicije iz tih zakona odnose se samo na elektronsko komuniciranje i komuniciranje putem elektronskih medija, a ne i na ostale oblike komuniciranja na daljinu, zbog čega su, u kontekstu zaštite potrošača, one uže u odnosu na ono što predviđa Direktiva. Na primjer, definicijom operatora sredstva komunikacije na daljinu, predviđenom tim zakonima, ne bi bili obuhvaćeni, na primjer, izdavači novina, kataloga itd.
4. Dok je Direktivom predviđeno da se neke njene odredbe neće primjenjivati na ugovore koji se odnose na dostavu potrošaču jela, pića i svakodnevnih namirnica putem dostavljača, Zakonom o zaštiti potrošača u tom segmentu izostavljeno je pominjanje dostavljača. U tom smislu, prema Zakonu o zaštiti potrošača, njegova pravila se ne bi primjenjivala na sve ugovore o dostavi potrošaču hrane, pića i svakodnevnih namirnica, dok se Direktiva ne primjenjuje na te ugovore samo ako je predviđeno da će se te namirnice potrošaču dostavljati putem dostavljača.
5. U pogledu obaveze dostave potrošaču prethodnog obavještenja, odredbe Zakona o zaštiti potrošača načelno odgovaraju pravilima Direktive. Međutim, Zakonom o zaštiti potrošača nije predviđeno da se to obavještenje mora potrošaču dostaviti u razumnom roku (*in good time*) prije zaključivanja ugovora, kao što je to predviđeno Direktivom.
6. Dok Direktiva zahtijeva da prethodno obavještenje potrošaču bude razumljivo i jasno, Zakonom o zaštiti potrošača predviđeno je samo da to obavještenje mora biti razumljivo. Nadalje, Zakonom o zaštiti potrošača nije predviđeno da to obavještenje mora biti dato u skladu s načelom savjesnosti i poštenja, kao što to predviđa Direktiva.
7. Za slučaj telefonske komunikacije Direktiva predviđa da se potrošač unaprijed mora obavijestiti o komercijalnoj svrsi poziva, dok je Zakonom o zaštiti potrošača predviđeno samo to da se u navedenim slučajevima potrošač mora obavijestiti o svrsi poziva.
8. Za razliku od Direktive, Zakon o zaštiti potrošača ne predviđa da se u potvrdi prethodnog obavještenja potrošaču mora dostaviti informacija o geografskoj adresi lica na koju može uputiti svoje prigovore.
9. Zakon o zaštiti potrošača sadrži odredbu kojom se definiše kako se i u kojem trenutku ugovor raskida, ako potrošač iskoristi svoje pravo na jednostrani raskid ugovora. Sličnu odredbu Direktiva ne sadrži. No, budući da se time ne umanjuju prava potrošača, već naprotiv, unosi u zakonsko uređenje više pravne sigurnosti, ovo je odstupanje dopušteno.
10. Dok Direktiva određuje da je trgovac dužan da ispuni ugovor u roku od najviše 30 dana od dana kada je potrošač uputio svoju narudžbu, Zakonom o zaštiti potrošača predviđeno je da je trgovac dužan da ispuni ugovor u roku od najviše 30 dana od dana zaključivanja ugovora. Budući da će zaključivanje ugovora uslijediti nakon što je potrošač uputio svoju narudžbu, proizilazi da je rješenje Zakona o zaštiti potrošača za potrošača nepovoljnije od rješenja koje predviđa Direktiva.

11. Direktiva određuje da, u slučajevima u kojima trgovac nije u mogućnosti da ispuni ugovor na vrijeme zbog toga što mu nije dostupna naručena roba, trgovac o tome mora obavijestiti potrošača u roku od 30 dana. S druge strane, Zakonom o zaštiti potrošača samo su navedena prava koja potrošač ima u slučaju neispunjenja ugovora na vrijeme. No, Zakonom o zaštiti potrošača nije predviđena obaveza trgovca da o nemogućnosti ispunjenja ugovora obavijesti potrošača u roku od 30 dana.
12. Za razliku od Direktive, Zakonom o zaštiti potrošača nijesu predviđeni mehanizmi zaštite potrošača u slučaju plaćanja platnom karticom.
13. Kao i Direktivom, Zakonom o zaštiti potrošača predviđeni su zaštitni mehanizmi za slučaj nenaručenih isporuka od strane trgovca. Zakonom o zaštiti potrošača predviđeno je da takve tehnike trgovanja predstavljaju nepoštenu poslovnu praksu te da su, kao takve, zabranjene. No, Zakonom o zaštiti potrošača ne uređuje se zaštita potrošača u situacijama kada trgovac u ugovoru navede da će ćutanje potrošača značiti pristanak na zaključivanje ugovora.
14. Za razliku od Direktive, Zakonom o zaštiti potrošača nije predviđen sistem kolektivne zaštite potrošača od postupanja koja su u suprotnosti sa pravilima tog zakona o prodaji na daljinu, kako u pogledu trgovaca tako i u pogledu operatora sredstva komunikacije na daljinu.
15. Crna Gora nije preuzela pravilo Direktive kojim se određuje da se ugovorna odredba o izboru mjerodavnog prava neće uzeti u obzir ako je izabranim mjerodavnim pravom predviđen niži stepen zaštite potrošača od onog koji predviđa Direktiva. Ovakvim zakonskim rješenjem potrošači u Crnoj Gori stavljaju se u nepovoljni položaj u odnosu na Direktivu, iz čega proizilazi da u ovom segmentu Crna Gora nije ispravno prenijela ovu direktivu.
16. Za razliku od Direktive, Zakonom o zaštiti potrošača nije predviđeno da njegova pravila o prodaji na daljinu predstavljaju opšta pravila (*lex generalis*), koja se neće primjenjivati u slučajevima kada je nekim drugim zakonom posebno uređena prodaja na daljinu nekih posebnih vrsta proizvoda.
17. Iz Zakona o zaštiti potrošača nije vidljivo da je prilikom njegovog stupanja na snagu javnost informisana o tome da je tim zakonom prenijeta ova direktiva. Zbog toga proizilazi da Crna Gora u ovom segmentu nije ispravno prenijela Direktivu.

3.4.2. Presude Suda pravde EU

Sud pravde Evropske unije u nekoliko je navrata odlučivao bilo o interpretaciji bilo o implementaciji ove direktive u pojedinim državama članicama. U kontekstu ispravne implementacije ove direktive, od naročite su važnosti sljedeće presude:

Presuda od 3. septembra 2009. godine u predmetu C-489/07 *Pia Messner protiv Firma Stefan Krüger* [2009] Zbirka sudskih odluka str. I-07315

U ovoj presudi Sud pravde Evropske unije odlučio je da se pravila člana 6 st. 1 i 2 Direktive (koji uređuju pravo potrošača na jednostrani raskid ugovora) moraju tumačiti na način da zabranjuju da se nacionalnim pravom predvidi kako u slučaju da potrošač iskoristi svoje pravo na raskid ugovora, trgovac ima pravo da traži naknadu vrijednosti za upotrebu stvari do njenog vraćanja. Međutim, Sud je takođe potcrtao da navedene odredbe Direktive ne sprječavaju mogućnost dosuđivanja te naknade ako je potrošač koristio stvar suprotno načelima prava, a pogotovo načelu savjesnosti i poštenja i sticanju bez osnove.

Presuda od 15. aprila 2010. godine u predmetu C-511/08 *Verbraucherzentrale Nordrhein-Westfalen eV protiv Handelsgesellschaft Heinrich Heine GmbH*, OJ (2010) C 148, 0006 - 0007

U ovoj presudi Sud pravde Evropske unije odlučio je da odredba člana 6 stav 2 Direktive sprječava da se nacionalnim zakonodavstvom propiše kako će trgovac moći da traži troškove povrata proizvoda nakon što je on iskoristio svoje pravo na raskid ugovora.

3.4.3. Praktične preporuke

Na osnovu navedenog, dajemo sljedeće praktične preporuke:

1. Uskladiti definiciju trgovca s definicijom tog pojma iz Direktive.
2. Dopuniti listu sredstava komunikacije na daljinu na koje se odnosi Zakon, saglasno Direktivi.
3. Zakonom o zaštiti potrošača definisati operatora sredstva komunikacije na daljinu i to saglasno Direktivi.
4. Precizirati da se pravila Zakona o prodaji na daljinu ne odnose samo na one ugovore o dostavi hrane, pića i svakodnevnih potrepština kojima je predviđeno da se dostava vrši putem redovnog dostavljača.
5. Izričito propisati da se prethodno obavještenje mora dostaviti potrošaču u razumnom roku prije zaključivanja ugovora.
6. Precizirati da prethodno obavještenje, uz to što mora biti razumljivo, mora biti i jasno.
7. Precizirati da se u slučaju telefonske komunikacije potrošač prethodno mora obavijestiti o komercijalnoj svrsi poziva.
8. Precizno odrediti da u potvrdi prethodnog obavještenja potrošač mora biti obaviješten o geografskoj adresi lica na koju može uputiti svoje prigovore.
9. Propisati da je trgovac dužan da ispuni ugovor najkasnije u roku od 30 dana od dana kada je potrošač stavio svoju narudžbu.
10. Propisati da je, u slučaju nemogućnosti ispunjenja ugovora, trgovac dužan da o tome obavijesti potrošača u roku od 30 dana.
11. Propisati mehanizme zaštite potrošača u slučaju plaćanja platnom karticom, saglasno Direktivi.
12. Propisati da u slučaju isporuke nenaručenih proizvoda potrošač neće biti vezan ugovorom čak ako je trgovac ugovorom predvidio da će se ćutanje potrošača tumačiti kao njegov pristanak na zaključivanje ugovora.
13. Predvidjeti sistem zaštite kolektivnih interesa potrošača.
14. Saglasno Direktivi, zakonski propisati da se ugovorna klauzula o izboru mjerodavnog prava neće uzimati u obzir ako je izabranim pravom potrošaču pružen niži nivo zaštite od onoga koji je propisan crnogorskim zakonodavstvom.
15. Izričito propisati da se odredbe Zakona o zaštiti potrošača o prodaji na daljinu neće primjenjivati ako je zaštita potrošača prilikom prodaje na daljinu posebne vrste proizvoda propisana posebnim zakonom.
16. U prelaznim i završnim odredbama Zakona navesti da se tim zakonom preuzima ova direktiva.

3.5. Direktiva 98/6/EZ (isticanje cijena ponuđenih proizvoda)

3.5.1. Navodi Tabela usklađenosti

Analizom zakonodavstva utvrđeno je da se u Crnoj Gori ova direktiva prenosi Zakonom o zaštiti potrošača, a da su referentni i drugi zakoni. Crnogorsko zakonodavstvo u pogledu ove direktive ima nizak stepen usklađenosti.

Odstupanja crnogorskog zakonodavstva od Direktive uočena su u sljedećim elementima:

1. Zakon o zaštiti potrošača nije usklađen sa Direktivom u pogledu definicije prodajne cijene.

Nasuprot jasnoj definiciji sadržanoj u Direktivi da je prodajna cijena konačna cijena jednog komada proizvoda ili date količine proizvoda, uključujući PDV i sve druge poreze, Zakon o zaštiti potrošača ne sadrži definiciju prodajne cijene. I pored toga što nacionalno zakonodavstvo sadrži pravila o formiranju i označavanju cijene, ovo nije u saglasnosti sa pravilima o zaštiti potrošača, naročito pravom na informisanje.

2. Zakon o zaštiti potrošača nije usklađen sa Direktivom u pogledu definicije cijene po jedinici mjere.

Nasuprot jasnoj definiciji sadržanoj u Direktivi da cijena po jedinici mjere označava konačnu cijenu, uključujući PDV i sve druge poreze, za jedan kilogram, jedan litar, jedan metar, jedan kvadratni metar ili jedan kubni metar proizvoda ili neku drugu pojedinačnu kvantitativnu jedinicu koja se široko i uobičajeno koristi u državama članicama u prometu određenih proizvoda, Zakon o zaštiti potrošača ne sadrži preciznu definiciju cijene po jedinici mjere. Nacionalno zakonodavstvo sadrži iste mjere koje su određene Direktivom.

3. Zakon o zaštiti potrošača nije u potpunosti usklađen sa Direktivom u pogledu definicije robe u rasutom stanju (rinfuza).

Prema Direktivi proizvodi koji se prodaju na mjeru su proizvodi koji nijesu unaprijed pakovani i mjere se u prisustvu potrošača, dok Zakon o zaštiti potrošača definiše da je **roba u rasutom stanju (rinfuza)** roba koja nije prethodno zapakovana. U definiciji nedostaje dio „mjerenja u prisustvu potrošača“. U ovom smislu definicija je nepotpuna.

4. Zakon o zaštiti potrošača nije u potpunosti usklađen sa Direktivom u pogledu definicije trgovca.

Prema Direktivi trgovac je bilo koje fizičko ili pravno lice koje prodaje ili nudi na prodaju proizvode koji ulaze u okvire njegove komercijalne ili profesionalne aktivnosti. Zakon o zaštiti potrošača definiše da je trgovac lice koje prodaje robu ili pruža usluge potrošačima. Razlika koja postoji je u pogledu nedostatka definicije da prodaja treba da se odvija u okvirima komercijalne ili profesionalne aktivnosti kao i da obuhvata ponudu na prodaju.

5. Zakon o zaštiti potrošača nije usklađen sa Direktivom u pogledu isticanja cijene na proizvode koje prodavci nude potrošačima.

Prodajna cijena i cijena po jedinici mjere ističu se kod svih proizvoda koje prodavci nude potrošačima prema pravilima Direktive. Zakon o zaštiti potrošača predviđa da je trgovac dužan da obavijesti potrošača o važećoj cijeni proizvoda koja mora biti vidno istaknuta. S obzirom na to da Zakon ne sadrži definiciju prodajne cijene i cijene po jedinici mjere ne može se reći da je usklađen sa Direktivom.

6. Zakon o zaštiti potrošača nije usklađen sa Direktivom u pogledu isticanja cijene za robu u rasutom stanju (rinfuza).

Direktiva predviđa da za proizvode koji se prodaju na mjeru, mora biti naznačena samo cijena po jedinici mjere. Prema Direktivi, cijena po jedinici mjere označava konačnu cijenu, uključujući PDV i sve druge poreze, za jedan kilogram, jedan litar, jedan metar, jedan kvadratni metar ili jedan kubni metar proizvoda ili neku drugu pojedinačnu kvantitativnu jedinicu koja se široko i uobičajeno koristi u državama članicama u prometu određenih proizvoda. Zakon o zaštiti potrošača definiše da se na robu u rasutom stanju ističe važeća cijena po jedinici mjere na pakovanju ili neposredno pored robe. Odstupanje se javlja u pogledu definicije važeće cijene (vidi tačku 1 ovog dijela). I u slučaju da je u drugim zakonskim ili podzakonskim aktima definisano šta se podrazumijeva pod terminom „važeća cijena“ i kako se određuje važeća cijena, ovo nije u saglasnosti sa Direktivom budući da ta informacija nije lako dostupna potrošaču. Zakon isto tako ne opredjeljuje šta se podrazumijeva pod terminom „cijena po jedinici mjere“ (vidi tačku 2 ovog dijela).

7. Zakon o zaštiti potrošača nije u usklađen sa Direktivom u pogledu isticanja cijene pri reklamiranju.

Direktiva predviđa da svaka reklama koja pominje prodajnu cijenu proizvoda koje prodavci nude potrošačima, takođe mora isticati cijenu po jedinici mjere u skladu sa pravilima Direktive. Zakon o zaštiti potrošača ne sadrži pravila o isticanju cijene pri reklamiranju.

8. Zakon o zaštiti potrošača nije u potpunosti usklađen sa Direktivom u pogledu načina isticanja prodajne cijene i cijene po jedinici mjere.

Direktiva određuje da prodajna cijena i cijena po jedinici mjere moraju biti nedvosmislene, lako uočljive i čitke, dok Zakon utvrđuje pravila o isticanju „važeće cijene“ koja nije definisana u saglasnosti sa Direktivom. Što se tiče načina isticanja cijene (nedvosmisleno, lako uočljivo i čitko), bez obzira na to što Zakon koristi različitu terminologiju, ta terminologija odgovara

smislu odredaba Direktive, pa je prema tome, u ovom segmentu Zakon usklađen sa Direktivom. Sveobuhvatno, međutim, usklađenost nije potpuna.

9. Zakon o zaštiti potrošača nije u potpunosti usklađen sa Direktivom u pogledu pitanja na šta se odnosi cijena po jedinici mjere.

Prema Direktivi, cijena po jedinici mjere mora da se odnosi na količinu koja je označena u skladu sa odredbama nacionalnog prava i prava Zajednice. Dodatno, tamo gdje odredbe nacionalnog prava ili prava Zajednice zahtijevaju isticanje neto težine i neto težine suve materije za izvjesne ranije upakovane proizvode, biće dovoljno da se istakne cijena po jedinici mjere neto mase suve materije. Zakon o zaštiti potrošača pitanje označavanja cijene uređuje jednom odredbom prema kojoj se važeća cijena ističe po jedinici mjere na pakovanju ili neposredno pored robe. Termini „važeća cijena“ i „cijena po jedinici mjere“ nijesu u saglasnosti sa Direktivom (vidi tač. 1 i 2 ovog dijela) pa, prema ovome, prenošenje Direktive nije korektno.

10. Zakon o zaštiti potrošača nije u potpunosti usklađen sa Direktivom u pogledu kazne za nepoštovanje odredbi u pogledu označavanja i isticanja cijena.

Prema Direktivi, države članice propisuju kazne za nepoštovanje odredaba nacionalnog prava usvojenih radi implementacije Direktive i preduzimaju sve neophodne mjere da obezbijede njihovu primjenu. Ove kazne moraju biti djelotvorne, primjerene i da služe svrsi prevencije. Nacionalno zakonodavstvo Crne Gore sadrži odredbe kojima se propisuju kazne za nepoštovanje odredaba nacionalnog prava u pogledu označavanja i isticanja cijena. Međutim, budući da materijalne odredbe Zakona u svom pretežnom dijelu nijesu usklađene sa Direktivom, smatra se da ni ovaj dio Zakona nije usklađen.

3.5.2. Presude Suda pravde EU

Nema presuda Suda pravde EU koje se odnose na ovu direktivu.

3.5.3. Praktične preporuke

Na osnovu navedenog, dajemo sljedeće praktične preporuke:

1. Izmijeniti i dopuniti Zakon i precizirati šta je prodajna cijena.
2. Izmijeniti i dopuniti Zakon i precizirati šta je cijena po jedinici mjere.
3. Izmijeniti i dopuniti definiciju Zakona u pogledu robe u rasutom stanju (rinfuza).
4. Izmijeniti i dopuniti definiciju trgovca u Zakonu tako da obuhvati ponudu na prodaju i da ponuda i prodaja treba da se odvijaju u okvirima komercijalne ili profesionalne aktivnosti.
5. Izmijeniti i dopuniti Zakon o zaštiti potrošača u pogledu isticanja cijene na proizvodima koje prodavci nude potrošačima.
6. Izmijeniti i dopuniti Zakon u pogledu isticanja cijene za robu u rasutom stanju (rinfuza).
7. Izmijeniti i dopuniti Zakon o zaštiti potrošača tako da sadrži pravila o načinu isticanja cijene pri reklamiranju.
8. Izmijeniti i dopuniti Zakon o zaštiti potrošača tako da sadrži pravila o načinu isticanja prodajne cijene i cijene po jedinici mjeri.
9. Izmijeniti i dopuniti Zakon o zaštiti potrošača u pogledu pitanja na šta se odnosi cijena po jedinici mjere.
10. Izmijeniti i dopuniti kaznene odredbe Zakona o zaštiti potrošača koje se odnose na označavanje i isticanje cijena na način da one sadržajno odgovaraju promjenama koje bi trebalo izvršiti na osnovu prethodnih preporuka.
11. U prelaznim i završnim odredbama zakona kojim se ona preuzima, navesti da se Direktiva preuzima tim zakonom.

3.6. Direktiva 99/44/EZ (neki aspekti prodaje potrošačke robe i pratećih garancija)

3.6.1. Navodi Tabela usklađenosti

Analizom zakonodavstva utvrđeno je da se u Crnoj Gori ova direktiva prenosi Zakonom o zaštiti potrošača i Zakonom o obligacionim odnosima. Crnogorsko zakonodavstvo je, generalno, usklađeno sa Direktivom, ali postoje odstupanja od Direktive.

Odstupanja crnogorskog zakonodavstva od Direktive uočena su u sljedećim elementima:

1. Nasuprot postojanju definicije robe široke potrošnje u Direktivi, zakonodavstvo ne sadrži eksplicitno takvu definiciju. Zakon o zaštiti potrošača definiše pojmove proizvod, roba, tehnička roba, roba u rasutom stanju (rinfuza), javne usluge, ali ni jedna od ovih definicija nije u smislu definicije robe široke potrošnje utvrđene Direktivom.

2. Definicija prodavca (u smislu Direktive), odnosno trgovca kao u Zakonu o zaštiti potrošača ne odgovara Direktivi. Iz Direktive jasno proizilazi da se prodavcem (trgovcem) smatra fizičko ili pravno lice koje prodaje robu široke potrošnje u okviru svoje poslovne djelatnosti ili profesije. Međutim iz Zakona o zaštiti potrošača proizilazilo bi da se trgovcem može smatrati svako lice koje prodaje robu tj. pruža usluge potrošačima.

3. Zakon o zaštiti potrošača ne odgovara u potpunosti Direktivi u pogledu obaveza davaoca garancije koje proizilaze iz oglasa koji je on davao u vezi sa robom. Zakon o zaštiti potrošača definiše sadržaj garancije i obaveze koje iz nje proizilaze. Međutim, bez obzira na to što Zakon predviđa da garantni list mora da sadrži izjave iz oglasa, ne precizira da će potrošač imati pravo da koristi prava predviđena zakonom čak i u slučajevima kada obaveze koje je trgovac preuzeo oglasom nijesu usklađene s obavezama navedenim u garanciji.

4. Zakon o zaštiti potrošača i Zakon o obligacionim odnosima ne sadrže jasnu definiciju pojma popravka. Direktiva jasno definiše šta označava pojam „popravka“, kao jedno od prava potrošača u slučaju neusaglašenosti isporučene robe sa onim što je ugovoreno, dok iz Zakona o zaštiti potrošača i Zakona o obligacionim odnosima samo implicitno može da se utvrdi sadržaj tog pojma.

5. Nacionalno zakonodavstvo nije sasvim jasno u pogledu toga da li su polovni proizvodi koji se prodaju na javnim aukcijama isključeni iz pojma „roba široke potrošnje“. Direktiva daje mogućnost da se iz pojma „roba široke potrošnje“ isključe polovni proizvodi koji se prodaju na javnim aukcijama na kojima potrošači mogu lično da učestvuju. Zakonodavstvo, implicitno isključuje ovu robu, ali ne postoji jasna definicija.

6. Nacionalno zakonodavstvo nije u potpunosti u skladu sa Direktivom što se tiče tretmana ugovora o isporuci buduće robe široke potrošnje kao ugovora o prodaji. Prema Direktivi, ugovori o isporuci buduće robe široke potrošnje, odnosno robe koju tek treba proizvesti, za potrebe pravila Direktive u svakom slučaju smatraju se ugovorima o prodaji. Zakon o obligacionim odnosima članom 466 stav 3 uređuje da se prodaja može odnositi i na buduću stvar. Isto tako, relevantno za ovu odredbu Direktive, ZOO članom 548 reguliše prodaju po specifikaciji. Pitanje se, međutim, postavlja u pogledu robe koju tek treba proizvesti. Naime, proizvodnja (izrada) određene robe, prema ZOO-u po pravilu predstavlja ugovor o djelu, time da se članom 670 uređuje odnos sa ugovorom o prodaji tako da: (1) ugovor kojim se jedna strana obavezuje da izradi određenu pokretnu stvar od svog materijala smatra se u sumnji kao ugovor o prodaji; (2) ugovor ostaje ugovor o djelu ako se naručilac obavezao da da bitan dio materijala potreban za izradu stvari; i (3) ugovor se smatra ugovorom o djelu ako su ugovorne strane imale u vidu naročito poslenikov rad. Pri uređenju

ovih pravila, ZOO ne pravi razliku da li je u pitanju izrada robe široke potrošnje (prema definiciji iz Direktive) ili neka druga stvar, što je razumljivo s obzirom na karakter Zakona. Razlika u Direktivi i Zakonu javlja se po pitanju tretmana ugovora kojim se jedna strana obavezuje da izradi određenu pokretnu stvar od svog materijala. Dok Direktiva predviđa da će se ovaj ugovor u svakom slučaju smatrati ugovorom o prodaji, ZOO ovo vezuje za postojanje sumnje. Na taj način postoji mogućnost da se na ove ugovore primjenjuju pravila o ugovoru o djelu.

7. Zakonodavstvo nije u potpunoj saglasnosti sa Direktivom u pogledu slučaja kada postoji (ne)usaglašenost isporučene robe sa ugovorenom.

Prema Direktivi, prodavac mora da isporuči potrošaču robu koja je u skladu sa ugovorom o prodaji, pri čemu pozitivno definiše kada postoji usaglašenost. Zakon o obligacionim odnosima negativno definiše saobraznost, ali ovo nije relevantno. Međutim, Zakon ne obuhvata situaciju da roba treba da odgovara opisu i da ima kvalitet koji je naveo prodavac.

8. Nacionalno zakonodavstvo nije u saglasnosti sa Direktivom u vezi odgovornosti za neispunjenje obaveza za isporuku robe koja nije u skladu sa ugovorom.

Direktiva predviđa građansku odgovornost za neispunjenje obaveza za isporuku robe koja nije saobrazna ugovoru. Zakon o zaštiti potrošača predviđa i prekršajnu odgovornost za isti slučaj. Budući da bi ovakav dualizam mogućih sankcija mogao dovesti do pravne nesigurnosti, pogotovo ako bi se u različitim vrstama postupka primjenjivali različiti kriterijumi određivanja neispravnosti robe, u budućem bi zakonskom uređenju ovoj problematici trebalo posvetiti naročitu pažnju.

9. Zakon o zaštiti potrošača nije u saglasnosti sa Direktivom u pogledu načina ostvarivanja prava potrošača u slučaju isporuke robe koja nije u saglasnosti sa ugovorom.

Direktiva utvrđuje jasan redosljed izvršenja prava koja proizilaze iz slučaja isporuke robe koja nije u saglasnosti sa ugovorom. Zakon o zaštiti potrošača, nasuprot tome, ostavlja slobodan izbor potrošaču. Ovo se možda smatra kao davanje većih prava u saglasnosti sa članom 8 Direktive, ali dovodi se u pitanje da li je u skladu sa Ugovorom o Evropskoj uniji. Zakon o obligacionim odnosima utvrđuje isti redosljed kao i Direktiva. Ovaj dualitet uređenja, kao i ostavljanje mogućnosti slobodnog izbora prava nije u saglasnosti sa Direktivom.

10. Zakon o zaštiti potrošača nije u saglasnosti sa Direktivom u pogledu pitanja kada potrošač može da zahtijeva od prodavca da popravi ili da zamijeni robu.

Direktiva definiše da potrošač može da zahtijeva od prodavca da popravi ili da zamijeni robu samo ako to nije nemoguće ili neprimjereno. Pri tome, jasno se određuju situacije kada se zahtjev smatra neprimjerenim (ako u poređenju sa drugim zahtjevom koji je potrošač mogao da istakne, stvara pretjerane troškove, kada se uzme u obzir: (1) vrijednost koju bi roba imala da je saobrazna ugovoru, (2) značaj nesaobraznosti robe onome što je ugovoreno, i (3) da li se drugi zahtjev mogao ispuniti bez značajnijih nepogodnosti za potrošača). Ovi slučajevi nijesu obuhvaćeni nacionalnim zakonodavstvom.

11. Zakonodavstvo Crne Gore nije u saglasnosti sa Direktivom u pogledu pitanja kada potrošač može da zahtijeva od prodavca srazmjerno smanjenje cijene ili raskid ugovora.

Prema Direktivi, potrošač može da zahtijeva srazmjerno smanjenje cijene ili da raskine ugovor ako: (1) potrošač nema pravo na popravku ili zamjenu, ili (2) prodavac nije izvršio zamjenu ili popravku u razumnom roku, ili (3) prodavac nije izvršio zamjenu ili popravku bez značajnih nepogodnosti po potrošača. Zakonodavstvo Crne Gore ne obuhvata slučaj da potrošač može da zahtijeva srazmjerno smanjenje cijene ili raskid ugovora ako prodavac nije izvršio zamjenu ili popravku bez značajnih nepogodnosti po potrošača.

12. Nacionalno zakonodavstvo nije u saglasnosti sa Direktivom u pogledu prava potrošača kada je neusaglašenost neznatna.

Prema Direktivi, ako je neusaglašenost neznatna potrošač nema pravo da raskine ugovor. Nasuprot tome, prema Zakonu o obligacionim odnosima (član 486 stav 1) neznatna nesaobraznost se uopšte ne uzima u obzir, tj. potrošač neće imati pravo ni na popravku,

zamjenu, odnosno smanjenje cijene. Na ovaj način, prava koja potrošač ima po nacionalnom zakonodavstvu manja su u poređenju sa onima koja daje Direktiva.

13. Nacionalno zakonodavstvo nije u saglasnosti sa Direktivom u pogledu pitanja roka odgovornosti prodavca.

Direktiva definiše da je prodavac odgovoran ukoliko neusaglašenost postane vidljiva u roku od dvije godine od isporuke robe, dok je po Zakonu o obligacionim odnosima ovaj rok utvrđen na jednu godinu nakon obavještanja (koji može da bude i nakon šest mjeseci po isporuci). Ovako utvrđen rok nije u saglasnosti sa Direktivom.

14. Nacionalno zakonodavstvo nije u saglasnosti sa Direktivom u pogledu pitanja roka za ispunjenje obaveze obavještanja prodavca o nedostacima.

Prema Direktivi, kada je propisano da potrošač mora da obavijesti prodavca o neusaglašenosti robe da bi mogao da ostvari prava koja mu se u tom slučaju garantuju, taj rok treba da bude dva mjeseca od dana kada je uočio tu nesaobraznost. Nacionalno zakonodavstvo utvrđuje različite rokove. Prema Zakonu o obligacionim odnosima postoje različiti rokovi za notifikaciju za vidljive i skrivene nedostatke: a) skriveni nedostaci: u roku od osam dana od otkrivanja, ali ne kasnije od šest mjeseci od predaje; b) vidljivi nedostaci: odmah po saznanju, ali ne kasnije od šest mjeseci od otkrivanja nedostatka.

15. Zakon o obligacionim odnosima nije u skladu sa Direktivom u pogledu pitanja pretpostavke postojanja neusaglašenosti koja se pojavi u roku od šest mjeseci od isporuke.

Direktiva predviđa da se pretpostavlja da je svaka neusaglašenost robe s ugovorom koja je postala vidljiva u roku od šest mjeseci od isporuke postojala u času isporuke, ako takva pretpostavka nije suprotna prirodi određene robe ili prirodi određene nesaobraznosti. Zakon o obligacionim odnosima ne definiše ove slučajeve na isti način kao i Direktiva jer prema ZOO, prodavac će biti odgovoran za nedostatke koji se pojave nakon prelaska rizika na kupca (predaje robe) ako su oni rezultat razloga koji su postojali prije toga.

16. Nacionalno zakonodavstvo nije u potpunosti u skladu sa Direktivom u pogledu pitanja odnosa garancije i oglasa.

Prema Direktivi, garancija pravno obavezuje ponudioca pod uslovima koji su navedeni u izjavi o garanciji i tokom oglašavanja. Po nacionalnom zakonodavstvu davalac garancije dužan je da ispuni obaveze utvrđene garancijom, a garantni list sadrži i navode iz reklamnog materijala. Nacionalno zakonodavstvo ne precizira da i uslovi pod kojima se ispunjavaju obaveze treba da budu u saglasnosti sa oglasima.

17. Zakon o zaštiti potrošača nije u potpunoj saglasnosti sa Direktivom po pitanjima sadržaja garancije, prava koja iz nje proizilaze, načina na koji garancija treba da je sačinjena i sl.

U Direktivi je definisano da će se u garanciji: a) nalaziti izjava o tome da potrošač ima određena prava koja su garantovana zakonima države članice i jasnu naznaku da garancija nema uticaja na ta prava; b) jasnim i lako razumljivim jezikom izložiti sadržina garancije i osnovni podaci koji su neophodni da bi se ostvarila prava po osnovu garancije, prije svega trajanje i teritorijalno važenje garancije i ime i adresa davaoca garancije. Zakon o obligacionim odnosima u potpunosti odgovara sadržaju pravila Direktive, dok to nije slučaj sa Zakonom o zaštiti potrošača.

18. Zakon o zaštiti potrošača nije u potpunosti u saglasnosti sa Direktivom u pogledu načina na koji se dostavlja garancija.

Prema Direktivi, na zahtjev potrošača, garancija se dostavlja u pisanom obliku ili na drugom trajnom mediju koji je na raspolaganju potrošaču i kojem potrošač može lako da pristupi. Nasuprot tome, u Zakonu o zaštiti potrošača predviđen je samo pisani oblik.

19. Zakon o zaštiti potrošača nije u potpunosti u saglasnosti sa Direktivom po pitanju slučaja kada je garancija u suprotnosti sa zahtjevima o sadržaju, načinu izdavanja i jeziku garancije.

Direktiva predviđa da u slučaju da je garancija u suprotnosti sa zahtjevima koji se odnose na sadržaj garancije, način izdavanja i jezik na kojem je izdata, ta okolnost ni na koji način ne

utiče na njenu punovažnost, pa potrošač može i dalje da se pouzda u garanciju i da zahtijeva da se postupi u skladu s njom. Zakon o zaštiti potrošača ovo ograničava samo na slučaj kada garancija nije izdata u pisanom obliku.

20. U crnogorskom zakonodavstvu u pogledu ove materije postoji dualizam uređenja koji u velikoj mjeri utiče na pravnu sigurnost i, u krajnjoj liniji, ispravnost prenošenja Direktive u crnogorsko zakonodavstvo. Naime, ova je materija uređena i ZZP-om i ZOO-om. Pritom, iako ZZP navodi da se na one odnose koji nijesu njime uređeni primjenjuje ZOO, problem nastaje u onim situacijama u kojima ZZP uređuje pojedine segmente ove materije, ali suprotno onome što predviđa Direktiva. U takvim situacijama mora se zaključiti kako crnogorsko zakonodavstvo nije saglasno sa Direktivom, i to uprkos činjenici da ZOO te segmente uređuje uglavnom u saglasnosti s Direktivom.

3.6.2. Presude Suda pravde EU

Presuda 19. februara 2004. godine u predmetu C-310/03 Komisija evropskih zajednica protiv Velikog Vojvodstva Luksemburg [2004] Zbirka sudskih odluka str. I-1969

Presuda od 19. februara 2004. godine u predmetu C-312/03 Komisija evropskih zajednica protiv Kraljevine Belgije [2004] Zbirka sudskih odluka str. I-1975

U oba slučaja Sud pravde EU zauzeo je stav da se ocjena da li je direktiva implementirana u nacionalno zakonodavstvo vrši upućivanjem na situaciju koja je postojala u državi na kraju propisanog roka za implementaciju i da sud neće imati u vidu kasnije promjene zakonodavstva.

Presuda od 17. aprila 2008. godine u predmetu C-404/06 Quelle AG protiv Bundesverband der Verbraucherzentralen i Verbraucherverbände [2008] Zbirka sudskih odluka str. I-2685

U ovom slučaju presudom SP EU određuje se da član 3 Direktive 1999/44 treba da se tumači na način da sprječava da nacionalno zakonodavstvo omogući da prodavac koji je prodao robu koja nije u skladu sa ugovorom ima pravo da od kupca traži da plati naknadu za korišćenje te robe do njene zamjene.

3.6.3. Praktične preporuke

Na osnovu navedenog, dajemo sljedeće praktične preporuke:

1. Izbjegavati postojeći dualizam uređenja te donijeti odluku hoće li se ova direktiva prenijeti u crnogorsko zakonodavstvo putem ZZP ili ZOO.
2. U Zakonu o zaštiti potrošača promijeniti definicije i: a) uvesti definiciju robe široke potrošnje, b) definisani domen primjene posebnih pravila o prodaji robe široke potrošnje uskladiti sa Direktivom, odnosno isključiti stvari prodane u izvršnom postupku ili na drugi način po sili zakona, vodu i gas kada nijesu stavljeni u prodaju u ograničenom obimu ili utvrđenoj količini, električnu energiju, i precizirati da se iz zakonske definicije robe široke potrošnje isključe polovni proizvodi koji se prodaju na javnim aukcijama na kojima potrošači mogu lično da učestvuju.
3. Precizirati definiciju prodavca, odnosno trgovca, tako da označava da se radi o fizičkom ili pravnom licu koje prodaje robu široke potrošnje u okviru svoje poslovne djelatnosti ili profesije.
4. Proširiti definiciju iz člana 19 Zakona, da obuhvati da obaveze proizilaze i iz oglasa.
5. U Zakonu o zaštiti potrošača uvesti definiciju popravke tako da označava usaglašenost isporučene robe sa onim što je ugovoreno.
6. Uvesti definiciju prodaje robe široke potrošnje, koja predviđa da se ugovori o isporuci robe koju tek treba proizvesti, za potrebe zakona i pravila o prodaji robe široke potrošnje, smatraju ugovorima o prodaji.

7. U nacionalnom zakonodavstvu predvidjeti kao slučaj neusaglašenosti situaciju kada roba ne odgovara opisu koji je dao prodavac i nema kvalitete robe koju je prodavac pokazao potrošaču kao uzorak ili model.
8. Revidirati član Zakona o zaštiti potrošača koji se odnosi na prekršajnu odgovornost u slučaju neispunjenja obaveze iz garancije.
9. Revidirati član Zakona o zaštiti potrošača koji se odnosi na izvršenje prava koja proizilaze iz slučaja isporuke robe koja nije u skladu sa ugovorom i predvidjeti da će kupac imati pravo prvo da zahtijeva da se roba besplatno usaglasi sa onim što je ugovoreno putem popravke ili zamjene, pa ukoliko se ne ispune uslovi za popravku ili zamjenu da zahtijeva srazmjerno smanjenje cijene ili da raskine ugovor, a u skladu sa pravilima o smanjenju cijene i raskidu ugovora.
10. Definirati nacionalnim zakonodavstvom da se, u slučajevima prodaje robe široke potrošnje koja nije u skladu sa ugovorom, popravka ili zamjena kao pravo potrošača mogu zahtijevati samo ako to nije nemoguće ili neprimjereno, i pri tom, u smislu Direktive, definisati šta će se smatrati neprimjerenim zahtjevom.
11. Definirati nacionalnim zakonodavstvom da potrošač može da zahtijeva srazmjerno smanjenje cijene ili raskid ugovora ako prodavac nije izvršio zamjenu ili popravku bez značajnih nepogodnosti po potrošača.
12. Precizirati u nacionalnom zakonodavstvu da se neznatna neusaglašenost neće uzimati u obzir samo kad je u pitanju raskid ugovora.
13. Promijeniti nacionalno zakonodavstvo u pogledu roka odgovornosti u slučaju isporuke robe koja nije u skladu sa ugovorenim.
14. Promijeniti nacionalno zakonodavstvo u pogledu roka obavještanja, tako da ovaj rok iznosi najmanje dva mjeseca.
15. Promijeniti nacionalno zakonodavstvo u pogledu pretpostavke neusaglašenosti robe s ugovorom koja je postala vidljiva u roku od šest mjeseci od isporuke.
16. Precizirati u zakonodavstvu da i uslovi pod kojima se ispunjavaju obaveze u vezi garancije treba da budu u skladu sa oglasima.
17. Precizirati nacionalnim zakonodavstvom pravila o sadržaju garancije, prava koja iz nje proizilaze, način na koji garancija treba da je sačinjena i sl, prema zahtjevima člana 6 stav 2 Direktive.
18. Precizirati nacionalnim zakonodavstvom da se na zahtjev potrošača garancija dostavlja, pored pisanog oblika, i na drugom trajnom mediju koji je na raspolaganju potrošaču i kojem potrošač može lako da pristupi.
19. Nacionalno zakonodavstvo treba dopuniti tako da predvidi da je garancija punovažna bez obzira na to da li je u skladu ili suprotna zakonskim zahtjevima u pogledu njenog sadržaja, načina izdavanja i jezika.
20. U prelaznim i završnim odredbama zakona kojim se ona preuzima, navesti da se Direktiva preuzima tim zakonom.

3.7. Direktiva 2005/29/EZ (nepoštena poslovna praksa)

3.7.1. Navodi Tabela usklađenosti

Direktiva 2005/29/EZ o nepoštenoj poslovnoj praksi uspostavlja harmonizovana pravila protiv nepoštene poslovne prakse i doprinosi visokom nivou zaštite potrošača. Prenošenjem ove direktive osigurava se da potrošači ne budu obmanjivani ili izloženi agresivnom marketingu i da svaka tvrdnja učinjena od strane trgovaca bude jasna, tačna i potkrijepljena, omogućavajući potrošačima da naprave izbor na osnovu vjerodostojnih i tačnih informacija. Svrha Direktive (član 1) je da doprinese ispravnom funkcionisanju unutrašnjeg tržišta i postigne visok stepen zaštite potrošača ujednačavanjem zakona i drugih propisa država članica o nepoštenim poslovnim praksama kojima se povređuju ekonomski interesi potrošača. Ovaj član Direktive eksplicitno navodi na harmonizaciju onih praksi „koje povređuju ekonomske interese potrošača“. Imajući ovo u vidu, Direktiva ne utiče na mogućnost da države članice imaju dopunska i restriktivnija pravila koja regulišu poslovnu praksu radi zaštite zdravlja i bezbjednosti potrošača (saglasno članu 3 Direktive) ili zaštite životne sredine.

Direktiva reguliše nepoštenu poslovnu praksu privrednih subjekata prema potrošaču (B2C - *business to consumer commercial practice*), i tako definiše nepoštenu poslovnu praksu, pa stoga poslovna praksa B2B (*business to business*) ne spada pod ovu direktivu i djelimično je regulisana Direktivom 2006/114/EZ o obmanjućem i upoređujućem oglašavanju. Međutim države članice mogu odlučiti da prošire zaštitu i na poslovnu praksu B2B (ili na C2C - *consumer to consumer*), što je slučaj sa Njemačkom, Austrijom i Švedskom koje su proširile odredbe ove direktive na poslovnu praksu B2B, dok je Francuska to uradila samo za određene odredbe. Direktiva navodi (uvodna izjava 6) da niti pokriva, niti utiče na nacionalne propise o nepoštenoj poslovnoj praksi kojom se povređuju isključivo ekonomski interesi konkurenata ili propise koji se odnose na transakcije između trgovaca.

Direktiva se zasniva na načelu potpune ili maksimalne harmonizacije nacionalnog prava, sa ciljem da se otklone barijere funkcionisanju unutrašnjeg tržišta. Međutim, postoje dva ograničenja u pogledu efekta potpune harmonizacije.

Prvo, u pogledu člana 3 stav 9 u odnosu na finansijske usluge i nepokretnu imovinu gdje se primjenjuje princip minimalne harmonizacije i države članice mogu primijeniti pravila koja su stroža od odredbe ove direktive, ali koja su u skladu sa pravom EU.

Drugo se odnosi na vremensko odstupanje od principa potpune harmonizacije kada su u pitanju Direktive koje sadrže klauzule o minimalnoj harmonizaciji, tako da u skladu sa članom 3 stav 5 za period od šest godina počevši od 12. juna 2007. godine, države članice mogu da produže primjenu odredaba nacionalnog zakonodavstva (primjer kod Direktive 98/6/EZ i Direktive 97/7/EZ).

Ova dva ograničenja biće predmet revizije Direktive koja će se saglasno odredbi člana 18 sprovesti do 12. juna 2011. godine.

Analizom zakonodavstva Crne Gore radi utvrđivanja u kojem je dijelu ova direktiva prenijeta, može se konstatovati da je Direktiva u neznatnom dijelu prenijeta Zakonom o zaštiti potrošača.

Odstupanja crnogorskog zakonodavstva od Direktive uočena su u sljedećim elementima:

1. Za razliku od Direktive koja definiše da je „potrošač“ svako fizičko lice koje u poslovnoj praksi pokrivenom ovom direktivom djeluje u svrhu koja je van njegove djelatnosti, poslovanja, zanata ili profesije, Zakon o zaštiti potrošača, pod terminom „potrošač“ podrazumijeva 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.

Potrošač se prema ovoj direktivi određuje kao fizičko lice, što je i crnogorski Zakon o zaštiti potrošača preuzeo. Zakon utvrđuje da potrošač kupuje, poručuje, prima, koristi robe ili usluge uključujući i javne usluge što se može obuhvatiti terminom „djeluje“, prema ovoj direktivi. Odstupanja od potpunog prenošenja odredbe kojom se definiše „potrošač“ postoje u smislu da u definisanju pojma „potrošač“ kao i u daljim odredbama nije primijenjen termin „poslovna praksa“, u smislu ove direktive (vidi tačku 4 ovog teksta o definiciji poslovne prakse). Osim toga, čini se da je termin „djeluje“, koji je korišćen u Direktivi, širi od popisa aktivnosti koje navodi ZZP.

2. Definicija „trgovca“ je djelimično prenesena u Zakon o zaštiti potrošača i ista ne obuhvata aktivnosti trgovca koje se odnose na sve elemente poslovne prakse (svaki postupak, propust, način ponašanja ili predstavljanja, komercijalnu komunikaciju koja obuhvata oglašavanje i marketing trgovca, direktno povezanih sa promocijom, prodajom ili isporukom proizvoda potrošačima).

Definicijom trgovca u Zakonu o zaštiti potrošača takođe nije obuhvaćena poslovna praksa koju trgovac obavlja putem posrednika, koji djeluju u ime ili za račun trgovca.

3. Prema Direktivi „proizvod“ označava svaku robu ili uslugu uključujući i nepokretnu imovinu, prava i obaveze. Ovakav opseg definisanja „proizvoda“ srijeće se i kod Direktive o obmanjujućem i upoređujućem oglašavanju kao i kod novog Predloga direktive o potrošačkim pravima.

Zakon o zaštiti potrošača pri definisanju „**proizvoda**“, upućuje da je to roba ili usluga koja može biti u prometu uključujući i javne usluge, ali ne obuhvata i nepokretnu imovinu, prava i obaveze.

Direktiva ne definiše šta podrazumijeva pod terminom „prava“, ali se smatra da su ovim terminom obuhvaćena i prava intelektualne svojine.

4. Definicija „poslovne prakse“ nije prenešena u Zakon o zaštiti potrošača. Direktiva pod „poslovnom praksom“ u članu 2 tačka d definiše „svaki postupak, propust, način ponašanja ili predstavljanja, komercijalnu komunikaciju koja obuhvata oglašavanje i marketing trgovca, direktno povezanih sa promocijom, prodajom ili isporukom proizvoda potrošačima“.

Ove termine treba sagledati u hronološkom redosljedu, promocija treba da bude uzeta u obzir kao predugovorna, prodaja kao ugovorna, a isporuka kao postugovorna faza. Tako da termin „prodaja“ u obligacionom pravu „sugeriše“ na ugovor.

Ova direktiva se primjenjuje na nepoštenu poslovnu praksu privrednih subjekata prema potrošaču, kako je navedeno i u članu 5 Direktive, a to je **prije, za vrijeme i nakon** komercijalne transakcije proizvoda (imajući u vidu širu definiciju proizvoda koja crnogorskim zakonom nije prenijeta, a koja uključuje nepokretne stvari, prava i obaveze). Trgovac mora da obezbijedi da i poslije prodaje, poslovna praksa obezbjeđuje iste standarde kao i prije prodaje. Poslovna praksa se mora sagledati i u skladu sa članom 3 stav 1 koji se odnosi na područje primjene.

Postavlja se pitanje da li koncept poslovne prakse obuhvata situacije kada trgovac kupuje proizvod od potrošača?

U skladu sa definicijom iz Direktive, poslovna praksa pokriva samo praksu koja je „direktno vezana za promociju, prodaju, ili isporuku proizvoda potrošaču“. Obrnuta situacija kada trgovac kupuje proizvode od potrošača nije obuhvaćena ovom direktivom, a to mogu biti situacije kada određeni trgovac u svrhu svoje profesionalne aktivnosti kupuje proizvod od potrošača kao npr. dileri kola, kupovina antikviteta, ili prodaja robe kao „polovne robe“.

Online poslovne prakse obuhvaćene su ovom direktivom, što se odnosi na socijalne medije uključujući blogove, socijalne mreže koje su postale značajne za komercijalnu praksu i koje trgovci često koriste za promovisanje i reklamu svojih proizvoda.

U definiciji poslovne prakse integrisana je i promocija, a Direktiva obuhvata nekoliko odredbi koje se odnose na promociju kao praksu (član 6 tačka d, tač. 5, 6, 19 i 31 Aneksa I).

5. Nepoštena poslovna praksa je ona koja "bitno poremeti ekonomsko ponašanje potrošača" pri čemu se to odnosi na „korišćenje poslovnih praksi za bitnu povredu sposobnosti potrošača da donese odluku zasnovanu na svim potrebnim podacima, čime navode potrošača da donese odluku o zaključenju posla koju u drugačijim okolnostima ne bi donio“. Ova odredba je djelimično prenešena u Zakon o zaštiti potrošača, gdje se odnosi na „prodaju i informacije koje se daju potrošačima“, ali ne uzimajući u obzir poslovnu praksu u smislu u kojem je ista definisana u Direktivi.

6. „Odluka o pravnom poslu“, „kodeks ponašanja“, „profesionalna pažnja“, „nedopušteni uticaj“, kao i „regulisano zanimanje“ nijesu definisani Zakonom o zaštiti potrošača i odredbe Direktive u kojima su ovi termini upotrijebljeni nijesu prenesene Zakonom o zaštiti potrošača. Iako neke odredbe Zakona na drugi način odlikavaju značenje navedenih termina, iste se djelimično ili suštinski razlikuju od odredbi Direktive.

7. Direktiva u članu 5 stav 1 izričito zabranjuje nepoštene poslovne prakse, dalje definišući koji će se postupci smatrati nepoštenim:

- a) ako je suprotan zahtjevima profesionalne pažnje,
- b) ako bitno remeti ili je vjerovatno da će bitno poremetiti ekonomsko ponašanje prosječnog potrošača u vezi proizvoda do kojeg takav postupak dopire, ili kome je namijenjen, ili će poremetiti prosječnog člana grupe kada je poslovna praksa usmjerena na posebnu grupu potrošača.

U ovom dijelu Direktiva upotrebljava termin „prosječni potrošač“, odnosno „prosječni član grupe“. U dijelu ovog teksta, u tački 3.7.2 o presudi u predmetu C-210/96, data je definicija ovog termina od strane SP EU.

Zakon o zaštiti potrošača sankcioniše zabranjena ponašanja trgovca, ali ne uzima u obzir zabranu nepoštenih poslovnih praksi, niti uticaj ovih postupaka na ekonomsko ponašanje prosječnog potrošača, ili prosječnog člana grupe.

Članom 5 stav 3 Direktive predviđeno je da će se „nepošteni postupci koji bi vjerovatno bitno poremetili ekonomsko ponašanje samo jasno prepoznatljive grupe potrošača koja je posebno ranjiva na praksu ili osnovni proizvod zbog svoje mentalne ili fizičke slabosti, starosti ili naivnosti na način koji bi trgovac razumno mogao da predvidi prosuđivati iz perspektive prosječnog člana te grupe potrošača“. Ovo ne dovodi u pitanje opštu i legitimnu praksu oglašavanja, davanja pretjeranih izjava ili navoda koji nijesu bili planirani da se doslovno shvate.

Ranjiva grupa potrošača je definisana na način da su to lica koja imaju mentalne ili fizičke slabosti, starija lica i djeca (na koja se odnosi termin „naivnosti“).

Zakon o elektronskim medijima sadrži odredbe koje se odnose na određene ranjive grupe potrošača, ali ovaj zakon, prije svega, ima ograničavajuće djelovanje samo na komercijalnu audiovizuelnu komunikaciju, a ne i u domenu poslovne prakse kako je definisana i ne odnosi se samo na elektronske medije.

8. Definišući nepoštenu poslovnu praksu, Direktiva posebno utvrđuje da će se nepoštenim postupcima smatrati: (a) oni koji su obmanjujući i kao takvi navedeni u članu 6 (obmanjujuće radnje) i članu 7 (obmanjujuća propuštanja), ili (b) oni koji su agresivni i kao takvi navedeni u čl. 8 i 9. Zakon o zaštiti potrošača samo djelimično odražava suštinu definisanih pojmova u smislu da se „zabranjenim ponašanjem trgovca naročito smatra saopštavanje netačnih, nepotpunih, nejasnih i dvosmislenih informacija o proizvodu ili uslovima prodaje kojima se potrošač dovodi u zabludu prilikom kupovine proizvoda“.

9. Odredbe koje sadrži Aneks I ove direktive, odnose se na poslovne prakse koje se u svim okolnostima smatraju nepoštenim i dijele se na obmanjujuće poslovne prakse (tač. 1 do 23) i agresivne poslovne prakse (tač. 24 do 31). Ove odredbe u najvećem dijelu nijesu prenesene Zakonom o zaštiti potrošača. Tačke 7, 12, 25, 26, 27 i 29 Aneksa I samo su djelimično prenesene i treba da budu prenesene u cjelini. Tačke 1, 9, 14, 15 i 24 Aneksa I (od kojih tačka 24 spada u agresivne poslovne prakse) ispravno su presene.

3.7.2. Presude Suda pravde EU

Sud pravde Evropske unije je u odnosu na ovu direktivu najčešće procjenjivao uticaj poslovne prakse na prosječnog potrošača, odnosno prosječnog člana grupe, te je i koncept razvijen i definisan od strane SP EU. U kontekstu ispravne implementacije ove direktive prema konceptu prosječnog potrošača, kao i u drugim okolnostima, kada je u pitanju reklamiranje, od važnosti su sljedeće presude:

Presuda od 16. jula 1998. godine u predmetu C-210/96 *Gut Springenheide GmbH i Rudolf Tusky protiv Oberkreisdirektor des Kreises Steinfurt - Amt für Lebensmittelüberwachung* [1998] Zbirka sudskih odluka str. I-4657

Sud pravde Evropske unije kada je odmjeravao rizik za obmanjivanje potrošača u odnosu na uslove slobodnog protoka robe imao je u vidu da „u cilju utvrđivanja da li je određen opis,

trgovačka marka, promotivni opis ili izjava obmanjujuća, neophodno se moraju uzeti u obzir pretpostavljena očekivanja“ prosječnog potrošača, koji je „razumno dobro obaviješten i razumno pažljiv i oprezan“.

Ovdje se radi o presudi koja se odnosi na procjenu da li je tvrdnja učinjena sa ciljem da obmane kupca, pri čemu nacionalni sud mora uzeti u obzir karakteristike koje definišu prosječnog potrošača. U ovom slučaju SP EU, prosječni potrošač je kritički orijentisana osoba, obazriva i pažljiva u njenom odnosu i ponašanju na tržištu. Prosječni potrošač trebalo bi da se u tom smislu informiše o kvalitetu i cijeni proizvoda i napravi efikasan izbor.

Presuda od 13. januara 2000. godine u predmetu C-220/98 *Estée Lauder Cosmetics GmbH & Co. OHG protiv Lancaster Group GmbH* [2000] Zbirka sudskih odluka str. I-117

U slučaju obmanjujuće reklame u pogledu kozmetičkih proizvoda, SP EU je zauzeo stav da je potrebno utvrditi da li socijalni, kulturni ili lingvistički faktori mogu opravdati termin „*lifting*“. Ovaj termin se koristio vezano za kremu za učvršćavanje („*firming*“), što za njemačkog (prosječnog) potrošača znači nešto drugo, suprotno potrošačima u drugim državama članicama. Takođe je potrebno imati u vidu da li su uputstva za upotrebu proizvoda sama po sebi dovoljna da učine sasvim jasnim da su efekti upotrebe ovog proizvoda kratkotrajni, tako da to neutralizuje bilo koji zaključak koji vodi obrnutom zaključku tj. da su efekti dugotrajni.

Presuda od 26. novembra 1996. godine u predmetu C-313/94 *F.lli Graffione SNC protiv Ditta Fransa* [1996] Zbirka sudskih odluka str. I-6039

Prema tački 22 „mogućnost zabrane reklame na osnovu obmanjujuće prirode trgovačke marke nije, u principu, isključena zbog činjenice da se ta ista trgovačka marka u drugim državama članicama ne smatra obmanjujućom“.

Tako da (uprkos tome što je Direktivom usvojen princip potpune harmonizacije) zahtijevanje da strani trgovac obezbijedi dopunsku informaciju treba da bude opravdano kroz socijalne, kulturne i lingvističke faktore, da potrošači u zemlji destinacije za razliku od zemlje porijekla ne bi bili obmanuti propustom davanja određenih informacija.

Saglasno tački 26, nacionalni sudovi su ti koji su nadležni da procijene kulturne, lingvističke ili socijalne faktore koji dopuštaju drugačiju procjenu nepoštenog karaktera poslovne prakse.

Svi relevantni faktori moraju se uzeti u obzir, kao što su uslovi pod kojima se proizvod prodaje, informacije date potrošačima, jasnoća takvih informacija, prezentacija i sadržina reklamnog materijala, kao i rizik od greške u odnosu na dotičnu grupu potrošača.

3.7.3. Praktične preporuke

Na osnovu prethodno utvrđenog stanja dajemo sljedeće preporuke:

1. Zakonom o zaštiti potrošača utvrditi pojam nepoštene poslovne prakse kao i pojmove vezane za nepoštenu poslovnu praksu.
2. Preciznije definisati pojam trgovca saglasno Direktivi.
3. Predvidjeti da „**proizvod**“ označava svaku robu ili uslugu uključujući i nepokretnu imovinu, prava i obaveze.
4. Predvidjeti pojam prosječnog potrošača i prosječnog člana grupe i definisati ranjive potrošače.
5. Urediti posebnom glavom nepoštenu poslovnu praksu trgovca u odnosu na potrošače i u potpunosti usaglasiti odredbe sa predmetnom Direktivom.
6. Predvidjeti da se odredbe ovog dijela Zakona neće primjenjivati na određene aspekte nepoštene poslovne prakse ukoliko su isti uređeni posebnim propisima, pod pretpostavkom da su posebni propisi usklađeni s pravilima Evropske unije kojima su uređeni pojedini aspekti nepoštene poslovne prakse.
7. Posebnim poglavljima urediti: zabranu nepoštene poslovne prakse; obmanjujuću poslovnu praksu (obmanjujuće radnje i obmanjujuća propuštanja); agresivnu poslovnu praksu; uznemiravanje, prisilu i nedopušteni uticaj, kao i kodeks ponašanja.
8. Utvrditi nadležnost za sprovođenje ovog dijela Zakona.

9. U prelaznim i završnim odredbama navesti da se Direktiva preuzima ovim zakonom.

3.8. Direktiva 2006/114/EZ (obmanjujuće i upoređujuće oglašavanje)

3.8.1. Navodi Tabela usklađenosti

Usvajanjem Direktive 2006/114/EZ prestala je da važi Direktiva 84/450/EZ o obmanjujućem i upoređujućem oglašavanju, koja je prije donošenja nove direktive nekoliko puta pretrpjela značajne izmjene. Razlozi za donošenje ove direktive zasnivaju se na činjenicama da se propisi o obmanjujućem oglašavanju koji su na snazi u državama članica razlikuju, dovodeći privredne subjekte u zabludu i pritom ometaju sprovođenje reklamnih kampanja van nacionalnih granica, kao i da utiču na slobodan protok roba i usluga. Iz tih razloga bilo je potrebno da se donošenjem ove direktive spriječi obmanjujuće i protivzakonito upoređujuće oglašavanje, a da „potrošači i trgovci mogu i moraju na najbolji način iskoristiti unutrašnje tržište, da je oglašavanje veoma bitno sredstvo stvaranja autentičnih prodajnih centara za sve robe i usluge širom Zajednice, te da osnovne odredbe koje regulišu formu i sadržinu upoređujućeg oglašavanja moraju biti unificirane, a uslovi za upoređujuće oglašavanje u državama članicama usklađeni“ (uvodna izjava 6). Ukoliko su ove pretpostavke zadovoljene, to će pomoći objektivnom prikazivanju svojstava raznih uporedivih proizvoda. Upoređujuće oglašavanje može takođe i stimulisati konkurenciju dobavljača roba i usluga, a u korist potrošača. Ova direktiva odnosi se na odnose B2B (*business to business*), vezana je za konkurenciju, ali indirektno štiti i potrošače kako je rečeno u uvodnoj izjavi da „uslovi dozvoljenog upoređujućeg oglašavanja, što se tiče upoređivanja, treba da budu utvrđeni u cilju određivanja koje prakse koje se odnose na upoređujuće oglašavanje mogu narušiti tržišnu utakmicu, dovesti konkurenciju u nepovoljniji položaj i mogu negativno uticati na izbor potrošača“.

Pregled crnogorskog zakonodavstva, da bi se utvrdila usklađenost sa ovom direktivom, ukazuje da je Direktiva djelimično primijenjena kroz Zakon o zaštiti potrošača, Zakon o elektronskim medijima, Zakon o medijima, kao i Zakon o unutrašnjoj trgovini.

Odstupanja crnogorskog zakonodavstva od Direktive uočena su u sljedećim elementima:

1. Članom 1 Direktive utvrđuje se da je svrha donošenja zaštita trgovaca od obmanjujućeg oglašavanja i njegovih neprihvatljivih posljedica, kao i da propiše uslove pod kojima je dozvoljeno upoređujuće oglašavanje.

Zakonom o unutrašnjoj trgovini utvrđeno je da se nelojalnom konkurencijom smatra naročito reklamiranje, oglašavanje ili nuđenje robe navođenjem podataka ili upotrebom izraza kojim se stvara ili se može stvoriti zabluda na tržištu o toj robi, čime se određeni trgovac dovodi ili se može dovesti u povoljniji položaj.

Ovim zakonom nije regulisano i upoređujuće oglašavanje, preko propisivanja uslova pod kojim je isto dozvoljeno. S obzirom na to da se Direktivom 2006/114/EZ uređuje samo praksa B2B i ista se odnosi na zaštitu trgovaca od obmanjujućeg oglašavanja i njegovih neprihvatljivih posljedica uključujući i nedozvoljeno upoređujuće oglašavanje, ove odredbe trebalo bi da budu sastavni dio odredaba zakona koji se odnosi na nelojalnu konkurenciju ili nekog drugog zakona kojim se uređuju odnosi među trgovcima.

2. Oglašavanje je prema odredbi Direktive definisano da „označava bilo kakvo predstavljanje u vezi sa trgovinom, poslovnom djelatnošću, zanatom ili slobodnom profesijom u cilju pospješivanja prodaje robe ili usluga, uključujući nepokretnosti, prava i obaveze“.

Zakon o zaštiti potrošača pod reklamom (oglašavanjem) podrazumijeva obavještanje putem sredstava masovne komunikacije ili na drugi način u vezi poslovanja, odnosno vršenja djelatnosti, radi promovisanja isporuke robe ili usluga, uključujući nepokretnu imovinu, prava i obaveze.

Oblast djelovanja Direktive i svrha donošenja je „zaštita trgovca od obmanjujućeg oglašavanja i njegovih neprihvatljivih posljedica“ tako da postojanje ove odredbe u Zakonu o zaštiti potrošača nije sa namjerom da zaštiti trgovca nego samo potrošača kao fizičko lice, što

je i cilj Zakona o zaštiti potrošača, ali ne i cilj ove direktive. U tom smislu, definicija reklame iz ZZP nije relevantna u kontekstu prenošenja ove direktive.

3. Saglasno Direktivi, obmanjujuće oglašavanje označava bilo kakvo oglašavanje koje na bilo koji način, uključujući način na koji je prezentovan, obmanjuje ili je vjerovatno da će da obmane lica prema kojima je usmjereno ili do kojih doseže i zbog svoje obmanjujuće prirode vjerovatno može da utiče na njihovo ekonomsko ponašanje, ili koje, zbog iznjetih razloga, škodi ili je vjerovatno da će naškoditi konkurentu.

Zakonom o zaštiti potrošača (ZZP) reklama koja dovodi u zabludu znači svako oglašavanje kojim se potrošači dovode u zabludu o svojstvima proizvoda ili uslovima prodaje i kao takvo utiče na njihov izbor. Ova definicija ne obuhvata definiciju iz Direktive koja se odnosi na lica (što može da obuhvati i fizička i pravna lica) i štetu od ovakvog oglašavanja koju trpi konkurent, jer sama priroda definicije data u ZZP odgovara zaštiti potrošača i odnosi se na potrošača (kao fizičko lice) a ne na druga lica, konkurenta, ili na trgovce. U tom smislu, ni ova definicija iz ZZP nije relevantna u kontekstu prenošenja ove direktive.

Prilikom izmjene ZZP pojam oglašavanje (reklamiranje) i djelovanje reklame na potrošače trebalo bi da bude obuhvaćen definicijom pojma "nepoštene poslovne prakse" (prenošenjem Direktive 2005/29/EZ), gdje će se definicijom "poslovnih praksi privrednih subjekata prema potrošaču" (član 2 tačka d) obuhvatiti svi postupci uključujući i oglašavanje.

Zakonom o elektronskim medijima data je definicija koja se odnosi na prikriveno oglašavanje, koje je saglasno ovom zakonu „predstavljanje riječima ili slikama robe, usluga, imena, zaštitnog znaka ili aktivnosti proizvođača roba ili pružaoca usluga u radijskim i/ili TV programima kada je cilj takvog predstavljanja oglašavanje i moglo bi dovesti javnost u zabludu u vezi sa njegovom prirodom“.

Ovim zakonom takođe nije predviđena povreda konkurenta, a upotrijebljen je i termin „javnost“ (u direktivi je primijenjen termin „lica“). Zakonom se ograničava prikriveno oglašavanje koje dovodi u zabludu samo u radijskim i/ili TV programima.

Zakonom o medijima zabranjeno je oglašavanje prodaje i kupovine organa ili tkiva ljudskog tijela za transplantaciju ili transfuziju, reklamiranje oružja, opojnih droga, duvanskih proizvoda, prometa roba i pružanja usluga zabranjenih zakonom, lijekova i medicinskih tretmana koji su jedino dostupni uz medicinski recept, postupaka i metoda liječenja nesaglasnih posebnom zakonu o zdravstvenoj zaštiti. Reklame za sve druge lijekove i medicinske tretmane moraju biti jasno prepoznatljive kao takve i istinite. Prilikom reklamiranja alkoholnih pića, mediji moraju poštovati odredbe posebnog zakona.

Ovim zakonom nabrojane su zabrane reklamiranja po vidu proizvoda i oblasti, a dio ovih zabrana predmet su regulisanja drugih - *lex specialis* zakona.

4. Po Direktivi je upoređujuće oglašavanje definisano da označava svako oglašavanje koje izričito ili putem nagovještaja identifikuje konkurenta ili robu ili usluge koje nudi konkurent.

Preneseni član Direktive u ZZP ne nudi zaštitu drugih konkurenata od komparativne reklame već samo potrošača, pa je djelimično prenošenje između ostalog utvrđeno na osnovu djelovanja, jer ciljna grupa na koju se Direktiva odnosi nije obuhvaćena (B2B).

5. Zakon o zaštiti potrošača definicijom trgovca ne obuhvata i lica koja istupaju u ime i za račun trgovca, dok Direktiva ovom definicijom obuhvata ne samo trgovce koji djeluju za sopstveni račun, nego i posrednike koji djeluju u ime trgovca. To su, primjera radi, agenti koje trgovac plaća na tržištu ili koji oglašavaju svoje proizvode, i isti treba da budu obuhvaćeni definicijom trgovca.
6. Tvorac kodeksa nije obuhvaćen zakonima, a "označava svaki subjekt, uključujući i trgovca ili grupu trgovaca, koji je odgovoran za formulisanje i reviziju kodeksa ponašanja i/ili za praćenje da li kodeks poštuju lica koja su se obavezala da će ga poštovati“.

Udruženja trgovaca usvajaju ovakve kodekse koji podstiču bolju i pravednu konkurenciju, a istovremeno štite od obmanjujućeg i nedozvoljenog upoređujućeg oglašavanja.

7. Karakteristike koje se uzimaju u obzir prilikom utvrđivanja da li je oglas obmanjujući djelimično su prenešene u ZZP u odnosu na zaštitu potrošača, ali ne i na zaštitu

konkurenta kako je Direktivom utvrđeno, ali iste treba da se nađu i u zakonima koji uređuju konkurenciju.

Član 3 tačka a Direktive nije prenešen u ZZP, a odnosi se na to da se prilikom utvrđivanja da li je oglas obmanjujući uzimaju u obzir „karakteristike robe ili usluga, kao što je njihova raspoloživost, priroda, vršenje, sastav, način i datum proizvodnje ili pružanja, primjerenost namjeni, načinu upotrebe, količini, specifikaciji, geografskom ili trgovačkom porijeklu ili rezultatima koji se očekuju od njihove upotrebe ili rezultatima i materijalnim karakteristikama proba ili provjera koje su sprovedene na robi ili uslugama“. Ova se direktiva odnosi na odnose B2B, a ista odredba u skladu je sa članom 6 stav 1 tačka b Direktive 2005/29/EZ o nepoštenoj poslovnoj praksi, koja obuhvata odnose B2C.

Kada se radi o odredbama o nepoštenim poslovnim praksama moramo imati u vidu da su iste samo neznatno prenešene u ZZP.

Tačka b istog člana Direktive djelimično je prenešena u ZZP imajući u vidu interese potrošača ali ne i konkurenta kada su u pitanju karakteristike za procjenu obmanjujuće prirode oglasa koje se odnose na „cijenu ili način na koji je cijena izračunata, i uslovima pod kojima se roba isporučuje odnosno usluge pružaju“. Napominjemo da je ovaj član Direktive (u vezi sa B2B) u skladu sa članom 6 stav 1 tačka b Direktive 2005/29/EZ (u vezi sa B2C).

Članom 3 tačka c ove direktive predviđene su karakteristike koje se koriste za utvrđivanje da li je oglas obmanjujući, a odnose se na „prirodu, svojstva i prava oglašivača, kao što je identitet i svojina, kvalifikacije i vlasnička prava nad industrijskom, trgovačkom ili intelektualnom svojinom ili njegove nagrade ili priznanja“ i iste nijesu prenešene u ZZP. Ovaj član Direktive (odnosi B2B) je u skladu sa članom 6 stav 1 tačka f Direktive 2005/29/EZ (odnosi B2C).

8. Članom 4 stav 1 tačke a do h Direktiva uređuje dozvoljeno upoređujuće oglašavanje ističući u tački a da reklamiranje nije obmanjujuće u smislu člana 2 tačka b, člana 3 i člana 8 stav 1 ove direktive, kao i člana 6 (obmanjujuće radnje - gdje je stavom 2 tačka b obuhvaćeno upoređujuće oglašavanje koje dovodi do zabune) i člana 7 (obmanjujuća propuštanja) Direktive 2005/29/EZ. Ovaj član je djelimično prenešen u ZZP, a jedan stav je djelimično prenešen u Zakon o elektronskim medijima.

Direktiva 2006/114/EZ stavila je van snage Direktivu 84/450/EZ i Direktivu 97/55/EZ - koja je uvela upoređujuće oglašavanje i odnosila se na trgovce - konkurente (B2B) i na potrošače (B2C).

Prije donošenja Direktive 2005/29/EZ, upoređujuće oglašavanje prenošeno je zakonima koji uređuju zaštitu potrošača (iskustvo u regionu) i obuhvatalo je uticaj na potrošače i trgovce saglasno Direktivi 84/450/EZ.

Donošenjem Direktive 2005/29/EZ obmanjujuće i upoređujuće oglašavanje prema potrošaču (B2C) uređeno je ovom direktivom i ista se prenosi zakonima o zaštiti potrošača, ili neke zemlje donose poseban zakon u ovoj oblasti (u regionalnom okruženju - Slovenija).

9. Može se reći da je član 5, koji se odnosi na obezbjeđivanje odgovarajućih i efikasnih sredstava u borbi protiv obmanjujućeg oglašavanja, u smislu kakva će se rješenja predvidjeti i da li će se ovlastiti sudovi ili organi uprave, djelimično prenesen ZZP-om, imajući u vidu da su određene odredbe korektno prenesene, druge nijesu prenesene a dio odredbi je djelimično prenesen. Odredbe koje su korektno i djelimično prenesene obuhvataju samo odnose B2C jer se ovim zakonom štite potrošači.

3.8.2. Presude Suda pravde EU

Presuda od 18. novembra 2010. godine u predmetu C-159/09 Lidl SNC protiv Vierzon Distribution SA

Uslovi pod kojima je upoređujuće oglašavanje dozvoljeno - Upoređivanje cijena na osnovu izbora prehrambenih proizvoda na tržištu između dviju konkurentskih prodajnih lanaca.

Društvo Vierzon Distribution dalo je oglas u lokalnim novinama koji prikazuje račune na kojima su opštim oznakama, koje su po potrebi propraćene težinom ili količinom, navedena 34 uglavnom prehrambena proizvoda koji su bili kupljeni u prodavnici društva Vierzon Distribution, odnosno u prodavnici društva Lidl, i iz kojih se može vidjeti da je ukupna cijena

tih proizvoda u prodavnici Vierzon Distribution 46,30 EUR, dok je u prodavnici Lidl 51,40 EUR.

Oglas je sadržao i slogane: "Ne može svako da bude E. Leclerc! Niske cijene – dokaz da je E. Leclerc i dalje najjeftiniji", i "Na engleskom jeziku kažu 'hard discount' – na francuskom jeziku kažu 'E. Leclerc'".

Zbog ovoga je Lidl podnio tužbu pred *Tribunal de Commerce de Bourges* (Privredni sud, Bourges) tražeći da Vierzon Distribution plati štetu na osnovu nelojalne konkurencije, da izvod presude bude objavljen u štampi i istaknut na posterima u njihovoj prodavnici.

Tribunal de Commerce de Bourges odlučio je da prekine postupak i dostavi pitanje Sudu pravde na donošenje prethodne odluke.

Sud pravde odlučio je sljedeće:

Član 3a stav 1 tačka a Direktive 84/450, izmijenjene i dopunjene Direktivom 97/55, treba da se tumači da oglas može da dovede u zabludu, naročito:

- ako je utvrđeno, u svjetlu svih relevantnih okolnosti u datom slučaju, i naročito podataka koji su navedeni u tom oglasu ili iz njega izostavljeni, da se znatan broj potrošača kojima je oglas upućen može odlučiti za kupovinu u pogrešnom uvjerenju da je izbor proizvoda koji je sastavio oglašivač reprezentativan za opšti nivo njegovih cijena u poređenju sa cijenama konkurenta, i da bi stoga više uštedjeli, kao što je navedeno u oglasu, ako bi redovno kupovali proizvode koje svakodnevno troše kod oglašivača nego kad bi ih kupovali kod konkurenta, ili u pogrešnom uvjerenju da su svi proizvodi oglašivača jeftiniji od proizvoda njegovog konkurenta, ili
- ako je utvrđeno da su u svrhu poređenja, koje se zasniva isključivo na cijeni, izabrani prehrambeni proizvodi koji, ipak, imaju različita svojstva koja mogu znatno da utiču na izbor prosječnog potrošača, a da te razlike nijesu vidljive iz predmetnog oglasa.
- Član 3a stav 1 tačka c Direktive 84/450, izmijenjene i dopunjene Direktivom 97/55, treba da se tumači da znači da uslov provjerljivosti iz te odredbe zahtijeva, u slučaju oglasa, kao što je onaj u glavnom postupku, koji upoređuje cijene dva izbora roba, da je robu o kojoj je riječ moguće prepoznati na osnovu podataka sadržanih u oglasu.

Presuda od 12. juna 2008. godine u predmetu C-533/06 O2 Holdings Limited, O2 (UK) Limited protiv Hutchison 3G UK Limited [2008] Zbirka sudskih odluka str. I-4231

U ovom slučaju radi se o upotrebi trgovačke marke konkurenta u oglasu radi upoređenja karakteristika robe ili usluga koje se prodaju od strane oglašivača, sa onim od konkurenta.

Tumačenje je u smislu da vlasnik registrovane trgovačke marke nema pravo da spriječi treće lice da koristi znak identičan ili sličan njegovoj marki, prilikom upoređujućeg oglašavanja koje ispunjava sve uslove, propisane članom 3a stav 1 Direktive 84/450, pod kojima je upoređujuće oglašavanje dozvoljeno.

Član 5 stav 1 tačka b Direktive 89/104 tumači se tako da vlasnik registrovane trgovačke marke nema pravo da spriječi treće lice da, prilikom upoređujućeg oglašavanja, koristi znak sličan toj marki za robu ili usluge identične ili slične onima za koje je ta marka registrovana ako takva upotreba ne stvara vjerovatnoću zabune kod javnosti, i to bez obzira na to da li upoređujuće oglašavanje ispunjava sve uslove iz člana 3a Direktive 84/450, izmijenjene i dopunjene Direktivom 97/55, pod kojima je upoređujuće oglašavanje dozvoljeno, ili ih ne ispunjava.

3.8.3. Praktične preporuke

1. S obzirom na to da se radi o Direktivi koja se odnosi na prakse B2B i ukoliko se Direktiva o nepoštenim poslovnim praksama koja se odnosi na odnose B2C prenese Zakonom o zaštiti potrošača (kako su već date preporuke u ovom domenu), ostaje da se ova direktiva u najvećem dijelu prenese zakonima koji štite od nelojalne konkurencije, ili nekim od zakona kojima se odnosi u trgovini uređuju na uopšten način. Zakonom o zaštiti potrošača štite se potrošači kao fizička lica, a ovdje se radi o zaštiti trgovaca od obmanjujućeg i upoređujućeg oglašavanja, tako da preporuka za

prenošenje ove direktive nije da se ista prenese Zakonom o zaštiti potrošača, već posebnim zakonom.

2. Potrebno je donijeti odluku hoće li se segment upoređujućeg oglašavanja koji ova Direktiva šire uređuje, urediti zakonom o zaštiti potrošača ili zakonom u kojem će ova materija biti uređena integralno.
3. Treba imati u vidu da, ukoliko se član 6 stav 2 tačka a Direktive 2005/29/EZ prenese u Zakon o zaštiti potrošača, obuhvatiće zaštitu potrošača od poslovnih praksi koje dovode u zabludu, a odnose se na „plasiranje proizvoda na tržište, koje obuhvata i upoređujuće oglašavanje koje dovodi do zabune u vezi sa proizvodima, trgovačkim markama, trgovačkim imenima ili drugim razlikujućim svojstvima konkurenata“.
4. Na ovaj način će i trgovci i potrošači biti zaštićeni od obmanjujućih oglašavanja i nedozvoljenih upoređujućih oglašavanja, čime bi se zaštitili potrošači kao fizička lica Zakonom o zaštiti potrošača i trgovci zakonima koji štite od nelojalne konkurencije, odnosno kojim se odnosi u trgovini uređuju na uopšten način.

3.9. Direktiva 2008/48/EZ (ugovori o potrošačkim kreditima)

3.9.1. Navodi Tabela usklađenosti

Analitičkim pregledom crnogorskog zakonodavstva utvrđeno je kako je u Crnoj Gori materija ove direktive tek načelno propisana Zakonom o zaštiti potrošača. Pri tom je utvrđeno kako crnogorsko zakonodavstvo u značajnoj mjeri ne ispunjava zahtjeve predviđene ovom direktivom budući da predmetno crnogorsko zakonodavstvo nije bilo predmet usklađivanja s Direktivom 2008/48/EZ.

Navedeno crnogorsko zakonodavstvo, naročito kroz čl. 33 do 36 Zakona o zaštiti potrošača, uređuje pitanja ugovora o potrošačkom kreditu i obaveza informisanja na načelnoj osnovi (član 33), utvrđuje osnove sadržaja ugovora o potrošačkom kreditu te obavezu davanja predugovornih informacija i obračun efektivne kamatne stope (član 34), informisanje potrošača o promjeni uslova kreditiranja (član 35), te pitanje prijevremene otplate kredita (član 36). Ovaj propis uređuje i ostala pitanja vezana za predmetnu Direktivu, naročito pojmove i definicije, nadzor, te vansudsku zaštitu.

Budući da odredbe predmetne Direktive u svom pretežnom dijelu nijesu prenesene u crnogorsko zakonodavstvo, potrebno je izvršiti usklađivanje ili značajnom novelom postojećeg Zakona o zaštiti potrošača ili donošenjem novog propisa o potrošačkom kreditu.

3.9.2. Presude Suda pravde EU

Budući da je riječ o nedavno donešenoj Direktivi, SP EU još nije donio nijednu presudu kojom bi se uređivalo pitanje njenog tumačenja ili implementacije. Štaviše, SP EU nije donio nijednu presudu koja bi se ticala ispravnosti implementacije ili tumačenja Direktive 2008/48/EZ.

3.9.3. Praktične preporuke

Na osnovu navedenog, dajemo sljedeće praktične preporuke za potrebe usklađivanja crnogorskog zakonodavstva s odredbama Direktive 2008/48/EZ:

1. Na osnovu Tabele usklađenosti pripremiti nacrt novele Zakona o zaštiti potrošača ili nacrt novog Zakona o potrošačkom kreditu, u skladu s odredbama Direktive 2008/48/EZ.
2. Saglasno predmetnoj direktivi, sprovesti uvođenje kataloga predugovornih i ugovornih obaveza informisanja u crnogorsko zakonodavstvo.
3. Propisati i sprovesti uvođenje standardizovanog obrasca za potrošačko kreditiranje saglasno kogentnim odredbama predmetne direktive.
4. Posebno voditi računa o transparentnom uređenju pitanja obračuna kamata i naknade za prijevremenu otplatu potrošačkog kreditiranja.

5. Prilikom pripreme i donošenja novog zakonodavnog okvira donijeti odluku o području i sadržaju primjene sistema potrošačkog kreditiranja te rokove uvođenja sistema, saglasno pravilima iz predmetne direktive.
6. Prilikom pripreme i donošenja novog zakonodavnog okvira donijeti odluku da li je oportuno uvođenje dodatnih uslova koje moraju ispunjavati povjerioci, bez narušavanja pravne tekovine Evropske unije.
7. Prilikom pripreme i donošenja novog zakonodavnog okvira donijeti odluku da li je oportuno uvođenje dodatnih uslova koje moraju ispunjavati kreditni posrednici, bez narušavanja pravne tekovine Evropske unije.
8. Prilikom pripreme i donošenja novog zakonodavnog okvira donijeti odluku o mogućem sistemu registracije, odnosno sistemu licenciranja (*ex ante* nadzor) kreditnih posrednika i povjerioca te s tim u vezi odluku o registarskom, odnosno evidencionom sistemu, sve u svrhu održivog, odnosno efikasnog i djelotvornog sistema nadzora.
9. Prilikom pripreme i donošenja novog zakonodavnog okvira donijeti odluku o sistemu upravnog i inspekcijskog nadzora (*ex post* nadzor) s posebnim pitanjem institucionalnog uređenja i jasno uspostavljenih granica nadležnosti.

3.10. Direktiva 2008/122/EZ (pojedini aspekti ugovora o vremenski podijeljenom korišćenju (timeshare), dugotrajnom turističkom proizvodu, preprodaji i razmjeni)

3.10.1. Navodi Tabela usklađenosti

Materija *timeshare* ugovora je u crnogorskom zakonodavstvu uređena Zakonom o zaštiti potrošača. Međutim, pravila tog zakona izrađena su na osnovu "stare" Direktive o *timeshareu*, odnosno Direktive 94/47/EZ. Kako je u međuvremenu ta direktiva stavljena van snage novom Direktivom 2008/122/EZ koja navedenu materiju uređuje na značajno različit način od "stare" direktive, jasno je da crnogorsko zakonodavstvo u ovom segmentu u velikoj mjeri nije usklađeno s *acquisem*. Prije svega, novom se Direktivom, pored *timesharea*, uređuju i neki novi dugotrajni turistički proizvodi koji nijesu bili uređeni Direktivom 94/47/EZ. Osim toga, pravilima Direktive 2008/122/EZ u značajnoj su mjeri izmijenjena pravila Direktive 94/47/EZ koja se odnose na sam *timeshare*. No, jedna od najznačajnijih promjena u uređenju ove materije jeste pravna priroda direktiva kojima se ona uređuje. I dok je Direktiva 94/47/EZ usvojila princip minimalne harmonizacije, Direktivom 2008/122/EZ usvojen je princip maksimalne harmonizacije.

U ovom trenutku, odstupanja crnogorskog zakonodavstva od Direktive postoje u sljedećim elementima:

1. Direktivom je predviđeno da se ona odnosi samo na ugovore zaključene između trgovca i potrošača. S druge strane, Zakon o zaštiti potrošača definiše potrošački ugovor kao ugovor zaključen s potrošačem ili grupom potrošača. Takva definicija otvara mogućnost da se potrošačkim ugovorom smatra i onaj ugovor koji je s potrošačem ili grupom potrošača zaključio drugi potrošač. Dakle, dok se Direktiva odnosi isključivo na tzv. odnose B2C (*business to consumer*), Zakonom o zaštiti potrošača otvorena je mogućnost da se njegova pravila, pa time i pravila o *timeshareu*, odnose, pored odnosa B2C, i na odnose C2C (*consumer to consumer*). Kako je Direktivom usvojen princip maksimalne harmonizacije, proizilazi da Zakon o zaštiti potrošača u ovom aspektu nije usklađen sa Direktivom.
2. Za razliku od Direktive, Zakonom o zaštiti potrošača nije izričito predviđeno da njegova pravila o *timeshare* ugovorima ne utiču na primjenu opštih pravila građanskopravne odgovornosti, pravila registracije nepokretnosti i prava na nepokretnostima, na sistem registracije lica koja se bave turističkim uslugama te na definisanje pravne prirode prava koje za potrošača proizilazi na osnovu *timeshare* ugovora ili ugovora o dugotrajnom turističkom proizvodu.
3. Kako je Zakon o zaštiti potrošača izrađen, između ostalog, na osnovu Direktive 94/47/EZ, njegova definicija *timesharea* više ne odgovara definiciji tog pojma iz

- Direktive. Prije svega, iz Zakona o zaštiti potrošača proizilazi da predmet *timeshare* ugovora može biti isključivo nepokretnost, dok je iz Direktive jasno da predmet *timeshare* ugovora može biti i pokretna stvar i nepokretnost. Nadalje, Zakonom o zaštiti potrošača obuhvaćeni su samo oni ugovori koji su zaključeni na rok duži od tri godine, dok se Direktiva odnosi na ugovore koji su zaključeni na rok duži od godinu dana.
4. Zakonom o zaštiti potrošača nijesu definisani novi turistički proizvodi koje uređuje Direktiva, kao što su dugotrajni turistički proizvod, ugovor o preprodaji i ugovor o razmjeni.
 5. Definicija trgovca iz Zakona o zaštiti potrošača u velikoj mjeri odstupa od definicije tog pojma iz Direktive. Prije svega, za razliku od Direktive, po Zakonu o zaštiti potrošača trgovac može biti svako lice koje prodaje *timeshare*, bez obzira radi li to u okviru svoje profesionalne djelatnosti ili ne. Nadalje, iz Zakona o zaštiti potrošača proizilazilo bi da će se njegova pravila o *timeshareu* primjenjivati samo na lica koja zaista zaključuju *timeshare* ugovor, dok se Direktiva odnosi na sva lica koja nude zaključivanje ugovora o turističkim proizvodima, bez obzira jesu li ti ugovori zaista zaključeni ili ne. Konačno, Direktivom je predviđeno da se trgovcem smatra i svako lice koje radi u ime ili za račun trgovca, dok takvo pravilo nije predviđeno Zakonom o zaštiti potrošača.
 6. Definicija potrošača iz Zakona o zaštiti potrošača odstupa od definicije tog pojma iz Direktive. Za razliku od Direktive, po Zakonu o zaštiti potrošača potrošačem se smatra svako lice koje kupuje *timeshare*, bez obzira kupuje li taj proizvod od profesionalca ili drugog potrošača.
 7. Za razliku od Direktive, Zakonom o zaštiti potrošača nijesu definisani pojmovi „pomoćni ugovor“, „trajni medij“, „kodeks ponašanja“, „tvorac kodeksa ponašanja“.
 8. Zakonom o zaštiti potrošača nije predviđeno pravilo predviđeno Direktivom, prema kojem će se prilikom izračunavanja dužine trajanja ugovora uzeti u obzir i odredbe ugovora o prečutnom obnavljanju ili produženju.
 9. Iako Zakon o zaštiti potrošača, isto kao i Direktiva, propisuje da reklamni materijali trgovca moraju sadržati obavještenje potrošaču gdje može dobiti detaljnija predugovorna obavještenja o turističkom proizvodu koji je predmet ugovora, sadržaj tog obavještenja iz Zakona o zaštiti potrošača ne odgovara sadržaju obavještenja iz Direktive.
 10. Zakon o zaštiti potrošača ne sadrži pravilo koje bi odgovaralo pravilu Direktive kojim je određeno da će u slučaju nuđenja ili prodaje turističkog proizvoda na određenom promotivnom ili prodajnom događaju biti jasno istaknuta komercijalna priroda tog događaja, kao i da će obavještenje o turističkom proizvodu morati biti dostupno potrošaču već na tom događaju.
 11. Za razliku od Direktive, Zakon o zaštiti potrošača ne sadrži odredbu kojom se zabranjuje reklamiranje ili prodaja turističkog proizvoda kao investicije.
 12. Sadržaj prethodnog obavještenja iz Zakona o zaštiti potrošača ne odgovara sadržaju tog obavještenja iz Direktive. Osim toga, za razliku od Direktive, Zakon o zaštiti potrošača ne sadrži zahtjev da to obavještenje bude dato na jasan i razumljiv način. Nadalje, za razliku od Direktive, Zakonom o zaštiti potrošača nije predviđeno da će to obavještenje, zavisno od vrste turističkog proizvoda, biti dato na standardizovanom formularu. Konačno, za razliku od Direktive, Zakonom o zaštiti potrošača nije predviđeno da će to obavještenje biti za potrošača besplatno te dostavljeno u pisanom obliku ili nekom drugom, potrošaču dostupnom, trajnom mediju.
 13. Pravilo iz Zakona o zaštiti potrošača o jeziku na kojem prethodno obavještenje mora biti sastavljeno ne odgovara pravilu iz Direktive.
 14. U pogledu ugovora o turističkom proizvodu, za razliku od Direktive, Zakon o zaštiti potrošača ne predviđa mogućnost da ugovor bude sastavljen u nekom drugom, potrošaču dostupnom, trajnom mediju, osim u pisanoj formi. Ima li se na umu da je Direktivom predviđen princip maksimalne harmonizacije, pitanje je da li je takvo rješenje Zakona saglasno rješenju iz Direktive.
 15. U pogledu jezika na kojem mora biti sastavljen ugovor o turističkom proizvodu, za razliku od Direktive kojom je navedeno da ugovor mora biti zaključen na jeziku prebivališta potrošača ili, po njegovom izboru, jeziku države čiji je državljanin, Zakonom o zaštiti potrošača predviđeno je da ugovor o *timeshareu* mora biti sastavljen na jeziku prebivališta potrošača ili bilo kojem drugom jeziku, po njegovu izboru. Ima li se na umu da je Direktivom predviđen princip maksimalne

- harmonizacije, pitanje je da li je takvo rješenje Zakona saglasno rješenju iz Direktive. Nadalje, za razliku od Direktive, Zakon o zaštiti potrošača ne određuje da jezik koji je odabrao potrošač mora biti službeni jezik Unije. Naime, Unija će insistirati na tome da u zakonu piše kako to mora biti službeni jezik države članice EU, iako Crna Gora još uvijek nije članica. Ono što se može učiniti jeste da se u prelaznim i završnim odredbama napiše da će se to pravilo početi primjenjivati od dana prijema Crne Gore u Evropsku uniju. Nadalje, za razliku od Direktive, Zakon o zaštiti potrošača određuje da ugovor o *timeshareu* mora biti ovjeren od strane nadležnog organa. Uz to što nije jasno o kojem je to organu riječ, nije jasna ni svrha ovakvog pravila. Konačno, Zakonom o zaštiti potrošača predviđeno je da ugovor sastavljen na službenom jeziku države potrošača mora biti ovjeren od stalnog sudskog tumača za taj jezik. Pritom, nije jasna svrha tog pravila.
16. Kao i Direktiva, Zakon o zaštiti potrošača propisuje da sadržaj ugovora o *timeshareu* izuzetno može odstupati od sadržaja ponude, ali jedino ako su ta odstupanja rezultat okolnosti na koje trgovac nije mogao uticati. No, za razliku od Direktive, Zakonom o zaštiti potrošača nije preciznije određen sadržaj sintagme „okolnosti na koje trgovac nije mogao uticati“. Osim toga, za razliku od Direktive, Zakonom o zaštiti potrošača nije precizirano u kojoj formi te izmjene moraju biti dostavljene potrošaču.
 17. Za razliku od Direktive, Zakon o zaštiti potrošača ne sadrži posebna pravila o načinu obavještavanja potrošača o njegovom pravu na raskid ugovora.
 18. Pravila Zakona o zaštiti potrošača u pogledu prava na jednostrani raskid ugovora manje su povoljna za potrošača u odnosu na ista pravila iz Direktive. Prije svega, Zakon o zaštiti potrošača ne sadrži posebno pravilo o početku toka roka za raskid u slučaju kad potrošač primi ugovor nakon njegovog zaključivanja. Nadalje, Zakon o zaštiti potrošača ne predviđa pravo potrošača na jednostrani raskid ugovora u pogledu ostalih dugotrajnih turističkih proizvoda, različitih od *timesharea*.
 19. Rokovi za jednostrani raskid ugovora, predviđeni Zakonom o zaštiti potrošača, nijesu usklađeni s pravilima Direktive.
 20. Za razliku od Direktive, Zakonom o zaštiti potrošača nije predviđena prekršajna odgovornost trgovca za slučaj da trgovac nije ispunio svoju obavezu obavještavanja potrošača ni nakon proteka roka za jednostrani raskid ugovora.
 21. Za razliku od Direktive, Zakonom o zaštiti potrošača nije predviđen početak toka prava na jednostrani raskid ugovora u slučaju kad je obavještenje o pravu na raskid potrošaču bilo dostavljeno nakon proteka roka u kojem je trebalo da bude dostavljeno. Isto tako, Zakonom o zaštiti potrošača nije predviđeno posebno pravilo o uticaju roka za jednostrani raskid ugovora o *timeshareu* na raskid ugovora o razmjeni turističkog proizvoda.
 22. Za razliku od Direktive, Zakon o zaštiti potrošača ne precizira u kojoj formi se mora dati izjava o raskidu ugovora.
 23. Dok u slučaju raskida ugovora Direktiva propisuje da potrošač neće biti dužan da plati nikakve troškove, Zakonom o zaštiti potrošača predviđeno je da je potrošač dužan da plati troškove ovjere ugovora.
 24. Pravilo iz Zakona o zaštiti potrošača o zabrani plaćanja bilo kakve naknade ili njenog dijela prije zaključivanja ugovora primjenjuje se samo na ugovore o *timeshareu*, dok Direktiva predviđa slično pravilo u pogledu bilo kojeg dugotrajnog turističkog proizvoda. Nadalje, Zakonom o zaštiti potrošača izričito je navedena samo zabrana plaćanja unaprijed, a ne i zabrana svih ostalih finansijskih transakcija koje su navedene u Direktivi.
 25. Za razliku od Direktive, Zakon o zaštiti potrošača ne sadrži posebno pravilo o zabrani plaćanja unaprijed ili zabrani bilo koje slične finansijske transakcije u pogledu ugovora o preprodaji turističkog proizvoda.
 26. Za razliku od Direktive, Zakon o zaštiti potrošača ne sadrži posebna pravila koja se odnose na ugovore o dugotrajnim turističkim proizvodima.
 27. Pravila Zakona o zaštiti potrošača o prestanku sporednih ugovora sadržajno ne odgovaraju pravilima iz Direktive.
 28. Pravilo Zakona o zaštiti potrošača o uticaju izbora mjerodavnog prava na zaštitu potrošača u pogledu ugovora o dugotrajnim turističkim proizvodima sadržajno ne odgovara pravilu iz Direktive. Zakonom o zaštiti potrošača predviđeno je opšte pravilo prema kojem će se na ugovor primjenjivati pravo koje su strane odabrale. S druge

- strane, Direktivom je predviđeno da se izbor mjerodavnog prava neće uzeti u obzir ako izabrano pravo potrošaču pruža niži nivo zaštite od onog koji predviđa Direktiva.
29. Za razliku od Direktive, Zakonom o zaštiti potrošača nije predviđen i razrađen sistem kolektivne zaštite potrošača.
 30. Suprotno Direktivi, Zakonom o zaštiti potrošača nije predviđen sistem obavještanja potrošača o pravilima tog zakona kojima se uređuju ugovori o dugotrajnim turističkim proizvodima.
 31. Suprotno Direktivi, Zakonom o zaštiti potrošača nijesu predviđene efikasne sankcije za trgovce koji ne poštuju pravila tog zakona o ugovorima o dugotrajnim turističkim proizvodima.
 32. Iz Zakona o zaštiti potrošača nije vidljivo da je prilikom stupanja na snagu tog zakona javnost upućena na to da je tim zakonom prenesena ova direktiva.
 33. Zakon o zaštiti potrošača ne sadrži pravila kojima se uređuje sadržaj informacija koje se u pojedinim fazama zaključivanja i ispunjavanja ugovora o dugotrajnim turističkim proizvodima moraju dostavljati potrošaču, a čiji je sadržaj uređen Aneksima I-IV Direktive.

3.10.2. Presude Suda pravde EU

Kako je riječ o nedavno donešenoj Direktivi, Sud pravde Evropske unije još nije donio nijednu presudu kojom bi se uređivalo pitanje njenog tumačenja ili implementacije. Štaviše, Sud pravde Evropske unije nije donio nijednu presudu koja bi se ticala ispravnosti implementacije ili tumačenja Direktive 94/47/EZ.

3.10.3. Praktične preporuke

Potrebno je pristupiti stvaranju novog pravnog uređenja zaštite potrošača kod sklapanja dugotrajnih turističkih proizvoda i to u skladu s Direktivom 2008/122/EZ, kojim bi se potrošačima pružila adekvatna zaštita ne samo prilikom zaključivanja *timeshare* ugovora, već i svih ostalih dugotrajnih turističkih proizvoda koje uređuje navedena Direktiva. U tu svrhu, potrebno je:

- a. u cjelini preuzeti ovu direktivu u crnogorsko zakonodavstvo,
- b. iscrpno, precizno i tačno preuzeti osnovne definicije, institute i pravila te direktive.

3.11. Direktiva 2009/22/EZ (sudske i upravne zabrane za zaštitu interesa potrošača)

3.11.1. Navodi Tabela usklađenosti

Još i tako precizno, cjelokupno i za potrošača povoljno materijalnoopravno uređenje ostaje bez praktične vrijednosti ako ne postoje efikasne procesne mogućnosti za ostvarivanje prava. Prvo područje procesnopravne zaštite potrošača odnosi se na uređenje posebnih pravozaštitnih oblika (tužbi) za zaštitu kolektivnih i disperzivnih interesa potrošača (davanje procesne legitimacije organizacijama za zaštitu potrošača za podnošenje tužbi u korist potrošača). Država ima obavezu da u svom pravnom poretku predvidi mogućnost da, u korist potrošača, tužbu u sudskom postupku ili predlog u upravnom postupku za zabranu daljih radnji koje su u suprotnosti sa propisima o zaštiti potrošača (prije svega u vezi zabrane i sprečavanja buduće upotrebe nepoštenih poslovnih praksi i nepoštenih ugovornih odredaba u potrošačkim ugovorima) podnese javnopravni subjekt ili organizacija za zaštitu potrošača. Pojedinačni potrošači i trgovci nemaju aktivnu legitimaciju. Cilj postupka je dobijanje sudske zabrane za nastavak radnji, znači – sa dejstvom za budućnost. Postupak mora biti ubrzan. Nije svrha tog postupka da se utvrđuje valjanost ugovora koji su već zaključeni ili čak odlučivanje o novčanoj naknadi (sniženje cijene, odšteta).

Analitičkim pregledom crnogorskog zakonodavstva utvrđeno je da se u Crnoj Gori nastojalo da se ova direktiva prenese na dva načina: kroz Zakon o zaštiti potrošača (koji sadrži mogućnost da organizacija potrošača podnese tužbu za zaštitu kolektivnih interesa

potrošača, barem u određenim područjima primjene) i kroz opšte nadležnosti tržišne i drugih inspekcija (koje mogu zabraniti radnje koje su u suprotnosti sa zakonodavstvom iz oblasti zaštite potrošača). Pri tom je utvrđeno da crnogorsko zakonodavstvo u značajnoj mjeri ispunjava zahtjeve predviđene ovom direktivom. Ipak, postoje i bitna odstupanja od Direktive koja se sastoje bilo u nepreuzimanju određenih rješenja predviđenih Direktivom, bilo u nedovoljno preciznom ili jasnom zakonskom uređenju, čime se dovodi u pitanje ispravnost prenošenja ove direktive. Na drugoj strani, neke odredbe u crnogorskom ZZP u suprotnosti su sa važećim načelima građanskog parničnog postupka, naročito u pogledu poštovanja autonomije stranaka.

Odstupanja crnogorskog zakonodavstva od Direktive uočena su u sljedećim elementima (osim onih koji važe za sve oblasti – npr. definicija trgovca i potrošača):

1. Direktiva zahtijeva da se procesna legitimacija za pokretanje postupka za zaštitu kolektivnih interesa potrošača da bilo javnopravnim subjektima, bilo organizacijama potrošača i da se može ostvarivati bilo u upravnom, bilo u sudskom postupku. Kako iz člana 7, tako je i iz člana 2 stav 1 tačka b Direktive jasno da država članica može i kumulirati mogućnost tih postupaka – znači, da može omogućiti „dva kolosjeka“ – zaštitu u upravnom (npr. inspeksijskom) postupku na jednoj strani, i zaštitu u redovnom građanskom postupku, na osnovu tužbe organizacije za zaštitu potrošača, na drugoj strani.

Takav je i pristup crnogorskog zakonodavca i to je u načelu pozitivno. Zbog nedovoljno razvijenog nevladinog sektora organizacija za zaštitu potrošača, bilo bi nedovoljno ako bi se samo njima prepustila odgovornost za pokretanje postupaka za zaštitu kolektivnih interesa. Na drugoj strani, dobro je da se podstiče i taj aspekt aktivnosti organizacija potrošača. Zbog toga ne bi bilo svrsishodno da se nadležnost za zaštitu kolektivnih interesa prepusti samo inspeksijskim službama.

2. Dok se direktiva odnosi samo na zaštitu kolektivnih interesa, crnogorski ZZP, kod određivanja kakve tužbe može podnijeti organizacija za zaštitu potrošača, ne pravi razliku između kolektivnih i individualnih interesa potrošača. Naime, omogućava i poništavanje već zaključenih ugovora i naknadu štete (član 112 stav 2).

Na prvi pogled se čini da je uređenje u crnogorskom zakonodavstvu čak povoljnije za potrošača (što bi bilo dopušteno prema članu 7 Direktive). Ali, u stvari, radi se o nerazumijevanju šta su kolektivni interesi potrošača i šta je svrha posebnih tužbi za njihovu zaštitu. Svrha Direktive je da omogućava tužbe za prestanak radnji – znači sa dejstvom za budućnost (jer za te slučajeve često i nema nekog konkretnog zahtjeva ili povrede prava konkretnog potrošača u konkretnom ugovoru). Za ugovore koji su već zaključeni (i iz kojih proizilazi npr. pravo na poništaj, na sniženje cijene, na vraćanje uplaćene cijene, na odštetu...), potrošači imaju individualne zahtjeve i saglasno načelima parničnog postupka njihovo je individualno pravo i odgovornost da zahtijevaju zaštitu tih prava. U suprotnom slučaju može doći do ozbiljne povrede ustavnog prava na kontradiktoran postupak. Treba naime uzeti u obzir i mogućnost da se tužba organizacije potrošača ne završi povoljno za potrošača. Ako potrošač za parnicu ne bi znao, a nepovoljan ishod parnice bio bi obavezujući i za njega, to bi bilo u suprotnosti sa ustavnim pravom na saslušanje. Uspostavljanje takvog sistema zahtijevalo bi detaljno regulisanje *opt-out* ili *opt-in* postupka (znači: obavještanja potrošača o parnici organizacije potrošača i omogućavanja da se potrošač bilo uključi, bilo isključi iz te parnice i njenog dejstva). I u pogledu procesnopravne zaštite potrošača potrebno je uvažiti – na osnovu Ustava i Evropske konvencije o ljudskim pravima – načela poštovanja autonomije stranaka (načelo dispozitivnosti) i prava na saslušanje (*right to be heard*).

3. Dok Direktiva predviđa davanje procesne legitimacije za pokretanje postupka javnopravnom subjektu ili organizaciji potrošača, crnogorski ZZP podnošenje tužbe za zaštitu kolektivnih interesa omogućava i pojedinom potrošaču.

Na prvi pogled se čini da je uređenje u crnogorskom zakonodavstvu čak povoljnije za potrošača (što bi bilo dopušteno prema članu 7 Direktive). Ali, u stvari, radi se o nerazumijevanju šta su kolektivni interesi potrošača i šta je svrha posebnih tužbi za njihovu zaštitu. Suština kolektivnih interesa potrošača je u tome da se oni, prije svega, odnose na situacije kada individualno pravo pojedinog potrošača (u smislu građanskopravnog odnosa) još nije povrijeđeno. Potrošačima je nužno omogućiti traženje sudske zaštite njihovih

individualnih interesa iz zaključenih ugovora, a ne zaštitu kolektivnih interesa potrošača sa dejstvom za budućnost. Omogućavanje neograničenom broju subjekata da podnose tužbe za zaštitu kolektivnih interesa prouzrokuje i brojne procesne komplikacije i nedoumice, npr. u pogledu litispencije, troškova, zloupotrebe prava, dejstva *res iudicata*... Isto tako, potrebno je da iz zakona jasno proizilazi da je zakonodavac svjestan toga šta je razlika između kolektivnih i individualnih interesa potrošača (kod čega, kao i u Direktivi, nije nužno ni svrsishodno da se pojam kolektivnih interesa potrošača detaljnije definiše).

4. Dok Direktiva (u aneksu) detaljno nabraja u pogledu kojih prava potrošača je moguća kolektivna zaštita na osnovu tužbe organizacije potrošača, ZZP to ograničava na zabranu reklame i zabranu nepoštenih ugovornih odredbi (te zabranu proizvoda i prometa proizvoda, koji nije bezbijedan).

Kod određivanja područja primjene tužbe organizacije potrošača crnogorsko zakonodavstvo nije usaglašeno sa Direktivom. U formalnom smislu, Direktiva je ipak preuzeta, jer je prema Direktivi dovoljno već postojanje jednog „kolosjeka“ – npr. u upravnom (inspekcijskom) postupku. Crnogorsko zakonodavstvo koje uređuje ovlašćenja tržišne i drugih inspekcija, omogućava podnošenje mjera zabrane za sva područja prava zaštite potrošača. To barem proizilazi iz člana 16 Zakona o inspekcijskom nadzoru (upravne mjere i radnje). U ZZP su upravne mjere, koje može preduzeti inspekcijski organ, definisane uže (član 127 – zabrana prometa određenih proizvoda; ne i zabrana npr. poslovnih praksi ili oglašavanja). Svrshodnije bi bilo da se u samom ZZP detaljnije nabroje upravne zabrane koje može preduzeti inspekcijski organ u pogledu obezbjeđivanja poštovanja prava potrošača iz tog (i drugih) zakona. Budući da primarna obaveza za zaštitu kolektivnih interesa potrošača treba da ostane vezana za aktivnosti i tužbe potrošačkih organizacija, u svakom slučaju je nužno da se u ZZP, u glavi o ovlašćenjima organizacija potrošača, proširi područje primjene.

5. Direktiva govori o tome da države „određuju sudove ili organe uprave nadležne za odlučivanje u postupku pokrenutom od strane ovlašćenog subjekta“ i time sugerise da, što se upravnopravne zaštite tiče, država mora (1) odrediti jedan subjekt koji može pokrenuti postupak i (2) odrediti subjekt („organ uprave“) koji odlučuje o zahtjevu prvog subjekta. Crnogorski zakon, što se upravnopravnog „kolosjeka“ tiče, koncentriše obje nadležnosti (pokretanje postupka i odlučivanje u postupku) u isti državni organ – tržišnu ili drugu inspekciju. Inspektor, naime, pokreće postupak i u tom postupku i odlučuje.

Smatramo, da crnogorsko zakonodavstvo nije u suprotnosti sa Direktivom. Svrha i cilj Direktive nijesu poremećeni samo zbog toga jer se uvodi postupak po službenoj dužnosti (dakle inspekcijski organ, koji pokreće postupak i odlučuje o zabrani), a ne na predlog nekog drugog organa. Isto tako, treba uzeti u obzir da je poslije izricanja upravne mjere inspekcije moguća žalba, a u sljedećem stepenu i sudska zaštita u upravnom sporu. Tako da ni načela poštenog postupka nijesu prekršena.

6. Dok Direktiva zahtijeva – kad je to svrsishodno – sankciju objave odluke ili ispravke, crnogorski ZZP to omogućava samo za nebezbedne proizvode i reklamiranje, i to samo objavljivanje odluke.

Područje primjene prema ZZP je preusko i Direktiva u tom pogledu nije prenesena. Na drugoj strani, objavljivanje odluke u službenom listu nije svrsishodno. Cilj objavljivanja je upoznavanje potrošača i konkurenata i time otklanjanje prouzrokovanih dejstava, a objave u službenom listu tom cilju odgovaraju samo fiktivno.

7. Dok Direktiva zahtijeva i omogućavanje (pod određenim uslovima i sa mogućim prethodnim konsultacijama) podnošenja tužbi od strane ovlašćenih subjekata iz drugih država članica (ako se radi o povredama, koje imaju prekogranično dejstvo), takvih odredbi u crnogorskom ZZP nema.

ZZP je potrebno usaglasiti sa zahtjevima Direktive. Kod toga je potrebno uvažiti da se radi o zahtjevu koji mora da ima dejstvo tek od dana pristupanja Crne Gore Evropskoj uniji. Zato je potrebna i adekvatna prelazna odredba o vremenu stupanja na snagu.

8. *Contra preferentem* odredba ima veze sa kolektivnom zaštitom, ali je treba prenijeti u kontekstu Direktive o nepoštenim ugovornim odredbama. Što se tiče već zaključenih ugovora, pomenuto pravilo znači da se odredba tumači povoljno za potrošača. Ali to

pravilo ne omogućava trgovcu da se u postupku tužbe za kolektivnu zaštitu potrošača, u kome se traži zabrana konkretne odredbe, brani argumentom da odredba nije nepoštena, jer se može tumačiti i u korist potrošača.

Pravilo treba uključiti u poglavlje kojim se prenosi direktiva o nepoštenim ugovornim odredbama.

3.11.2. Presude Suda pravde EU

Presuda od 1. oktobra 2002. godine u predmetu C-167/00 Verein für Konsumenteninformation protiv Karl Heinz Henkel [2002] Zbirka sudskih odluka str. I-8111

U tom predmetu postavilo se pitanje da li se na posebne odredbe u korist potrošača, kod određivanja međunarodne nadležnosti za sporove iz potrošačkih ugovora (sa prekograničnim elementom), može pozivati i u slučaju kada tužbu ne podnosi potrošač sam nego organizacija potrošača. SP EU je zauzeo stav da pomenute odredbe Briselske regulative (tada: Briselske konvencije) važe samo kada potrošač sam podnese tužbu. Osim toga, tužba za zabranu (*injunction*) uopšte nije tužba, koja proizilazi iz „ugovora”. Sa tom tužbom štiti se širi, kolektivni interes potrošača i osnov te tužbe nije u „ugovornim” obavezama trgovca, nego u njegovim vanugovornim obavezama (delikt ili kvazi delikt).

Iz pomenutih razloga, SP EU je zauzeo stav da se preventivna tužba organizacije za zaštitu potrošača sa zahtjevom za zabranu upotrebe nepoštenih ugovornih odredbi smatra tužbom u vezi delikta ili kvazi-delikta prema članu 5 stav 3 Briselske konvencije (sada: Briselske regulative I).

3.11.3. Praktične preporuke

Na osnovu navedenog, dajemo sljedeće praktične preporuke:

1. Zakonski propisati da su za podnošenje tužbe za zaštitu kolektivnih interesa potrošača u građanskom parničnom postupku aktivno legitimisane organizacije potrošača, brisati mogućnost da zaštitu kolektivnih interesa potrošača traži i sam potrošač.
2. Zadržati i mogućnost zaštite kolektivnih interesa u upravnom postupku, preko ingerencija tržišne i drugih inspekcija. Zbog nedoumica, izričito nabrojati u kojim područjima primjene inspekcijski organi mogu izricati zabrane i razmisliti o tome da se neka područja iz tih ingerencija isključe (npr. opšti ugovorni uslovi – jer se radi o prvenstveno građanskopravnim pitanjima i zbog toga nije svrsishodno da o tome odlučuje inspekcijski organ i žalbeni organ u upravnom postupku).
3. U odnosu na postojeći zakon proširiti područje primjene. Ipak ne čini se svrsishodnim da se preuzme model Direktive, koja nabraja taksativno, za prava iz kojih drugih direktiva važi mogućnost kolektivne zaštite. Svrsishodnije (i na osnovu člana 7 Direktive i dopušteno) rješenje je da se mogućnost kolektivne zaštite prava potrošača (tužbom za prestanak odnosno zabranu dalje upotrebe odnosno radnje) propiše za sve radnje koje su u suprotnosti sa važećim normama prava zaštite potrošača.
4. Jasno propisati mogućnost izdavanja privremenih mjera zabrane (regulatorne privremene mjere) koje sud može izdati već za vrijeme trajanja parnice, a i prije podnošenja tužbe (kod čega sud postavlja rok u kome je moguće podnijeti tužbu).
5. Jasno propisati da uređenje (tužba organizacije potrošača) važi samo za tužbe za prestanak, odnosno zabranu radnji koje su u suprotnosti sa zakonima iz oblasti prava potrošača (kolektivni interes), a ne i za zaštitu individualnih interesa iz konkretnih ugovora (poništaj, smanjenje cijene, vraćanje uplaćene cijene...). Isto tako ne preporučuje se ni ovlašćivanje organizacija potrošača za podnošenje tužbi sa kondemnatornim zahtjevom za oduzimanje protivpravne dobiti. To može da ostane ingerencija inspekcijskih organa, odnosno prekršajnog postupka.
6. Preciznije zakonski definisati neka pitanja postupka (nadležnost, određivanje vrijednosti spornog predmeta, naknada troškova, litispendencija, načelo ubrzanja postupka).

7. Saglasno Direktivi, predvidjeti zakonsko pravilo o mogućnosti objavljivanja presude odnosno ispravke izjave na predlog tužioca.
8. Postupak kolektivne zaštite prava potrošača po „upravnom kolosjeku“ u ZZP ne regulisati detaljnije, ali ipak jasno zapisati da odredbe tog zakona o ovlaštenjima organizacija za zaštitu potrošača u parničnom postupku ne utiču na postojeća ovlaštenja inspekcijских organa u upravnom postupku.
9. U prelaznim i završnim odredbama Zakona navesti da se tim zakonom preuzima ova direktiva.
10. U prelaznim i završnim odredbama Zakona urediti mogućnost podnošenja tužbe i od strane kvalifikovanih subjekata iz drugih država članica EU, ali da ta odredba stupa na snagu tek u trenutku kada Crna Gora postane članica EU.

4. PREPORUKE ZA PREUZIMANJE DODATNIH PROPISA POTROŠAČKOG ACQUISA

4.1. Direktiva 2002/65/EZ (pružanje finansijskih usluga na daljinu)

4.1.1. Bitni elementi preuzimanja

Direktivom 2002/65/EZ uređen je sistem zaštite potrošača u oblasti pružanja finansijskih usluga na daljinu. Bitni elementi preuzimanja određena predmetne direktive vezani su za pitanja pružanja informacija potrošaču prije zaključivanja ugovora na daljinu, mogućnost uslovljavanja i dodatnih informacija koje se nužno moraju pružiti potrošaču, pitanje primjerenog stavljanja na raspolaganje svih ugovornih uslova, pravo na odustanak, rokovi i izuzeća od ovoga prava, kao i pitanja načina i uslova plaćanja, te uređenje primjerenog i sprovedivog sistema sankcija i nadzora.

Direktiva 2002/65/EZ donesena je u cilju obezbjeđivanja slobode potrošačkog izbora koja je osnovno pravo potrošača, u čiju je svrhu potrebno pružiti visok nivo zaštite potrošača kako bi se ojačalo povjerenje potrošača u pružanje finansijskih usluga na daljinu.

Potrebno je napomenuti da Direktiva 97/7/EZ utvrđuje osnovna pravila za ugovaranje na daljinu, međutim, kako ova direktiva ne pokriva finansijske usluge, bilo je potrebno donijeti novu direktivu, Direktivu 2002/65/EZ.

U smislu Direktive 2002/65/EZ, finansijskim se uslugama smatraju bankarske usluge, usluge kreditiranja, osiguranja, penzijskog osiguranja, ulaganja i usluge platnog prometa.

Uz već navedeno važno je potcrtati nekoliko posebno bitnih elemenata Direktive. Naime, Direktiva 2002/65/EZ primjenjuje se svakako na svaki gore navedeni ugovor o finansijskoj usluzi zaključen na daljinu. Međutim, važno je naglasiti kako se ova direktiva primjenjuje i na svaku prvu od niza sukcesivnih finansijskih usluga („operacija“) ili razdvojenih finansijskih usluga iste prirode koje se izvršavaju tokom vremena, a koje se mogu smatrati cjelinom, bez obzira da li je pojedina finansijska usluga ili niz finansijskih usluga uređena jednim ili više ugovora.

Tako se zaključivanjem početnog ugovora može, na primjer, smatrati otvaranje računa u banci, prihvatanje kreditne kartice ili zaključenje ugovora o upravljanju portfeljom, a kasnijim povezanim poslovima može se, na primjer, smatrati polaganje ili podizanje sredstava s ovog računa, plaćanja kreditnom karticom ili transakcije u okviru ugovora o upravljanju portfeljom. Dodavanje novih elemenata početnom ugovoru, kao na primjer mogućnost korišćenja elektronskog plaćanja vezano za postojeći račun u banci, ne predstavlja dodatni posao, već novi ugovor na koji se Direktiva primjenjuje. No, na primjer, uplata novih udjela u investicionom fondu smatra se pak sukcesivnom finansijskom uslugom iste prirode.

Konačno, važno je potcrtati kako Direktiva postavlja uslove u svrhu primjerenog nivoa informisanosti potrošača prije i nakon zaključivanja ugovora. Prije zaključivanja ugovora potrošač mora primiti prethodne informacije koje su dovoljne kako bi bio u mogućnosti da na primjeren način procijeni finansijsku uslugu koja mu je ponuđena i donese informisanu odluku.

4.1.2. Presude Suda pravde EU

Sud pravde Evropske unije još nije donio nijednu presudu kojom bi se uređivalo pitanje tumačenja predmetne direktive. Vezano za pitanja implementacije, Sud pravde donio je presude protiv Kraljevine Španije i Velikog Vojvodstva Luksemburg u kojima ih je upozorio na njihovu obavezu usklađivanja zakonodavstva s odredbama ove direktive (predmet C-141/06 Komisija protiv Španije i predmet C-127/06 Komisija protiv Luksemburga). Sud pravde Evropske unije nije donio nijednu presudu koja bi se ticala ispravnosti tumačenja i implementacije Direktive 2002/65/EZ.

4.1.3. Praktične preporuke

Na osnovu navedenog dajemo sljedeće praktične preporuke za potrebe usklađivanja crnogorskog zakonodavstva s odredbama Direktive 2002/65/EZ:

1. Uskladiti crnogorsko zakonodavstvo o zaštiti potrošača s odredbama predmetne Direktive putem pripreme i donošenja novele Zakona o zaštiti potrošača.
2. Prilikom pripreme i donošenja novog zakonodavnog okvira donijeti odluku o opsegu i sadržaju mogućih dodatnih informacija u svrhu proširenja zaštite potrošača u ovoj oblasti.
3. Prilikom pripreme i donošenja novog zakonodavnog okvira donijeti odluku o opsegu izuzetaka od prava odustanka potrošača, saglasno odredbama predmetne Direktive.
4. U svrhu efikasnosti i djelotvornosti usklađenih pravila, urediti primjeren sistem sankcija, s posebnim osvrtom na primjeren okvir nadzora i primjene.

4.2. Preporuke Komisije 98/257/EZ i 2001/310/EZ

4.2.1. Bitni elementi preuzimanja

Alternativno rješavanje potrošačkih sporova na nivou EU uređeno je preporukama (Preporuka Komisije 98/257/EZ od 30. marta 1998. godine o načelima koja se primjenjuju na tijela odgovorna za vansudsko rješavanje potrošačkih sporova i slična preporuka 2001/310/EZ od 4. aprila 2001. godine). Ne radi se o formalno obavezujućim pravnim aktima. Ipak, ta oblast je izuzetno bitna, jer *nepostojanje adekvatnih oblika alternativnog rješavanja potrošačkih sporova i faktički znači da je potrošaču realno oduzeta bilo kakva mogućnost pravne zaštite*. Pristup redovnom sudu, iako formalno otvoren, za potrošača često nije realna opcija. Uspostavljanje alternativnih oblika rješavanja potrošačkih sporova mora biti jedan od primarnih projekata u oblasti prava zaštite potrošača. Adekvatni sistemi alternativnog rješavanja potrošačkih sporova, naime, ne doprinose samo efikasnom ostvarivanju prava potrošača, nego i smanjuju opterećenje redovnih sudova i time pozitivno utiču na funkcionisanje pravosuđa u cjelini. Iskustvo zemalja članica EU dokazuje da je oblike alternativnog rješavanja potrošačkih sporova teško nametnuti „izvana“, isključivo državnim regulativom. Za efikasnost tih oblika potrebno je da ih stvarno prihvate i preduzeća i potrošači; zato je kod uspostavljanja sistema alternativnog rješavanja potrošačkih sporova nužno zalaganje za saradnju naročito predstavnika privrednih komora. Saglasno zahtjevima prvo pomenute preporuke, formirani model vansudskog rješavanja sporova mora biti u saglasnosti sa sljedećim načelima:

Načelo nezavisnosti: Organ kome je povjereno odlučivanje u potrošačkom sporu mora da ispunjava kriterijume nezavisnosti i nepristrasnosti. Uslovu nezavisnosti može biti udovoljeno na dva načina - bilo tako da u sporu odlučuje kolektivno tijelo čiji sastav garantuje jednakopravnu zastupljenost predstavnika potrošača i predstavnika privrede, ili tako da

odlučuje individualni organ koji je nezavisan od interesa stranaka u sporu (i tako, da mu je garantovan dovoljno dug mandat, što smanjuje mogućnost pritiska prijetnjom prestanka odnosno neimenovanja u novi mandat). U svakom slučaju, potrebno je zajamčiti stručnost, iskustvo i kompetentnost lica koje će rješavati spor.

Načelo transparentnosti: Alternativno rješavanje sporova može biti efikasno samo ako je zajamčeno da će potrošač uopšte unaprijed znati za mogućnost, odnosno tijelo koje rješava potrošačke sporove, za bitne karakteristike i prednosti koje mu taj oblik rješavanja sporova može donijeti, sa načinom postupka a i sa njegovim pravnim posljedicama (obavezujuća priroda odluke, troškovi...).

Načelo kontradiktornosti: Načelo kontradiktornosti (*adversarial principle*), odnosno pravo na saslušanje je zajamčeno i članom 6 Evropske konvencije o ljudskim pravima. Jeste da je jedan od glavnih ciljeva uspostavljanja tijela za alternativno rješavanje potrošačkih sporova da se time postigne brzo i jeftino rješenje spora, ali to ne smije ići na račun povrede prava na kontradiktoran postupak kao prava koje je zajamčeno Ustavom i međunarodnopravnim konvencijama.

Načelo efikasnosti: Cilj alternativnog rješavanja potrošačkih sporova je da se time omogući faktička pristupačnost pravne zaštite, brzina postupka i niži troškovi postupka nego što je to moguće postići u okviru redovnog sudskog postupka. S tim u vezi, preporuka EU naglašava sljedeće aspekte: ne smije biti predviđeno obavezno zastupanje od strane advokata; postupak mora biti bilo besplatan, bilo povezan samo sa niskim troškovima; element efikasnosti je brzina postupka; bitna je i odredba da organ koji odlučuje u potrošačkom sporu mora imati aktivnu ulogu u postupku jer je u potrošačkom sporu na taj način potrebno sanirati faktičku neravnopravnost u položaju stranaka; aktivnija uloga organa u tom slučaju služi izjednačavanju stranaka.

Načelo zakonitosti: Uspostavljanje alternativnih oblika rješavanja potrošačkih sporova ne smije prouzrokovati da se zbog toga smanji nivo zakonski priznatih prava potrošača. I organ koji odlučuje u tom obliku rješavanja sporova mora zato uvažiti materijalnopravne kogentne propise, koji se odnose na zaštitu potrošača. Nije dopušteno da se potrošač i preduzeće sklapanjem dogovora o alternativnom rješavanju spora dogovore da taj organ neće odlučiti po važećim kogentnim propisima iz oblasti zaštite potrošača. Iz preporuke EU proizilazi i da odluka mora biti izdata u pisanom obliku i da mora biti obrazložena.

Načelo dobrovoljnosti: Preporuka EU, u skladu sa zahtjevima Evropske konvencije o ljudskim pravima, naglašava da ni potrošač, ni preduzeće ne smiju biti prisiljeni na oblik rješavanja spora koji bi isključio sud. Vrlo bitna je i sljedeća odredba u preporuci EU: potrošač se prava na pristup sudu ne može odreći (sklapanjem dogovora o alternativnom rješavanju spora) prije nastanka spora. Razlog je u tome da potrošač u vrijeme kad zaključuje ugovor (npr. o kupovini robe ili o turističkom aranžmanu) još ni ne računa na to da će doći do spora. Zato je tada vrlo lako da preduzeće – npr. u opštim uslovima ugovora – potrošaču nametne arbitražni dogovor. Jeste da je i u takvom slučaju u formalnom smislu to pravi dogovor, koji se zasniva na volji obje stranke, ali u realnosti radi se manje-više o odredbi koju je jedna strana (preduzeće) nametnula drugoj strani (potrošaču) koja na to u vrijeme zaključivanja ugovora nije ni obraćala pažnju.

Načelo zastupanja: Preporuka EU naglašava da potrošaču nije moguće ni zabraniti da kod tih oblika rješavanja spora ima pomoć advokata ili druge pravno kvalifikovane osobe – ako sam to želi.

Gore predstavljenoj preporuci odgovaraju samo modeli kod kojih treća neutralna osoba, koja vodi postupak alternativnog rješavanja spora, taj postupak zaključuje sa obrazloženom odlukom. Ta odluka može biti obavezujuća, ili obavezujuća pod uslovom da nijedna stranka predmet ne iznese pred sud, a može biti i samo preporuka. Ali „odluka” organa koji odlučuje mora imati barem svojstvo preporuke (i u toj preporuci organ mora – na osnovu primjene zakona – pismeno i obrazloženo iznijeti svoj stav o tome koja je stranka u pravu). Znači da na taj način potrošač, iako se ne radi o obavezujućoj odluci (sa dejstvom pravosnažnosti i izvršnosti), barem sazna da li je u pravu. Gore pomenuti dokument na taj način isključuje prije svega

postupak medijacije. U medijaciji, naime, medijator stranke pokušava navesti da sklope nagodbu, može i izložiti svoje mišljenje i preporuke. Ali ako medijacija ne uspije – znači ako ne dođe do nagodbe, medijator nikako ne može izdati neku pismenu “odluku” ili “mišljenje” o tome, kako bi po njegovom mišljenju trebalo riješiti spor. Ako medijacija ne uspije, jednostavno ne dođe ni do kakvog dokumenta sa kojim bi se postupak zaključio (osim kratke izjave medijatora da medijacija nije uspjela). Kako se pak pokazalo da medijacija u oblasti građanskopravnih sporova uopšte doživljava veliki razvoj i da ima brojne prednosti, a da može biti (barem ponekad) korisna i u potrošačkim sporovima, pojavila se potreba da se na neki način i taj način alternativnog rješavanja sporova uključi u preporuke EU – i da se kod toga utvrde i kvalitativni uslovi koje postupak medijacije mora ispunjavati da bi se mogao ocijeniti kao pozitivan doprinos ostvarivanju prava potrošača. Zbog toga je Komisija izdala novu, dodatnu preporuku br. 2001/310/EZ od 4. aprila 2001. godine i ta preporuka naglašava načela nepristrasnosti, efektivnosti i transparentnosti. Osim toga, sadrži i načelo poštenja (*principle of fairness*). Organ koji vodi postupak npr. medijacije, mora paziti na to da će nagodba, koju će potrošač sklopiti, stvarno biti odraz njegove prave volje i da će potrošač imati dovoljno vremena da se upozna sa predlogom o nagodbi i da o njemu razmisli. Organ koji vodi postupak potrošača mora upozoriti na to da može potražiti i pravno savjetovanje o predlogu nagodbe i da bi se sudski postupak mogao za njega zaključiti i bolje od sadržaja nagodbe. Svaka stranka mora biti obaviještena o tome da ima pravo bilo kada da odustane od postupka.

Crna Gora je donošenjem Zakona o zaštiti potrošača (i na osnovu tog zakona i Pravilnika) kao prva zemlja u regionu postavila zakonski okvir za alternativno rješavanje potrošačkih sporova. Pomenuti zakon daje osnov za formiranje Arbitražnog odbora za rješavanje sporova potrošača (član 97). U cjelini uređenje postupka pred Arbitražnim odborom može se ocijeniti pozitivnim, ali uz određene nedostatke. Zabrinjava prije svega da je u tom sistemu odluka Arbitražnog odbora obavezujuća samo ako ide u korist potrošaču; odluka koja ide u korist preduzeća u svakom slučaju ima samo svojstvo preporuke i potrošača ne sprječava da u istom predmetu podnese tužbu sudu. Na prvi pogled izgleda da to ide u prilog efikasnoj zaštiti potrošača, ali to nije tako. Naime, potrebno je uzeti u obzir da preduzeće nije moguće prisiliti da se odrekne sudske zaštite i da izjavi da će odluku Odbora prihvatiti kao obavezujuću. Odluka Odbora može biti obavezujuća (u smislu da ima svojstvo pravosnažne sudske odluke) samo ako se obje strane s tim saglase. Ali u sistemu, kakav je prihvaćen u crnogorskom Zakonu o zaštiti potrošača, preduzeća realno neće imati pravog interesa za davanje izjave o prihvatanju odluke Odbora kao obavezujuće. Ako, naime, prethodnim prihvatanjem odluke arbitražnog odbora kao obavezujuće preduzeće može samo da izgubi (ako je odluka za trgovca nepovoljna, ima svojstvo pravosnažne i izvršne sudske odluke, a ako je odluka za trgovca povoljna, preduzeće je još uvijek izloženo mogućnosti da ga potrošač u istom predmetu tuži pred sudom) može se očekivati da neće biti mnogo trgovaca koji će izjaviti da će (buduću) odluku Odbora prihvatiti kao obavezujuću. Za trgovca je svrsishodno da izjavi da (buduću) odluku Odbora prihvata kao obavezujuću samo u slučaju da i sam time može nešto ne samo da izgubi (ako u sporu pobijedi potrošač, odluka Odbora će biti izvršna isprava), nego i da dobije – a to je, da u slučaju ako u postupku pred Odborom trgovac uspije, da je time spor u cjelini riješen i da ni potrošač nema mogućnost da u istom predmetu podnese tužbu sudu. To je prava stimulacija preduzeća da i oni dobiju interes za konačno rješenje spora pred Arbitražnim odborom. Takva su i uređenja u sličnim sistemima većine država članica Evropske unije. Zato je moguće zaključiti da bi i Zakon o zaštiti potrošača Crne Gore bilo nužno u tom dijelu promijeniti.

4.2.2. Presude Suda pravde EU

Presuda od 18. marta 2010. godine u predmetima C-317/08 do C-320/08 *Alassini i drugi*

U ovoj presudi SP EU je naglasio veliki značaj uspostavljanja modela vansudskog rješavanja potrošačkih sporova (u konkretnom primjeru: u oblasti pružanja univerzalnih usluga). Države imaju odgovornost da ti modeli, ako su uspostavljeni, ispunjavaju zahtjeve iz akata EU: "S tim u vezi, mora se istaći da član 34 stav 1 Direktive o univerzalnim uslugama (2002/22/EZ) zadaje cilj državama članicama da se uspostave vansudski postupci za postupanje sa nerazriješenim sporovima koji uključuju potrošače i koji se odnose na pitanja koja proističu iz Direktive. Stoga, činjenica da je nacionalnim propisom koji je predmet glavnog postupka

uspostavljen vansudski postupak za poravnania koji je pri tom obavezno sredstvo prije pokretanja postupka pred sudskim tijelom nije takve prirode da ugrožava postizanje pomenutog cilja. Upravo suprotno, takav zakon, sve dok obezbjeđuje da se vansudski postupci sistematski koriste za rješavanje sporova, doprinosi jačanju djelotvornosti Direktive o univerzalnim uslugama" (tačka 45).

4.2.3. Praktične preporuke

Na osnovu navedenog dajemo sljedeće praktične preporuke:

1. Sistem alternativnog rješavanja potrošačkih sporova, ustanovljen kod Privredne komore Crne Gore, treba zadržati uz određena poboljšanja i promjene zakona i pravilnika.
2. Potrebno je razmotriti koje bi od odredaba, koje su sada u pravilniku, trebalo staviti u zakon.
3. Za slučaj da potrošač podnese tužbu Arbitražnom odboru, a trgovac izjavi da prihvata jurisdikciju Arbitražnog odbora da donese obavezujuću odluku, ta odluka bi trebalo da bude obavezujuća za obje strane.
4. Potrebno je predvidjeti mogućnost i postupak za prestanak mandata člana Arbitražnog odbora prije isteka mandata (npr. zbog neaktivnosti).
5. Potrebno je izmijeniti i dopuniti odredbe o obavezi da se prije podnošenja tužbe Arbitražnom odboru spor pokuša riješiti direktno sa trgovcem, odnosno korišćenjem internih žalbenih mehanizama.
6. Potrebno je omogućiti Arbitražnom odboru da po sopstvenom nahođenju odbije odlučivanje u komplikovanim predmetima, naročito onima koji su povezani sa skupim ili neizvjesnim postupkom dokazivanja spornih činjenica.
7. Svrsishodno bi bilo ograničiti jurisdikciju Arbitražnog odbora za odlučivanje o predmetima koji su zbog velike vrijednosti ili složenosti u načelu neprikladni za odlučivanje Arbitražnog odbora.

DODATAK A: RADNI MATERIJAL

1. Izvori prava Evropske unije:

Konsolidovana verzija Ugovora o Evropskoj uniji i Ugovora o funkcionisanju Evropske unije (izabrane odredbe)

Direktiva Savjeta 85/577/EEZ od 20. decembra 1985. godine za zaštitu potrošača u pogledu ugovora sklopljenih izvan poslovnih prostorija

Direktiva Savjeta 90/314/EEZ od 13. juna 1990. o paket aranžmanima, paket vikendima i paket turama

Direktiva Savjeta 93/13/EEZ od 5. aprila 1993. o nepoštenim odredbama u potrošačkim ugovorima

Direktiva 97/7/EZ Evropskog Parlamenta i Savjeta od 20. maja 1997. godine o zaštiti potrošača vezano za ugovore na daljinu

Direktiva 98/6/EZ Evropskog Parlamenta i Savjeta od 16. februara 1998. o zaštiti potrošača prilikom isticanja cijena ponuđenih proizvoda

Direktiva 99/44/EZ Evropskog Parlamenta i Savjeta od 25. maja 1999. o nekim aspektima prodaje robe široke potrošnje i pratećim garancijama

Direktiva 2005/29/EZ Evropskog parlamenta i Savjeta od 11. Maja 2005 o nepoštenoj poslovnoj praksi privrednih subjekata prema potrošačima na unutrašnjem tržištu

Direktiva 2006/114/EZ Evropskog parlamenta i Savjeta od 12. Decembra 2006. o obmanjujućem i upoređujućem oglašavanju

Direktiva 2008/48/EZ Evropskog parlament od 23. aprila 2008. o ugovorima o potrošačkim kreditima

Direktiva 2008/122/EZ Evropskog parlamenta i Savjeta od 14 januara 2009 o zaštiti potrošača u pogledu pojedinih aspekata vremenski podijeljenog korišćenja nepokretnosti (timeshare), dugoročnih proizvoda za odmor, preprodaje i razmjene

Direktiva 2009/22/EZ Evropskog parlamenta i Savjeta od 23. aprila 2009. o sudskim i upravnim zabranama za zaštitu interesa potrošača

Direktiva 2002/65/EZ Evropskog parlamenta i Savjeta od 23. septembra 2002. o prodaji na daljinu finansijskih usluga

Preporuka Komisije 98/257/EZ od 30. marta 1998. godine o načelima koja se primjenjuju na tijela odgovorna za vansudsko rješavanje potrošačkih sporova

Preporuka Komisije 2001/310/EZ od 4. aprila 2001. godine o načelima koja važe za vansudska tela uključena u sporazumno rešavanje potrošačkih sporova

Predlog Direktive Evropskog parlamenta i Saveta o potrošačkim pravima, COM(2008) 614 final

2. Sudska praksa Suda pravde Evropske unije

Direktiva Savjeta 85/577/EEZ od 20. decembra 1985. godine za zaštitu potrošača u pogledu ugovora sklopljenih izvan poslovnih prostorija

- Presuda od 14. marta 1991. godine u predmetu C-361/89 Di Pinto [1991] Zbirka sudskih odluka str. I-01189

- Presuda od 22. aprila 1999. godine u predmetu C-423/97 Travel Vac SL protiv Manuel José Antelm Sanchis [1999] Zbirka sudskih odluka str. I-02195

- Presuda od 13. decembra 2001. godine u predmetu C-481/99 Georg Heininger i Helga Heininger protiv Bayerische Hypo- und Vereinsbank AG [2001] Zbirka sudskih odluka str. I-09945
- Presuda od 25. oktobra 2005. godine u predmetu C-229/04 Crailsheimer Volksbank eG protiv Klaus Conrads i drugih [2005] Zbirka sudskih odluka str. I-09273
- Presuda od 10. aprila 2008. godine u predmetu C-412/06 Annelore Hamilton protiv Volksbank Filder eG [2008] Zbirka sudskih odluka str. I-2383
- Presuda od 15. aprila 2010. godine u predmetu C-215/08 E. Friz GmbH protiv Carsten von der Heyden
- Presuda od 17. decembra 2009. godine u predmetu C-227/08 Eva Martín Martín protiv EDP Editores SL

Direktiva Savjeta 90/314/EEZ od 13. juna 1990. godine o paket aranžmanima, paket vikendima i paket turama

- Presuda od 8. oktobra 1996. godine u spojenim predmetima C-178/94, C-179/94, C-188/94, C-189/94 i C-190/94 Erich Dillenkofer, Christian Erdmann, Hans-Jürgen Schulte, Anke Heuer, Werner, Ursula i Trosten Knor protiv Republike Njemačke [1996] Zbirka sudskih odluka str. I-04845
- Presuda od 14. maja 1998. godine u predmetu C-364/96 Verein für Konsumenteninformation protiv Österreichische Kreditversicherungs AG [1998] Zbirka sudskih odluka str. I-02949
- Presuda od 1. decembra 1998. godine u predmetu C-410/96 Krivični postupak protiv André Ambry [1998] Zbirka sudskih odluka str. I-07875
- Presuda od 15. juna 1999. godine u predmetu C-140/97 Walter Rechberger, Renate Greindl, Hermann Hofmeister i drugi protiv Republike Austrije [1999] Zbirka sudskih odluka str. I-03499
- Presuda od 12. marta 2002. godine u predmetu C-168/00 Simone Leitner protiv TUI Deutschland GmbH & Co. KG [2002] Zbirka sudskih odluka str. I-02631
- Presuda od 30. aprila 2002. godine u predmetu C-400/00 Club-Tour, Viagens e Turismo SA protiv Alberto Carlos Lobo Gonçalves Garrido, i Club Med Viages Lda [2002] Zbirka sudskih odluka str. I-04051

Direktiva Savjeta 93/13/EEZ od 5. aprila 1993. godine o nepoštenim odredbama u potrošačkim ugovorima

- Presuda od 24. januara 2002. godine u predmetu C-372/99 Komisija evropskih zajednica protiv Republike Italije [2002] Zbirka sudskih odluka str. I-00819
- Presuda od 7. maja 2002. godine u predmetu C-478/99 Komisija evropskih zajednica protiv Kraljevine Švedske [2002] Zbirka sudskih odluka str. I-04147
- Presuda od 9. septembra 2004. godine u predmetu C-70/03 Komisija evropskih zajednica protiv Kraljevine Španije [2004] Zbirka sudskih odluka str. I-07999

Direktiva 97/7/EZ Evropskog Parlamenta i Savjeta od 20. maja 1997. godine o zaštiti potrošača vezano za ugovore na daljinu

- Presuda od 3. septembra 2009. godine u predmetu C-489/07 Pia Messner protiv Firma Stefan Krüger [2009] Zbirka sudskih odluka str. I-07315
- Presuda od 15. aprila 2010. godine u predmetu C-511/08 Verbraucherzentrale Nordrhein-Westfalen eV protiv Handelsgesellschaft Heinrich Heine GmbH, OJ (2010) C 148, 0006 – 0007

Direktiva 99/44/EZ Evropskog Parlamenta i Savjeta od 25. maja 1999. godine o nekim aspektima prodaje robe široke potrošnje i pratećim garancijama

- Presuda 19. februara 2004. godine u predmetu C-310/03 Komisija evropskih zajednica protiv Velikog Vojvodstva Luksemburg [2004] Zbirka sudskih odluka str. I-1969
- Presuda od 19. februara 2004. godine u predmetu C-312/03 Komisija evropskih zajednica protiv Kraljevine Belgije [2004] Zbirka sudskih odluka str. I-1975
- Presuda od 17. aprila 2008. godine u predmetu C-404/06 Quelle AG protiv Bundesverband der Verbraucherzentralen i Verbraucherverbände [2008] Zbirka sudskih odluka str. I-2685

Direktiva 2005/29/EZ Evropskog parlamenta i Savjeta od 11. maja 2005. godine o nepoštenoj poslovnoj praksi privrednih subjekata prema potrošačima na unutrašnjem tržištu

- Presuda od 16. jula 1998. godine u predmetu C-210/96 Gut Springenheide GmbH i Rudolf Tusky protiv Oberkreisdirektor des Kreises Steinfurt - Amt für Lebensmittelüberwachung [1998] Zbirka sudskih odluka str. I-4657
- Presuda od 13. januara 2000. godine u predmetu C-220/98 Estée Lauder Cosmetics GmbH & Co. OHG protiv Lancaster Group GmbH [2000] Zbirka sudskih odluka str. I-117
- Presuda od 26. novembra 1996. godine u predmetu C-313/94 F.lli Graffione SNC protiv Ditta Fransa [1996] Zbirka sudskih odluka str. I-6039

Direktiva 2006/114/EZ Evropskog parlamenta i Savjeta od 12. Decembra 2006. o obmanjujućem i upoređujućem oglašavanju

- Presuda od 18. novembra 2010. godine u predmetu C-159/09 Lidl SNC protiv Vierzon Distribution SA
- Presuda od 12. juna 2008. godine u predmetu C-533/06 O2 Holdings Limited, O2 (UK) Limited protiv Hutchison 3G UK Limited [2008] Zbirka sudskih odluka str. I-4231

Direktiva 2008/48/EZ Evropskog parlament od 23. aprila 2008. godine o ugovorima o potrošačkim kreditima

- Presuda od 27. Marta 2007. godine u predmetu C-429/05 Max Rampion and Marie-Jeanne Godard, née Rampion v. Franfinance SA and K par K SAS [2007] Zbirka sudskih odluka I-08017

Direktiva 2009/22/EZ Evropskog parlamenta i Savjeta od 23. aprila 2009. godine o sudskim i upravnim zabranama za zaštitu interesa potrošača

- Presuda od 1. oktobra 2002. godine u predmetu C-167/00 Verein für Konsumenteninformation protiv Karl Heinz Henkel [2002] Zbirka sudskih odluka str. I-8111

Preporuke Komisije 98/257/EZ i 2001/310/EZ

- Presuda od 18. marta 2010. godine u predmetima C-317/08 do C-320/08 Alassini i drugi

3. Nacionalno zakonodavstvo Crne Gore:

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 unutrašnjoj trgovini, Sl.list RCG br. 49/08

Zakon o privrednim društvima, Sl.list RCG br. 6/02 i Sl.list CG br. 17/07 i 80/08

Zakon o elektronskoj trgovini, Sl.list RCG br. 80/04 i Sl.list CG br. 41/10

Zakon o elektronskim komunikacijama, Sl.list CG br. 50/08

Zakon o elektronskim medijima, Sl.list CG br. 46/10 i 49/10

Zakon o bankama, Sl.list CG br. 17/08

Zakon o ljekovima, Sl.list RCG br. 80/04 i Sl.list CG br. 18/08

Zakon o inspeksijskom 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 parničnom postupku, Sl.list RCG br. 22/04 i 76/06

Zakon o opštoj bezbjednosti proizvoda, Sl.list CG br. 48/08

Zakon o tehničkim zahtjevima za proizvode i ocjenjivanju usaglašenosti proizvoda s propisanim zahtjevima, Sl.list CG br.14/08

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

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

LITERATURA

1. Knjige:

Baretić M.: "Zaštita potrošača u Europskoj zajednici", Gavella N., Alinčić M., Hrabar D., Gliha I., Josipović T., Korać A., Baretić M., Nikšić S.: "Europsko privatno pravo", Pravni fakultet u Zagrebu, Zagreb, 2002.

Bertola, G., Disney, R. and C. Grant, The Economics of Consumer Credit, Cambridge, MA and London: The MIT Press. 2006.

Bouček, V., Europsko međunarodno privatno pravo u eurointegracijskom procesu i harmonizacija hrvatskog međunarodnog privatnog prava, Pravni fakultet u Zagrebu, Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ), Zagreb, 2009.

Caponi, R., The collective redress action in the Italian legal system, ERA Forum, Vol. 10, 2009/1, str. 7-36.

Cartwright, P., Banks, Consumers and Regulation, Oxford and Portland, Oregon, 2004.

Cartwright, P., Consumer Protection and the Criminal Law: Law, Theory, and Policy in the UK. Cambridge: Cambridge University Press, 2001.

Chen, K. and A. Fadlalla, eds. Online Consumer Protection: Theories of Human Relativism, Hershey, PA and New York, NY: Information Science Reference, 2009.

Čikara, E., Gegenwart und Zukunft der Verbraucherkreditverträge in der EU und in Kroatien, LIT Verlag, Wien (et al.), 2010.

Ferretti, F., The Law and Consumer Credit Information in the European Community, Routledge.Cavendish, London/New York, 2008.

Finlay, S., Consumer Credit Fundamentals, 2nd ed. Basingstoke and New York, NY: Palgrave Macmillan. 2009.

Finlay, S., The Management of Consumer Credit: Theory and Practice, 2nd ed. Basingstoke and New York, NY: Palgrave Macmillan, 2010.

Furmston, M. and J. Chuah, eds. Commercial and Consumer Law, Harlow: Pearson Education Limited, 2010.

Galič, A., Procesnopravna zaštita potrošača u pravu Evropske unije, *Evropski pravnik*, 2006/1 str. 107-119.

Galič, A., Alternativno rješavanje potrošačkih sporova u pravu EU i u pravu država članica EU, *Pravni zbornik*, Podgorica, 2008/1-2, str. 205-222.

Галев, Г. / Ј. Дабовиќ Анастасовска, *Облигационо право, Второ изменето и дополнето издание*, ЦЕППЕ, Скопје, 2009.

Hodges C., *Collective Redress in Europe: The New Model*, *Civil Justice Quarterly*, (29) 2010/3 str. 370-395.

Howells G. and S. Weatherill, *Consumer Protection Law*, 2nd ed., Ashgate, Farnham, 2005.

Howells, G. and R. Schulze, eds. *Modernising and Harmonising Consumer Contract Law*. Munich: Sellier, 2009.

Lindblom, P.H., *Group litigation in Scandinavia*, *ERA Forum*, Vol. 10, 2009/1, str. 7-36.

Macleod, JK, *Consumer Sales Law*, Routledge.Cavendish, London/New York, 2007.

Micklitz, H.-W., „Comparative Analysis on the Consumer Protection Laws of Albania, Bosnia and Herzegovina, Croatia, Macedonia, Montenegro and Serbia”, pripremljeno za Gesellschaft für Technische Zusammenarbeit u okviru Otvorenog regionalnog fonda za Jugoistočnu Evropu – Pravna reforma - Komponenta 3: Harmonizacija pravnih okvira za zaštitu potrošača i uspostavljanje mreže institucija za zaštitu potrošača u regionu, 2008.

Milić, D., *Obligaciono pravo sa sudskom praksom: Priručnik/Zakon o obligacionim odnosim - III dopunjeno izdanje*, NNK International, Beograd, 2003.

Milović, R. M., Korać, R., Z. Rašović, *Evropsko pravo i pravni sistem u Crnoj Gori*, Službeni list Crne Gore, Podgorica 1999.

Nebbia, P., *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, Oxford and Portland, OR: Hart Publishing, 2007.

Nebbia, P. and T. Askham, *EU Consumer Law*, Oxford: Oxford University Press, 2004.

Niemi, J., Ramsay, I. and W.C. Whitford, eds. *Consumer Credit, Debt and Bankruptcy: Comparative and International Perspectives*. Oxford and Portland, OR: Hart Publishing, 2009.

Perović, S. (ed.), *Komentar Zakona o obligacionim odnosima*, Beograd 1995.

Radišić, J., *Garancija za trajan kvalitet i odgovornost za štetu od stvari sa nedostatkom*, Institut za uporedno pravo, Beograd, 1972.

Rickett, C., T. Telfer, *International Perspectives on Consumers' Access to Justice*, Cambridge University Press, 2003.

Schulte-Nölke, H. (ed.), *Consumer Law Compendium*, University of Bielefeld.

Schulze, R., Schulte-Nölke, H. and J. Jones, eds. *A Casebook on European Consumer Law*, Oxford and Portland, OR: Hart Publishing, 2002.

Stadler, A., *A test case in Germany: 16.000 private investors vs. Deutsche Telekom*, *ERA Forum*, Vol. 10, 2009/1, str. 37-50.

Tzakas D.-P., *Effective collective redress in antitrust and consumer protection matters: A panacea or a chimera?*, *Common Market Law Review*, Vol. 48, 2011/4, str. 1125-1174.

Vandone, D., *Consumer Credit in Europe: Risks and Opportunities of a Dynamic Industry*, Heidelberg, London and New York: Physica-Verlag, 2009.

Van Boom, W. and M. Loos (ed.), *Collective Enforcement of Consumer Law*, Europa Law Publishing, Groningen, 2007.

Ziegel, J.S., *New Developments in International Commercial and Consumer Law: Proceedings of the 8th Biennial Conference of the International Academy of Commercial and Consumer Law*, Oxford and Portland, OR: Hart Publishing, 1998.

Walker, P.M., *Consumer Law*, 4th ed. London and Sydney: Cavendish Publishing Limited, 2001.

Weatherill, S., *EU Consumer Law And Policy*, Edward Elgar Publishing, Cheltenham, 2005.

Willet, C., *Fairness in Consumer Contracts*, Ashgate, Farnham, 2007.

2. Članci:

Baretić M., „Implementacija prava Europske zajednice o zaštiti potrošača u hrvatsko pravo“, Zbornik XLI Susreta pravnika, Zagreb 2003.

Baretić, M., „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, 57.

Czuzcai, J., „Final Report on EU Consistency of Srbija/Crna Gora Regulatory Framework for Consumer Protection“, PLAC an EU Funded Project, Belgrade/Podgorica 2006.

Čikara, E., „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, 1067.

Čikara, E., „Nova Direktiva 2008/48/EZ o ugovorima o potrošačkom kreditu i učinci njezina preuzimanja u hrvatsko pravo, Pravo i porezi, br. 7-8/2009 i br. 9/2009.

Čikara, E., „Prijevremena otplata kredita prema novom Zakonu o potrošačkom kreditiranju“, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 31 br. 1, Supplement, 2010.

Čapeta, T., „Zaštita potrošača – pravni aspekti“, Zagreb 2002.

Дабовиќ-Анастасовска, Ј. и Н. Гавриловиќ, „Формата на договорите во нашето договорно право“, Годишник на Правниот факултет „Јустинијан Први“ во Скопје, 40, 2006, стр. 517-536.

Dabović-Anastasovska, J. i Gavrilović, N., „Nevažnost ugovora u makedonskom pravu“, *Pravni život*, 11, 2007, str. 769-792.

Дабовиќ-Анастасовска, Ј. и Н. Гавриловиќ, „Поимот и склучувањето на договорите во македонското право, руското право и Начелата на европското договорно право“ во Зборник на трудови „Актуелните прашања за државата и правото на Република Македонија и Руската Федерација“: том 2. Скопје: Правен факултет „Јустинијан Први“, 2007, стр. 453-471.

Дабовиќ-Анастасовска, Ј. и Н. Гавриловиќ, „Измена на цената кај договорот за градење“ во Зборник во чест на Тодор Рушков. Скопје: Правен факултет „Јустинијан Први“, 2010, стр. 1-15.

Дабовиќ-Анастасовска, Ј., Лончар-Велкова, М. и Н. Гавриловиќ, “Заштита на потрошувачите во договорните односи во правото на Република Македонија” во Зборник во чест на Владимир Митков. Скопје: Правен факултет „Јустинијан Први“, 2010, стр. 351-374.

Галев, Г., Давовиќ-Анастасовска, Ј., Здравева, Н. и Н. Гавриловиќ, “Компаративно искуство на кодификација на граѓанското право во поранешните југословенски републики: теоретски и практични аспекти”, во Зборник од научната расправа “Кодификација на македонското граѓанско и трговско право”. Скопје: Македонска академија на науките и уметностите, 2008, стр. 125-158.

Галев, Г., Давовиќ-Анастасовска, Ј., Здравева, Н. и Н. Гавриловиќ, “Компаративни искуства за подготовка на граѓански законик на Република Македонија” во Зборник од научната расправа “Кодификација на македонското граѓанско и трговско право”. Скопје: Македонска академија на науките и уметностите, 2008, стр. 219-244.

Schulte-Nölke, H., „The transposition of European consumer directives into the national laws of the EU–Member States”, *Tijdschrift voor Consumentenrecht en handelspraktijken*, 4/2009, 133.

Šarčević, S., 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, 193.

Vilus, J., „Elektronsko ugovorno pravo”, *Pravo i privreda*, 1995/11-12, 1-18.

Vilus, J., „Nekorektne klauzule u ugovoru sa potrošačima – Povodom Direktive EEZ 93/13 od 1993. godine”, *Strani pravni život*, 1996/1-3, 131-146.

Vilus, J., „Direktiva Evropskog parlamenta i Saveta o prodaji na daljinu (97/7/EZ)”, *Evropsko zakonodavstvo*, 2003/4, 47-50.

Vilus, J., „Zakon o zaštiti potrošača Srbije i propisi Evropske unije”, *Evropsko zakonodavstvo*, 2006/15-16, 63-69.

Weatherill, S., „Law and Integration in the European Union”, Oxford University Press, Oxford 1995, 151-157.

An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings - Final Report, A Study for the European Commission, Health and Consumer Protection Directorate-General Directorate B – Consumer Affairs prepared by The Study Centre for Consumer Law – Centre for European Economic Law, Katholieke Universiteit Leuven, 2007.

http://ec.europa.eu/consumers/redress/reports_studies/comparative_report_en.pdf

Final Report to DG SANCO – Study on the use of Alternative Dispute Resolution in the European Union, Submitted by Civic Consulting of the Consumer Policy Evaluation Consortium (CPEC), 2009. http://ec.europa.eu/consumers/redress_cons/adr_study.pdf

**Guidelines for harmonisation of Montenegrin
consumer legislation**

1 INTRODUCTION

Harmonisation of Montenegrin legislation with the *acquis* is one of the main duties of Montenegro in the process of association with the European Union (EU). Naturally, that duty also includes harmonisation of Montenegrin legislation with the EU consumer protection law. Over recent decades, the EU adopted a number of directives regulating consumer protection whose rules should be included in Montenegrin legislation. When transposing EU directives in the field of consumer protection into Montenegrin legislation, it is necessary to do the following preliminary work:

- a) identify fields of consumer protection regulated by individual EU directives,
- b) define the system of transposition of EU consumer protection directives into Montenegrin legislation,
- c) define the method of transposition of EU consumer protection directives into Montenegrin legislation.

The analysis covered the following EU instruments:

- Directive 85/577/EEC (contracts negotiated away from business premises),
- Directive 90/314/EEC (package travel, package holidays and package tours),
- Directive 93/13/EEC (unfair terms in consumer contracts),
- Directive 97/7/EC (distance contracts),
- Directive 98/6/EC (indication of the prices of products offered to consumers),
- Directive 99/44/EC (certain aspects of the sale of consumer goods and associated guarantees),
- Directive 2002/65/EC (distance marketing of consumer financial services),
- Directive 2005/29/EC (unfair commercial practices),
- Directive 2006/114/EEC (misleading and comparative advertising),
- Directive 2008/48/EC (credit agreements for consumers),
- Directive 2009/22/EC (injunctions for the protection of consumers' interests),
- Commission Recommendation 98/257/EC,
- Commission Recommendation 2001/310/EC.

The rules under all the above-mentioned directives ought to be included in Montenegrin legislation. However, the system and the method of transposition of those directives into Montenegrin legislation depend primarily on the decision of Montenegro.

As regards the system of transposing EU consumer protection directives into Montenegrin legislation, it is necessary to decide first whether the essentially diverse consumer protection rules provided for by individual directives will be transposed into Montenegrin legislation by means of one or more laws. Furthermore, if it is decided to transpose EU consumer protection directives into Montenegrin legislation by means of more than one law, it is necessary to determine into which laws individual directives will be transposed. Namely, it has to be decided whether those directives will be transposed into some already existing laws or new laws, not existing at the moment, will be adopted for the purpose of their transposition. Finally, in the context of defining the system of transposition of EU consumer protection directives into Montenegrin legislation, it is necessary to identify first which bodies will be responsible for supervision over the implementation of the rules adopted in practice.

As regards the method of transposition of EU consumer protection directives into Montenegrin legislation, it is necessary previously to decide whether the Montenegrin consumer legislation will afford the consumers a higher level of protection than that afforded by individual directives, in view of the fact that a certain number of those directives provide for a minimum harmonisation principle. Furthermore, in that context, it is necessary to decide whether a certain system of generalisation of matters regulated by individual directives will be applied when individual directives are transposed into Montenegrin legislation.

Individual aspects of harmonisation of Montenegrin legislation with the *acquis* will be elaborated in more detail in the following chapter.

2 GENERAL RECOMMENDATIONS FOR TRANSPOSITION OF CONSUMER ACQUIS

2.1. Harmonisation system

Under the Stabilisation and Association Agreement, Montenegro undertook to harmonise its law with the *acquis*. In accordance with such commitment, the consumer protection rules provided for by individual EU directives must be transposed into Montenegrin legislation. However, Montenegro decides autonomously under which system of harmonisation it will transpose individual EU directives into Montenegrin legislation.

From the aspect of transparency of consumer protection rules, it is advisable to transpose the rules of individual consumer protection directives into one piece of legislation. However, in view of the number, and especially heterogeneity of the rules contained in individual directives, such system of harmonisation is difficult to implement.

Therefore, we propose to regulate the subject matter of consumer protection in several laws. The Consumer Protection Law (CPL) would be the basis for consumer protection legal framework. That Law would lay down general principles and organisational structure of consumer protection, as well as some contractual relationships entered into by the consumers. Such system of transposition already exists in Montenegro, as the current Consumer Protection Law regulates all three of the above-mentioned consumer protection aspects. Other fields of consumer protection, such as the protection of health and safety of consumers, would be regulated by separate pieces of legislation.

In the process, it is necessary to take into consideration the fact that the personal scope of application of individual EU consumer protection directives, especially those regulating contractual relationships, is very diverse, which needs to be taken into account when deciding which directives will be transposed into the Consumer Protection Law and which into some other laws. Thus, for instance, Package Travel Directive relates to any traveller, regardless of whether the traveller takes the package for private or business purposes. Furthermore, Directive on liability for defective products applies to any injured party, regardless of whether or not the injured party was a consumer. Therefore, the mentioned directives, although they fall within the scope of consumer protection in terms of form, provide protection to a much wider group of people than other consumer protection directives. Therefore, these directives lay down general protection rules and to transpose them properly they need to be transposed into a general piece of legislation, applying to all persons, and not into a partial piece of legislation applying only to a specific group of population, such as the Consumer Protection Law. Therefore, it would be advisable to transpose the mentioned directives into Montenegrin legislation by means of the Law on Obligations, or perhaps some other general law (e.g. Law on Tourism – as regards the Directive on package travel, package holidays and package tours). Moreover, the rules of some directives would be transposed more consistently if they are transposed as general rules affording protection to everyone not only consumers, even though their personal scope relates only to consumers. This is the case of, for example, the rules of the Directive on certain aspects of the sale of consumer goods and associated guarantees, regulating the so-called liability for material defects, that have been accepted as general rules in a number of the EU Member States. Therefore, it would be opportune to transpose the rules of that directive as well into Montenegrin legislation by means of the Law on Obligations (LO).

In accordance with the abovementioned, when deciding which directives will be transposed by means of the CPL, it should be ensured, first of all, that it incorporates directives relating to fundamental consumer rights (e.g. product labelling and the indication of the prices of products, unfair commercial practices), directives regulating the system of protection of consumer rights (e.g. Injunctions Directive), as well as directives regulating certain aspects of contractual relationships entered into by a consumer (e.g. distance selling, selling away from business premises, unfair terms in consumer contracts, timeshare contracts, consumer credits etc.) providing specific protection in those relationships exclusively to consumers but not to other parties to those relationships.

In Montenegrin legislation, legal matters are, as a rule, divided into different pieces of legislation on the basis of *rationae materiae* principle, in view of subject-matter regulated by particular pieces of legislation. On the other hand, in the current CPL, as well as in a future CPL, relevant matters would be regulated on the basis of *rationae personae* principle, in view of the person whose protection is regulated under that law. Therefore, the proposed concept of the CPL would differ from standard legal drafting rules in Montenegro in terms of employed legislative drafting technique. However, proposed legal drafting structure is determined to a great extent by certain specificities of the EU consumer protection directives and a need to transpose the rules of those directives into Montenegrin legislation transparently. Namely, a large number of consumer protection directives contain both public law and private law rules, as well as the rules of substantive and procedural law. If the rules in those directives were to be transposed into Montenegrin legislation on the basis of *rationae materiae* principle, they would need to be divided into a large number of different laws, which would result in comprehensive atomization of consumer protection rules and, consequently, in their non-transparency. Namely, consumers must be able to relatively easily find information about situations and the manner in which they are protected in relationships in the market. To that effect, the consumer protection rules must be transparent, and that will be possible only if most rules regulating a particular market relationship and which are as such regulated by one directive – are provided for in a single place, in one law.

For the reasons which will be explained in more detail below, we believe that instead of amending the current CPL, new CPL should be drafted. However, for the abovementioned reasons, we believe that the structure of elaborating the subject matter of consumer protection which is provided for in the current CPL should be kept to a great extent.

Along with the structure described, the CPL will have a very specific legal nature. Namely, in the context of general principles of consumer protection and organisational structure of consumer protection, that law will represent *lex generalis*. On the other hand, in the context of contractual relationships which are regulated by that law, it will be *lex specialis* in relation to the Law on Obligations, which is a *lex generalis* in the field of contractual relationships. Additionally, when transposing consumer protection directives into Montenegrin legislation, it is necessary to take into account the above-mentioned fact that the CPL will regulate certain relationships on the basis of *rationae personae* principle. This, however, gives rise to danger that some other law, regulating specific relationships, which is drafted according to the principle of *rationae materiae*, will also contain certain consumer protection rules. For instance, the Law on Domestic Trade, the Law on Banks etc. could also contain certain rules protecting consumers, i.e. specific rules protecting all persons including consumers. If the rules of those laws providing protection to consumers differed as to their contents from the rules that will be provided for by the CPL, the rules in those laws should be repealed so as not to threaten the application of the rules in the CPL. Namely, if those other laws contained some specific rules on consumer protection in the respective field they regulate (e.g. if the Law on Banks contained specific rules on consumer protection in the performance of banking transactions), the rules in those laws would be specific rules (*lex specialis*) in relation to the rules in the CPL, and would override the application of the rules in the CPL. Thus, despite the fact that the CPL would correspond to individual directives in terms of contents, Montenegrin legislation would not be harmonised with the *acquis*. This problem should also be taken into account as regards other laws into which individual directives will be transposed. Thus, for instance, should the Directive on package travel, package holidays and package tours be transposed into the Law on Tourism and not the Law on Obligations, it must be ensured that all rules provided for by that Directive are incorporated in the Law on Tourism, and not to have one part of those rules transposed into the Law on Tourism and the other part into the Law on Obligations. Namely, in the part where the Law on Tourism would regulate the package contract, that Law would be *lex specialis* in relation to the Law on Obligations and would thus override the rules of the Law on Obligations regulating the same subject-matter.

Finally, it should be underlined that, in addition to adoption of necessary harmonising legislation, full harmonisation of national law with the *acquis* involves also efficient enforcement of the adopted laws. Therefore, the CPL needs to provide for clear, precise and transparent rules which would determine which state administration bodies would be competent for supervision over the implementation of that Law. Since in that context the EU

rules give the states considerable freedom, Montenegro would be, in principle, free to place the supervision over the implementation of that Law within the competence of the existing state administration bodies or possibly to form some new bodies for that purpose. In the process, however, it is necessary to take into account that probably, due to heterogeneity of the subject-matter regulated by that Law, the competence for supervision over the implementation of the Law should be divided between several state administration bodies. In any event, those bodies need to have appropriate organisational capacities, human resources and expertise for the supervision over the implementation of the Law to be efficient.

2.1.1. Directives of minimum/maximum harmonisation approach

The so-called concept of minimum harmonisation is as a rule adopted in consumer protection directives, which means that those rules provide for a minimum level of protection that must exist in all the EU member states, whereas individual member states, when transposing those directives, may retain or provide for a higher level of protection than that provided for by the Directive. However, in doing so, they must take into account that those more stringent protective measures must be in line with the Treaty on the European Union and the Treaty on the functioning of the European Union, which more specifically means that those more stringent protective measures must not endanger other EU policies (e.g. fundamental freedoms).

On the other hand, as regards new generation of consumer protection directives a trend of transition from the minimum harmonisation concept to the maximum harmonisation concept has been noticed. This means that in respect of the subject-matter regulated by those directives, Member States may not provide for a higher level of protection than that provided for by a directive, except in the elements of regulatory framework where that is explicitly permitted by individual directives.

Those specificities of European law should be taken into account when defining the contents of the new CPL. Thus, when transposing each directive, it is necessary to determine whether it is a directive of minimum or maximum harmonisation. It is also worth mentioning that sometimes it will not be possible to determine that in the text of directive, but it will be necessary to consult the relevant case law of the Court of Justice of the European Union (CJEU) where that Court ruled on legal nature of individual directives. Furthermore, if it is determined in a particular case that an individual directive provides for a maximum harmonisation concept, more stringent protection mechanisms than those provided for by that directive should not be introduced on the occasion of its transposition, unless that is explicitly permitted by the directive. If, on the other hand, it is determined in a particular case that individual directive provides for the minimum harmonisation concept, it is necessary to decide whether in the field covered by that directive, Montenegrin consumers should be afforded higher level of protection than the minimum prescribed by the directive. In the process, it is necessary to take into account two problems: firstly, the fact that more stringent protection mechanisms may endanger other EU policies (primarily fundamental freedoms), and, secondly, that occasionally certain provisions affording consumers greater protection at first glance, can in fact lead to reduced consumer protection. Therefore, if it is intended to give the consumers higher level of protection than the minimum prescribed by the directive when transposing individual minimum harmonisation directives, it is necessary first to consult the case law of the Court of Justice of the European Union so as to determine if in that specific case acceptance of more stringent protection mechanisms is permitted or not.

During the analysis of current legislation of Montenegro in the field of consumer protection, it has been noticed that in certain situations Montenegrin legislator utilised the possibilities offered by the minimum harmonisation concept and afforded the consumer a higher level of protection than that provided for in individual directives. However, on that occasion it has also been noticed by consulting the case law of the CJEU that more stringent protection mechanisms corresponding in terms of contents to those accepted by the Montenegrin legislator are not permitted.

2.2. Method of transposition of directives

In order to ensure that individual directives are fully and correctly transposed into Montenegrin legislation, when defining the text of the CPL it is necessary to take into account several factors: 1. the need to fully transpose directives, 2. the need to define main terms in consumer legislation fully and precisely and 3. the need (possibility) to generalise individual solutions provided for in individual directives.

The mentioned aspects of the method of transposition of consumer protection directives need to be taken into account especially in the context of the forthcoming accession negotiations between Montenegro and the EU. Namely, under new generation of accession agreements (the so-called Stabilisation and Association Agreements) candidate countries assume the obligation to harmonise fully their legislation with the *acquis* before the candidate country joins the European Union. In the process, as shown by the experience of the Republic of Croatia, the candidate countries are subject to an extremely detailed scrutiny of the level of harmonisation of their legislation with the *acquis*, and the candidate country is expected to transpose fully and correctly the entire *acquis* in a relevant field already in the stage of negotiations for the membership of the EU. Therefore, in order to successfully complete negotiations in the chapter on consumer protection, Montenegro will have to prove that its legislation is fully harmonised with each segment of consumer *acquis*.

2.2.1. Requirement of full transposition of directives

On the basis of the Treaty on the Functioning of the European Union (Article 288 paragraph 3), directives are binding as to the result to be achieved, however they leave to the member states the choice of form and methods. In principle, thus, directives should define in general terms the aim to be achieved, and the Member States should be entirely free to determine the way and method of achieving that aim. It is necessary, however, to underline that in the field of consumer protection, as a rule, directives do not contain a general description of the aim to be achieved, but they contain very precise and detailed individual rules on how to achieve desired aim. In such a situation, very often consumer protection directives can be transposed only by means of full transposition of the contents of individual rules from such directives into national legislation.

It is, however, necessary to highlight that transposition of the rules from individual directives must not be reduced to uncritical copying of individual rules of the directive. It is necessary to take into account the fact that once they are transposed into national legislation, the rules taken from individual directives must not be a “foreign body” in the national legal order, but a consistent and coherent part of the national legal order. Namely, sometimes certain directives contain some non-legal terms and concepts, which are not known in specific national legal orders. It is thus intended to describe the aim to be achieved in individual directives, and when those provisions are transposed into national legislation it is necessary to find a corresponding concept in the national legal order to attain the aim described in the directive. Thus, for instance, the Unfair Contract Terms Directive lays down that the member states must ensure that unfair terms in consumer contract do not affect the consumer. This is a non-legal term intended to describe the ultimate aim to be achieved by that directive. When transposing that directive, Montenegrin legislator adopted a correct position that in Montenegrin legislation the aim provided for in the Directive may be achieved by using the concept of nullity of contract, and it prescribed in the CPL (Article 66 paragraph 1) that an unfair term in a consumer contract shall be null and void.

Furthermore, it is necessary to take account of the fact that the whole content of a directive is binding, so that correct transposition of individual directive requires to transpose substantive rules provided for in those directives in their entirety. Therefore, Member States may not choose only some rules from a directive they will transpose but they must transpose all substantive rules lay down by individual directive.

Evidently, the intention was to transpose a large number of consumer protection directives into Montenegrin legislation by means of the current CPL. However, having analysed

Montenegrin legislation in the field of consumer protection, it has been noticed that in certain segments of Montenegrin legislation not all rules of individual directives have been transposed, i.e. certain rules of the directives have not been transposed fully. To that end, we believe that for the purpose of full harmonisation of Montenegrin legislation with individual directives of the EU in the field of consumer protection, it is necessary to make certain interventions in current legislation, in order to achieve more complete and precise legal framework. When doing so, due to a number of expected interventions and the need to achieve satisfactory level of transparency of that framework, we believe that instead of amendments to the current CPL, a new law should be drafted in that field.

2.2.2. Terms and definitions in consumer directives

As already highlighted in previous paragraphs, consumer protection directives provide for very precise and detailed legal rules. That, particularly, relates to some fundamental terms and definitions in the field of consumer protection. It is also extremely important for the terms and definitions in national legislation to be harmonised with the rules in individual directives in terms of contents. Naturally, discrepancy from the contents of terms and definitions provided for in specific directives will be possible only if permitted by a particular directive, especially if the directive contains the principle of minimum harmonisation, so that, to achieve greater consumer protection, it is permitted to diverge from the rules of such directive. However, in such situations it is necessary first to decide whether there is a wish and whether it is opportune to afford Montenegrin consumers in certain segments a higher level of protection than that afforded by a particular directive. Namely, when defining legal framework for consumer protection, apart from reasonable consumer interests, account should also be taken of reasonable interests of traders, and also of legal order and legal certainty in general. To that end, legislator should not insist on a higher level of consumer protection in those segments where that will lead to disproportionate deterioration of traders' position.

Additionally, it is also necessary to take into account the fact that certain terms used in individual directives do not have corresponding translation equivalents in Montenegrin, i.e. Montenegrin legislation does not have legal concepts designated by those terms. In such a situation it will be necessary to find (maybe even to invent) corresponding Montenegrin terms. In the process, it is necessary to take care not to create terminological confusion, i.e. not to use Montenegrin terms corresponding linguistically to the terms in individual directives, but which do not correspond in terms of contents to the concepts hidden behind those terms. For instance, Directive 97/7EC and Directive 2002/65/EC use the term "distance" contracts. However, the terms "*distancioni ugovori*" and "*distanciono zaključivanje ugovora*" should not be used in Montenegrin legislation, but the terms "*ugovori na daljinu*" and "*zaključivanje ugovora na daljinu*", since the term "*distanciono zaključivanje ugovora*" is used in current Montenegrin legal terminology to denote certain methods of conclusion of contracts which do not correspond to that regulated by the mentioned directives.

In the case it is intended to implement generalisation or uniformity of certain terms and definitions from consumer directives (discussed in more detail below), account should be taken of the fact that it is necessary to ensure that uniform terms and definitions provided for in national legislation correspond in terms of contents to those terms and definitions in all directives. This is especially important in light of the fact that an increasing number of directives contain a principle of maximum harmonisation, and it is not possible to provide for a higher level of protection in national legislation than that provided for in such a directive. In that connection, if the Montenegrin legislation would provide for a uniform term or a uniform definition formulated more broadly than in particular directives (e.g. definition of the term "trader"), such rule of national legislation might comply with a minimum harmonisation directive, however, it would not comply with a maximum harmonisation directive.

The analysis of the current Montenegrin consumer protection legislation showed that some (mainly general) terms and definitions differ, to a certain extent, from those terms and definitions in particular directives. Such a situation is, as a rule, satisfactory as regards the directives containing the principle of minimum harmonisation, but it is questionable in respect of the directives containing the principle of maximum harmonisation. Furthermore, the analysis showed that sometimes some fundamental terms and definitions have not been

transposed into Montenegrin legislation entirely which results in non-conformity between Montenegrin legislation and the rules provided for in individual directives. Therefore, in new legal framework for consumer protection some basic terms and definitions of that framework should be defined more precisely and comprehensively.

2.2.3. Generalisation of individual rules

A large number of consumer protection directives are still the so-called directives based on “vertical” approach, which means that they regulate the consumer protection in a specific field, in specifically defined market relationships. Thus, for instance, the Consumer Credit Directive provides protection to consumers only when that particular type of contract is concluded. The Directive on contracts negotiated away from business premises and the Distance Selling Directive regulate consumer protection only in respect of those methods of conclusion of contracts. In such a situation, it happens very frequently that a large number of directives define the same terms and concepts anew. Thus, for instance, a large majority of consumer protection directives contain their own definitions of terms “consumer” and “trader”. Furthermore, a certain number of directives contains the same consumer rights (thus, for instance, the Directive on the contracts negotiated away from business premises, the Distance Selling Directive and the Timeshare Directive, provide for the consumer’s right of withdrawal). In such a situation, it is opportune when drafting a new consumer protection legal framework to start a specific generalisation of basic terms, definitions and, potentially, of individual consumers’ rights, as was done in the current CPL.

However, the following should be taken into account. Firstly, basic terms of the *acquis*, such as the terms “consumer” or “trader” are still fairly inconsistently regulated in individual directives. Thus, sometimes the definitions of those terms, provided for in one directive, are more or less different from the definitions of the same terms provided for in some other directive. Therefore, if there is an intention to provide in Montenegrin legislation for uniform definitions of such terms, account must be taken to accept the definition which will be broad enough to encompass all definitions of the same term, provided for in all the directives to be transposed. Secondly, if raising certain concepts and consumers’ rights provided for in only some directives to a level of general rules which are to apply to all relationships involving consumers is considered, account should be taken not to undermine thus the consistency of legal order and legal certainty. Therefore, when taking such decisions, apart from reasonable consumers’ interests, one must also take into account reasonable interests of traders, and also of legal transactions and their security in general. For instance, individual directives lay down that a consumer has the right of withdrawal. The right of withdrawal is not a general right which the consumer has in any situation but an individual right which the consumer has in only specific situations laid down in individual directives. In principle, granting the right of withdrawal to the consumer in any situation could be considered. However, legal certainty could be considerably violated thereby because in each consumer contractual relationship for a certain period of time it would not be certain whether the contract concluded would survive or the consumer would terminate it, by invoking such right, which can have very adverse effects on legal certainty. Still, a certain level of generalisation is also possible in respect of this specific consumer right. Namely, individual directives provide for a consumer’s right of withdrawal from the contract of different duration. Therefore, in order to achieve consistency of the system and simplicity of application, the duration of such right could be made uniform. Naturally, the length of period of time during which this right could be invoked must be such as to satisfy the requirements of all directives providing for such right.

In accordance with the above-mentioned, when defining rules of Montenegrin legislation in the field of consumer protection, it should be taken into account that it is necessary to generalise certain concepts and terms. However, the decision whether to proceed in certain segments with generalising the subject-matter should be taken on the basis of previous analysis whether in each specific case such generalisation is permitted and whether it is opportune from the aspect of protection of legal certainty.

2.3. Powers under public law and civil law

Individual directives provide for different consumer protection mechanisms. Thus, for example, a large number of directives provide for a specific mechanism of consumer protection through injunctions to achieve the protection of collective interests of consumers, i.e. which on the basis of an action brought by a consumer protection organisation and other stakeholders, order certain traders and groups of traders to cease certain practice violating consumer rights. The Member States are obliged to provide for an efficient system of protection of collective interests of consumers, however, they are free to choose whether such protection would be exercised within administrative or judicial proceedings. To that end, it will be necessary to decide in Montenegro whether collective consumer protection will be exercised within administrative or judicial proceedings or, possibly, simultaneously in both types of proceedings. When taking such decision, it should be taken into consideration that the prescribed mechanism must be efficient, which means that a mechanism enabling fast, effective and reliable protection of collective interests of the consumers should be chosen.

Additionally, since the rules in certain directives provide for a range of the rules of public law and private law, when transposing those directives in Montenegrin legislation, account must be taken not to have overlap of powers between administrative (inspection) and court instances. Namely, depending on the specific segment of consumer protection, different public bodies may be competent to provide a certain type of protection to consumers. Thus, for example, supervision over compliance with the rules of public law is carried out by inspection bodies. On the other hand, the courts determine whether contractual obligations have been performed properly. Thus, legal framework needs to provide for clear division of competences as regards the control of fulfilment of individual rules of consumer protection.

2.4. System of denoting compliance of national law

Harmonisation process does not end with drafting the law transposing individual EU directives. Namely, the Member States (and, hence, candidate countries) have the obligation of the so-called interpretative harmonisation, i.e. the obligation to interpret the rules of national legislation in accordance with the objective of the directive which is transposed into national legislation by means of those rules. This so-called *favour conventionis* method of interpretation of legislation frequently requires from those who interpret a specific rule of national law to consult a relevant case of the European Court of Justice (ECJ) in which the Court interpreted specific rules from specific directives. For those applying national law harmonised with individual EU directives and those interpreting it to be able to apply the mentioned method of interpretation, they must know reliably that a specific directive has been transposed by means of a specific rule of national law. Therefore, certain directives require the Member States to publish, as appropriate, that a particular EU directive has been transposed by means of specific provisions of national law. The way in which this will be done has been, in principle, left to the discretion of the Member States. However, the system adopted must be transparent and must enable everyone who apply and interpret national laws to be able to find information on whether an EU directive has been transposed into a specific national law, in an appropriate manner.

We believe that the most appropriate way of denoting compliance of national laws with a particular EU directive would be to list the directives transposed into a particular law in transitional and final provisions of that law. To that end, it would be advisable to list explicitly in transitional and final provisions of the CPL the directives which will be transposed into the Montenegrin legal order by means of that Law. Certainly, this does not prevent Montenegro to adopt or devise some other manner of denoting compliance of national laws with a certain directive.

In order to ensure transparency of the EU law transposed into national law, efforts should definitely be made to transpose the rules of a single EU directive into Montenegrin legislation by means of a single law. Thus, as a rule, the transposition of rules of a single directive by

means of several laws should be avoided. Only in exceptional circumstances, if there are truly justified reasons, the rules of a single directive could be transposed by means of several laws.

2.5. General recommendations

In accordance with the above, in the context of harmonisation of Montenegrin legislation with the consumer *acquis*, we would like to make the following recommendations.

1. New CPL should be drafted

Due to the scope of amendments to be made to the existing legislation in order to harmonise it fully with the relevant EU directives, we believe that it is more pertinent to proceed to draft new CPL, and not the amendments to the current CPL. Furthermore, new law should retain the structure of the current CPL to the greatest extent possible, which means that the new CPL should also regulate general principles of consumer protection, organisational structure of consumer protection and some contractual relationships entered into by consumers.

- 2. The following instruments should be transposed into the CPL:** Directive 85/577/EEC (contracts negotiated away from business premises), Directive 93/13/EEC (unfair terms in consumer contracts), Directive 97/7/EC (distance contracts), Directive 98/6/EC (indication of the prices of products offered to consumers), Directive 2002/65/EC (distance marketing of consumer financial services), Directive 2005/29/EC (unfair commercial practices), Directive 2009/22/EC (injunctions for the protection of consumers' interests), Commission Recommendation 98/257/EC, Commission Recommendation 2001/310/EC.

Possibly, if there are justified reasons, some of the above-mentioned instruments could be transposed into some other, either existing or new laws. For instance, since the subject-matter of consumer credits, especially in the context of supervision over financial market, is to a certain extent specific, transposing Directive 2008/48/EC (credit agreements for consumers) into a separate law might be considered.

- 3. Directives providing protection to a wider group of people (e.g. Directive on package travel, package holidays and package tours and the Directive on liability for defective products) as well as the directives which, despite the fact that they regulate exclusively consumer protection, could be accepted as general rules (e.g. Directive on certain aspects of the sale of consumer goods and associated guarantees) should be transposed into general laws, more specifically, either into the Law on Obligations or maybe some other laws (e.g. into the Law on Tourism as regards the Directive on package travel, package holidays and package tours). Since it does not regulate relationships between traders and consumers, but predominantly mutual relationships between traders, Directive 2006/114/EC (misleading and comparative advertising) should be transposed into some of the laws regulating trade relations in general terms. Furthermore, as the mentioned Directive regulates, among other things, the protection of consumers against comparative advertising, it is necessary to decide whether that segment of this subject-matter will be regulated by the CPL or the law in which this subject-matter will be regulated in an integrated manner.**
- 4. It should be ensured that a single directive is transposed entirely into a single law.**

That would ensure appropriate transparency of the consumer protection rules and enable easier application of that legislation in practice and, on the other hand, it would avoid possibility of the laws into which different rules of the same directive are transposed to override each other. By way of exception, in cases where that is assessed as necessary, the rules of one directive could be transposed into different laws.

5. All substantive rules of individual directives must be transposed into Montenegrin legislation in their entirety.

Thus, when transposing individual directives, all rules laid down in the directive should be accepted and not only some rules.

6. Individual concepts, terms and definitions provided for in individual directives must be transposed into Montenegrin legislation properly, correctly, precisely and fully.

7. When transposing individual directives into Montenegrin legislation, it must be decided whether the consumers will be afforded a higher level of protection and in which segments.

It is necessary to determine first whether in this specific segment providing higher level of protection is permitted, i.e. whether in the specific case it is a minimum harmonisation directive. Additionally, if it is concluded in the specific case that it is a minimum harmonisation directive, it should be determined by analysing the rules of the directive or relevant case-law of the ECJ whether the intended raising of the level of protection is permitted and whether it is opportune from the aspect of preserving legal certainty and appropriate protection of all stakeholders.

8. When drafting the CPL, to the extent to which it is opportune, the concepts and rules provided for in different directives should be made uniform.

This uniformity will especially become important when defining basic terms, such as the terms “consumer”, “trader” etc., used in different directives, which should be uniformly used in the entire CPL.

In the process, it should be taken into account that in individual directives the same terms are defined differently and that in such type of uniformity approach it is necessary to choose a term or definition, which is broad enough to include all definitions of that term provided for in individual directives.

Furthermore, achieving uniformity or generalisation of individual rules provided for in different directives may be considered. However, that type of uniformity should be adopted only if it is assessed as opportune, on the basis of all relevant circumstances.

9. The CPL should work out clear division of competences as regards the supervision over the implementation of that Law.

When doing so, the account should be taken not to have overlap of competences between individual public bodies, as well as not to have overlap of control of public law and private law aspects of consumer protection.

10. A system of denoting compliance of Montenegrin legislation with individual EU directives should be devised.

We believe that such objective may be attained in the simplest way by listing precisely in the transitional and final provisions of the law which EU directives have been transposed into that law.

3 RECOMMENDATIONS FOR TRANSPOSITION OF SELECTED PIECES OF CONSUMER LEGISLATION

3.1. Directive 85/577/EEC (contracts negotiated away from business premises)

3.1.1. Table of Correspondence references

Analytical study of Montenegrin legislation showed that the intention in Montenegro was to transpose this Directive into the CPL. It has also been found that Montenegrin legislation fulfils the requirements provided for by this Directive to a substantial extent. However, certain differences from the Directive have been noticed which include either non-transposition of certain provisions of the Directive or insufficiently precise and clear legal provisions, which calls into question the correctness of transposition of this Directive.

Inconsistencies between Montenegrin legislation and the Directive have been found in the following elements:

1. When defining the scope of the rules on selling away from business premises, the CPL lays down that such rules, inter alia, encompass the cases of selling in public places, while the same Law does not provide that those rules also apply to excursions organised by the trader. In principle, broadening the scope of application of those rules to include selling in public places would be in accordance with the Directive, since thus the consumers are afforded a higher level of protection. However, excluding from the CPL situations in which the products are sold during excursions organised by traders means that Montenegrin law in that segment does not afford the consumers the level of protection provided for by the Directive. Consequently, in that segment Montenegrin law does not comply with the EU law.
2. Article 49 of the CPL lays down that a trader must present to the consumer evidence that he is authorised to conclude the contract. First of all, it is not clear what the authorisation in question is, and particularly, what the legal consequences when the trader does not present such authorisation to the consumer are, or when the trader does not have such authorisation at all. This is especially important as according to the Directive, the consumer is entitled to a protection afforded by the Directive regardless of whether the trader is authorised for such type of trade or not. Therefore, if it would appear that the market inspectorate would not control the activity of the traders dealing with such type of trade and which do not have an appropriate authorisation, the consumers in Montenegro would be less protected than the consumers in the EU.
3. The CPL does not contain provisions which would correspond to the provision of Article 1(3) and Article 1(4) of the Directive, laying down that the rules of the Directive shall also apply to contracts in respect of which an offer was made by the consumer under conditions similar to those described in previous paragraphs of the same Article irrespective of whether the consumer was bound by that offer or not. Thus, Montenegrin legislation affords the consumers a lower level of protection than that provided by the Directive.
4. The definition of a trader provided for in the CPL differs considerably from the definition of that term in the Directive. Primarily, it results from the CPL that the term "trader" shall mean only a person who concludes a contract for purchase and sale and a contract for the supply of services, and not the persons concluding other types of contracts (e.g. leasing agreement, partnership agreement - See C-215/08), while, on the other hand, the Directive lays down that 'trader' means any person who acts in

his professional capacity in the market, hence, who concludes any type of contract. Furthermore, according to the CPL 'trader' shall mean only a person who actually concludes a contract, while according to the Directive 'trader' shall mean any person acting in the market regardless of whether he will conclude a contract in a particular case or not. Finally, unlike the Directive, the CPL does not lay down that 'trader' also means a person acting in the name or on behalf of a trader.

It can be concluded from the above that the scope of application of the rules in the CPL on selling away from business premises is narrower than the scope of application of rules of the Directive and that thus consumers in Montenegro are less protected than they should be according to the Directive.

5. Directive prescribes that its provisions do not apply to contracts for the supply of foodstuffs or beverages or other goods intended for current consumption in the household and supplied by regular roundsmen. On the other hand, the CPL lays down that its provisions on selling away from business premises do not apply to periodical supply of foodstuffs or beverages or other goods intended for current consumption in the household. Therefore, while on the basis of the Directive, its rules do not apply only to those contracts where the mentioned items are supplied by regular roundsmen, pursuant to the CPL its provisions shall not apply to any contracts for sale and purchase of the mentioned items regardless of whether they are supplied by regular roundsmen or not.

Thus, the scope of exclusion of the rules of the CPL is broader than the scope of exclusion of the rules of the Directive, which means that in that segment the consumers in Montenegro are less protected than provided for by the Directive.

6. The Directive provides that its provisions shall not apply to the contracts concluded on the basis of a trader's catalogue which the consumer has a proper opportunity of reading in the absence of the trader's representative, if there is intended to be continuity of contact between the trader's representative and the consumer in relation to that or any subsequent transaction, and if both the catalogue and the contract clearly inform the consumer of his right to cancel the contract. Unlike the Directive, the CPL provides that its provisions on selling away from trader's business premises shall not apply if the consumer had the opportunity of reading the catalogue, on the basis of which the contract was concluded, in the absence of the trader's authorised representative. Thus, the consumers could be placed in a position which is less favourable than that prescribed by the Directive, because, in the case when the consumer read the catalogue in the presence of the trader's representative, a trader could claim that it was not his authorised representative, and that, consequently, the provisions of the CPL on selling away from business premises should not apply to that situation. Furthermore, the CPL provides that its provisions on selling away from business premises shall not apply if the catalogue and the contract provide for the continuity of any business relationship between the trader and the consumer, while the Directive lays down that its provisions shall only apply if the catalogue and the contract provide for a continuity of contact between the trader's representative and the consumer in relation to that or any subsequent transaction. Thus, the scope of exclusion of the rules of the CPL is broader than the scope of exclusion of the rules of the Directive, which means that in this segment the consumers in Montenegro are less protected than provided for by the Directive. Finally, the provision of Article 54 paragraph 4 item 4 contains wrong reference to Article 50, instead of Article 51 of the Law.
7. Directive lays down that the trader is required to give consumer written notice of his right of cancellation. The CPL provides that such notice must be given in writing or in electronic form. Since the CPL does not determine who has the right to decide in which form such notice will be given, it results that the trader could decide that himself, which means that he could use only electronic form which in turn would threaten the position of consumers who do not use computers, such as the elderly. Furthermore, while in respect of this notice the Directive places focus on the consumer's right to cancel the contract and lays down that the trader is required to notify the consumer of his right, the CPL defines that the trader is required to inform

the consumer of all important elements of the contract in such notice. To that effect, there is a danger that the notice of the right to cancel the contract could be “hidden” in a lot of information on other elements of the contract, which could affect adversely the ability of average consumer to be properly informed of his right of cancellation.

8. Directive contains a specific rule which defines at which moment the notice of the right of cancellation must be given to the consumer and it, thus, states that in the case when the consumer initiated the conclusion of the contract, it is the time when the offer is made by the consumer. Since the CPL does not address the situation when the consumer initiates the conclusion of the contract, the CPL does not provide for a specific rule on the period within which the notice of the right of cancellation must be given to the consumer in situations when the consumer initiated the conclusion of the contract.
9. Pursuant to the Directive, in the case when the consumer exercises his right of cancellation, the consumer must cancel the contract by written notice given within the period laid down in the Directive. Moreover, Directive prescribes that it will be considered that the contract has been cancelled timely if the notice is dispatched before the end of the period laid down in the Directive. This rule has not been implemented in the CPL which creates uncertainty about whether it is sufficient for the contract to be cancelled if the notice of cancellation is dispatched before the end of the period or it is necessary that the trader receive such notice before the end of such period, in which case the consumers in Montenegro would be placed in a more unfavourable position than that prescribed by the Directive.
10. Article 52 of the CPL provides that the consumer shall not have the right to cancel the contract negotiated away from the trader’s business premises in all those situations in which it does not have the right to cancel the distance contract. Since the Directive does not provide for such exclusion, it arises that the provision of Article 52 of the CPL places the consumers in Montenegro in a more unfavourable position than that prescribed by the Directive.

3.1.2. Judgments of the Court of Justice of the European Union

The ECJ ruled several times both on interpretation and on implementation of this Directive in individual Member States. In the context of proper implementation of this Directive, the following judgments are particularly important:

Judgment of 14 March 1991 in Case C-361/89 *Di Pinto* [1991] ECR I-01189

In this judgment, the Court ruled, *inter alia*, that Directive does not preclude Member States from extending the protection which it affords to cover traders.

Judgment of 22 April 1999 in Case C-423/97 *Travel Vac SL v Manuel José Antelm Sanchis* [1999] ECR I-02195

In this judgment, the Court ruled, *inter alia*, that the consumer can exercise his right of renunciation without there being any need to prove that the consumer was influenced or manipulated by the trader. Furthermore, the Court ruled in this judgment that the Directive does not preclude a Member State from adopting rules providing that the notice of renunciation is not subject to any condition as to form, explaining it with a claim that thereby the consumers are not placed in a less favourable position, since the informal termination of the contract is less demanding on the consumer than the written form. Interpreting this judgment of the Court, it could be concluded that the Member States should not prescribe the form of cancellation of contract which would be less favourable to the consumer than the written form prescribed by the Directive.

Judgment of 13 December 2001 in Case C-481/99 *Georg Heininger and Helga Heininger v Bayerische Hypo- und Vereinsbank AG* [2001] ECR I-09945

In this judgment, the Court ruled, *inter alia*, that the Directive precludes the national legislature from imposing a time-limit of one year from the conclusion of the contract within which the right of cancellation may be exercised, where the consumer has not received the notice of his right of cancellation. Therefore, in this judgment, the Court found that in the case when the consumer has not received the notice of his right of cancellation, the consumer's right of cancellation cannot be limited by time.

Judgment of 25 October 2005 in Case C-229/04 *Crailsheimer Volksbank eG v Klaus Conrads and Others* [2005] ECR I-09273

In this judgment, the Court ruled, *inter alia*, that the Directive must be interpreted as meaning that when a third party intervenes in the name of or on behalf of a trader in the conclusion of a contract, the application of the Directive cannot be made subject to the condition that the trader was or should have been aware that the contract was concluded away from business premises.

Judgment of 10 April 2008 in Case C-412/06 *Annelore Hamilton v Volksbank Filder eG* [2008] ECR I-2383

In this judgment, the Court ruled, *inter alia*, that the Directive does not preclude the national legislature to provide that the right of cancellation may be exercised no later than one month from the time at which the contracting parties have performed in full their obligations under a contract for long-term credit, where the consumer has been given defective notice concerning the exercise of that right.

Judgment of 15 April 2010 in Case C-215/08 *E. Friz GmbH v Carsten von der Heyden*

In this judgment, the Court ruled, *inter alia*, that the Directive also applies to contracts on partnership, concluded away from business premises, when the principal purpose of the contract is not to become a member of that partnership, but is a means of capital investment.

Judgment of 17 December 2009 in Case C-227/08 *Eva Martín Martín v EDP Editores SL*

In this judgment, the Court ruled, *inter alia*, that the Directive does not preclude the national legislature to provide that where the consumer was not informed of his right of cancellation, the national court may declare, of its own motion, that a contract is void, even though the consumer at no stage pleaded that the contract was void.

3.1.3. Practical recommendations

1. The scope of application of the rules of the CPL concerning contracts negotiated away from trader's business premises should be harmonised with the requirements of the Directive. To that end, it should be prescribed that those rules of the CPL also apply to contracts negotiated during an excursion organised by the trader. In the process, a provision of the current CPL according to which those rules would also apply to contracts negotiated in public places could be kept, since by such provision consumers are afforded higher level of protection than that provided by the Directive. However, the term "public place" should be defined more precisely.
2. The role of "trader's authorisation for conclusion of contract" provided for by Article 49 of the CPL should be defined more precisely and the consequences of not presenting such authorisation should be defined.
3. In accordance with Article 1(3) and Article 1(4) of the Directive, the CPL should provide that its rules also apply to situations when the consumer suggested to conclude a contract away from trader's business premises, irrespective of whether he was bound by that offer or not.
4. The definition of a trader should be harmonised with the definition of that term in the Directive, and in particular it should be defined that a "trader" means also a person acting in the name or on behalf of a trader.

5. The exclusion of the rule of the CPL on contracts negotiated away from business premises concerning periodical supply of foodstuffs or beverages to the household should be regulated more precisely in accordance with the Directive.
6. The exclusion of the rules of the CPL on contracts negotiated away from business premises concerning selling on the basis of a catalogue should be regulated more precisely in accordance with the Directive.
7. The rules of the CPL on contracts negotiated away from business premises concerning the trader's obligation to give consumer a notice of his right of cancellation should be regulated more precisely in accordance with the Directive.
8. In accordance with the Directive, it should be provided that in the cases when the consumer initiated the conclusion of the contract, the period for sending the notice on the consumer's right of cancellation starts to run from the time when the offer is made by the consumer.
9. In accordance with the Directive, it should be provided that it will be considered that the contract has been cancelled timely if it is dispatched within the time limits laid down in the CPL.
10. The provision of Article 52 of the current CPL should be repealed.
11. In accordance with the ECJ's judgment in Case C-423/97, it should be prescribed that the consumer can exercise his right of renunciation regardless of the reasons that led him to do that.
12. In accordance with the ECJ's judgment in Case C-481/99, it should be prescribed that in the case when the consumer has not received the notice of his right of cancellation, his right of cancellation shall not be limited by time.

3.2. Directive 90/314/EEC (package travel, package holidays and package tours)

3.2.1. Table of Correspondence references

The analysis of legislation showed that in Montenegro Directive 90/314/EEC has been transposed into the Law on Tourism and the Law on Obligations. Montenegrin legislation has been harmonised with the Directive to a certain extent; however, there are some inconsistencies.

Inconsistencies between Montenegrin legislation and the Directive have been identified in the following elements:

1. The Law on Tourism is not fully harmonised with the definition of a package in the Directive.

The Law on Tourism defines that a 'package' is a pre-arranged combination of not fewer than two offered individual services, consisting of transport, accommodation and other tourist or hospitality services that make a whole, and are provided in the period of more than twenty-four hours or include at least one overnight accommodation and are sold at an inclusive previously fixed price. The Directive is more precise in the definition of a package, since it states that the separate billing of various components of the same package shall not absolve the organizer or retailer from the obligations under the Directive.

2. National legislation is not fully harmonised with the definition of an organizer in the Directive.

The Directive defines that 'organizer' means the person who, other than occasionally, organizes packages and sells or offers them for sale, whether directly or through a retailer. The Law on Tourism links the term 'organizer' with the travel agencies on the one hand while it also gives possibility for some specific organisations to appear as organizers. The Law on Obligations does not contain the definition of an "organizer". Accordingly, there is an inconsistency as regards compliance.

3. National legislation is not fully harmonised with the definition of a retailer in the Directive.

According to the Directive, 'retailer' means the person who sells or offers for sale the package put together by the organizer. National legislation omits the term "offers for sale" and defines that "retailer" may sell and offer only the packages for which it has concluded a contract and terminology used is not in line with the Law on Obligations.

4. National legislation is not fully harmonised with the definition of a consumer (traveller) in the Directive.

The Directive defines that 'consumer' (traveller) means the person who takes or agrees to take the package ('the principal contractor'), or any person on whose behalf the principal contractor agrees to purchase the package ('the other beneficiaries') or any person to whom the principal contractor or any of the other beneficiaries transfers the package ('the transferee'). The Law on Tourism defines that 'traveller' means "the person who buys or agrees to buy the package or another tourist service, as well as a person on whose behalf or in whose name a tourist service is acquired or any other person to whom the use of package or service is assigned". In the first half (the principal contractor and the other beneficiary) the definition is harmonised. However, in the final part of the definition, the Law on Tourism uses the term "assignment of right of use" while the Directive uses the term "transfer of the package". Difference which occurs is significant because there is a different legal regime in the transfer of contract and the assignment of right (cession).

5. National legislation is not fully harmonised with the definition of a contract in the Directive.

According to the Directive, 'contract' means the agreement linking the consumer to the organizer and/or the retailer. The Law on Tourism is linking the contract only to the organizer. Furthermore, the Law on Tourism (Article 29 paragraph 2) lays down that the contract should be made in accordance with the law governing obligations, although it also contains the rules on the content of the contract (Article 31). It should be pointed out that the subject matter of the travel contract is by its nature the subject matter which is regulated by the Law on Obligations. The existence of duality of legal regime does not favour legal certainty and consumer protection. Additionally, in such dual legal regime there is a problem as regards the possibility to apply both legal frameworks. Namely, if certain aspects of the contract of organisation of travel are regulated by the Law on Tourism, and certain aspects of such contract by the Law on Obligations, it is not possible to apply in parallel both legal frameworks. In that case, the Law on Tourism, as *lex specialis*, would override the application of the Law on Obligations, as *lex generalis*. In such a situation, it should be concluded that in fact Montenegrin legislation is not harmonised with the Directive in all aspects regulated by the Law on Obligations.

6. National legislation is not fully harmonised with the rules of the Directive as regards the content of information relating to the contract.

While the Directive lays down that any descriptive matter supplied by the organizer and/or the retailer to the consumer, the price of the package and any other conditions applying to the contract must not contain any misleading information; in the Law on Obligations information is primarily related to the advertising material and not to other information materials which the organizer could give to the consumer, on the one hand, while the Law on Tourism regulates the content of information in an incomplete manner. Namely, the Law on Tourism completely correctly lays down that information material may not contain incorrect information, but it does not provide for the situation when the information is correct but misleading to an average consumer.

7. National legislation is not fully harmonised with the rules of the Directive concerning the time of providing information on visas and health formalities.

The Law on Obligations is not precise in that the information on health formalities and visas should be provided before the contract is concluded as defined in the Directive.

8. National legislation is not fully harmonised with the rules of the Directive concerning local representatives of organizers and/or retailers, i.e. on establishing contact with the organizer and/or retailer.

The Directive provides that the organizer and/or retailer shall provide information about the local representative to the consumer, in good time before the start of the journey, specifying

the content of such information. The Law on Obligations and the Law on Tourism also provide for giving of information about local representative, but do not specify information details within the meaning of the Directive.

Additionally, according to the Directive, where no representatives of organizers and/or retailers or local agencies exist, the consumer must in any case be provided with an emergency telephone number or any other information that will enable him to contact the organizer and/or the retailer. This provision has not been transposed into national legislation.

9. National legislation is not harmonised with the rules of the Directive concerning the content of the package contract.

Directive specifies the content of the contract. National legislation of Montenegro introduces dual regime of the contract, regulating also that subject-matter under the Law on Obligations and the Law on Tourism. Furthermore, even though the Law on Tourism refers to the Law on Obligations, it also contains the rules on the contract. Such dualism does not support the consumer protection. Additionally, the list of elements to be included in the contract laid down in national legislation does not comply with the Directive. Namely, the Law on Tourism and the Law on Obligations regulate the mandatory content of the contract differently.

10. National legislation is not harmonised with the rules of the Directive concerning the terms of the contract and manner of providing information on the terms of the contract.

National legislation does not contain all rules of the Directive concerning the form of contract and the manner of providing information. Namely, national legislation does not prescribe, as provided for by the Directive, that the terms of the contract may be submitted in other form and not only in writing, that the information must be comprehensible and accessible to the consumer and that the traveller should be given a copy of the terms of the contract.

11. National legislation is not harmonised with the rules of the Directive concerning last-minute reservations or contracts

Directive lays down that the rules concerning the terms of the contract do not preclude the conclusion of last-minute reservations or contracts. This rule does not exist in the national legislation. The fact that this is not mentioned in legislation may be interpreted as that thus a consumer is afforded a higher level of protection, which is permitted by the Directive. However, bearing in mind also the usual practice of belated conclusion of last-minute reservations or contracts, the interests of the market and the requirement for the information on his rights to be easily available to the consumer, this provision of the Directive should be clearly stated in the legislation.

12. National legislation is not harmonised with the rules of the Directive regarding the transfer of the travel contract.

The Directive provides for clear rules that the traveller may be a person to whom the package is transferred by the principal contractor, as well as the conditions applicable to such transfer. On the other hand, national legislation provides for assignment of rights to use the package (cession). The Directive also provides for joint and several liability of transferors and transferees, in order to protect the organizer/retailer from the situation of not being able to collect the debt from the traveller to whom the principal contractor transferred the contract. Such situation is not provided for in national legislation.

13. National legislation is not harmonised with the rules of the Directive regarding the revision of prices of packages

The Directive contains clear provisions which regulate when the revision of the price is possible. While the Directive lays down that the possibility of revision of the price must be stated in the contract, the Law on Obligations places this into the travel certificate. Despite the fact that the travel certificate is an integral part of the contract, it is still necessary to regulate this issue in accordance with the Directive to achieve full harmonization. According to the requirements of the Directive, the contract should also state how the revised price is to be calculated, as well as the case of revision of the price to allow for variations in transportation costs, including the cost of fuel. This issue is not regulated by national legislation.

14. National legislation is not harmonised with the Directive regarding the rights and obligations of the organizer and the traveller in the case when before the departure the organizer is constrained to alter significantly any of the essential terms.

According to the Directive, if the organizer finds that before the departure he is constrained to alter significantly any of the essential terms, such as the price, he shall notify the consumer as quickly as possible in order to enable him to take appropriate decisions and in particular: either to withdraw from the contract without penalty, or to accept a rider to the contract specifying the alterations made and their impact on the price. The consumer shall inform the organizer or the retailer of his decision as soon as possible. Although by applying rules on amendments to the contract due to altered circumstances it could be concluded that this provision of the Directive has been fully transposed into national legislation, it should be taken into consideration that the procedure for amending the contract due to altered circumstances is far more complicated than that laid down in the Directive and that such interpretation is not in favour of the consumer: the Law on Obligations provides only for the case of revising the price over 10% but it does not include the obligation of notifying as soon as possible.

15. National legislation is not fully harmonised with the Directive regarding the right of the consumer who withdraws from the contract if the organizer alters the terms of the journey

The Directive sets out that if the consumer withdraws from the contract because the organizer finds that before the departure he is constrained to alter significantly any of the essential terms, such as the price, or if, for whatever cause, other than the fault of the consumer, the organizer cancels the package before the agreed date of departure, the consumer shall be entitled: (a) either to take a substitute package of equivalent or higher quality where the organizer and/or retailer is able to offer him such a substitute (if the replacement package offered is of lower quality, the organizer shall refund the difference in price to the consumer); (b) or to be repaid as soon as possible all sums paid by him under the contract. The right to take a substitute package, under conditions laid down in the Directive, is not provided for by national legislation at all, while the right to be repaid all sums paid by him under the contract exists but it is not specified whether the organizer is to do that as soon as possible.

16. National legislation is not harmonised with the Directive as regards the right of the consumer (traveller) to equivalent transport back to the place of departure, or to another return-point to which the consumer has agreed if it is impossible to make alternative arrangements or these are not accepted by the consumer for good reasons, where the package is changed after departure

The Directive prescribes a wide range of consumer rights where, after departure, a significant proportion of the services contracted for is not provided or the organizer perceives that he will be unable to procure a significant proportion of the services to be provided. National legislation provides for a broader list of rights but that list does not contain the right, provided for by the Directive, that, if it is impossible to make alternative arrangements or these are not accepted by the consumer for good reasons, the organizer shall, where appropriate, provide the consumer, at no extra cost, with equivalent transport back to the place of departure, or to another return-point to which the consumer has agreed and shall, where appropriate, compensate the consumer.

17. National legislation is not harmonised with the Directive as regards the right to prompt assistance by the organizer and/or retailer to a consumer in difficulty that may not be attributable to the organizer and/or retailer.

The Directive prescribes that with regard to the damage resulting for the consumer from the failure to perform or the improper performance of the contract, where such failures are attributable to a third party unconnected with the provision of the services contracted for, and are unforeseeable or unavoidable, or if such failures are due to a case of force majeure (such as that defined in the Directive), or to an event which the organizer and/or retailer or the supplier of services, even with all due care, could not foresee or forestall, the organizer and/or retailer party to the contract shall be required to give prompt assistance to a consumer in difficulty. This obligation of the organizer and/or retailer i.e. the consumer right is not provided for by the national legislation.

18. National legislation is not harmonised with the Directive as regards the obligation of the organizer and/or retailer or his local representative, if there is one, to make prompt efforts to find appropriate solutions in cases of complaint. Directive lays down that in cases of complaint, the organizer and/or retailer or his local representative, if there is one, must make prompt efforts to find appropriate solutions. There is no such provision in the national legislation.

19. It is not clear whether the current Montenegrin legislation provides for the possibility for a traveller whose contract has not been performed or has been improperly performed to claim compensation for non-material damage from the organizer. In the judgment delivered in Case C-168/00, the ECJ held that the Directive must be interpreted as conferring, in principle, on a traveller a right to claim compensation for non-material damage resulting from the non-performance or improper performance of the contract of organisation of travel.

3.2.2. Judgments of the Court of Justice of the European Union

Judgment of 8 October 1996 in Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Erich Dillenkofer, Christian Erdmann, Hans-Jürgen Schulte, Anke Heuer, Werner, Ursula and Trosten Knor v Bundesrepublik Deutschland* [1996] ECR I-04845

According to the Judgment the *failure* to transpose a directive gives rise to a right of reparation for individuals suffering injury if the result prescribed by the directive entails the grant to individuals of rights whose content is identifiable and a causal link exists between the breach of the State's obligation and the loss and damage suffered.

Furthermore, the results prescribed by Article 7 of the Directive entail the grant to travellers of rights guaranteeing a refund of money paid over and their repatriation in the event of the organizer's insolvency, while the content of those rights is sufficiently identifiable.

According to the Judgment, Article 7 is to be interpreted as meaning that the security given, regardless of the form, obliges the organizer to honour it and that a Member State may not omit to transpose a directive on the basis of a judgment of a domestic supreme court.

According to the Judgment, the Directive does not require Member States to adopt specific legislation protecting travellers against their own negligence. Where a directive has not been transposed within the prescribed period, a national court may inquire whether the injured person showed reasonable care so as to avoid or prevent damage.

Judgment of 14 May 1998 in Case C-364/96 *Verein für Konsumenteninformation v Österreichische Kreditversicherungs AG* [1998] ECR I-02949

Article 7 of Directive is to be interpreted as covering, as an insured event, a situation in which the purchaser of a package who has paid the travel organizer for the costs of his accommodation is compelled, following the travel organizer's insolvency, to pay the hotelier for his accommodation again in order to be able to leave the hotel and return home.

Judgment of 1 December 1998 in Case C-410/96 *Criminal proceedings against André Ambry* [1998] ECR I-07875

According to the judgment it should be interpreted that Article 7 in conjunction with Article 8 prescribes that the obligation to make provision for security constitutes a minimum obligation, and that Member States may provide that the security in question must not only exist but must also be immediately available for payment if required for the repatriation of travellers, provided that this is done in conformity with the Treaty, and in particular with Article 59. It shall be deemed contrary to EU law, for national rules to require that, where the security is provided by a credit institution or insurance company situated in another Member State, the guarantor must conclude an agreement with a credit institution or insurance company situated in the national territory.

Judgment of 15 June 1999 in Case C-140/97 *Walter Rechberger, Renate Greindl, Hermann Hofmeister and Others v Republik Österreich* [1999] ECR I-03499

According to the judgment, Article 7 applies even if the consideration which the purchaser is required to pay does not correspond to the total value of the package or relates only to a single component of it. Secondly, there is no basis in the text of the Directive for limiting its scope to packages offered to a potentially unlimited number of consumers and it would be contrary to the purpose of the Directive to do so. Lastly, the fact that an advertising campaign consisting in the offer of free trips by a daily newspaper has been found to be incompatible with national competition law cannot prevent those trips from constituting package travel within the meaning of the Directive.

The security prescribed by Article 7 of the Directive must cover all contracts for package travel entered into from the date of accession to the European Union. Article 7 is not properly transposed into national legislation, where the national legislation does not require an effective guarantee of the refund of all money paid over and repatriation in the event of the travel organizer's insolvency.

According to the judgment, once a direct causal link has been established, a Member State's liability for breach of Article 7 of the Directive cannot be precluded by imprudent conduct on the part of the travel organizer or by the occurrence of exceptional or unforeseeable events, since such circumstances are not such as to preclude the existence of a direct causal link.

Judgment of 12 March 2002 in Case C-168/00 *Simone Leitner v TUI Deutschland GmbH & Co. KG* [2002] ECR I-02631

According to the judgment, Article 5 of Directive 90/314/EC must be interpreted as conferring, in principle, on consumers a right to compensation for non-material damage resulting from the non-performance or improper performance of the services constituting a package (package holiday).

Judgment of 30 April 2002 in Case C-400/00 *Club-Tour, Viagens e Turismo SA v Alberto Carlos Lobo Gonçalves Garrido, and Club Med Viages Lda* [2002] ECR I-04051

According to the judgment, the term package used in Article 2(1) of Directive 90/314, must be interpreted so as to include holidays organised by travel agents, at the request of and in accordance with the specifications of a consumer or limited group of consumers. According to the definition of package given in Article 2(1) of the directive, which is designed amongst other things to protect consumers who buy package holidays, it is enough if, first, the combination of tourist services sold by a travel agency at an inclusive price includes two of the three services referred to in that paragraph and, second, that service covers a period of more than 24 hours or includes overnight accommodation. There is nothing in that definition to suggest that holidays organised at the request of and in accordance with the specifications of a consumer or a defined group of consumers cannot be regarded as package holidays within the meaning of the Directive. That interpretation is reinforced by the directive, which provides that among the elements to be included in a contract covered by the directive are special requirements which the consumer has communicated to the organizer or retailer when making the booking, and which both have accepted.

As the definition of package referred to in Article 2(1) of Directive 90/314 includes holidays organised in accordance with the consumer's specifications, the term pre-arranged combination used in that provision necessarily covers cases where the combination of tourist services is the result of the wishes expressed by the consumer up to the moment when the parties reach an agreement and conclude the contract. The term pre-arranged combination used in Article 2(1) of Directive 90/314 must be interpreted so as to include combinations of tourist services put together at the time when the contract is concluded between the travel agency and the consumer.

3.2.3. Practical recommendations

On the basis of the above considerations, we give the following recommendations:

1. The Law on Tourism should be amended to bring the definitions of “package”, “organizer”, “retailer” (intermediary), “consumer” (traveller) and “contract” in line with the provisions of the Directive and the judgment of the ECJ in Case C-400/00.
2. National legislation should be amended so as to provide for a prohibition to provide misleading information.
3. National legislation should specify that the information on health formalities and visas should be provided before the contract is concluded.
4. National legislation should be amended to provide for an obligation to give precise and detailed information on local representatives of the organizer and/or retailer, i.e. on how to contact the organizer and/or retailer.
5. National legislation has a dualism in regulating the package contract. By its nature this is a subject matter to be regulated by the Law on Obligations and all rules should be contained in that Law. However, if it is not possible to amend that Law, the Law on Tourism should regulate the mandatory content of the contract in the same way as the Law on Obligations and the Directive.
6. The provisions of the national legislation concerning the terms of the contract and manner of providing information on the terms of the contract should be specified, i.e. it should be provided that the terms of contract may be submitted in other form and not only in writing, that the information must be comprehensible and accessible and that the traveller should be given a copy of the terms of the contract.
7. National legislation should specify that the provisions relating to information on the terms of the contract do not preclude the conclusion of last-minute reservations or contracts.
8. National legislation should clearly prescribe that it is possible to transfer the contract and not to assign rights and that the transferor of the package and the transferee shall be jointly and severally liable to the organizer and/or retailer.
9. National legislation should specify the conditions for the revision of the price and the cases when the revision of the price is possible.
10. National legislation should be amended to provide for the rights and obligations of the organizer and the traveller in the case when before the departure the organizer is constrained to alter any of the essential terms provided for by the Directive.
11. It should be specified in the Law on Obligations that in accordance with the judgment delivered in Case C-168/00, the consumer, in principle, has the right to compensation for non-material damage resulting from the non-performance of the contract.
12. National legislation should be amended so that it precisely defines the rights of the consumer who withdraws from the contract if the organizer alters the terms of the journey and particularly to include the right to equivalent transport back to the place of departure, or to another return-point to which the consumer has agreed if it is impossible to make alternative arrangements or these are not accepted by the consumer for good reasons, where the package is changed after departure.
13. National legislation should be amended so that it provides for an obligation of the organizer and/or retailer to give prompt assistance to a consumer in difficulty that may not be attributable to the organizer and/or retailer; as well as the obligation of the organizer and/or retailer or his local representative if there is one, to make prompt efforts to find appropriate solutions in cases of complaint.

3.3. Directive 93/13/EEC (unfair terms in consumer contracts)

3.3.1. Table of Correspondence references

The analytical study of Montenegrin legislation showed that the intention in Montenegro was to transpose this Directive into the CPL. It has also been found that Montenegrin legislation fulfils the requirements provided for by this Directive to a substantial extent. However, certain differences from the Directive have been noticed which include either non-transposition of certain provisions of the Directive or insufficiently precise and clear legal provisions, which calls into question the correctness of transposition of this Directive.

Inconsistencies between Montenegrin legislation and the Directive have been found in the following elements:

1. Unlike the Directive, the CPL does not provide that the rules of that Law on unfair contract terms shall not apply to the contractual terms which correspond, in terms of contents, to mandatory legal provisions and those which reflect rules and principles of international conventions, particularly in the transport area.

Although, at first glance, such legal provision affords greater protection to the consumers, which would be in principle permitted on the basis of Article 8 of the Directive, it is questionable whether such provision is in accordance with the Treaty on the European Union. Apart from that, a question arises as to the appropriateness of such provision. Namely, it is assumed that mandatory legal rules and rules of the international conventions do not contain unfair provisions, so that such legal provision indirectly open up the possibility to challenge mandatory legal rules and the rules of international conventions.

2. Definitions of a consumer and a trader in the CPL do not correspond fully to the definitions of those terms in the Directive.

While the Directive makes it completely clear that the consumer shall be any natural person who concludes any type of contract for purposes outside his profession, according to the CPL the consumer shall be only the natural person who concludes contract for purchase and sale for purposes outside his profession. The same can also be said in the context of legal definition of a trader. In that connection, it is not clear whether the provisions of the CPL on unfair contract terms include all types of contracts or only some types. Thereby, the CPL does not meet the requirement that the legal provisions regulating these matters be sufficiently precise and clear (see judgment in Case C-478/99).

3. While the Directive sets out that a contractual term shall be regarded as unfair if, *inter alia*, it causes a **significant** imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer, the Law provides that to assess a certain contractual term as unfair any extent of imbalance in the parties' rights and obligations, to the detriment of the consumer, shall be sufficient.

Although the mentioned legal provision affords the consumers greater protection than that provided for by the Directive, and thus complies with the requirements of the Directive, a question whether such provision is opportune from the perspective of legal certainty may be raised. Namely, according to the current legal provision, a validity of any contractual term may be disputed even when such provision causes only insignificant imbalance in the parties' rights and obligations.

4. The CPL does not provide for the rule laid down in the Directive which, even in certain situations where it is found that individual contractual term has been individually negotiated, permits to assess the admissibility of the rest of a contract if an overall assessment of the contract indicates that it is a pre-formulated standard contract.

By omitting such provision, Montenegro did not transpose the Directive correctly in this segment. Namely, without the mentioned rule, the very fact that individual contractual term has been individually negotiated would prevent the consumer to challenge the rest of a contract that has not been individually negotiated.

5. The CPL does not contain the rule of the Directive setting out which circumstances will be taken into consideration by the court when assessing whether a certain contractual term is unfair.

On the one hand, legal framework is thus not sufficiently precise and clear, which is contrary to the requirements set out in the Directive (see C-478/99), while, on the other hand, it opens up the possibility, in the absence of uniform criteria, for the courts in Montenegro to assess the admissibility of contractual terms according to the criteria that are different from the European criteria.

6. Unlike the Directive, the CPL does not provide that the assessment of the unfair nature of the terms shall relate neither to the subject matter nor the price, in so far as these terms are written clearly.

Although such provision affords higher level of protection to the consumers, which is permitted on the basis of Article 8 of the Directive, the question arises as to whether such provision is opportune from the viewpoint of legal certainty. Namely, it may reasonably be expected that an averagely careful consumer will be aware of the essential elements of the contract, and that, accordingly, he does not require specific protection. Apart from that, as regards essential elements of the contract, the freedom of negotiating should not be restricted without an important reason. Under the current legal provision, it seems as if the consumers are protected against themselves.

7. Unlike the Directive, which provides that the so-called *contra preferentem* method of interpretation of contracts shall not apply in the procedures for collective consumer protection, the CPL enables that method of interpretation to be applied in those procedures as well. Additionally, while the Directive provides that, in the cases where such method of interpretation of contracts is permitted, the interpretation most favourable to the consumer shall prevail, the CPL provides that the interpretation which is more favourable to the consumer shall prevail.

Such provision does not comply with the judgment delivered in Case C-70/03. Consequently, in this segment Montenegro did not transpose the Directive correctly.

8. Montenegro did not transpose the rule of the Directive which lays down that the contractual term on the choice of applicable law shall not be taken into account if the chosen applicable law provides for a lower level of protection than that afforded by the Directive.

By such legal provision the consumers in Montenegro are placed in a less favourable position in relation to the Directive, from which it arises that in this segment Montenegro did not transpose the Directive correctly.

9. The CPL does not specify clearly that the procedures for the protection of consumers' collective interests in the segment of unfair contract terms may be initiated against associations of traders even in situations when the recommended unfair contractual term has not been used in a specific contract.

It results from the foregoing that in this segment Montenegrin legislation is not precise and clear enough, which is contrary to the requirements laid down in the judgment delivered in Case C-372/99.

10. It is not apparent from the CPL that when this Law entered into force the public has been informed that this Directive has been transposed into that Law.

Therefore, it arises that in this segment Montenegro did not transpose the Directive correctly.

11. Although the CPL provides for indicative list of unfair contract terms, individual terms contained in that list do not correspond, in terms of contents, fully to the annex to the Directive.

3.3.2. Judgments of the Court of Justice of the European Union

The ECJ ruled several times either on interpretation or on implementation of this Directive in individual Member States. In the context of proper implementation of this Directive, the following judgments are particularly important:

Judgment of 24 January 2002 in Case C-372/99 *Commission of the European Communities v Italian Republic* [2002] ECR I-00819

In this Judgment the Court held that the Italian Republic has failed to implement this Directive correctly, more specifically because it did not clearly prescribe that the so-called action for the protection of consumers' collective interests may also be brought against associations of traders that recommend the use of specific unfair contract term even in situations when the recommended provision has not been used in a specific contract. It is clear from the judgment that the rules prohibiting unfair terms in consumer contracts cover not only those contract terms which are actually used but also those that could potentially be used.

Judgment of 7 May 2002 in Case C-478/99 Commission of the European Communities v Kingdom of Sweden [2002] ECR I-04147

In this judgement the Court held:

- that each of the Member States is obliged to adopt all the measures provided for by the Directive necessary to ensure that the system established is fully effective, and that it is essential that the legal situation resulting from national implementing measures be sufficiently precise and clear so that individuals are made fully aware of their rights,
- that the list of unfair terms laid down in the annex to the Directive is only indicative and that, consequently, some terms appearing in the list need not necessarily be considered unfair and, conversely, a term that does not appear in the list may none the less be regarded as unfair and that the list does not give consumers rights going beyond those that result from Articles 3 to 7 of the Directive.
- that the prescribed list of unfair contract terms constitutes a valuable source of information for the consumers and that, despite the fact that it does not necessarily need to form an integral part of the legal act implementing the Directive, it has to be published in a way ensuring that the public can obtain knowledge of it.

Judgment of 9 September 2004 in Case C-70/03 Commission of the European Communities v Kingdom of Spain [2004] ECR I-07999

In this judgment, the Court decided that Spain failed to implement the Directive correctly because it did not provide that *contra preferentem* method of interpretation shall not apply in the procedures for collective protection initiated against an individual trader or the group of traders.

In these proceedings, Spain contended that by extending *contra preferentem* method of interpretation to cover the procedures for collective protection of consumers, the consumers are afforded higher level of protection, which is permitted bearing in mind that this Directive is a minimum harmonisation directive. On the other hand, the Court held that by such provision the consumers are placed in a more unfavourable position because in the procedures for collective protection the consumers are not provided protection *in concreto* but the protection *in abstracto*.

In the mentioned judgment, the Court also held that Spain failed to implement the Directive correctly because it did not provide that the consumers cannot be denied protection provided by the Directive on the basis of the choice of applicable law.

3.3.3. Practical recommendations

On the basis of the above considerations, we give the following practical recommendations:

1. It should be prescribed by the law that the rules on unfair terms in consumer contracts do not apply to contractual terms which reflect mandatory legal provisions and the rules of international conventions.
2. The terms “consumer” and “trader” should be more specifically defined by the law to correspond to the definitions of those terms in the Directive.
3. It should be prescribed that the contractual term shall be regarded as unfair only if it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.
4. It should be prescribed that even in situations when individual contractual term has been individually negotiated it is permitted to assess the admissibility of other terms of that contract.
5. In accordance with the Directive, a legal rule setting out which circumstances will be taken into consideration by the court when assessing whether a specific contractual term is unfair should be provided for.
6. In accordance with the Directive, it should be prescribed by the law that the assessment of admissibility of the terms on the subject matter or the price shall not be performed.

7. In accordance with the Directive, it should be prescribed by the law that *contra preferentem* method of interpretation of contracts shall not apply in the procedures for collective consumer protection.
8. In accordance with the Directive, it should be prescribed by the law that the contractual term on the choice of applicable law shall not be taken into account if the chosen law affords the consumer a lower level of protection than that provided for by Montenegrin law.
9. It should be prescribed by the law that the procedure for collective consumer protection against an association of traders may also be initiated in respect to the contractual term that has only been recommended and not necessarily used in a specific contract.
10. It should be stated in the transitional and final provisions of the Law that this Directive has been transposed into that law.
11. In accordance with the Directive, indicative list of unfair contract terms should be defined more specifically.

3.4. Directive 97/7/EC (distance contracts)

3.4.1. Table of Correspondence references

The analytical study of Montenegrin legislation showed that as a rule the intention in Montenegro was to transpose this Directive into the CPL, while some elements, and in particular the definitions, have been given in some specific pieces of legislation, such the Law on Electronic Communications and the Law on Electronic Media. In the process, it has been established that Montenegrin legislation fulfils the requirements provided for by this Directive to a considerable extent. Nevertheless, certain differences from the Directive have been noticed which comprise either non-transposition of certain provisions of the Directive, or insufficiently precise or clear legal provisions, which calls into question the correctness of transposition of this Directive.

Inconsistencies between the Montenegrin legislation and the Directive have been found in the following elements:

1. Definition of a trader in the CPL has not been fully harmonised with the definition of that term in the Directive. On the one hand, legal definition of that term is broader than the definition in the Directive as the CPL permits that a trader shall mean any person selling goods or supplying services to consumers, regardless of whether he does it in his professional capacity. Such discrepancy is, however, permitted since it affords greater protection to the consumers. However, the CPL states that a trader shall mean any person selling goods or supplying services to consumers. However, it is not clear from this definition whether it also relates to some specific products, such as leasing for instance.
2. The list of means of distance communication in the CPL differs to a certain extent from the list of such means provided for by the Directive. While the Directive refers to addressed and unaddressed printed matters, the CPL only refers to printed matters. Furthermore, while the Directive refers to telephone with or without human intervention, the CPL only refers to the telephone. Therefore, individual means of distance communication are more precisely defined in the Directive than in the CPL. Finally, the CPL does not list videophone and videotext as opposed to the Directive.
3. Definition of operator of a means of distance communication has not been provided for in the CPL, however, that term is defined the Law on Electronic Communication and the Law on Electronic Media. Nevertheless, the definitions in those laws relate only to electronic communication and communication through electronic media, and not to other forms of distance communication, which is why, in the context of consumer protection, those definitions are narrower than those provided for in the Directive. For instance, the definition of operator of a means of distance

communication provided for in those laws would not cover, for instance, publishers of newspapers, catalogues etc.

4. While the Directive provides that some of its provisions shall not apply to contracts for the supply of foodstuffs, beverages or other goods intended for everyday consumption supplied by regular roundsmen, the CPL fails to mention roundsmen in that segment. To that effect, according to the CPL, its rules would not apply to all contracts for the supply of foodstuffs, beverages or other goods intended for everyday consumption to the consumer, while the Directive does not apply to those contracts only if it has been provided that those goods will be supplied to the consumer by regular roundsmen.
5. As regards the obligation to provide the consumer with prior information, the provisions of the CPL correspond in principle to the rules of the Directive. However, the CPL does not provide that this information must be delivered to the consumer in good time prior to the conclusion of the contract, as provided for in the Directive.
6. While the Directive requires that prior information to the consumer should be provided in a clear and comprehensible manner, the CPL provides only that the information must be provided in a comprehensible manner. Furthermore, the CPL does not provide that the information must be given in accordance with the principle of good faith, as provided for in the Directive.
7. In the case of telephone communication, the Directive provides that the consumer must be informed of the commercial purpose of the call beforehand, while the CPL provides only that in the specified cases the consumer must be informed of the purpose of the call.
8. As opposed to the Directive, the CPL does not provide that in the confirmation of prior information the consumer shall be provided information on the geographical address of the person to which the consumer may address his complaints.
9. The CPL contains the provision laying down in what manner and at what moment the contract is terminated if the consumer exercises his right to withdrawal. The Directive does not contain a similar provision. However, since thereby the consumer rights are not decreased, but on the contrary, more legal certainty is introduced in legal framework, this discrepancy is permitted.
10. While the Directive defines that the trader must fulfil the contract within a maximum of 30 days from the day following that on which the consumer forwarded his order, the CPL provides that the trader must fulfil the contract within a maximum of 30 days from the day of conclusion of the contract. Since the conclusion of the contract will take place after the consumer forwarded his order it results that the provision of the CPL is less favourable to the consumer than the provision of the Directive.
11. The Directive lays down that, in the cases where a trader fails to perform his side of the contract in time on the grounds that the goods ordered are unavailable, the consumer must be informed of this situation within 30 days. On the other hand, the CPL only mentions the consumer's rights in the event of failure to perform the contract in time. However, the CPL does not provide for the trader's obligation to inform the consumer within 30 days that he is unable to perform the contract.
12. Unlike the Directive, the CPL does not provide for consumer protection mechanisms in the case of payment by payment card.
13. The same as the Directive, the CPL provides for protection mechanisms in the case of supplies by the trader without their being ordered. The CPL provides that such techniques of trading shall constitute unfair commercial practice and that, as such, they are prohibited. However, the CPL does not regulate consumer protection in

situations when the trader states in a contract that the absence of a response shall constitute consent to the conclusion of the contract.

14. Unlike the Directive, the CPL does not provide for the system of collective protection of consumers against acts contrary to the rules of that Law concerning distance selling, both regarding the traders and regarding the operators of means of distance communication.

15. Montenegro did not transpose the rule of the Directive laying down that the contractual term on the choice of applicable law will not be taken into account if the chosen applicable law affords a lower level of consumer protection than that afforded by the Directive.

By such legal provision the consumers in Montenegro are placed in a more unfavourable position than that provided for in the Directive, from which it arises that in this segment Montenegro did not transpose this Directive correctly.

16. Unlike the Directive, the CPL does not provide that its rules on distance selling constitute general rules (*lex generalis*) which will not apply in the cases when some other law regulates specifically distance selling of some specific types of products.

17. It is not clear from the CPL that when it entered into force the public was informed that this Directive has been transposed into that law.

Consequently, in this segment Montenegro did not transpose the Directive correctly.

3.4.2. Judgments of the Court of Justice of the European Union

The ECJ ruled several times either on interpretation or on implementation of this Directive in individual Member States. In the context of correct implementation of this Directive, the following judgments are particularly important:

Judgment of 3 September 2009 in Case C-489/07 *Pia Messner v Firma Stefan Krüger* [2009] ECR I-07315

In this Judgment, the Court held that the rules of Article 6(1) and Article 6(2) of the Directive (regulating consumer's right of withdrawal) must be interpreted as precluding a provision of national law which provides that, in the case of withdrawal by a consumer within the withdrawal period, a seller may claim compensation for the value of the use of the goods until they are returned. However, the Court also underlined that the mentioned provisions of the Directive do not prevent the consumer from being required to pay compensation for the use of the goods in the case where he has made use of those goods in a manner incompatible with the principles of law, such as those of good faith or unjust enrichment.

Judgment of 15 April 2010 in Case C-511/08 *Verbraucherzentrale Nordrhein-Westfalen eV v Handelsgesellschaft Heinrich Heine GmbH*, OJ (2010) C 148, 0006 - 0007

In this Judgment, the Court held that the provision of Article 6(2) of the Directive precludes national legislation which allows the supplier to charge the costs of delivering the goods to the consumer where the latter exercises his right of withdrawal.

3.4.3. Practical recommendations

On the basis of the above considerations, we give the following practical recommendations:

1. The definition of a trader should be harmonised with the definition of that term in the Directive.
2. The list of means of distance communication to which the Law applies should be supplemented in accordance with the Directive.
3. The operator of a means of distance communication should be defined by the CPL in accordance with the Directive.

4. It should be specified that the rules of the Law concerning distance selling do not apply only to contracts for the supply of foodstuffs, beverages or other goods intended for everyday consumption supplied by regular roundsmen.
5. It should be explicitly prescribed that the consumer must be provided with prior information in good time prior to the conclusion of the contract.
6. It should be specified that prior information to the consumer must be provided not only in a comprehensible but also in a clear manner.
7. It should be specified that in the case of telephone communication, the consumer must be previously informed of the commercial purpose of the call.
8. It should be precisely defined that in the confirmation of prior information the consumer shall be provided information on the geographical address of the person to which the consumer may address his complaints.
9. It should be prescribed that the trader must fulfil the contract within a maximum of 30 days from the day following that on which the consumer forwarded his order.
10. It should be prescribed that where the trader is unable to perform his side of the contract, the consumer must be informed of this situation within 30 days.
11. The consumer protection mechanisms in the case of payment by payment card should be prescribed in accordance with the Directive.
12. It should be prescribed that in the case of supplies by the trader without their being ordered the consumer shall not be bound by the contract even where the trader stated in the contract that the absence of a response shall constitute his consent to the conclusion of the contract.
13. The system of protection of collective interests of consumers should be provided.
14. In accordance with the Directive, it should be prescribed by the law that the contractual clause on the choice of applicable law shall not be taken into account if the chosen law affords a lower level of consumer protection than that afforded by the Montenegrin law.
15. It should be prescribed explicitly that the provisions of the CPL concerning distance selling shall not apply if the consumer protection during distance selling of a specific type of products is prescribed by a special law.
16. It should be stated in the transitional and final provisions of the Law that this Directive has been transposed into that Law.

3.5. Directive 98/6/EC (indication of the prices of products offered to consumers)

3.5.1. Table of Correspondence references

The analysis of legislation showed that in Montenegro this Directive has been transposed into the CPL and that there are other relevant laws. Montenegrin legislation is harmonised with this Directive to a small extent.

Inconsistencies between the Montenegrin legislation and the Directive have been found in the following elements:

1. The CPL is not harmonised with the Directive as regards the definition of the selling price.

Unlike the clear definition in the Directive that the selling price shall mean the final price for a unit of the product, or a given quantity of the product, including VAT and all other taxes; the CPL does not contain the definition of the selling price. Although the national law contains the rules on determination and indication of prices, those rules do not comply with the rules on consumer protection, and in particular the right to information.

2. The CPL is not harmonised with the Directive as regards the definition of the unit price.

Unlike the clear definition contained in the Directive that the unit price shall mean the final price, including VAT and all other taxes, for one kilogramme, one litre, one metre, one square metre or one cubic metre of the product or a different single unit of quantity which is widely and customarily used in the Member States in the marketing of specific products; the CPL

does not contain precise definition of a unit price. National legislation contains the same measures as those laid down in the Directive.

3. The CPL is not fully harmonised with the Directive as regards the definition of products sold in bulk.

According to the Directive products sold in bulk shall mean products which are not pre-packaged and are measured in the presence of the consumer, while the CPL defines that **products sold in bulk** shall mean products which are not pre-packaged. The part “measured in the presence of the consumer” is missing from the definition. Accordingly, the definition is incomplete.

4. The CPL is not fully harmonised with the Directive as regards the definition of a trader.

According to the Directive, trader shall mean any natural or legal person who sells or offers for sale products which fall within his commercial or professional activity. The CPL defines that the trader shall mean a person who sells goods or provides services to consumers. There is a difference since it is missing from the definition that the sale should fall within his commercial or professional activity and include offer for sale.

5. The CPL is not harmonised with the Directive as regards the indication of the prices of products offered to consumers.

The selling price and the unit price shall be indicated for all products offered to consumers according to the rules of the Directive. The CPL shall provide that the trader is obliged to inform the consumer on the current price of the product which must be visibly indicated. Since the Law does not contain the definition of the selling price and the unit price it cannot be said that it is harmonised with the Directive.

6. The CPL is not harmonised with the Directive as regards the indication of prices for products sold in bulk.

The Directive provides that for products sold in bulk, only the unit price must be indicated. According to the Directive, unit price shall mean the final price, including VAT and all other taxes, for one kilogramme, one litre, one metre, one square metre or one cubic metre of the product or a different single unit of quantity which is widely and customarily used in the Member States in the marketing of specific products. The CPL defines that the current price of products sold in bulk is indicated on the package or immediately next to the products. Discrepancy occurs in the definition of current price (see paragraph 1 of this section). Even if other laws or secondary legislation define what the term “current price” means and how the current price is determined, this does not comply with the Directive since that information is not easily available to the consumer. The CPL does not define what the term “unit price” shall mean either (see paragraph 2 of this section).

7. The CPL is not harmonised with the Directive as regards indication of the price in advertisements.

The Directive provides that any advertisement which mentions the selling price of products offered to consumers shall also indicate the unit price subject to the rules of the Directive. The CPL does not contain rules on indication of the price in advertisements.

8. The CPL is not fully harmonised with the Directive as regards the manner of indication of the selling price and the unit price.

The Directive defines that the selling price and the unit price must be unambiguous, easily identifiable and clearly legible, while the CPL lays down the rules on indication of “current price” which is not defined in accordance with the Directive. As regards the manner of indication of the price (unambiguous, easily identifiable and clearly legible), despite the fact that the Law uses different terminology, that terminology is in line with the meaning of the provisions of the Directive, consequently, in this segment the Law is harmonised with the Directive. Comprehensively, however, harmonisation is not complete.

9. The CPL is not fully harmonised with the Directive as to what the unit price refers to.

According to the Directive, the unit price shall refer to a quantity declared in accordance with national and Community provisions. Additionally, where national or Community provisions require the indication of the net weight and the net drained weight for certain pre-packed products, it shall be sufficient to indicate the unit price of the net drained weight. The CPL regulates the indication of the price by a provision according to which the current price is indicated as the unit price on the package or immediately next to the product. The terms “current price” and “unit price” do not comply with the Directive (see paragraphs 1 and 2 of this section) so that the Directive has not been transposed correctly.

10. The CPL is not fully harmonised with the Directive as regards penalties for infringements of the provisions on indication of prices.

According to the Directive, Member States shall lay down penalties for infringements of national provisions adopted in application of this Directive, and shall take all necessary measures to ensure that these are enforced. These penalties must be effective, proportionate and dissuasive. National legislation of Montenegro contains the provisions laying down penalties for infringements of national provisions on indication of prices. However, since substantive provisions of the Law are not harmonised with the Directive for the most part, it is considered that this segment of the Law is not harmonised either.

3.5.2. Judgments of the Court of Justice of the European Union

There are no judgments of the ECJ relating to this Directive.

3.5.3. Practical recommendations

On the basis of the above considerations, we give the following practical recommendations:

1. Amend the Law and specify the meaning of the selling price.
2. Amend the Law and specify the meaning of the unit price.
3. Amend the definition of the Law regarding products sold in bulk.
4. Amend the definition of a trader in the Law so as to include the offer for sale and that both offer and sale shall fall within his commercial or professional activity.
5. Amend the CPL as regards the indication of the prices of products offered to consumers.
6. Amend the Law as regards the indication of the prices of products sold in bulk.
7. Amend the CPL so as to include the rules on the manner of indication of the price in advertisements.
8. Amend the CPL so as to include the rules on the manner of indication of the selling price and the unit price.
9. Amend the CPL as to what the unit price refers to.
10. Amend the penal provisions of the CPL relating to indication of prices so as to correspond in terms of contents to the amendments that should be made on the basis of the above-mentioned recommendations.
11. In the transitional and final provisions of the Law into which the Directive is transposed, it should be stated that it is transposed into that law.

3.6. Directive 99/44/EC (certain aspects of the sale of consumer goods and associated guarantees)

3.6.1. Table of Correspondence references

The analysis of legislation showed that in Montenegro this Directive has been transposed into the CPL and the Law on Obligations. Montenegrin legislation is generally harmonised with this Directive but there are certain differences from the Directive.

Inconsistencies between the Montenegrin legislation and the Directive have been found in the following elements:

1. Even though there is a definition of consumer goods in the Directive, legislation does not contain such definition explicitly.

The CPL defines the terms product, goods, technical goods, products sold in bulk, public services but none of these definitions falls within the definition of consumer goods laid down in the Directive.

2. Definition of a seller (within the meaning of the Directive), or a trader as in the CPL does not correspond to the Directive.

It is clear from the Directive that the seller (trader) shall mean any natural or legal person who sells consumer goods in the course of his trade, business or profession. However, from the CPL it would result that the trader shall mean any person who sells goods or provides services to consumers.

3. The CPL does not correspond fully to the Directive as regards the obligations of the guarantor which arise from his advertising relevant to the goods.

The CPL defines the contents of the guarantee and the obligations arising therefrom. However, regardless of the fact that the Law provides that the guarantee statement must contain the statements from the advertising, it does not specify that the consumer shall be entitled to exercise the rights provided for by the law even in cases when the obligations the trader assumed in advertising are not consistent to the obligations stated in the guarantee.

4. The CPL and the Law on Obligations do not contain clear definition of the term 'repair'. The Directive clearly defines the meaning of the term 'repair', as one of consumer rights in the event of lack of conformity of goods supplied with the contract, while the meaning of that term can only be implicitly established from the CPL and the Law on Obligations.

5. National legislation is not completely clear as to whether second-hand goods sold at public auction are excluded from the expression "consumer goods"

The Directive gives the possibility to provide that the expression "consumer goods" does not cover second-hand goods sold at public auction where consumers have the opportunity of attending the sale in person. Legislation excludes these goods implicitly but there is no clear definition.

6. National legislation is not fully harmonised with the Directive as regards the treatment of contracts for the supply of future consumer goods as contracts of sale.

According to the Directive, contracts for the supply of future consumer goods, i.e. goods to be manufactured or produced, are deemed contracts of sale for the purpose of the Directive in any event. The Law on Obligations in Article 466 paragraph 3 regulates that the sale may cover a future object. At the same time, it is relevant for this provision of the Directive that Article 548 of the Law on Obligations regulates sale according to specification. A question is however raised regarding the goods to be manufactured or produced. Namely, the production (manufacturing) of certain goods, is as a rule a contract for services according to the Law on Obligations, whereas Article 670 regulates relationship to a contract of sale in a way that: (1) a contract by which one party undertakes to manufacture a specific movable thing from his own material shall be considered, if in doubt, as a contract of sale; (2) but the contract shall remain a contract for services if the purchaser has undertook to provide a major part of the material needed for the manufacture of the object; and (3) such a contract shall in any case be regarded as a contract for services if the contracting parties had the supplier's work particularly in mind. When regulating these rules, the Law on Obligations does not make difference between the manufacturing of consumer goods (according to the definition in the Directive) and some other thing, which is understandable in view of the character of the Law. Difference between the Directive and the Law occurs as regards the treatment of the contract by which one party undertakes to manufacture a specific movable thing from his own material. While the Directive provides that this contract shall in any event be deemed a contract of sale, the Law on Obligations links this to the existence of doubt. Thus, there is a possibility that the rules on the contract for services shall apply to those contracts.

7. Legislation is not fully harmonised with the Directive as regards the case when there is (lack of) conformity of the goods supplied with the contract.

According to the Directive, the seller must deliver goods to the consumer which are in conformity with the contract of sale, defining conformity affirmatively. The Law on Obligations defines conformity negatively, but this is not relevant. However, the Law does not cover the

situation that the goods should comply with the description and possess the qualities given by the seller.

8. National legislation is not harmonised with the Directive as regards the liability for non-performance of obligations in the case of delivery of goods which are not in conformity with the contract.

The Directive provides for civil liability for non-performance of obligations in the case of delivery of the goods which do not conform with the contract. The CPL also prescribes the misdemeanour liability in the same case. Since such dualism of possible sanctions could result in legal uncertainty, especially if different criteria for determining defects of goods would apply in different types of proceedings, special attention should be paid to these problems in future legal framework.

9. The CPL is not harmonised with the Directive as regards the manner of exercising consumer rights in the case of delivery of goods which are not in conformity with the contract.

The Directive establishes a clear order of exercising rights arising from the case of delivery of goods which are not in conformity with the contract. The CPL, on the other hand, leaves that to the consumer's discretion. This may be deemed as granting greater rights in accordance with Article 8 of the Directive, however, it raises a question whether that is in accordance with the Treaty on the European Union. The Law on Obligations establishes the same order as the Directive. This dualism of legal provisions and leaving the choice to the consumer's discretion do not comply with the Directive.

10. The CPL is not harmonised with the Directive as to when the consumer may require the seller to repair or replace the goods.

The Directive defines that the consumer may require the seller to repair the goods or he may require the seller to replace them unless this is impossible or disproportionate. Furthermore, the situations when a remedy is deemed to be disproportionate are clearly defined (if it imposes costs on the seller which, in comparison with the alternative remedy, are unreasonable, taking into account: (1) the value the goods would have if there were no lack of conformity, (2) the significance of the lack of conformity with the contract, and (3) whether the alternative remedy could be completed without significant inconvenience to the consumer). These cases are not covered by national legislation.

11. Montenegrin legislation is not harmonised with the Directive as to when the consumer may require an appropriate reduction of the price or have the contract rescinded.

According to the Directive, the consumer may require an appropriate reduction of the price or have the contract rescinded if: (1) the consumer is entitled to neither repair nor replacement, or (2) if the seller has not completed the repair or replacement within a reasonable time, or (3) if the seller has not completed the repair or replacement without significant inconvenience to the consumer. The legislation of Montenegro does not cover the case when the consumer may require an appropriate reduction of the price or have the contract rescinded if the seller has not completed the repair or replacement without significant inconvenience to the consumer.

12. National legislation is not harmonised with the Directive as regards the consumer rights if the lack of conformity is minor.

According to the Directive, the consumer is not entitled to have the contract rescinded if the lack of conformity is minor. On the other hand, according to the Law on Obligations (Article 486 paragraph 1) minor lack of conformity is not taken into account at all, i.e. consumer shall not be entitled either to repair, replacement or reduction of the price. In this manner, the rights the consumer has under the national legislation are less than those granted by the Directive.

13. National legislation is not harmonised with the Directive as to the time period for liability of the seller.

The Directive defines that the seller shall be held liable where the lack of conformity becomes apparent within two years as from delivery of the goods, while under the Law on Obligations this time period is one year from notification (which may be even six months after delivery). Such time period does not comply with the Directive.

14. National legislation is not harmonised with the Directive as to the time limit for fulfilment of obligation of informing the seller on defects.
According to the Directive, when it is prescribed that, in order to benefit from his rights, the consumer must inform the seller of the lack of conformity, the consumer must do that within a period of two months from the date on which he detected such lack of conformity. National legislation establishes different time limits. According to the Law on Obligations there are different time limits for notification of visible and hidden defects: a) hidden defects: within eight days from the date on which they are detected, but no later than six months from delivery; b) visible defects: immediately when they are found, but no later than six months after the defects are detected.

15. The Law on Obligations is not harmonised with the Directive as regards the presumption that the lack of conformity which becomes apparent within six months of delivery existed at the time of delivery
The Directive provides that any lack of conformity with the contract which becomes apparent within six months of delivery of the goods shall be presumed to have existed at the time of delivery unless this presumption is incompatible with the nature of the goods or the nature of the lack of conformity. The Law on Obligations does not define these cases in the same manner as the Directive since according to the Law on Obligations, the seller shall be liable for defects that appear after transferring the risk to the buyer (delivery of goods) if they are caused by reasons that existed before that.

16. National legislation is not fully harmonised with the Directive as regards the relationship between the guarantee and advertising.
According to the Directive, the guarantee shall be legally binding on the offerer under the conditions laid down in the guarantee statement and the associated advertising. According to the national legislation, the guarantor is obliged to fulfil obligations laid down in the guarantee, and the guarantee statement contains also the specifications set out in the advertising material. National legislation does not specify that the conditions under which the obligations are fulfilled should also be consistent with the advertisements.

17. The CPL is not fully harmonised with the Directive as regards the contents of the guarantee, rights arising from it, how the guarantee should be made etc.
The Directive defines that the guarantee: a) shall state that the consumer has certain rights guaranteed under applicable national legislation and make clear that those rights are not affected by the guarantee; b) set out in plain intelligible language the contents of the guarantee and the essential particulars necessary for making claims under the guarantee, notably the duration and territorial scope of the guarantee as well as the name and address of the guarantor. The Law on Obligations is fully harmonised with the contents of the rules of the Directive, while that is not the case with the CPL.

18. The CPL is not fully harmonised with the Directive as regards the manner in which the guarantee is delivered.
According to the Directive, on request by the consumer, the guarantee shall be made available in writing or in the form of another durable medium available and accessible to him. On the other hand, the CPL provides only for the written medium.

19. The CPL is not fully harmonised with the Directive as regards the case when the guarantee is contrary to the requirements about contents, manner of issue and the language of the guarantee.
The Directive provides that in the case the guarantee is contrary to the requirements relating to the contents of the guarantee, manner of issue and the language in which it is issued, that circumstance shall in no way affect its validity, and the consumer can still rely on the guarantee and require that it be honoured. The CPL limits this only to the case when the guarantee has not been issued in writing.

20. In Montenegrin legislation, there is dualism in regulating this subject matter which largely affects legal certainty and, ultimately, correctness of transposition of the Directive into Montenegrin legislation. Namely, this subject matter is regulated by both

the CPL and the Law on Obligations. Furthermore, although the CPL states that the Law on Obligations shall apply to relationships not regulated by the CPL, the problem arises in the situations where the CPL regulates specific segments of this subject matter but contrary to what is provided for by the Directive. In such situations it must be concluded that Montenegrin legislation is not harmonised with the Directive, despite the fact that the Law on Obligations regulates those segments mainly in compliance with the Directive.

3.6.2. Judgments of the Court of Justice of the European Union

Judgment of 19 February 2004 in Case C-310/03 Commission of the European Communities v Grand Duchy of Luxembourg [2004] ECR I-1969

Judgment of 19 February 2004 in Case C-312/03 Commission of the European Communities v Kingdom of Belgium [2004] ECR I-1975

In both cases, the Court held that the question whether the directive has been implemented in the national legislation must be determined by reference to the situation prevailing in the Member State at the end of the prescribed period and that the Court cannot take account of any subsequent changes.

Judgment of 17 April 2008 in Case C-404/06 Quelle AG v Bundesverband der Verbraucherzentralen und Verbraucherverbände [2008] ECR I-2685

In this case, the ECJ ruled that Article 3 of Directive 1999/44/EC is to be interpreted as precluding national legislation under which a seller who has sold consumer goods which are not in conformity may require the consumer to pay compensation for the use of those defective goods until their replacement with new goods.

3.6.3. Practical recommendations

On the basis of the above considerations, we give the following practical recommendations:

1. Avoid the existing dualism of legal provisions and decide whether this Directive will be transposed into Montenegrin legislation by means of the CPL or the Law on Obligations.
2. Amend definitions in the CPL and: a) introduce a definition of consumer goods, b) harmonise defined scope of application of special rules on the sale of consumer goods with the Directive, i.e. exclude goods sold by way of execution or otherwise by authority of law, water and gas where they are not put up for sale in a limited volume or set quantity, electricity, and specify that the legal definition of consumer goods does not cover second-hand goods sold at public auction where consumers have the opportunity of attending the sale in person.
3. Specify the definition of a seller, or trader, so that it means any natural or legal person who sells consumer goods in the course of his trade, business or profession.
4. Extend the definition referred to in Article 19 of the Law to include that the obligations arise from advertising as well.
5. Introduce a definition of the term 'repair' in the CPL so that it means the conformity of goods supplied with the contract.
6. Introduce a definition of the sale of consumer goods which lays down that the contracts for the supply of consumer goods to be manufactured or produced are deemed contracts of sale for the purpose of the law and rules on the sale of consumer goods.
7. Define the situation when the goods do not comply with the description given by the seller and do not possess the qualities of the goods which the seller has held out to the consumer as a sample or model in the national legislation as a case of lack of conformity.
8. Revise Article of the CPL relating to misdemeanour liability for non-performance of an obligation arising from the guarantee.
9. Revise Article of the CPL relating to the exercise of the rights arising in the case when the goods delivered are not in conformity with the contract and prescribe that in the

first place the consumer shall be entitled to have the goods brought into conformity free of charge by repair or replacement, and if the conditions for repair or replacement are not fulfilled he may require an appropriate reduction of the price or have the contract rescinded, in accordance with the rules on the reduction of the price or the rescission of the contract.

10. Define in national legislation that in the cases of the sale of consumer goods which are not in conformity with the contract, repair or replacement may be required as a consumer right only if that is not impossible or disproportionate. It should also be defined within the meaning of the Directive when a remedy will be deemed to be disproportionate.
11. Define in national legislation that the consumer may require an appropriate reduction of the price or have the contract rescinded if the seller has not completed the repair or replacement without significant inconvenience to the consumer.
12. Specify in national legislation that a minor lack of conformity shall not be taken into account only as regards the right to have the contract rescinded.
13. Amend the national legislation as to the time period for liability in the case when the goods delivered are not in conformity with the contract.
14. Amend the national legislation as regards the time limit for informing the seller of the lack of conformity so that this time limit is at least two months.
15. Amend the national legislation as regards the presumption that the lack of conformity of the goods which becomes apparent within six months of delivery of the goods existed at the time of delivery.
16. Specify in the legislation that the conditions under which the obligations related to the guarantee are fulfilled should be consistent with the advertising as well.
17. Specify in the national legislation the rules on the contents of the guarantee, rights arising from it, the manner in which the guarantee should be made etc., according to the requirements of Article 6(2) of the Directive.
18. Specify in the national legislation that on request by the consumer, the guarantee shall be made available in writing or in the form of another durable medium available and accessible to him.
19. National legislation should be amended so that it prescribes that the guarantee shall be valid regardless of the fact whether it is in line or contrary to the requirements about contents, manner of issue and the language of the guarantee.
20. In the transitional and final provisions of the law into which the Directive is transposed, it should be stated that it is transposed into that law.

3.7. Directive 2005/29/EC (unfair commercial practices)

3.7.1. Table of Correspondence references

Directive 2005/29/EC on unfair commercial practices, lays down harmonised rules for the fight against unfair commercial practices and contributes to a high level of consumer protection. It ensures that consumers are not misled or exposed to aggressive marketing and that any claim made by traders in the EU is clear, accurate and substantiated, enabling consumers to make informed and meaningful choices. The purpose of the Directive (Article 1) is to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices harming consumers' **economic interests**. Article 1 of the Directive explicitly provides for the harmonisation of those practices "harming consumers' economic interests." Therefore, the Directive does not affect the possibility for Member States to have additional and more restrictive rules regulating commercial practices for reasons of protection of the health and safety of consumers (see Article 3 of the Directive) or the protection of the environment.

This Directive regulates unfair business-to-consumer commercial practices ("B2C"), and defines unfair consumer practice along those lines. Therefore, business-to-business ("B2B") commercial practices do not fall within the scope of this Directive and they are partly regulated under Directive 2006/114/EC on misleading and comparative advertising. However,

Member States may decide to extend the protection to B2B commercial practices (or to C2C - consumer-to-consumer). For example, Germany, Austria and Sweden have extended the provisions of the Directive to B2B commercial practices, while France has done the same for certain provisions only. It is stated in the Directive (recital 6) that the Directive neither covers nor affects the national laws on unfair commercial practices which harm only competitors' economic interests or which relate to a transaction between traders.

The Directive is based on the principle of full or maximum harmonisation of the national law, with the aim to remove barriers to the functioning of internal market. However, there are two limitations to the full harmonisation effect.

Firstly, as regards Article 3(9) in relation to financial services and immovable property where the principle of minimum harmonisation applies, Member States may impose requirements which are more restrictive than the provision of this Directive, but which comply with the EU law.

The second relates to temporal derogation from the principle of full harmonisation in the case of directives containing minimum harmonisation clauses, so that in accordance with Article 3(5) for a period of six years from 12 June 2007, Member States shall be able to continue to apply national provisions (e.g. Directive 98/6/EC and Directive 97/7/EC).

These two limitations will be the subject of the review of the Directive that will be implemented by 12 June 2011 in accordance with the provision of Article 18.

Upon the analysis of Montenegrin legislation made to establish to what extent this Directive has been transposed, it can be concluded that the Directive has been transposed into the CPL in an insignificant part.

Inconsistencies between the Montenegrin legislation and the Directive have been found in the following elements:

1. Unlike the Directive which defines that "consumer" means any natural person who, in commercial practices covered by this Directive, is **acting** for purposes which are outside his trade, business, craft or profession, according to the CPL, the term "consumer" means a natural person who is **buying, ordering, accepting, using goods or services** including public services for non-business and/or non-professional purposes or to whom the offer for a product or service is addressed.

According to this Directive the consumer is defined as a natural person, which Montenegrin CPL accepted. The Law defines that the consumer is buying, ordering, accepting, using goods or services including public services which can be covered by the term "acting" according to this Directive.

Discrepancy from full transposition of the provision defining "consumer" exist in that when defining the term "consumer" as well as in other provisions the term "commercial practice" within the meaning of this Directive has not been applied (see paragraph 4 below for the definition of commercial practice). Additionally, it seems that the term "acting" which is used in the Directive, is broader than the activities listed in the CPL.

2. The definition of "trader" is partly transposed into the CPL and the same does not cover the trader's activities relating to all elements of commercial practice (any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers).

The definition of a trader in the CPL does not include commercial practice in which the trader is acting through agents, acting in the name of or on behalf of a trader.

3. According to the Directive, "product" means any goods or service including immovable property, rights and obligations. This scope of definition of a product corresponds with the definition of a product in the Directive on Misleading and Comparative Advertising and in the proposal for a Directive on Consumer Rights

In the definition of a “product”, the CPL refers to goods or service that may be placed on the market, including also public services, but it does not include immovable property, rights and obligations.

The Directive does not define what the term “rights” means but it is considered that this term includes also the intellectual property rights.

4. The definition of “commercial practice” is not transposed into the CPL. The Directive defines in Article 2(d) that “commercial practice” means “any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers”.

These terms should be discussed chronologically, namely, the promotion should be taken into account as precontractual, the sale as contractual and the supply as a postcontractual phase. Thus, the term “sale” is ‘suggesting’ contract in the law of obligations.

This Directive applies to unfair business-to-consumer commercial practices as laid down in Article 5 of the Directive, before, during and after a commercial transaction in relation to a product (taking into consideration broader definition of a product that has not been transposed into Montenegrin law and that includes immovable property, rights and obligations). The trader must ensure that even after the sale, the commercial practice ensures the same standards as before the sale. Commercial practice must also be considered in accordance with Article 3(1) relating to the scope of application.

One may ask the following question: Does the concept of the commercial practices cover situations of traders buying products from consumers?

According to the definition provided in the Directive, commercial practices only cover practices “directly connected with the promotion, sale or supply of a product to consumers”. The reverse situation where traders purchase products from consumers does not fall within the scope of the Directive; this includes the cases when certain traders, in the course of their professional activity, purchase products from consumers, as for example car dealers, antique shops and retailers of secondhand goods.

Online commercial practices are covered by this Directive, and relate to social media, which include blogs, social networking sites, which have become important avenues for commercial practices and are often used by traders to promote and advertise their products.

Promotion is included in the definition of a commercial practice, and the Directive includes several provisions referring to promotion as practice (Article 6(d), Annex I points 5, 6, 19 and 31).

5. A commercial practice is unfair if it “materially distorts the economic behaviour” of consumers where this relates to “using a commercial practice to appreciably impair the consumer’s ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise”. This provision has been partly transposed into the CPL, where it relates to “selling and information provided to consumers”, but not taking into account commercial practice within the meaning defined in the Directive.

6. “Transactional decision”, “code of conduct”, “professional diligence”, “undue influence”, as well as “regulated profession” are not defined in the CPL and the provisions of the Directive where those terms are used have not been transposed into the CPL. Although some provisions of the Law reflect otherwise the meaning of the mentioned terms, the same differ partially or substantially from the provisions of the Directive.

7. In Article 5(1) the Directive explicitly prohibits unfair commercial practices and defines further which practice shall be unfair:

- a) if it is contrary to the requirements of professional diligence,
- b) if it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the

average member of the group when a commercial practice is directed to a particular group of consumers.

In this part the Directive uses the terms “average consumer” and “average member of the group”. See section 3.7.2 below regarding the judgment delivered in Case C-210/96 for a definition of the term average consumer given by the ECJ.

The CPL prescribes sanctions for prohibited conduct of traders, but it does not take into account prohibition of unfair commercial practices or an impact those practices may have on the economic behaviour of the average consumer or of the average member of the group.

Article 5(3) of the Directive lays down that “commercial practices which are likely to materially distort the economic behaviour only of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, shall be assessed from the perspective of the average member of that group”. This is without prejudice to the common and legitimate advertising practice of making exaggerated statements or statements which are not meant to be taken literally.

Vulnerable group of consumers is defined in a way that it includes persons having mental or physical infirmity, the elderly and children (to which the term “credulity” applies).

The Law on Electronic Media contains provisions that refer to certain vulnerable groups of consumers; however, that law primarily has a limited scope and applies only to commercial audiovisual communication, and not to the domain of commercial practice as defined which does not relate only to electronic media.

8. When defining unfair commercial practices, the Directive lays down in particular that unfair practices shall be deemed to be those that are: (a) misleading and as such referred to in Article 6 (misleading actions) and Article 7 (misleading omissions), or (b) those that are aggressive and as such referred to in Articles 8 and 9. The CPL only partly reflects the substance of defined terms in the sense that “prohibited conduct of the trader shall be deemed to be, in particular, disclosure of inaccurate, incomplete, unclear and ambiguous information about the product or conditions of sale by which the consumer is misled when buying the product”.

9. The provisions of Annex I to the Directive, refer to commercial practices which are in all circumstances considered unfair and are divided into misleading commercial practices (points 1 to 23) and aggressive commercial practices (points 24 to 31). These provisions, for the most part, have not been transposed into the CPL. Points 7, 12, 25, 26, 27 and 29 of Annex I have only been partially transposed and should be transposed entirely. Points 1, 9, 14, 15 and 24 of Annex I (of which point 24 falls within aggressive commercial practices) have been transposed correctly.

3.7.2. Judgments of the Court of Justice of the European Union

In respect of this Directive, the ECJ most often assessed the impact of a commercial practice on an average consumer, or an average member of the group, which is a concept developed and defined by the Court. In the context of correct implementation of this Directive according to the concept of an average consumer, as well as in other circumstances, as regards advertising, the following judgments are important:

Judgment of 16 July 1998 in Case C-210/96 *Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt - Amt für Lebensmittelüberwachung* [1998] ECR I-4657

The Court, when weighing the risk of misleading consumers against the requirements of the free movement of goods, has held that, “in order to determine whether a particular description, trade mark or promotional description or statement is misleading, it is necessary to take into account the presumed expectations” of “an average consumer who is reasonably well informed and reasonably observant and circumspect.”

This is a judgment that relates to assessment whether the claim has been made with the aim to mislead the buyer, while the national court must take into account the characteristics defining the average consumer. In this case of the Court, the average consumer is a critical person, observant and circumspect in his market behaviour. To that effect, an average consumer should inform himself about the quality and price of products and make efficient choices.

Judgment of 13 January 2000 in Case C-220/98 *Estée Lauder Cosmetics GmbH & Co. OHG v Lancaster Group GmbH* [2000] ECR I-117

In case of misleading advertising in the field of cosmetics, the Court held that it must be determined whether **social, cultural or linguistic factors** may justify the term 'lifting', used in connection with a firming cream, meaning something different to the German [average] consumer as opposed to consumers in other Member States. It must also be taken into account whether the instructions for the use of the product are in themselves sufficient to make it quite clear that its effects are short-lived, thus neutralising any conclusion to the contrary i.e. that its affects are long-term.

Judgment of 26 November 1996 in Case C-313/94 *F.Ili Graffione SNC v Ditta Fransa* [1996] ECR I-6039

According to paragraph 22 "the possibility of allowing a prohibition of marketing on account of the misleading nature of a trade mark is not, in principle, precluded by the fact that the same trade mark is not considered to be misleading in other Member States".

Therefore, (despite the Directive's full harmonisation character) requiring the foreign trader to provide an additional piece of information could be justified on the basis of social, cultural or linguistic factors, not to mislead the consumers of the country of destination, unlike those in the country of origin, by the omission to provide certain information.

In accordance with paragraph 26, national courts are those competent to make an assessment of such cultural, linguistic and social factors which warrant a different assessment of the unfair character of a commercial practice.

All relevant factors must be taken into account, such as the circumstances in which products are sold, the information given to consumers, the clarity of such information, the presentation and content of advertising material, and the risk of error in relation to the group of consumers concerned.

3.7.3. Practical recommendations

On the basis of established facts, we give the following recommendations:

1. The CPL should define the term "unfair commercial practice" and terms related to unfair commercial practice.
2. The term 'trader' should be defined more precisely in accordance with the Directive.
3. It should be provided that "**product**" shall mean any goods or service including immovable property, rights and obligations.
4. Terms "average consumer" and "average member of the group" should be provided for and vulnerable consumers should be defined.
5. Business-to-consumer unfair commercial practice should be regulated under a separate Title and the provisions should be fully harmonised with the relevant Directive.
6. It should be provided that the provisions of this part of the Law shall not apply to certain aspects of unfair commercial practice if the same are regulated by special legislation, provided that the special legislation complies with the EU rules regulating individual aspects of unfair commercial practice.
7. Separate chapters should regulate: prohibition of unfair commercial practice; misleading commercial practice (misleading actions and misleading omissions); aggressive commercial practice; harassment, coercion and undue influence, as well as the code of conduct.

8. The competence for the implementation of this part of the Law should be defined.
9. It should be stated in the transitional and final provisions of the Law that the Directive is transposed into that Law.

3.8. Directive 2006/114/EC (misleading and comparative advertising)

3.8.1. Table of Correspondence references

Directive 84/450/EC concerning misleading and comparative advertising was repealed by adoption of Directive 2006/114/EC. Directive 84/450/EC had been substantially amended several times before the adoption of new directive. The reasons to adopt this Directive are based on the facts that the laws against misleading advertising in force in the Member States differ, misleading business entities and, consequently, hindering the execution of advertising campaigns beyond national boundaries and thus affecting the free circulation of goods and provision of services. For these reasons, it was necessary to prevent misleading and unlawful comparative advertising by adoption of this Directive, and "given that consumers and traders can and must make the best possible use of the internal market, and that advertising is a very important means of creating genuine outlets for all goods and services throughout the Community, the basic provisions governing the form and content of comparative advertising should be uniform and the conditions of the use of comparative advertising in the Member States should be harmonised" (recital 6). If these conditions are met, this will help demonstrate objectively the merits of the various comparable products. Comparative advertising can also stimulate competition between suppliers of goods and services to the consumer's advantage. This Directive concerns B2B relations (*business to business*), and it is related to competition, but indirectly it also protects consumers as stated in recital 9 that "conditions of permitted comparative advertising, as far as the comparison is concerned, should be established in order to determine which practices relating to comparative advertising may distort competition, be detrimental to competitors and have an adverse effect on consumer choice".

The analysis of Montenegrin legislation carried out to determine compliance with this Directive shows that the Directive is partly implemented in the CPL, the Law on Electronic Media, the Law on Media, and the Law on Domestic Trade.

Inconsistencies between Montenegrin legislation and the Directive have been found in the following elements:

1. Article 1 of the Directive lays down that the purpose of this Directive is to protect traders against misleading advertising and the unfair consequences thereof and to lay down the conditions under which comparative advertising is permitted.

The Law on Domestic Trade lays down that unfair competition shall mean in particular advertising or offering goods by giving information or using expressions that create or may create deception in the market about the goods concerned, whereby a certain trader is placed or may be placed in a more favourable position.

This Law does not regulate comparative advertising by laying down the conditions under which it is permitted. Since Directive 2006/114/EC regulates only B2B practice and the same relates to the protection of traders against misleading advertising and the unfair consequences thereof including unlawful comparative advertising, these provisions should be an integral part of the provisions of the law relating to unfair competition or some other law governing relations among traders.

2. According to the provision of the Directive advertising "means the making of a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations".

The CPL defines advertisement (advertising) as any announcement extended through the means of mass communication or in any other manner in connection with business

operations, or a business activity, in order to promote the supply of goods or services, including immovable property, rights and obligations.

The scope of application and the purpose of the Directive is “to protect traders against misleading advertising and the unfair consequences thereof”, while the intention of this provision in the CPL is not to protect the trader but only the consumer as a natural person, which is the objective of the CPL but not the objective of this Directive. To that effect, the definition of advertisement under the CPL is not relevant in the context of transposition of this Directive.

3. In accordance with the Directive, misleading advertising means any advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by reason of its deceptive nature, is likely to affect their economic behaviour or which, for those reasons, injures or is likely to injure a competitor.

According to the CPL, misleading advertising shall mean any advertising by which the consumers are misled in respect of the characteristics of the products or terms of sale, and which therefore affect their choice. This definition does not include the definition in the Directive which relates to persons (which may include both natural and legal persons) and damage from such advertising sustained by the competitor, because the very nature of the definition in the CPL corresponds to the consumer protection and relates to the consumer (as a natural person) and not to other persons, competitors or traders. To that effect, this definition in the CPL is also not relevant in the context of transposition of this Directive.

When amending the CPL, the term advertisement (advertising) and the effects of advertising on the consumers should be covered by the definition of expression ‘unfair commercial practice’ (by transposition of Directive 2005/29/EC), where the definition of “business-to-consumer commercial practices” (Article 2(d)) will cover all practices including advertising.

The Law on Electronic Media gives definition related to hidden advertising, which according to this Law means “representation by words or images of goods, services, names, trademarks or activities of a producer of goods or provider of services in radio and/or TV programmes if advertising is the aim of such representation and could mislead the public about its nature”.

This Law does not provide for injury to the competitor either, and it uses the term “the public” (Directive uses the term “persons”). The Law limits misleading hidden advertising only to radio and/or TV programmes.

The Law on Media prohibits advertising of the sale and purchase of human organs or tissues for transplantation or transfusion, advertising of weapons, narcotics, tobacco products, trade in goods and provision of services prohibited by law, medicines and medical treatments available only by a medical prescription, curing procedures and methods that are not in compliance with the provisions of a special law on health care. Advertising of all other medicines and medical treatments must be clearly distinguishable as such and true. When advertising alcoholic beverages, the media must comply with the provisions of a special law.

This Law lists prohibited advertising by the type of product and field and a part of these prohibitions is also regulated by other *legi speciali*.

4. According to the Directive, comparative advertising is defined as meaning any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor.

Article of the Directive transposed into the CPL does not afford protection against comparative advertising to other competitors but only to the consumers, hence the partial transposition has been *inter alia* established on the basis of effects, as the target group of the Directive is not covered (B2B).

5. The definition of a trader in the CPL does not cover the persons acting in the name of or on behalf of a trader, while the definition in the Directive covers not only traders acting on their own behalf but also intermediaries who are acting in the name of a trader. These include, for instance, agents, paid by the trader in the market or who advertise their products and should be covered by the definition of the trader.
6. Code owner is not covered by laws and “means any entity, including a trader or group of traders, which is responsible for the formulation and revision of a code of conduct and/or for monitoring compliance with the code by those who have undertaken to be bound by it”.

The associations of traders adopt these codes to encourage better and more fair competition and at the same to protect against misleading and unlawful comparative advertising.

7. Characteristics taken into account when establishing whether advertising is misleading have been partly transposed into the CPL in relation to the consumer protection but not the protection of the competitor as defined in the Directive, however, these are to find place in the laws regulating competition.

Article 3(a) of the Directive is not transposed into the CPL. It lays down that in determining whether advertising is misleading, account shall be taken of “the characteristics of goods or services, such as their availability, nature, execution, composition, method and date of manufacture or provision, fitness for purpose, uses, quantity, specification, geographical or commercial origin or the results to be expected from their use, or the results and material features of tests or checks carried out on the goods or services”. This Directive relates to B2B relations, and the same provision is consistent with Article 6(1)(b) of Directive 2005/29/EC concerning unfair commercial practices, covering business-to-consumer relationships.

As regards the provisions on unfair commercial practices one must take into account that they have been transposed into the CPL to an insignificant extent.

Article 3(b) of the Directive is partly transposed into the CPL taking into account the interests of the consumers but not those of a competitor as regards features to determine whether advertising is misleading, concerning “the price or the manner in which the price is calculated, and the conditions on which the goods are supplied or the services provided”. We would like to mention that this Article of the Directive (concerning B2B) is consistent with Article 6(1)(b) of Directive 2005/29/EC (concerning B2C).

Article 3(c) of this Directive provides for features that are used to determine whether advertising is misleading and that concern “the nature, attributes and rights of the advertiser, such as his identity and assets, his qualifications and ownership of industrial, commercial or intellectual property rights or his awards and distinctions” and these have not been transposed into the CPL. This Article of the Directive (B2B relations) is consistent with Article 6(1)(f) of Directive 2005/29/EC (B2C relations).

8. Items (a) to (h) of Article 4(1) of the Directive regulate permitted comparative advertising underlining in item (a) that the advertising is not misleading within the meaning of Articles 2(b), Article 3 and Article 8(1) of this Directive or Article 6 (misleading actions – where paragraph 2(b) covers comparative advertising which creates confusion) and Article 7 (misleading omissions) of Directive 2005/29/EC. This Article is partly transposed into the CPL, and one paragraph is partly transposed into the Law on Electronic Media.

Directive 2006/114/EC repealed Directive 84/450/EC and Directive 97/55/EC – which introduced comparative advertising and concerned traders-competitors (B2B) and the consumers (B2C).

Before Directive 2005/29/EC was adopted, comparative advertising was transposed into the laws regulating consumer protection (experience in the region) and covered impact on consumers and traders in accordance with Directive 84/450/EC.

By adoption of Directive 2005/29/EC misleading and comparative advertising to the consumer (B2C) has been regulated by that directive and it is transposed into the laws on consumer protection, or some countries adopt a special law regulating this field (such as Slovenia – in the region).

9. It can be argued that Article 5, which relates to ensuring that adequate and effective means exist to combat misleading advertising, as to what solutions will be provided for and whether the courts or administrative authorities will be granted competence, is partly transposed into the CPL, considering the fact that certain provisions have been transposed correctly, some other provisions have not been transposed and a part of provisions was transposed partially. The provisions that have been transposed correctly and partially cover only B2C relations since the CPL protects consumers.

3.8.2. Judgments of the Court of Justice of the European Union

Judgment of 18 November 2010 in Case C-159/09 Lidl SNC v Vierzon Distribution SA

Conditions under which a comparative advertising is permitted – Price comparison based on selection of food products marketed by two competing retail store chains.

Vierzon Distribution placed an advertisement in a local newspaper, which reproduced till receipts listing, by means of general descriptions, accompanied, as appropriate, by their weight or volume, 34 products, in the main foodstuffs, purchased from the store belonging to Vierzon Distribution and that operated by Lidl, respectively, and showing a total cost of EUR 46.30 for the Vierzon Distribution products as against EUR 51.40 for those of Lidl.

The advertisement also included the slogans 'Not everybody can be E. Leclerc! Low prices – And the proof is E. Leclerc is still the cheapest' and 'In English, they say "hard discount" – in French they say "E. Leclerc"'.

For that reason, Lidl brought an action before the tribunal de commerce de Bourges (Commercial Court, Bourges) seeking an order that Vierzon Distribution pay damages on the ground of unfair competition and that extracts from the judgment to be delivered be published in the press and on posters in its store.

The tribunal de commerce de Bourges decided to stay the proceedings and to refer the question to the Court of Justice for a preliminary ruling.

The Court of Justice ruled as follows:

Article 3a(1)(a) of Directive 84/450, as amended by Directive 97/55, is to be interpreted as meaning that an advertisement may be misleading, in particular if:

- it is found, in the light of all the relevant circumstances of the particular case, in particular the information contained in or omitted from the advertisement, that the decision to buy on the part of a significant number of consumers to whom the advertisement is addressed may be made in the mistaken belief that the selection of goods made by the advertiser is representative of the general level of his prices as compared with those charged by his competitor and that such consumers will therefore make savings of the kind claimed by the advertisement by regularly buying their everyday consumer goods from the advertiser rather than the competitor, or in the mistaken belief that all of the advertiser's products are cheaper than those of his competitor, or
- it is found that, for the purposes of a comparison based solely on price, food products were selected which, nevertheless, have different features capable of significantly affecting the average consumer's choice, without such differences being apparent from the advertising concerned.
- Article 3a(1)(c) of Directive 84/450, as amended by Directive 97/55, is to be interpreted as meaning that the condition of verifiability set out in that provision requires, in the case of an advertisement, such as that at issue in the main proceedings, which compares the prices of two selections of goods, that it must be possible to identify the goods in question on the basis of information contained in the advertisement.

Judgment of 12 June 2008 in Case C-533/06 O2 Holdings Limited and O2 (UK) Limited v Hutchison 3G UK Limited [2008] ECR I-4231

This case concerns the use of trade mark of the competitor in an advertisement to compare the characteristics of the goods or services sold by the advertiser with those of the competitor.

It should be interpreted to the effect that the proprietor of a registered trade mark is not entitled to prevent the use by a third party of a sign identical with, or similar to, his mark, in a comparative advertisement which satisfies all the conditions, laid down in Article 3a(1) of Directive 84/450, under which comparative advertising is permitted.

Article 5(1)(b) of Directive 89/104 is to be interpreted as meaning that the proprietor of a registered trade mark is not entitled to prevent the use by a third party, in a comparative advertisement, of a sign similar to that mark in relation to goods or services identical with, or similar to, those for which that mark was registered where such use does not give rise to a likelihood of confusion on the part of the public, and that is so irrespective of whether or not the comparative advertisement satisfies all the conditions laid down in Article 3a of Directive 84/450, as amended by Directive 97/55, under which comparative advertising is permitted.

3.8.3. Practical recommendations

1. Since this is a Directive which concerns B2B practices and if the Unfair Commercial Practices Directive which concerns B2C practices is transposed into the CPL (as already recommended in this domain), it remains to transpose this Directive, for the most part, into the laws protecting against unfair competition or some of the laws regulating trade relations in general terms. The CPL protects consumers as natural persons, while this Directive concerns protection of traders against misleading and comparative advertising. Accordingly the recommendation for the transposition of this Directive is not to transpose it into the CPL but into a special law.
2. It is necessary to decide whether the segment of comparative advertising regulated more broadly by this Directive will be regulated by the law on consumer protection or the law in which this subject-matter will be regulated in an integrated manner.
3. It should be borne in mind that if Article 6(2)(a) of Directive 2005/29/EC is transposed into the CPL, it will include protection of consumers against misleading commercial practices which involve “any marketing of a product, including comparative advertising, which creates confusion with any products, trade marks, trade names or other distinguishing marks of a competitor”.
4. In this way both traders and consumers will be protected against misleading advertising and unlawful comparative advertising, whereby the consumers as natural persons would be protected by the CPL and the traders would be protected by the laws protecting against unfair competition or those regulating trade relations in general terms.

3.9. Directive 2008/48/EC (credit agreements for consumers)

3.9.1. Table of Correspondence references

The analytical study of Montenegrin legislation showed that in Montenegro the subject matter of this Directive has been prescribed by the CPL only in principle. Moreover, it has been established that Montenegrin legislation does not fulfil largely the requirements provided for by this Directive since the mentioned Montenegrin legislation has not been the subject of harmonisation with the Directive 2008/48/EC.

The mentioned Montenegrin legislation, in particular under Articles 33 to 36 of the CPL, regulates the issues of the consumer credit agreements and information requirements only in principle (Article 33), it sets out basic elements of consumer credit agreement, the obligation to provide pre-contractual information and calculation of effective interest rate (Article 34), informing consumers on the change in the terms of the credit (Article 35), and the issue of early repayment of the credit (Article 36). This Law regulates also other issues related to the said Directive, in particular the terms and definitions, supervision and out-of-court protection.

Since the provisions of the mentioned Directive, for the most part, are not transposed into Montenegrin legislation, it is necessary to carry out harmonisation either through substantial amendments to the existing CPL or by adoption of a new piece of legislation on consumer credit.

3.9.2. Judgments of the Court of Justice of the European Union

Since this is a recently adopted Directive, the ECJ has not adopted any judgment yet that would regulate the issue of its interpretation or implementation. Moreover, the ECJ has not adopted any judgment that would relate to correctness of implementation or interpretation of Directive 2008/48/EC.

3.9.3. Practical recommendations

On the basis of the above considerations, we give the following practical recommendations for the purpose of harmonisation of Montenegrin legislation with the provisions of Directive 2008/48/EC:

1. On the basis of the Table of Correspondence, draft amendments to the CPL or draft of new Law on Consumer Credit should be prepared in accordance with the provisions of Directive 2008/48/EC.
2. Pursuant to the said Directive, the catalogue of pre-contractual and contractual information obligations should be introduced into Montenegrin legislation.
3. Standardised consumer credit information form should be prescribed and introduced in accordance with cogent provisions of the mentioned Directive.
4. Special attention should be paid to regulate transparently the issues of calculation of interests and fee for early repayment of consumer credits.
5. During preparation and adoption of new legislative framework a decision should be made on the scope and content of application of consumer credit system and time limits for the introduction of the system, in accordance with the rules of the said Directive.
6. During preparation and adoption of new legislative framework it should be decided whether it is opportune to introduce additional requirements that must be met by the creditors, without infringing the *acquis communautaire*.
7. During preparation and adoption of new legislative framework it should be decided whether it is opportune to introduce additional requirements that must be met by the credit intermediaries, without infringing the *acquis communautaire*.
8. During preparation and adoption of new legislative framework, a decision should be taken about potential system of registration, i.e. system of licensing (*ex ante* supervision) of credit intermediaries and creditors, and the related decision about registration system, i.e. record keeping system, all for the purpose of sustainable, efficient and effective supervision system.
9. During preparation and adoption of new legislative framework, a decision should be taken about the system of administrative and inspection supervision (*ex post* supervision) with particular emphasis on institutional system, and clearly established limits of competence.

3.10. Directive 2008/122/EC (certain aspects of timeshare, long-term holiday product, resale and exchange contracts)

3.10.1. Table of Correspondence references

In Montenegrin legislation, the subject matter of timeshare contracts is governed by the CPL. However, the rules of that law were drafted on the basis of the “old” Timeshare Directive, i.e. Directive 94/47/EC. Since in the meantime that Directive was repealed by new Directive 2008/122/EC, regulating the mentioned issues substantially differently than the “old” directive, it is clear that in this segment Montenegrin legislation is largely not harmonised with the *acquis*. Primarily, new Directive, in addition to timeshare, regulates some new long-term holiday products that were not regulated by Directive 94/47/EC. Additionally, the rules of Directive 2008/122/EC substantially amended the rules of Directive 94/47/EC relating to timeshare. However, one of the most significant changes in regulation of these issues is a legal nature of directives regulating them. Namely, while Directive 94/47/EC adopted the principle of minimum harmonisation, Directive 2008/122/EC adopted the principle of maximum harmonisation.

At this moment, inconsistencies between the Montenegrin legislation and the Directive exist in the following elements:

1. Directive provides that it shall apply only to contracts concluded between a trader and a consumer. On the other hand, the CPL defines consumer contract as the contract concluded with a consumer or a group of consumers. Such definition opens up the possibility to cover by a consumer contract the contract concluded by another consumer with a consumer or a group of consumers. Therefore, while the Directive applies exclusively to the so-called B2C relations (*business to consumer*), the CPL opened up the possibility to apply its rules and, consequently, the timeshare rules, apart from B2C relations to C2C relations (*consumer to consumer*) as well. Since the Directive adopted the principle of maximum harmonisation, it results that the CPL is not harmonised with the Directive in this aspect.
2. Unlike the Directive, the CPL does not explicitly provide that its rules on timeshare contracts shall not affect the application of general rules of civil law liability, rules of registration of immovable property and real rights, the system of registration of persons providing tourist services and determination of the legal nature of the rights which arise for the consumer on the basis of a timeshare contract or long-term holiday product contract.
3. Since the CPL has been drafted *inter alia* on the basis of Directive 94/47/EC, its definition of timeshare does not comply any more with the definition of that term in the Directive. Primarily, it results from the CPL that only the immovable property may be the subject of timeshare contract, while it is clear from the Directive that both the movable things and immovable property can be the subject of timeshare contract. Furthermore, the CPL covers only those contracts that have been concluded for a term longer than three years, while the Directive applies to contracts of duration of more than one year.
4. The CPL does not define new holiday products regulated by the Directive such as long-term holiday product, resale contract and exchange contract.
5. Definition of a trader from the CPL largely differs from the definition of that term in the Directive. Primarily, unlike in the Directive, under the CPL the trader may be any person selling timeshare, regardless of the fact whether he does that for purposes relating to his profession or not. Furthermore, it would result from the CPL that its rules on timeshare would apply only to persons actually concluding timeshare contract, while the Directive relates to all persons offering conclusion of contracts on holiday products, regardless of whether such contracts have been actually concluded or not. Finally, the Directive provides that the trader also means anyone acting in the name of or on behalf of a trader, while the CPL does not provide for such rule.
6. The definition of a consumer in the CPL differs from the definition of that term in the Directive. Unlike in the Directive, under the CPL, the consumer means anyone buying timeshare, regardless of whether he buys that product from a professional or from another consumer.
7. Unlike the Directive, the CPL does not define the terms "ancillary contract", "durable medium", "code of conduct" and "code owner".
8. The CPL does not provide for a rule prescribed by the Directive according to which in calculating the duration of a contract, any provision in the contract allowing for tacit renewal or prolongation shall be taken into account.
9. Although the CPL, the same as the Directive, prescribes that any trader's advertising must provide the information to the consumer where he can obtain more detailed pre-contractual information on the holiday product which is the subject of the contract, the content of that information in the CPL does not correspond to the content of the information in the Directive.
10. The CPL does not contain the rule that would correspond to the rule in the Directive defining that where a holiday product is to be offered or sold at a promotion or sales event, the commercial purpose of the event must be clearly indicated, and that the information on holiday product must be available to the consumer during the event.
11. Unlike the Directive, the CPL does not contain the provision prohibiting marketing or selling of a holiday product as an investment.

12. The content of prior information in the CPL does not correspond to the content of that information in the Directive. Additionally, unlike the Directive, the CPL does not contain the requirement that such information be provided in a clear and comprehensible manner. Furthermore, unlike the Directive, the CPL does not provide that the information, depending on the type of holiday product, shall be provided by means of the standard information form. Finally, unlike the Directive, the CPL does not provide that the information shall be provided to the consumer, free of charge, in writing or on another durable medium which is easily accessible to the consumer.
13. The rule in the CPL regarding the language in which the prior information must be drawn up does not correspond to the rule of the Directive.
14. As regards the holiday product contract, unlike the Directive, the CPL does not provide that a contract can be made in writing or on another durable medium which is easily accessible to the consumer. In view of the fact that the Directive provides for a principle of maximum harmonisation a question may be raised whether such provision of the Law complies with the provision of the Directive.
15. As regards the language in which the holiday product contract is to be drawn up, unlike the Directive which lays down that a contract must be concluded in the language of the Member State in which the consumer is resident or a national, at the choice of the consumer, the CPL provides that a timeshare contract must be drawn up in the language of the country in which the consumer is resident or any other language, at his choice. In view of the fact that the Directive provides for a principle of maximum harmonisation it is questionable whether such provision of the Law complies with the provision of the Directive. Furthermore, unlike the Directive, the CPL does not define that the language chosen by the consumer must be an official language of the Union. Namely, the Union will insist on stating in the law that it must be an official language of an EU Member State, even though Montenegro is not a member yet. What can be done is to insert in transitional and final provisions that this rule shall start to apply from the date of accession of Montenegro to the EU. Furthermore, unlike the Directive, the CPL lays down that timeshare contract must be certified by a competent authority. Apart from the fact that it is not clear which is the authority in question, the purpose of this rule is not clear either. Finally, the CPL provides that the contract drawn up in the official language of the country of the consumer must be certified by a permanent court interpreter for that language. The purpose of that rule is not clear either.
16. The same as in the Directive, the CPL prescribe that the contents of the timeshare contract may by way of exception differ from the contents of the offer, but only if those changes are the result of the circumstances beyond the trader's control. However, unlike the Directive, the meaning of the phrase "circumstances beyond the trader's control" is not specified in the CPL. Furthermore, unlike the Directive, the CPL does not specify in which form those changes shall be communicated to the consumer.
17. Unlike the Directive, the CPL does not contain special rules on the manner of informing the consumer of his right of withdrawal.
18. The rules in the CPL concerning the right of withdrawal are less favourable to the consumer than the same rules in the Directive. Primarily, the CPL does not contain a special rule on the start of the withdrawal period in the case when the consumer receives the contract after the day of the conclusion of the contract. Furthermore, the CPL does not provide for the consumer's right of withdrawal from other long-term holiday products other than the timeshare contract.
19. Withdrawal periods laid down in the CPL are not harmonised with the rules of the Directive.
20. Unlike the Directive, the CPL does not provide for misdemeanour liability of a trader in the event that, on expiry of the withdrawal period, the trader has failed to comply with the information requirements.
21. Unlike the Directive, the CPL does not provide for the start of the withdrawal period when the information on the right of withdrawal was communicated to the consumer after expiry of the period in which it should have been communicated. Similarly, the CPL does not provide for a special rule on the impact of the withdrawal period for timeshare contract on the withdrawal from the exchange contract.
22. Unlike the Directive, the CPL does not specify in which form the decision to withdraw from the contract must be notified.

23. While the Directive lays down that in the event of withdrawal the consumer shall bear no costs, the CPL lays down that the consumer shall bear the costs of contract certification.
24. The rule in the CPL prohibiting payment of any consideration or its part before the contract is concluded applies only to timeshare contracts, while the Directive provides for a similar rule in regard of any long-term holiday product. Furthermore, the CPL explicitly refers only to the prohibition of advance payment but not the prohibition of all other financial transactions mentioned in the Directive.
25. Unlike the Directive, the CPL does not contain a specific rule on prohibition of advance payment or prohibition of any similar financial transaction relating to resale contracts.
26. Unlike the Directive, the CPL does not contain any specific rules relating to long-term holiday product contracts.
27. The contents of the rules in the CPL on termination of ancillary contracts do not correspond to the rules in the Directive.
28. The content of the rule in the CPL on the effect of the choice of applicable law to consumer protection in regard of long-term holiday product contracts does not correspond to the rule in the Directive. The CPL lays down a general rule according to which a law that is agreed between the parties to the contract will apply to the contract. On the other hand, the Directive provides that the choice of applicable law shall not be taken into account if the applicable law affords to the consumer lower level of protection than that granted by the Directive.
29. Unlike the Directive, the CPL does not provide for and it does not elaborate the system of collective protection of the consumers.
30. As opposed to the Directive, the CPL does not provide for a system of informing the consumers on the rules of that Law concerning long-term holiday product contracts.
31. As opposed to the Directive, the CPL does not provide for effective penalties in the event of a trader's failure to comply with the rules of the CPL concerning long-term holiday product contracts.
32. It is not apparent from the CPL that on the occasion of entry into force of that Law the public was informed that this Directive was transposed into that Law.
33. The CPL does not contain the rules regulating the content of information that must be communicated to the consumer in individual phases of conclusion and performance of long-term holiday product contracts, the content of which is set out in Annexes I-IV of the Directive.

3.10.2. Judgments of the Court of Justice of the European Union

Since this is a recently adopted Directive, the ECJ has not adopted any judgment yet that would regulate the issue of its interpretation or implementation. Moreover, the ECJ has not adopted any judgment concerning correctness of implementation or interpretation of Directive 94/47/EC.

3.10.3. Practical recommendations

It is necessary to start creating new legal framework for consumer protection with regard to conclusion of long-term holiday products in accordance with Directive 2008/122/EC, which would provide the consumers with adequate protection not only regarding the conclusion of timeshare contracts but also of all other long-term holiday products regulated by the mentioned Directive. For that purpose, it is necessary to:

- a. Transpose this Directive into the Montenegrin legislation entirely,
- b. Transpose main definitions, legal concepts and rules of that Directive fully, precisely and accurately.

3.11. Directive 2009/22/EC (injunctions for the protection of consumers' interests)

3.11.1. Table of Correspondence references

Even precise and comprehensive substantive legal provisions favourable to consumers remain without practical value if there are no efficient procedural possibilities to exercise rights. Firstly, the area of procedural law protection of consumers relates to regulation of specific forms of legal protection (actions) for the protection of collective and diffuse interests of the consumers (granting *legitimatio ad processum* to the consumer protection organisations to bring actions on behalf of the consumers). The State has a duty to provide for a possibility in its legal system that a body governed by public law or a consumer protection organisation may bring, on behalf of the consumers, an action in legal proceedings or file a motion, on their behalf, in administrative proceedings for prohibition of further acts that are contrary to the consumer protection legislation (primarily concerning the prohibition and prevention of future use of unfair commercial practices and unfair contract terms in consumer contracts). Individual consumers and traders do not have active legitimation (*legitimatio activa*). The aim of the proceedings is to obtain injunction against continuance of acts, meaning – with the effect for future. The proceedings must be speedy. The purpose of the proceedings is not to determine the validity of the contracts which have already been concluded or even to determine monetary compensation (reduction of the price, compensation for damages).

The analytical study of the Montenegrin legislation showed that the intention in Montenegro was to transpose this Directive in two ways: through the CPL (which contains the possibility for consumer organisation to bring an action for the protection of the collective interests of the consumers, at least in certain fields of application) and through general competences of the market inspectorate and other inspection bodies (which may prohibit acts contrary to the legislation in the field of consumer protection). It has also been found that the Montenegrin legislation fulfils the requirements provided for by this Directive to a considerable extent. However, there are also important inconsistencies between the national legislation and the Directive consisting of either non-transposition of certain solutions provided for by the Directive or of insufficiently precise or clear legal provisions, questioning the correctness of transposition of this Directive. On the other hand, some provisions in Montenegrin CPL are contrary to the applicable principles of civil contentious procedure, especially regarding the respect for the autonomy of the parties.

Inconsistencies between the Montenegrin legislation and the Directive have been found in the following elements (apart from those applicable to all areas – e.g. definitions of a trader and a consumer):

1. Directive requires that the *legitimatio ad processum* to initiate the proceedings for the protection of collective interests of consumers be granted either to a body governed by public law or consumer organisations and that it can be exercised either in administrative or in judicial proceedings. It is clear from both Article 7 and Article 2(1)(b) of Directive that a Member State may cumulate the possibility of those proceedings – meaning that it can enable “two tracks” – protection in administrative (e.g. inspection) procedure, on the one hand, and the protection in ordinary civil proceedings upon the action brought by a consumer protection organisation, on the other hand.

This is also the approach of the Montenegrin legislator and this is positive in principle. Due to insufficiently developed non-governmental sector of consumer protection organisations, it would be inadequate if only they would be given the responsibility to initiate proceedings for the protection of collective interests. On the other hand, it would be good to encourage that aspect of activity of consumer organisations. Therefore, it would not be appropriate to give the competence for the protection of collective interests of the consumers to inspection bodies only.

2. While the Directive only concerns the protection of collective interests, the Montenegrin CPL does not differentiate between the collective and individual interests of the consumers when determining which actions the consumer protection organisations may bring. Namely, it also enables annulment of contracts already concluded and compensation for damages (Article 112 paragraph 2).

At first glance it seems that provisions of the Montenegrin legislation are even more favourable to the consumer (which would be permitted according to Article 7 of the Directive). However, in fact this is the case of not understanding what the collective interests of consumers are and what the purpose of specific actions for their protection is. The purpose of the Directive is to enable actions for cessation – which means they have effect for the future (as in those cases there is often no specific claim or violation of the right of particular consumer in a particular contract). As for contracts that have already been concluded (and which give rise to e.g. right to annulment, to reduction of the price, to repayment of the price paid, to compensation for damages...), the consumers have individual claims and in accordance with the principles of civil procedure it is their individual right and responsibility to seek the protection of those rights. Otherwise, this can result in serious violation of constitutional right to adversarial proceedings. The possibility that the action of consumer organisation may end unfavourably to the consumer should be also taken into account. If the consumer was not informed of the litigation and the unfavourable outcome of the litigation was binding on him that would be contrary to the constitutional right to be heard. Establishing such system would require regulating in detail opt-out or opt-in procedure (which means: informing the consumer on the litigation of the consumer organisation and enabling the consumer either to opt in or opt out of such litigation or its effect). As regards the procedural law protection of the consumers it is necessary to observe – pursuant to the Constitution and the European Convention on Human Rights – the principle of respect for the autonomy of the parties (the principle under which the parties themselves determine the subject-matter of the case) and the right to be heard.

3. While the Directive provides for granting *legitimatio ad processum* to initiate proceedings to a body governed by public law or consumer organisation, the Montenegrin CPL enables an individual consumer to bring action for the protection of collective interests.

At first glance it would seem that provisions of the Montenegrin legislation are even more favourable to the consumer (which would be permitted according to Article 7 of the Directive). However, in fact this is the case of not understanding what the collective interests of consumers are and what the purpose of specific actions for their protection is. The essence of collective interests of the consumers is that they primarily relate to cases where an individual right of an individual consumer (in terms of civil law relationship) has not been violated yet. It is necessary to enable the consumers to seek judicial protection of their individual interests from the contracts concluded, and not the protection of collective interests of the consumers with the effect for the future. Enabling unlimited number of entities to bring actions for the protection of collective interests also causes numerous procedural complications and ambiguities, e.g. regarding lispendence, costs, abuse of rights, the effect of *res iudicata*... Similarly, it is necessary that it results from the law clearly, that the legislator is aware of the difference between collective and individual interests of the consumers (where, as in the Directive, it is not necessary to define the term collective interests of the consumers in more detail).

4. While the Directive (in the annex) lists in detail, regarding which consumer rights collective protection upon the action of the consumer organisations is possible, the CPL limits this to prohibition of advertising and prohibition of unfair contract terms (as well as the prohibition of the product and circulation of the product which is not safe).

When determining the scope of application of the action by the consumer organisation Montenegrin legislation is not harmonised with the Directive. Formally speaking, the Directive has nevertheless been transposed, because according to the Directive the existence of one “track” is sufficient – e.g. in administrative (inspection) proceedings. Montenegrin legislation regulating the powers of the market inspectorate and other inspection bodies enables filing injunctions in all fields of consumer right protection. At least, this results from Article 16 of the Law on Inspection Control (administrative measures and actions). In the CPL, administrative measures that an inspection body may undertake are defined more narrowly (Article 127 –

prohibition of circulation of certain products; but it does not include the prohibition of e.g. commercial practices or advertising). It would be more appropriate to list in the CPL in more detail administrative injunctions that an inspection body may undertake to ensure that the rights of the consumers from that Law and other laws are respected. Since the main obligation for the protection of collective interests of the consumers should remain connected with the activities and actions of the consumer organisations, it is necessary in any case to widen the scope of application in the title of the CPL concerning powers of consumer organisations.

5. The Directive states that the Member States “designate the courts or administrative authorities competent to rule on proceedings commenced by qualified entities” and thus suggests that, as regards administrative law protection, the State must (1) designate one entity which can commence the proceedings and (2) designate the entity (“administrative authority”), to rule on the claim of the former entity. As regards the administrative law “track”, Montenegrin law concentrates both competences (initiation of proceedings and ruling on the proceedings) in the same public body – market inspectorate or another inspection body. Inspector namely initiates the proceedings and also rules on those proceedings.

We believe that the Montenegrin legislation is not contrary to the Directive. The purpose and the objective of the Directive are not hindered only because ex officio proceedings are introduced (namely, inspection body initiating proceedings and ruling on prohibition) and not the proceedings on a motion from another body. Similarly, it should be taken into account that after imposing of administrative measure by the inspectorate, an appeal may be lodged. It is also possible to seek judicial protection within the administrative dispute in the next instance. Therefore, the principles of fair process are not violated either.

6. While the Directive requires – where appropriate – measures such as the publication of the decision or of a corrective statement, Montenegrin CPL enables that only for unsafe products and advertising and requires only the publication of the decision.

The scope of application under the CPL is too narrow and the Directive is not transposed in that respect. On the other hand, publication of the decision in the Official Gazette is not appropriate. The aim of the publication is to inform the consumers and competitors and thus to eliminate the resulting effects, and the publication in the Official Gazette conforms to this aim only pro forma.

7. While the Directive also requires to enable (under certain conditions and with possible prior consultation) bringing of actions by qualified entities from other Member States (in case of infringements having cross-border effect), there are no such provisions in Montenegrin CPL.

The CPL needs to be harmonised with the requirements of the Directive. In doing so, it is necessary to take into account that this is a requirement that must have effect only as of the day of accession of Montenegro to the EU. For that reason it is necessary to include an adequate transitional provision on the time of entry into force.

8. *Contra preferentem* provision is linked to the collective protection, but it needs to be transposed in the context of the Unfair Contract Terms Directive. As regards the contracts that have already been concluded the mentioned rules mean that the provision is to be interpreted in a way that is favourable to the consumer. However, that rule does not enable the trader to defend himself in the proceedings upon action for collective protection of the consumers, seeking prohibition of particular provision, with the argument that the provision is not unfair, as it may be interpreted in favour of the consumer.

The rule should be included in the chapter into which the Unfair Contract Terms Directive is transposed.

3.11.2. Judgments of the Court of Justice of the European Union

Judgment of 1 October 2002 in Case C-167/00 *Verein für Konsumenteninformation v Karl Heinz Henkel* [2002] ECR I-8111

In that case a question was raised whether the special provisions in favour of the consumers when determining international jurisdiction for disputes arising from consumer contracts (with a cross-border element) may also be invoked in the case when the action is not brought by an individual consumer but by a consumer organisation. The ECJ held that the mentioned provisions of the Brussels Regulation (at the time: Brussels Convention) are applicable only when an individual consumer brings action. Apart from that, the action for injunction is not an action arising from a “contract”. That action protects wider collective interest of the consumers and the basis for such an action is not in “contractual” obligations of the trader, but in his non-contractual obligations (delict or quasi-delict).

For the above reasons, the ECJ held that a preventive action brought by a consumer protection organisation for the purpose of preventing a trader from using terms considered to be unfair is a matter relating to delict or quasi-delict within the meaning of Article 5(3) of the Brussels Convention (now the Brussels Regulation I).

3.11.3. Practical recommendations

On the basis of the above considerations, we give the following practical recommendations:

1. It should be laid down by the law that the consumer organisations have active legitimation to bring action for the protection of collective interests of the consumers in civil contentious proceedings and the possibility that an individual consumer may seek protection of collective interests of the consumers should be erased.
2. Keep the possibility of protection of collective interests of the consumers within administrative procedure, through the competences of market inspectorate and other inspection bodies. To avoid ambiguities, it should be explicitly listed in which fields of application the inspection bodies may impose injunctions and consider whether to exclude some fields falling within their competence (e.g. general contract terms – as those are primarily civil law issues and therefore it is not appropriate that these be decided by an inspection body and appellate body within the administrative procedure).
3. Widen the scope of application in relation to the current law. Nevertheless, it does not seem appropriate to take over the model in the Directive which lists other directives protecting the rights to which the possibility of collective protection applies. It is more appropriate (and permitted on the basis of Article 7 of the Directive) to prescribe the possibility of collective protection of consumer rights (by action for a cessation or prohibition of further use or act) for all acts contrary to applicable provisions of the consumer protection law.
4. It should be clearly prescribed that it is possible to issue temporary injunctions (regulatory temporary measures), which the court may issue in the course of the proceedings and even before bringing an action (where the court sets the time limit within which action can be brought).
5. Prescribe clearly that the provisions (action by the consumer organisation) shall apply only to actions for cessation or prohibition of acts contrary to the laws regulating consumer rights (collective interest), and not to the protection of individual interests from specific contracts (annulment, reduction of the price, repayment of the price paid...). Similarly, it is not recommended to give consumer organisations the power to bring actions to enforce a claim for a confiscation of unlawful gain. This may remain within the competence of inspection bodies, i.e. of misdemeanour procedure.
6. Some procedural issues should be defined by the law more precisely (jurisdiction, determining the value of the item in question, reimbursement of costs, litispence, the principle of speedy proceedings).
7. In accordance with the Directive, legal rule on the possibility of publication of the decision or corrective statement, on a motion from the claimant, should be provided for.

8. The procedure of collective protection of consumer rights within “administrative track” in the CPL should not be regulated in more detail; however, it should be clearly written that the provisions of that Law concerning the powers of consumer protection organisations in the civil procedure do not affect the existing powers of inspection bodies in the administrative procedure.
9. It should be stated in the transitional and final provisions of the Law that this Directive is transposed into that Law.
10. Transitional and final provisions of the Law should include a provision that qualified entities from other EU Member States may bring actions, but that the provision shall become effective only when Montenegro becomes an EU Member State.

4 RECOMMENDATIONS FOR TRANSPOSITION OF ADDITIONAL PIECES OF CONSUMER LEGISLATION

4.1. Directive 2002/65/EC (distance marketing of financial services)

4.1.1. Important elements of transposition

Directive 2002/65/EC regulates the system of consumer protection in the field of distance marketing of financial services. Important elements of transposition of the provisions of Directive 2002/65/EC relate to the issues of providing information to the consumer prior to the conclusion of the distance contract, possibility of imposing conditions and additional information that must be provided to the consumer, issue of making available appropriately all contractual terms and conditions, right of withdrawal, time limits and exceptions to this right, as well as the issues of the manner and conditions of payment and regulating of adequate and implementable system of sanctions and supervision.

Directive 2002/65/EC was adopted in order to safeguard freedom of consumer's choice which is an essential consumer right, for the purpose of which it is necessary to provide a high degree of consumer protection in order to enhance consumer confidence in distance marketing of financial services.

It needs to be mentioned that Directive 97/7/EC lays down main rules on distance contracts, however, since Directive 97/7/EC does not cover financial services, it was necessary to adopt new directive, Directive 2002/65/EC.

Within the meaning of Directive 2002/65/EC "financial services" mean services of a banking, credit, insurance, personal pension, investment or payment nature.

Along with the already mentioned it is important to underline several important elements of the Directive. Namely, Directive 2002/65/EC applies to any above-mentioned distance contract concerning financial service. However, it is worth mentioning that this Directive applies to the first of a series of successive financial services ("operations") or separate financial services of the same nature performed over time which may be considered as forming a whole, irrespective of whether that financial service or series of financial services is the subject of a single contract or several successive contracts.

An "initial service agreement" may be considered to be for example the opening of a bank account, acquiring a credit card, concluding a portfolio management contract, and "operations" may be considered to be for example the deposit or withdrawal of funds to or from the bank account, payment by credit card, transactions made within the framework of a portfolio management contract. Adding new elements to an initial service agreement, such as a possibility to use an electronic payment instrument together with one's existing bank account, does not constitute an "operation" but an additional contract to which this Directive applies. However, the subscription to new units of the same collective investment fund is considered to be one of "successive operations of the same nature".

Finally, it is important to reiterate that the Directive lays down the requirements needed to ensure that an appropriate level of information is provided to the consumer both before and after conclusion of the contract. The consumer should receive, before conclusion of the contract, the prior information needed so as to properly appraise the financial service offered to him and hence make a well-informed choice.

4.1.2. Judgments of the Court of Justice of the European Union

The ECJ has not adopted any judgment that would regulate the issue of interpretation of the mentioned Directive yet. As regards implementation, the ECJ adopted judgments against the

Kingdom of Spain and the Grand Duchy of Luxemburg in which it warned them of their obligation to harmonise their legislation with the provisions of this Directive (Case C-141/06 the Commission v Spain and Case C-127/06 the Commission v Luxemburg). The ECJ has not delivered any judgment yet regarding correctness of interpretation and implementation of Directive 2002/65/EC.

4.1.3. Practical recommendations

On the basis of the above considerations, we give the following practical recommendations for the purpose of harmonisation of Montenegrin legislation with the provisions of Directive 2002/65/EC:

1. Harmonise Montenegrin legislation on consumer protection with the provisions of the Directive by preparing and adopting amendments to the CPL.
2. When preparing and adopting new legislative framework a decision should be made on the scope and content of possible additional information for the purpose of extending consumer protection in this field.
3. When preparing and adopting new legislative framework a decision should be made on the scope of exceptions to the consumer right of withdrawal, in accordance with the provisions of the mentioned Directive.
4. For the purpose of efficiency and effectiveness of harmonised rules, an appropriate system of sanctions, with particular emphasis on appropriate framework of supervision and application.

4.2. Commission Recommendations 98/257/EC and 2001/310/EC

4.2.1. Important elements of transposition

Alternative resolution of consumer disputes at the level of the EU is regulated by recommendations (Commission Recommendation 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes and similar Recommendation 2001/310/EC of 4 April 2001). These are not formally binding legal acts. Nevertheless, that field is highly important as *non-existence of adequate forms of alternative resolution of consumer disputes means in fact that the consumer is actually deprived of any possibility of legal protection*. Access to ordinary court, although formally open, is often not a realistic option for a consumer. Establishing alternative forms of resolution of consumer disputes must be one of primary projects in the field of consumer rights protection. Namely, adequate systems of resolution of consumer disputes contribute not only to the efficient exercise of consumer rights but they also reduce burden on ordinary courts and thus have a positive impact on the functioning of the judiciary as a whole. The experience of the EU member states proves that the forms of alternative resolution of consumer disputes can be difficult to impose “externally”, solely through the national legislation. For these forms to be efficient they need to be actually accepted both by companies and consumers; when establishing the system of alternative resolution of consumer disputes it is therefore essential that the cooperation is supported in particular by the representatives of the chambers of commerce. In accordance with the requirements of Recommendation 98/257/EC, the model of out-of-court settlement of consumer disputes that is formed must comply with the following principles:

Principle of independence: The body responsible for taking the decision in consumer dispute must comply with the criteria of independence and impartiality. The requirement for independence may be satisfied in two ways - regardless of whether the dispute is resolved by a collegiate body, whose composition guarantees equal representation of consumers and representatives of business sector, or it is resolved by an individual, who is independent of the interests of the parties to the dispute (and in a way that he/she is guaranteed a period of office of sufficient duration, which reduces the possibility of pressure by threatening to terminate his/her term of office or not to renew his/her term of office). In any case, it is necessary to guarantee professionalism, experience and competence of the person who will take decision.

Principle of transparency: Alternative dispute resolution may be efficient only if it is guaranteed that the consumer will indeed be informed in advance of the possibility and/or the body resolving consumer disputes, important characteristics and advantages that the particular form of dispute resolution may bring him, the procedure and its legal consequences (binding nature of the decision, costs...).

Adversarial principle: Adversarial principle i.e. the right to be heard is also guaranteed under Article 6 of the European Convention on Human Rights. Even though one of the main objectives of establishing body for alternative resolution of consumer disputes is to achieve speedy and inexpensive settlement of the dispute, that should not give rise to violation of the right to adversarial proceedings as the right guaranteed by the Constitution and the conventions of the international law.

Principle of effectiveness: The objective of alternative resolution of consumer disputes is to enable thereby actual access to legal protection, speed of the procedure and lower costs of procedure than it is possible to achieve within ordinary judicial process. In that connection, the EU recommendation highlights the following aspects: mandatory representation by a lawyer must not be prescribed; the procedure must be either free of charges or of moderate costs; the speed of the procedure is an element of efficiency; the provision that the body taking decision in consumer dispute must have an active role is also important because in that way it is necessary to correct the actual imbalance in the position of the parties; more active role of the body in that case serves to make the parties more equal.

Principle of legality: Establishing alternative forms of resolution of consumer disputes may not result in the consumer being deprived of the protection afforded by the mandatory provisions of the law. Therefore, the body deciding in such form of resolution of disputes must observe mandatory rules of substantive law, relating to consumer protection. By agreeing to alternative dispute resolution, the consumer and the company may not agree that the mentioned body will not take a decision according to applicable mandatory rules in the field of consumer protection. The EU Recommendation also lays down that the decision must be issued in writing stating the grounds on which it is based.

Principle of liberty: EU Recommendation highlights, in accordance with the requirements of the European Convention on Human Rights, that neither a consumer nor a company may be forced to a form of dispute resolution which would exclude a court. The following provision in the EU Recommendation is also very important: the consumer may not renounce his right to bring an action before the courts (by agreeing to alternative dispute resolution) prior to the materialisation of the dispute. The reason for this is that at the time when he concludes the contract (e.g. about purchase of goods or a travel package) the consumer does not expect that a dispute will arise. That is why it is then very easy for the company – e.g. in the general terms of the contract – to impose an arbitration agreement on a consumer. It is true that in such a case as well it is a true agreement in a formal sense, based on the wills of both parties, but in reality it is more or less a provision imposed by one party (a company) to the other party (a consumer), who did not even pay attention to that at the time of conclusion of the contract.

Principle of representation: The EU recommendation underlines that it is also not possible to prevent the consumer from being assisted by lawyer or another legally qualified person – if that is what he wants – in those forms of dispute resolution.

The recommendation described above corresponds only to the models where a third neutral person, running the process of alternative dispute resolution concludes that process with a reasoned decision. Such decision may be binding or binding on condition that no party brings an action before the court, and it can also be a recommendation only. However, 'decision' of the decision-taking body must have at least the effect of recommendation (and in that recommendation the body must – on the basis of the application of the law – in writing and in a reasoned manner – present its opinion which party is right). It means that in this manner the consumer, although it is not a binding decision (with the effect of *res judicata* and enforceability), will at least find out if he was right. The above-mentioned document in this

way excludes primarily mediation procedure. During mediation, namely, a mediator tries to help the parties to reach the settlement and he may present his opinion and recommendations. However, if the mediation fails – if the settlement is not reached, mediator may in no way issue a “decision” or an “opinion” in writing about how the dispute should be resolved in his opinion. If the mediation fails, it simply results in no document to conclude the procedure (apart from a short mediator’s statement that the mediation failed). Since it has nevertheless appeared recently that the mediation is experiencing a large expansion and that it has numerous advantages in the field of civil disputes, and that it may be (at least sometimes) useful in consumer disputes as well, a need has arisen to include in some way that method of alternative dispute resolution in the EU recommendations – and to set also qualitative conditions the mediation procedure must fulfil so that it can be assessed as positive contribution to exercising of consumer rights. Therefore, the Commission issued a new, additional Recommendation 2001/310/EC of 4 April 2001 and that recommendation highlights the principles of impartiality, effectiveness and transparency. Additionally, it also contains the principle of fairness. The body running the procedure, for instance of mediation, must take care that the settlement to be concluded by the consumer will truly reflect his true will and that the consumer will be allowed a reasonable period of time to inform himself of the suggested solution and to consider the suggested solution. The body running the procedure must warn the consumer that he has the right to seek legal advice on the suggested solution and that the suggested solution may be less favourable than an outcome determined by a court. Each party must be informed of their right to withdraw from the procedure at any time.

By adopting the CPL (and a rulebook on the basis of the CPL) Montenegro was the first country in the region to establish legal framework for alternative resolution of consumer disputes. The mentioned Law contains legal basis for forming the Arbitration Board for resolution of consumer disputes (Article 97). As a whole, provisions regulating the procedure before the Arbitration Board may be assessed as positive, but with certain deficiencies. The cause of major concern is that in this system the decision of the Arbitration Board is binding only if it is in the favour of the consumer; decision that is in the favour of the company, in any case, has an effect of recommendation and does not prevent the consumer from bringing an action before the court in the same case. At first sight it may seem that this favours efficient consumer protection, but it is not so. Namely, it is necessary to take into consideration that the company cannot be forced to renounce its right to judicial protection and to declare that it will accept the Board’s decision as binding. The decision of the Board may be binding (in the sense that it has the effect of legally binding judicial decision) only if both parties agree to that. However, in the system such as that accepted in the Montenegrin CPL, the companies will actually have no true interest in declaring that they accept the Board’s decision as binding. Namely, if by accepting beforehand the Arbitration Board’s decision as binding the company may only lose (if the decision is unfavourable to the trader it has the effect of a legally binding and enforceable judicial decision, but if the decision is favourable to the trader, the company is still exposed to the possibility to be sued by the consumer before the court in the same case) it may be expected that there will not be a lot of traders who will declare that they will accept (future) decision of the Board as binding. It is opportune for the trader to declare that he will accept (future) decision of the Board as binding only if he may not only lose something (if a consumer wins the case, the decision of the Board will be an enforceable document) but also gain. This would be the case if the trader won the case before the Board, thereby the dispute would be entirely solved and the consumer would not have the possibility to bring action before the court in the same case. This is a true incentive for the companies to have also the interest in final resolution of the dispute before the Arbitration Board. Such provisions also exist in the similar systems of the most EU Member States. Therefore, it may be concluded that the Montenegrin CPL must be amended in that part.

4.2.2. Judgments of the Court of Justice of the European Union

Judgment of 18 March 2010 in Joined Cases C-317/08 to C-320/08 *Alassini and Others*

In this judgment, the ECJ highlighted great importance of establishing models of out-of-court settlement of disputes involving consumers (in this specific example: in the field of provision of universal services). The States are responsible to ensure that such models, if established, fulfil requirements of the EU legislation: "In that connection, it must be stated that Article 34(1)

of the Universal Service Directive (2002/22/EC) assigns Member States the objective of establishing out-of-court procedures for dealing with unresolved disputes involving consumers and relating to issues covered by that directive. Accordingly, the fact that national legislation such as that at issue in the main proceedings has not only put in place an out-of-court settlement procedure, but has also made it mandatory to have recourse to that procedure before bringing an action before a judicial body, is not such as to jeopardise the attainment of that objective. On the contrary, such legislation, in so far as it ensures that out-of-court procedures are systematically used for settling disputes, is designed to strengthen the effectiveness of the Universal Service Directive" (paragraph 45).

4.2.3. Practical recommendations

On the basis of the above considerations, we give the following recommendations:

1. The system of alternative resolution of consumer disputes, established at the Chamber of Commerce of Montenegro should be retained with certain improvements and amendments to the law and rulebook.
2. It is necessary to consider, which provisions of the current rulebook should be included in the law.
3. In the case when the consumer files the complaint to the Arbitration Board, and the trader declares that he accepts the jurisdiction of the Arbitration Board to take a binding decision, that decision should be binding on both parties.
4. It is necessary to provide for the possibility of and the procedure for termination of term of office of a member of the Arbitration Board before the expiry of term of office (e.g. due to inactivity).
5. It is necessary to amend the provisions concerning the obligation to try to resolve the dispute directly with the trader i.e. by using internal complaint mechanisms, prior to filing complaint to the Arbitration Board.
6. It is necessary to enable the Arbitration Board to refuse to decide in complex cases, at its own discretion, especially in the cases related to expensive or uncertain procedure of presenting evidence for disputed facts.
7. It would be appropriate to limit the jurisdiction of the Arbitration Board as regards determination of cases which are in principle inappropriate for determination by the Arbitration Board due to their high value or complexity.

ANNEX A: WORKING MATERIAL

1. Sources of European Union law:

Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises

Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts

Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts

Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers

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

Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market

Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising

Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC

Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts

Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests

Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services

Commission Recommendation 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes

Commission Recommendation 2001/310/EC of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes

Proposal of the Directive of the Parliament and the Council on consumer rights, COM (2008) 614

2. Judicial practice of the Court of Justice of the European Union

Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises

- Judgment of 14 March 1991 in Case C-361/89 *Di Pinto* [1991] ECR I-01189

- Judgment of 22 April 1999 in Case C-423/97 *Travel Vac SL v Manuel José Antelm Sanchis* [1999] ECR I-02195

- Judgment of 13 December 2001 in Case C-481/99 *Georg Heininger and Helga Heininger v Bayerische Hypo- und Vereinsbank AG* [2001] ECR I-09945

- Judgment of 25 October 2005 in Case C-229/04 *Crailsheimer Volksbank eG v Klaus Conrads and Others* [2005] ECR I-09273

- Judgment of 10 April 2008 in Case C-412/06 *Annelore Hamilton v Volksbank Filder eG* [2008] ECR I-2383
- Judgment of 15 April 2010 in Case C-215/08 *E. Friz GmbH v Carsten von der Heyden*
- Judgment of 17 December 2009 in Case C-227/08 *Eva Martín Martín v EDP Editores SL*

Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours

- Judgment of 8 October 1996 in Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Erich Dillenkofer, Christian Erdmann, Hans-Jürgen Schulte, Anke Heuer, Werner, Ursula and Trosten Knor v Bundesrepublik Deutschland* [1996] ECR I-04845
- Judgment of 14 May 1998 in Case C-364/96 *Verein für Konsumenteninformation v Österreichische Kreditversicherungs AG* [1998] ECR I-02949
- Judgment of 1 December 1998 in Case C-410/96 *Criminal proceedings against André Ambry* [1998] ECR I-07875
- Judgment of 15 June 1999 in Case C-140/97 *Walter Rechberger, Renate Greindl, Hermann Hofmeister and Others v Republik Österreich* [1999] ECR I-03499
- Judgment of 12 March 2002 in Case C-168/00 *Simone Leitner v TUI Deutschland GmbH & Co. KG* [2002] ECR I-02631
- Judgment of 30 April 2002 in Case C-400/00 *Club-Tour, Viagens e Turismo SA v Alberto Carlos Lobo Gonçalves Garrido, and Club Med Viages Lda* [2002] ECR I-04051

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts

- Judgment of 24 January 2002 in Case C-372/99 *Commission of the European Communities v Italian Republic* [2002] ECR I-00819
- Judgment of 7 May 2002 in Case C-478/99 *Commission of the European Communities v Kingdom of Sweden* [2002] ECR I-04147
- Judgment of 9 September 2004 in Case C-70/03 *Commission of the European Communities v Kingdom of Spain* [2004] ECR I-07999

Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts

- Judgment of 3 September 2009 in Case C-489/07 *Pia Messner v Firma Stefan Krüger* [2009] ECR I-07315
- Judgment of 15 April 2010 in Case C-511/08 *Verbraucherzentrale Nordrhein-Westfalen eV v Handelsgesellschaft Heinrich Heine GmbH, OJ (2010) C 148, 0006 - 0007*

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

- Judgment of 19 February 2004 in Case C-310/03 *Commission of the European Communities v Grand Duchy of Luxembourg* [2004] ECR I-1969
- Judgment of 19 February 2004 in Case C-312/03 *Commission of the European Communities v Kingdom of Belgium* [2004] ECR I-1975
- Judgment of 17 April 2008 in Case C-404/06 *Quelle AG v Bundesverband der Verbraucherzentralen und Verbraucherverbände* [2008] ECR I-2685

Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market

- Judgment of 16 July 1998 in Case C-210/96 *Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt - Amt für Lebensmittelüberwachung* [1998] ECR I-4657
- Judgment of 13 January 2000 in Case C-220/98 *Estée Lauder Cosmetics GmbH & Co. OHG v Lancaster Group GmbH* [2000] ECR I-117
- Judgment of 26 November 1996 in Case C-313/94 *F.lli Graffione SNC v Ditta Fransa* [1996] ECR I-6039

Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising

- Judgment of 18 November 2010 in Case C-159/09 *Lidl SNC v Vierzon Distribution SA*
- Judgment of 12 June 2008 in Case C-533/06 *O2 Holdings Limited and O2 (UK) Limited v Hutchison 3G UK Limited* [2008] ECR I-4231

Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC

- Judgement of 27 March 2007 in Case C-429/05 Max Rampion and Marie-Jeanne Godard, née Rampion v. Franfinance SA and K par K SAS [2007] ECR I-08017

Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests

- Judgment of 1 October 2002 in Case C-167/00 *Verein für Konsumenteninformation v Karl Heinz Henkel* [2002] ECR I-8111

Commission recommendations 98/257/EC i 2001/310/EC

- Judgment of 18 March 2010 in Joined Cases C-317/08 to C-320/08 *Alassini and Others*

3. National legislation in Montenegro:

Constitution of Montenegro, *OG MN, No. 01/07*

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*

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

Law on Obligations, *OG MN No. 47/08*

Law on Internal Trade, *OG RMN No. 49/08*

Law on Business Organizations, *OG RMN, No. 6/02, and OG MN No. 17/07 and 80/08*

Law on Electronic Trade, *OG RMN, No. 84/04 and OG MN 41/10*

Law on Electronic Communications, *OG MN, No. 50/08*

Law on Electronic Media *OG MN, No. 46/10 and 49/10*

Law on Banks, *OG MN No. 17/08*

Law on Medicines, *OG RMN, No. 80/04 and OG MN 18/08*

Law on Inspection Surveillance, *OG RMN, No. 39/03 and OG MN, No. 76/09*

Law on Executive Proceedings, *OG RMN, No. 23/04*

Law on Contentious Proceedings, *OG RMN, No. 22/04 and 76/06*

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*

Law on Resolving Conflicts of Laws with Legal Provisions of other Countries in Certain Relations, *OG SFRY No. 43/82 and 72/82, OG FRY No. 46/96, and OG RMN, No. 06/02*

Decree on conditions for organization of public and auction sales, *OG MN No. 01/10*

Rulebook on Arbitration Board for Settlement of Consumer Disputes, *OG MN No. 28/08*

BIBLIOGRAPHY

1. Books:

Baretić M.: "Zaštita potrošača u Europskoj zajednici", Gavella N., Alinčić M., Hrabar D., Gliha I., Josipović T., Korać A., Baretić M., Nikšić S.: "Europsko privatno pravo", Pravni fakultet u Zagrebu, Zagreb, 2002.

Bertola, G., Disney, R. and C. Grant, *The Economics of Consumer Credit*, Cambridge, MA and London: The MIT Press. 2006.

Bouček, V., *Europsko međunarodno privatno pravo u eurointegracijskom procesu i harmonizacija hrvatskog međunarodnog privatnog prava*, Pravni fakultet u Zagrebu, Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ), Zagreb, 2009.

Caponi, R., *The collective redress action in the Italian legal system*, ERA Forum, Vol. 10, 2009/1, str. 7-36.

Cartwright, P., *Banks, Consumers and Regulation*, Oxford and Portland, Oregon, 2004.

Cartwright, P., *Consumer Protection and the Criminal Law: Law, Theory, and Policy in the UK*. Cambridge: Cambridge University Press, 2001.

Chen, K. and A. Fadlalla, eds. *Online Consumer Protection: Theories of Human Relativism*, Hershey, PA and New York, NY: Information Science Reference, 2009.

Čikara, E., *Gegenwart und Zukunft der Verbraucherkreditverträge in der EU und in Kroatien*, LIT Verlag, Wien (et al.), 2010.

Ferretti, F., *The Law and Consumer Credit Information in the European Community*, Routledge.Cavendish, London/New York, 2008.

Finlay, S., *Consumer Credit Fundamentals*, 2nd ed. Basingstoke and New York, NY: Palgrave Macmillan. 2009.

Finlay, S., *The Management of Consumer Credit: Theory and Practice*, 2nd ed. Basingstoke and New York, NY: Palgrave Macmillan, 2010.

Furmston, M. and J. Chuah, eds. *Commercial and Consumer Law*, Harlow: Pearson Education Limited, 2010.

Galič, A., *Procesnopravna zaštita potrošača u pravu Evropske unije*, *Evropski pravnik*, 2006/1 str. 107-119.

Galič, A., *Alternativno rješavanje potrošačkih sporova u pravu EU i u pravu država članica EU*, *Pravni zbornik*, Podgorica, 2008/1-2, str. 205-222.

Галев, Г. / Ј. Дабовиќ Анастасовска, *Облигационо право, Второ изменето и дополнето издание*, ЦЕППЕ, Скопје, 2009.

Hodges C., *Collective Redress in Europe: The New Model*, *Civil Justice Quarterly*, (29) 2010/3 str. 370-395.

Howells G. and S. Weatherill, *Consumer Protection Law*, 2nd ed., Ashgate, Farnham, 2005.

Howells, G. and R. Schulze, eds. *Modernising and Harmonising Consumer Contract Law*. Munich: Sellier, 2009.

Lindblom, P.H., *Group litigation in Scandinavia*, ERA Forum, Vol. 10, 2009/1, str. 7-36.

- Macleod, JK, *Consumer Sales Law*, Routledge.Cavendish, London/New York, 2007.
- Micklitz, H.-W., „Comparative Analysis on the Consumer Protection Laws of Albania, Bosnia and Herzegovina, Croatia, Macedonia, Montenegro and Serbia”, pripremljeno za Gesellschaft für Technische Zusammenarbeit u okviru Otvorenog regionalnog fonda za Jugoistočnu Evropu – Pravna reforma - Komponenta 3: Harmonizacija pravnih okvira za zaštitu potrošača i uspostavljanje mreže institucija za zaštitu potrošača u regionu, 2008.
- Milić, D., *Obligaciono pravo sa sudskom praksom: Priručnik/Zakon o obligacionim odnosim - III dopunjeno izdanje*, NNK International, Beograd, 2003.
- Milović, R. M., Korać, R., Z. Rašović, *Evropsko pravo i pravni sistem u Crnoj Gori*, Službeni list Crne Gore, Podgorica 1999.
- Nebbia, P., *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, Oxford and Portland, OR: Hart Publishing, 2007.
- Nebbia, P. and T. Askham, *EU Consumer Law*, Oxford: Oxford University Press, 2004.
- Niemi, J., Ramsay, I. and W.C. Whitford, eds. *Consumer Credit, Debt and Bankruptcy: Comparative and International Perspectives*. Oxford and Portland, OR: Hart Publishing, 2009.
- Perović, S. (ed.), *Komentar Zakona o obligacionim odnosima*, Beograd 1995.
- Radišić, J., *Garancija za trajan kvalitet i odgovornost za štetu od stvari sa nedostatkom*, Institut za uporedno pravo, Beograd, 1972.
- Rickett, C., T. Telfer, *International Perspectives on Consumers' Access to Justice*, Cambridge University Press, 2003.
- Schulte-Nölke, H. (ed.), *Consumer Law Compendium*, University of Bielefeld.
- Schulze, R., Schulte-Nölke, H. and J. Jones, eds. *A Casebook on European Consumer Law*, Oxford and Portland, OR: Hart Publishing, 2002.
- Stadler, A., *A test case in Germany: 16.000 private investors vs. Deutsche Telekom*, ERA Forum, Vol. 10, 2009/1, str. 37-50.
- Tzakas D.-P., *Effective collective redress in antitrust and consumer protection matters: A panacea or a chimera?*, *Common Market Law Review*, Vol. 48, 2011/4, str. 1125-1174.
- Vandone, D., *Consumer Credit in Europe: Risks and Opportunities of a Dynamic Industry*, Heidelberg, London and New York: Physica-Verlag, 2009.
- Van Boom, W. and M. Loos (ed.), *Collective Enforcement of Consumer Law*, Europa Law Publishing, Groningen, 2007.
- Ziegel, J.S., *New Developments in International Commercial and Consumer Law: Proceedings of the 8th Biennial Conference of the International Academy of Commercial and Consumer Law*, Oxford and Portland, OR: Hart Publishing, 1998.
- Walker, P.M., *Consumer Law*, 4th ed. London and Sydney: Cavendish Publishing Limited, 2001.
- Weatherill, S., *EU Consumer Law And Policy*, Edward Elgar Publishing, Cheltenham, 2005.
- Willet, C., *Fairness in Consumer Contracts*, Ashgate, Farnham, 2007.

2. Articles:

Baretić M., „Implementacija prava Europske zajednice o zaštiti potrošača u hrvatsko pravo“, Zbornik XLI Susreta pravnika, Zagreb 2003.

Baretić, M., „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, 57.

Czuzcai, J., „Final Report on EU Consistency of Srbija/Crna Gora Regulatory Framework for Consumer Protection“, PLAC an EU Funded Project, Belgrade/Podgorica 2006.

Čikara, E., „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, 1067.

Čikara, E., „Nova Direktiva 2008/48/EZ o ugovorima o potrošačkom kreditu i učinci njezina preuzimanja u hrvatsko pravo, Pravo i porezi, br. 7-8/2009 i br. 9/2009.

Čikara, E., „Prijevremena otplata kredita prema novom Zakonu o potrošačkom kreditiranju“, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 31 br. 1, Supplement, 2010.

Čapeta, T., „Zaštita potrošača – pravni aspekti“, Zagreb 2002.

Дабовиќ-Анастасовска, Ј. и Н. Гавриловиќ, „Формата на договорите во нашето договорно право“, Годишник на Правниот факултет „Јустинијан Први“ во Скопје, 40, 2006, стр. 517-536.

Dabović-Anastasovska, J. i Gavrilović, N., „Nevažnost ugovora u makedonskom pravu“, Pravni život, 11, 2007, str. 769-792.

Дабовиќ-Анастасовска, Ј. и н. Гавриловиќ, „Поимот и склучувањето на договорите во македонското право, руското право и Начелата на европското договорно право“ во Зборник на трудови „Актуелните прашања за државата и правото на Република Македонија и Руската Федерација“: том 2. Скопје: Правен факултет „Јустинијан Први“, 2007, стр. 453-471.

Дабовиќ-Анастасовска, Ј. и Н. Гавриловиќ, „Измена на цената кај договорот за градење“ во Зборник во чест на Тодор Рушков. Скопје: Правен факултет „Јустинијан Први“, 2010, стр. 1-15.

Дабовиќ-Анастасовска, Ј., Лончар-Велкова, М. и Н. Гавриловиќ, „Заштита на потрошувачите во договорните односи во правото на Република Македонија“ во Зборник во чест на Владимир Митков. Скопје: Правен факултет „Јустинијан Први“, 2010, стр. 351-374.

Галев, Г., Дабовиќ-Анастасовска, Ј., Здравева, Н. и Н. Гавриловиќ, „Компаративно искуство на кодификација на граѓанското право во поранешните југословенски републики: теоретски и практични аспекти“, во Зборник од научната расправа „Кодификација на македонското граѓанско и трговско право“. Скопје: Македонска академија на науките и уметностите, 2008, стр. 125-158.

Галев, Г., Дабовиќ-Анастасовска, Ј., Здравева, Н. и Н. Гавриловиќ, „Компаративни искуства за подготовка на граѓански законик на Република Македонија“ во Зборник од научната расправа „Кодификација на македонското граѓанско и трговско право“. Скопје: Македонска академија на науките и уметностите, 2008, стр. 219-244.

Schulte–Nölke, H., „The transposition of European consumer directives into the national laws of the EU–Member States“, Tijdschrift voor Consumentenrecht en handelspraktijken, 4/2009, 133.

Šarčević, S., 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, 193.

Vilus, J., „Elektronsko ugovorno pravo“, *Pravo i privreda*, 1995/11-12, 1-18.

Vilus, J., „Nekorektne klauzule u ugovoru sa potrošačima – Povodom Direktive EEZ 93/13 od 1993. godine“, *Strani pravni život*, 1996/1-3, 131-146.

Vilus, J., „Direktiva Evropskog parlamenta i Saveta o prodaji na daljinu (97/7/EZ)“, *Evropsko zakonodavstvo*, 2003/4, 47-50.

Vilus, J., „Zakon o zaštiti potrošača Srbije i propisi Evropske unije“, *Evropsko zakonodavstvo*, 2006/15-16, 63-69.

Weatherill, S., „Law and Integration in the European Union“, Oxford University Press, Oxford 1995, 151-157.

An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings - Final Report, A Study for the European Commission, Health and Consumer Protection Directorate-General Directorate B – Consumer Affairs prepared by The Study Centre for Consumer Law – Centre for European Economic Law, Katholieke Universiteit Leuven, 2007. http://ec.europa.eu/consumers/redress/reports_studies/comparative_report_en.pdf

Final Report to DG SANCO – Study on the use of Alternative Dispute Resolution in the European Union, Submitted by Civic Consulting of the Consumer Policy Evaluation Consortium (CPEC), 2009. http://ec.europa.eu/consumers/redress_cons/adr_study.pdf



Co-Funded by the European Union