

Emilia Miščenić

University of Rijeka, Croatia

emiscenic@pravri.hr

ORCID: 0000-0002-2695-9186

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

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1. Enforcement of Consumer Rights

1.1. Procedural Protection of Consumer Rights

The first part of this paper presented the legal development of relatively young Croatian consumer protection law as affected by the EU approximation process. The result is one main Consumer Protection Act (CPA) as *lex generalis* for consumer protection and the vast of consumer protection rules spread all over the Croatian legal system. The effective protection of consumer rights is even more undermined by various and separate rules on procedural protection of consumer rights. With the exception of the collective redress mechanism, the rest of the CPA provisions dealing with enforcement of consumer rights (Part IV to Part VII) mostly refer to rules elaborated in other more special legal acts¹. Under the common title “Procedural protection of consumer rights”, Part IV regulates out-of-court resolution of consumer disputes (Chapter I), and protection of collective interests of consumers (Chapter II).

¹ Part VIII contains transitional and final provisions.

1.1.1. Out-of-court Resolution of Consumer Disputes

Despite the fact that an alternative dispute resolution is quite a favorable mechanism of resolving consumer disputes, the CPA deals with it only partially and within one single article. The reason for it lies in the legal fragmentation of our system, on the one hand, and in efforts of simplifying the structure and the content of the CPA, on the other. According to Art. 105(1) CPA², in case of a dispute between a consumer and a trader, an application *can* be brought to Courts of Honour of the Croatian Chamber of Economy and of the Croatian Chamber of Trades and Crafts, or a proposal for mediation can be submitted to mediation centers. There are no other provisions dealing with the procedure, legal representation, legal effects of rulings or other important matters. Para. 2 simply refers to the regulation of procedure in more special Ordinances of enumerated bodies³ and to mediation rules in the Mediation Act⁴ and the following Ordinance⁵. As a voluntary mechanism, ADR is also foreseen in other legal acts dealing with protection of consumers, such as the Consumer Credit Act, the Insurance Act, the Payment System Act etc. As a result, there is a whole range of bodies offering ADR in Croatia, e.g. the Insurance ombudsman and the Mediation Center of the Croatian Insurance Bureau, the Mediation Center of the Croatian Employer's Association, the Mediation Center in

² Article observes 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, OJ L 115/31, 17.4.1998; 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, OJ L 109/56, 19.4.2001.

³ Ordinance of the Court of Honour of the Croatian Chamber of Economy (*Pravilnik o Sudu časti pri Hrvatskoj gospodarskoj komori*) OG Nos. 66/06, 114/06, 129/07, 8/08, 74/15 and 6/18; Ordinance of the Court of Honour of the Croatian Chamber of Trades and Crafts (*Pravilnik Suda časti Hrvatske obrtničke komore*) OG No. 22/17.

⁴ Mediation Act (*Zakon o mirenju*) OG No. 18/11.

⁵ Ordinance on Mediation (*Pravilnik o mirenju*) OG No. 142/11.

Banking Disputes, Mediation Center of the Croatian Bar Association and Mediation Center of the Croatian Mediation Association⁶. Publicly available rulings of these bodies, often reveal a serious misunderstanding and incorrect application of relevant CPA and other consumer protection rules. Such as in the case of the wrong shoes size, where the Court of Honor incorrectly granted rights to the consumer, who misused the legal rights by wearing and then searching a replacement of shoes on the ground of non-conformity⁷. However, there are also positive examples, particularly when it comes to decisions on unfair contract terms in credit agreements⁸. Improvements in this respect are expected from the new Alternative Dispute Resolution Act⁹, which should guarantee a high level of expertise from persons involved in solving a B2C dispute. Another important venue for resolution of B2C disputes is arbitration. Although not mentioned in the CPA, Art. 6(6) of the Arbitration Act¹⁰ prescribes that in case of a dispute from a consumer contract, arbitration agreement must be written in a special document signed by both parties. Besides being faster and cheaper for consumers, another advantage of enumerated out-of-court disputes resolution mechanisms presents the fact that decisions brought in mediation,

⁶ For more information visit the official web-site of the Ministry of Economy, Entrepreneurship and Crafts, Alternative Dispute Resolution in the Republic of Croatia (*Alternativno rješavanje potrošačkih sporova u Republici Hrvatskoj*) available at: <http://potrosac.mingo.hr/hr/potrosac/clanak.php?id=12645> (access: 25.07.2018).

⁷ See Collection of Decisions of the Court of Honour of the Croatian Chamber of Economy from 2012 to 2015, available at: <https://www.hgk.hr/sud-casti-pri-hgk/iii-zbirka-odluka-suda-casti-pri-hgk-2012-2015> (access: 25.07.2018).

⁸ See judgments of the Court of Honour of the Croatian Chamber of Economy, P-I-50/10 of 25 March 2011 and PŽ-II-13/11 of 7 October 2011 deciding on unfairness of contract terms used by the bank P.B.Z. d.d. in credit agreement concluded with the consumer A.D. See also judgment of the Court of Honour of the Croatian Chamber of Economy, P-I-67/10 of 23 January 2012 on unfair contract terms used by the bank OTP B. d.d. in credit agreement concluded with the consumer B.Š.

⁹ Alternative Consumer Dispute Resolution Act (*Zakon o alternativnom rješavanju potrošačkih sporova*) OG No. 121/16.

¹⁰ Arbitration Act (*Zakon o arbitraži*) OG No. 88/01.

arbitration or proceedings of Courts of Honors have the force of the enforcement title documents (hrv. *ovršna isprava*)¹¹.

1.1.2. Protection of Collective Interests of Consumers

Besides regular court proceedings initiated by an individual action, where the consumer enjoys the same position as any other plaintiff bringing an action due to violation of his civil law rights¹², a consumer may use a collective redress mechanism as regulated in Chapter II of the Part IV¹³. The rules of this chapter present implementation of the Directive 2009/22/EC and consequently enable any *qualified* entity or person to initiate a proceeding for the protection of collective interests of consumers against a person who acts contrary to the enumerated provisions of the CPA, OA, E-Commerce Act, Consumer Credit Act etc. (Art. 106(1)). According to Art. 107(1) CPA, the mark “qualified” requires that entities or a person have justified interest for collective protection of consumers, such as consumer protection associations or state authorities competent for consumer protection. To this purpose the Croatian Government adopted a Decision determining actively legitimate bodies to which belong: Ministry of Economy, Ministry of Finance, Ministry of Maritime Affairs, Transport and Infrastructure, Ministry of Health, *Agency* for Electronic Media, Croatian Regulatory Authority for Network Industries, “Consumer” – Croatian Union of the Consumer Protection Associations, and Union of the Consumer Protection Associations of Croatia¹⁴. Moreover, Art. 107(5) enables

¹¹ Enforcement Act (*Ovršni zakon*) OG No. 112/12, 25/13, 93/14, 55/16 and 73/17.

¹² *Arg. ex. Art. 1 of the Civil Procedure Act (Zakon o parničnom postupku)* OG SFRY 4/77, 36/77, 36/80, 69/82, 58/84, 74/87, 57/89, 20/90, 27/90, 35/91, incorporated into Croatian legal system by OG 53/91, 91/92, 58/93, 112/99, 129/00, 88/01, 117/03, 88/05, 02/07, 84/08, 96/08, 123/08, 57/11, 25/13 and 89/14.

¹³ Extensively to the subject A. Maganić, *Zaštita kolektivnih interesa i prava potrošača*, “Zbornik 52. susreta pravnika u Opatiji”, 2014, pp. 203–236.

¹⁴ Decision on Determining of Authorities and Persons Authorized to Initiate Proceeding for Protection of Collective Interests of Consumers (*Odluka*

a qualified entity from another EU Member State to initiate proceedings for protection of collective interests of consumers. Exactly these rules were the stumbling stone in the first Croatian collective redress proceeding *Franak*. Namely, lost in a forest of provisions on consumer protection, the Association *Franak* initiated a collective redress proceeding against seven (later widened to another one)¹⁵ banks in September 2011 before the Commercial Court in Zagreb. Naturally, the action was dismissed on the ground of missing active legitimation. It is then that Association *Franak* decided not to give up and signed the cooperation agreement with the actively legitimate Croatian Union of the Consumer Protection Associations-“Consumer”, who initiated the proceeding in April 2012¹⁶.

If the claim is justified, the court shall issue a decision 1) determining and precisely defining infringement act, 2) ordering a defendant to stop with activities violating consumer protection provisions and if possible, ordering measures necessary for removal of detrimental consequences created by defendant's unlawful behavior, and 3) prohibiting such or similar behaviour in future (Art. 114). Moreover, such a court decision has an *erga omnes* effect, which enables the plaintiff, qualified entity or person, but also every consumer to request an enforcement of a decision ordering a defendant to refrain in the future from the same or similar illegal behavior in relation to all consumers (Art. 117). The collective redress procedure does not exclude the possibility of initiating damage compensation proceedings, of initiating procedure for declaring the contract null or void, or the possibility of initiating

o određivanju tijela i osoba ovlaštenih za pokretanje postupka za zaštitu kolektivnih interesa potrošača) OG No. 105/14. This Decision replaced the previous Regulation on determining of persons authorized to initiate the proceeding for the protection of the collective interests of consumers (*Uredba o određivanju osoba ovlaštenih za pokretanje postupka radi zaštite kolektivnih interesa potrošača*) OG No. 124/09.

¹⁵ Under Art. 106(2) CPA passively legitimate are individual trader or a group of traders coming from the same economic sector, who violate enumerated provisions, chambers and traders interest associations promoting unlawful conduct, or carriers of trader's code of conduct promoting unfair business practices.

¹⁶ For more details, E. Mišćenić, *Croatian Case “Franak”*, p. 184.

any other proceedings for realization of rights guaranteed by the CPA or other laws (Art. 120). Both special provisions of the CPA and subsidiary applicable provision of the Civil Procedure Act (Arts. 502.a *et seq.*) contain rules on binding effect of the court decision brought in collective redress proceeding upon other courts (Art. 118 CPA; Art. 502.c. CPA). Accordingly, in the many proceeding of individuals initiated against their creditors, findings from the case Franak were used as the grounds for the court's decision¹⁷. Whether this was a right thing to do remains however questionable due to the never-ending development in this proceeding. Once the Constitutional Court of Croatia found a violation of the plaintiff's right to a fair trial¹⁸, due to incorrect interpretation of domestic law on unfair contract terms with the Directive 93/13/EEC and relevant CJEU case law, the whole case was sent to a renewed trial in October 2017¹⁹.

1.2. Other Enforcement Mechanisms

Besides out-of-court and court proceedings, there are also other enforcement mechanisms available to the consumers. To the lowest line of defense belongs the written complaint of the consumer directly to the trader, to which the latter is obliged to respond within 15 days (Art. 10). However, in case of a complaint to public services, there is a second step, enabling reclamation to which the competent committee must answer in writing within 30 days (Art. 25(6)). Only after these steps have been exhausted, can the consumer use inspectional supervision (Art. 135). The competent inspector can require from the trader to remove established violations of consumer protection rights and even prohibit the sale until

¹⁷ E.g. in judgement of Municipal Court Osijek of 19 June 2015, P-135/2015-8.

¹⁸ Decision of the Constitutional Court of the Republic of Croatia of 13 December 2016, U-III – 2521/2015 and others.

¹⁹ Order of the Supreme Court of the Republic of Croatia of 3 October 2017, Revt 575/16-5.

the trader has complied (Art. 137). He can also initiate a special misdemeanor procedure against the trader, who may end up paying a fine between max. 15.000,00 HRK – for trader’s individuals up to 100.000,00 HRK – for trader’s legal persons (Art. 138). In addition to those mechanisms, some violations of consumer rights present a criminal offence sanctioned with a prison fine, such as in case of misleading advertising²⁰.

One should also not forget to mention other B2C dispute resolution mechanisms before the so-called regulatory authorities presenting independent and non-profit legal persons with public authorities. These shall, in most cases, concern some of the public services mentioned above²¹, in which cases competent regulatory authorities offer their own venue of dispute resolution according to the rule of more special legal acts. For example, a consumer being a subscriber of a mobile phone contract can submit its complain to the Croatian Regulatory Authority for Network Industries in accordance with the specific rules for complains provided for in the *Electronic Communications Act*. The competent regulatory agency shall issue a decision or resolution within administrative procedure, however, only after the consumer has unsuccessfully exhausted the above-described first two steps of complaining directly to the mobile phone operator²². To other relevant regulatory agencies belong, for example, the Croatian Financial Services Supervisory Agency competent for financial services, the Croatian Energy Regulatory Agency competent for provision of electricity and heating, the Croatian Food Agency, while the Croatian National Bank presents a main supervisory authority for credit, electronic money and payment services (Art. 134 CPA)²³.

²⁰ Art. 255 of the Criminal Act (*Kazneni zakon*) OG Nos. 125/11, 144/12, 56/15, 61/15, 101/17.

²¹ See E. Mišćenić, *Croatian Consumer Protection Law: From Legal Approximation to Legal Fragmentation (Part I)*, title 2.1.2.2.2.

²² How to complain to HAKOM, available at: <https://www.hakom.hr/default.aspx?id=130> (access: 25.07.2018).

²³ Detail elaboration of enforcement in Croatia is offered by Josipović T., *Enforcement Activity in Consumer Protection Regulation in Croatia*, “Journal of Consumer Policy” 2013, No. 36:287, p. 304.

1.3. Institutional Consumer Protection

The Part V of the CPA deals with institutional framework competent for consumer protection and enumerates the so-called carriers of consumer protection in Croatia. According to Art. 124 CPA, to these bodies belong the Croatian Parliament, the Government, the ministry competent for consumer protection affairs (i.e. Ministry of Economy, Entrepreneurship and Crafts), competent inspections, the National Consumer Protection Council, business associations, consumer protection associations, units of local self-government, and other bodies of public authorities each within their competence. However, as seen, despite their role as carriers of consumer protection, even these bodies, such as the Ministry of Economy, Entrepreneurship and Crafts sometimes offer incorrect interpretation of relevant consumer protection rules, therefore offering less protection to consumers²⁴. Further provisions offer just basic information on representatives of the National Consumer Protection Council (Art. 125), tasks of the local units (Art. 126) and of consumer protection associations (Arts. 127–129). Although latter may provide services of consumer counselling, they are not allowed to offer free legal aid, a service that is subject to specific conditions and authorities set in the Free Legal Aid Act²⁵. This is also one of the decisive reasons why the enforcement of consumer protection in Croatia is still unsatisfactory, despite the fact that there are more than thirty registered consumer protection associations and four main counselling centers for consumer protection. The second chapter of this part is devoted to the National Consumer Protection Program (Arts. 130–133 CPA). Although the Program is to be adopted every four years and the last one expired on January 1 2017²⁶,

²⁴ IUS-INFO – Interpretation of the Ministry – Can Contract on Intermediation in Immovable Be Considered as Consumer Contract (*Mišljenja ministarstva – Smatra li se ugovor o posredovanju nekretnina potrošačkim ugovorom*).

²⁵ Free Legal Aid Act (*Zakon o besplatnoj pravnoj pomoći*) OG No. 143/13.

²⁶ National Consumer Protection Programme for the time period 2013–2016, OG No. 90/13.

the new National Consumer Protection Program for the time period from 2017 to 2020 is still under consideration and has not been adopted yet²⁷.

2. Other Legal Acts Relevant for Consumer Protection

2.1. Consumer Protection under the Obligations Act

As described in the first part of this paper, despite the initial reluctance to implement EU Directives on consumer protection into the OA, eventually this Act became the second most important act for consumer obligations relations, not because the OA is *lex generalis* in obligation relations (Art. 4(2) CPA), but because it transposed as many as four consumer protection Directives: 85/374/EEC, 90/314/EEC, 93/13/EEC, and 1999/44/EC. However, Art. 1.a OA, introduced as late as in 2015²⁸, includes the Directive 1999/34/EC amending the Directive 85/374/EEC, but omits to mention the Directive 93/13/EEC. Although at first sight this might seem unimportant, such oversights stand in the way of consistent interpretation of domestic law with its EU law sources. The mentioned EU Directives have all been transposed excessively (germ. *überschießende Richtlinienumsetzung*) in order to be applicable to B2C and all other civil law relations. Nonetheless, there are exceptions to this approach, in part of the Act dealing with conformity of “things” (Arts. 400–422), where some provisions are limited strictly to B2C contractual relations. As an example, one should mention Art. 402 OA dealing with defects for which the seller is not liable. Para. 2 of this provision sets the criterion of prudent and diligent buyer of average knowledge and experience, which is not applicable to “consumer contracts”. According to Art. 402(3) OA, consumer contracts are contracts concluded by a natural person as buyer

²⁷ E-counselling, available at: <https://esavjetovanja.gov.hr/ECon/MainScreen?entityId=4892> (access: 25.07.2018).

²⁸ OG No. 78/15.

outside of his/her economic or professional activity, with a natural or legal person who as a seller acts within his/her economic or professional activity. That way Art. 402(3) OA actually transposed the definitions of the “consumer” and the “seller” from Art. 1(2)(a) and (c) of the Directive 1999/44/EC. Another example of provision applicable only to B2C contracts is Art. 403(4) OA that sets the consumer free from the duty to examine the thing for visible defects. This paragraph incorporates the option from Art. 5(2) of the Directive 1999/44/EC and obliges the consumer only to notify the seller about the lack of conformity within 2 months from the day of defect discovery and no later than 2 years from the passing of risk to the consumer. It seems to the author that this rule is in direct conflict with the conclusion of the CJEU in the case *Faber*, where Art. 5(2) of Directive was interpreted as not allowing the consumer less than two months for notification²⁹. Further Directive provisions have been transposed excessively, such as Art. 3 of the Directive 1999/44/EC on remedies in cases of non-conformity (Art. 410). All of these provisions, including those incorporating Directives rules on the warranty (Arts. 423–429) are to be read and applied together with more special rules on conformity, passing of risk, and on delivery introduced into the CPA by the Directive 2011/83/EU³⁰. Such level of fragmentation complicates significantly application of rules on the conformity of “products” (*arg. ex* Art. 43(2) CPA) and warranty, and undermines significantly the protection of consumer rights in practice. What is even more important, the Croatian enforcement bodies should be more aware of the importance of EU law for interpretation and application of each and single of these provisions. For example, the notion “free of charge” as taken over from Art. 3 of the Directive 99/44/EC into Art. 410(4) OA is to be interpreted in accordance with the standings of the CJEU in cases such as *Quelle* or *Putz*³¹. Here, the CJEU made clear that this no-

²⁹ Judgement of 4 June 2015, C-497/13, *Faber*, EU:C:2015:357, para. 65: “provided that that consumer has a period of not less than two months from the date on which he detected that lack of conformity to give that notification”.

³⁰ See E. Mišćenić, *Croatian*, title 2.1.2.2.3.1.

³¹ Judgment of 17 April 2008, C-404/06, *Quelle*, EU:C:2008:231; judge-

tion concerns all the costs the consumer has to bear in order to bring the goods in conformity with the product³². Another case that is of particular importance for the Croatian OA offering protection to buyers of second-hand goods is the *Ferenschiold* case³³. The CJEU clarified that in MS, which used the option from Art. 7(1) of the Directive 99/44/EC enabling parties to agree on a shorter *guarantee period*, which cannot be less than a year, this choice does not affect the minimum *limitation period* set in Art. 5(1) of the Directive³⁴. This mandatory rule on two years of *limitation period* running from the moment of passing of risks is in the Croatian OA transposed in even more satisfactory manner and it starts to run from the moment when the consumer informed the seller of non-conformity (Art. 422(1)).

The same concerns are relevant for other parts of the OA incorporating the rest of enumerated EU Directives. Due to the complete harmonization nature of the Directive 85/374/EEC, the OA implemented it literally into Arts. 1073–1080 on producer's liability for defective products³⁵. There is a long list of the CJEU cases relevant for the proper interpretation and application of these OA rules that are often even unrecognized as "harmonized" provisions of the OA part on the tort law. Some of the main notions, such as "defective product" (Art. 1075) or "damage" (Art. 1073(2)), depend from the proper interpretation given in cases, such as the *Boston Scientific Medizintechnik* case³⁶ in which the CJEU concluded that even potential risk of the defect does not offer the safety reasonably

ments in joined cases of 16 June 2011, C-65/09, *Gebr. Weber and Putz*, EU:C:2011:396.

³² The CJEU accentuated that the list of the costs included in Art. 3(4) of the Directive 99/44/EC is not exhaustive, but illustrative.

³³ Judgement of 13 July 2017, C-133/16, *Ferenschiold*, EU:C:2017:541.

³⁴ *Ibidem*, para. 51.

³⁵ In judgment of 25 April 2002, C-183/00, *González Sánchez*, EU:C:2002:255, para. 28 the CJEU established that "the fact that the Directive provides for certain derogations or refers in certain cases to national law does not mean that in regard to the matters which it regulates harmonisation is not complete".

³⁶ Judgement of 5 March 2015 in joined cases C-503/13 and 504/13, *Boston Scientific Medizintechnik*, EU:C:2015:148.

expected from the “product”³⁷, whereby this “product” (Art. 1074) is not to be confused with the abovementioned “product” from the Art. 5(22) CPA³⁸. Actually, there is no clear standing of the Croatian case law as to what is to be understood under the notion of defective “product” in light of amendments introduced by the Directive 99/34/EC. In one of the cases in 2013, the Supreme Court concluded that, according to its legal view, collecting of blood and blood ingredients does not represent putting the product into circulation on the market and thus application of OA provisions on producer’s liability is excluded³⁹. In another case from the same year, it came to a conclusion that trichinella is not an expected feature of sausages or of ingredients from which these are made and therefore decided that their producer is liable on the ground of liability for defective products⁴⁰. Another particularity concerns the Directives threshold of 500 Euros for material damage to other items than the defective product itself. Art. 1073(3) OA transposed this rule in a manner allowing the compensation of damage caused only for the part of the damage exciding 500 Euros.

When it comes to the implementation of the Directive 90/314/EEC into provisions of the OA, we are currently faced with a peculiarity. Namely, this Directive was originally transposed by Arts. 881–903 OA and partially also by provisions of the Act on Provision of Services in Tourism from 2007⁴¹. In the meantime, the Directive was replaced by the new Directive (EU) 2015/2302 on package travel and linked travel arrangements⁴², which was intro-

³⁷ Ibidem, para. 56.

³⁸ See E. Mišćenić, *Croatian*, title 2.1.2.2.1.

³⁹ Judgment of the Supreme Court of the Republic of Croatia of 30 October 2013, Rev 1951/10-2.

⁴⁰ Judgment of the Supreme Court of the Republic of Croatia of 3 December 2013, Rev 2105/11-4.

⁴¹ Act on Provision of Services in Tourism (*Zakon o pružanju usluga u turizmu*) OG No. 68/07, 88/10, 30/14 and 152/14.

⁴² Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC, OJ L 326, 11.12.2015, p. 1–33.

duced into our legal system by entrance into force of the new Act on Provision of Services in Tourism with January 1, 2018⁴³. However, despite the planned amendments, the OA provisions are still in force, therefore enabling a legal situation in which corresponding provisions of two EU Directives dealing with the same issues in different manner coexist and eventually contradict each other⁴⁴. The OA provisions gathered under the title “Contract on the travel organization” contain a definition of the notion in Art. 881(1), in which, due to excessive implementation of the Directive, the “consumer” is replaced by the term “traveller”⁴⁵. As in the Directive 90/314/EEC, the following rules regulate the content of the brochure (Art. 882), information to be given to the traveller before contract conclusion (Art. 883), the form and content of the contract (Art. 884), as well as the duties of the travel organizer (Arts. 885–893) and of the traveller (Arts. 894–898). The right of replacement of the traveller (Art. 899) or traveller’s right to terminate the contract is regulated under a separate title on special rights and duties of contracting parties (Arts. 899–903). In respect of other harmonized parts of the Act, here too the question arises whether the courts recognize their duty to interpret provisions in accordance with the *acquis*, including the case law of the CJEU (e.g. the *Leitner* case)⁴⁶.

Probably the most appropriate example justifying these doubts are the rules of the OA on general contract conditions (Arts. 295–

⁴³ Act on Provision of Services in Tourism (*Zakon o pružanju usluga u turizmu*) OG No. 130/17.

⁴⁴ This is relevant despite the transitional provision on application of harmonized provision from July 1 2018 in Art. 28(2) of the Directive (EU) 2015/2302, since many provisions of the new Act apply from January 1, 2018.

⁴⁵ “By a contract on the travel organisation, the organiser of the travel is obliged to acquire for the passenger at least two services consisting in transport, accommodation or other tourist services, which create a whole and are offered during a time period longer than 24 hours or include at least one overnight accommodation (package-arrangement) and the traveller is obliged to pay for it one inclusive price”.

⁴⁶ Judgement of 12 March 2002, C-168/00, *Leitner*, EU:C:2002:163, where the CJEU concluded that the notion “damage” is to be interpreted in a broad meaning as to include non-material damage occurred during the travel package arrangement.

–296). The fact that these articles are approximated with the Directive 93/13/EEC is not even mentioned in Art. 1.a OA. For almost ten years after implementation of the Directive in the first CPA 2003, the Croatian courts were ruling simply by applying OA provisions on general contract conditions and by ignoring more special CPA provisions on unfair contract terms. This actually proved that double-track regulation of unfair contract terms was a wrong choice of the Croatian legislator. As explained, these two parallel systems share many similarities, for example in respect of provisions on criteria for assessment of the contract (Art. 51 CPA, Art. 296(2) OA), exclusion of contractual terms from the unfairness test (Art. 49(5) CPA, Art. 296(3) OA), *contra proferentem* interpretation (Art. 54(1) CPA, Art. 320(1) OA), etc. Consequently, the minimum harmonization standard of the Directive 93/13/EEC could have been used for more excessive transposition of its rules into the OA. Further argument going in favor of such a choice is the OA regulation of legal consequences of unfairness, namely of nullity⁴⁷. Pursuant to OA provisions on nullity of contracts, the right to invoke nullity does not expire (Art. 328) and the court watches upon the nullity *ex officio* (Art. 327(1)). This is in keeping with the mandatory Art. 6(1) of Directive 93/13/EEC and the settled CJEU case law on unfair contract terms, as in cases *Cofidis*⁴⁸ or *Océano*⁴⁹. In this respect, one should mention Conclusions of the Supreme Court of the Republic of Croatia of 12 April 2016, which acknowledged the *ex officio* duty of courts to watch upon *invalidity* of general standard contract terms, but only when they have the terms at their disposal⁵⁰. Since the rules on invalidity of general standard contract

⁴⁷ Arts. 322–329 OA regulate general conditions for nullity of contracts, legal consequences, partial nullity, subsequent disappearance of the nullity cause, invoking nullity, time period for invoking nullity etc.

⁴⁸ Judgment of 21 November 2002, C-473/00, *Cofidis*, EU:C:2002:705.

⁴⁹ Judgment of 27 June 2000 in joined cases C-240/98 to C-244/98, *Océano Grupo Editorial and Salvat Editores*, EU:C:2000:346.

⁵⁰ Conclusions of the Supreme Court of the Republic of Croatia, No. Su-IV-155/16 of 12 April 2016: “In cases when this doesn’t follow from factual allegations of the parties, i.e. when there is no explicit statement of parties in respect of nullity of certain general standard contract term, the court must

terms (Art. 296(1)) actually transpose the unfairness test, one could conclude by analogy that the Supreme Court acknowledges the *ex officio* duty to watch upon the *unfairness* of general standard contract terms. Besides the cases on unfair general contract conditions in credit agreements, most of the cases under the Croatian case law deal with unfairness of general contract conditions in subscription contracts. For example, in one of the cases in 2016 the Municipal court in Rijeka ruled that the term of the Croatian Telecom business conditions prohibiting a consumer the access to court if the amount of the invoice was not contested within 30 days is an unfair contract term limiting the consumer's access to justice⁵¹. In another case, the Municipal court in Varaždin decided that the term in operators business conditions requiring payment of telecommunication services until the end of the agreed contract date even in cases where the consumer uses his/her right to early termination of the contract is an unfair and invalid contract term⁵².

2.2. Consumer Protection Under Special Legal Acts

Besides the two pillars of consumer protection, namely the CPA and the OA, there is a vast range of other legal acts in the Croatian legal system protecting consumers either directly or indirectly. To the first category belong those explicitly mentioning the "consumer" and containing consumer protection rules transposed from more special EU Directives on consumer protection. As seen, in case of

ex officio (when it has general standard contract terms at disposal), evaluate whether provisions of general standard contract terms are invalid, i.e. in case when this doesn't follow from factual allegations and there are no general standard contract terms available in the proceeding file, the court is not obliged to evaluate nullity (preclusion) of certain provision of general standard contract terms *ex officio*, and the adequacy of the claim shall in this case be decided upon the rules on the burden of proof.

⁵¹ Judgement of the Municipal court in Rijeka, Gž. 943/2015-2 of 23 May 2016.

⁵² Judgement of the Municipal court in Varaždin, Gž. 2912/2014-2 of 24 March 2015.

consumer credit agreements the consumer enjoins protection of the special Consumer Credit Act transposing Directive 2008/48/EC, but in case of mortgage credit agreements both the Consumer Credit Act and the *Mortgage Consumer Credit Act* (transposing Directive 2014/17/EU) are relevant. If the loan was approved by a bank or some other credit institution, consumer protection rules of the Credit Institution Act apply in parallel. Since the loan is usually followed by an ancillary service, such as insurance contract, provisions protecting consumers under the Insurance Act also apply. When the consumer enters a more simple B2C transaction, such as the online sale, the CPA and the COA apply together with the more special E-Commerce Act transposing Directive 2000/31/EC. However, online shopping regularly involves online payment transaction regulated by another set of consumer protection rules deriving from the Payment Services Act (implementing Directive 2007/64/EC). For the safety of food that the consumer eats, there is the Food Act⁵³, but also Act on Informing Consumers on the Food Safety⁵⁴, or Act on Genetically Modified Organisms⁵⁵, all harmonized with numerous EU acts on food safety and labelling. With respect to the products safety, consumers are protected by the General Product Safety Act harmonized with Directives 87/357/EEC and 2001/95/EC, and by the Act on Items of General Use⁵⁶ setting a framework for implementation of a long list of product safety EU regulations. The consumer – the traveler, is protected by relevant CPA and OA provisions, but also by consumer protection rules of the more special Act on Provision of Services in Tourism. A more special Act on Obligations and Real Rights Relations in Air Traffic⁵⁷ regulates obligation relations of travellers using air flights. On the

⁵³ Food Act (*Zakon o hrani*) OG Nos. 56/13, 14/14 and 56/16.

⁵⁴ Act on Informing Consumer on the Food Safety (*Zakon o informiranju potrošača o hrani*) OG Nos. 56/13, 14/14, and 56/16.

⁵⁵ Act on Genetically Modified Organisms/AGMO (*Zakon o genetski modificiranim organizmima*) OG Nos. 70/05, 46/07, 137/09, 28/13, and 47/14 (indirect protection).

⁵⁶ Act on Items of General Use/AIGU (*Zakon o predmetima opće uporabe*) OG Nos. 39/13 and 47/14.

⁵⁷ Act on Obligations and Real Rights Relations in Air Traffic (*Zakon o ob-*

other hand, the consumer – the subscriber, besides by the CPA, enjoys or at least “should enjoy” the protection of more special Electronic Communications Act and its subordinate legal acts⁵⁸. When it comes to the latter, it is simply impossible to enumerate all subordinate legal acts that are relevant for consumer protection. In general, these follow the rules of the main legal act transposing relevant EU Directive and usually implement standard forms and special rules from their annexes.

The second mentioned category of legal acts is not less relevant. Here, the consumers are protected indirectly through legal regulation of the trader’s behavior on the market. As an example, one could use the Unpermitted Advertising Act transposing Directive 2006/114/EC and dealing directly with B2B relations and indirectly protecting consumers. Rules of similar nature are contained in the Trade Act or Protection of Market Competition Act⁵⁹. Besides by provisions of the CPA and the OA, a consumer using various public services is protected indirectly by an endless list of acts regulating the position and duties of public services providers. To mention just a few: Energy Act, Electricity Market Act, Act Regulating Energy Related Activities, Public Utilities Management Act, Gas Market Act, Act on Production, Thermal Energy Market Act, Postal Services Act, Act on Sustainable Waste Management etc.⁶⁰ There are also more horizontal legal act, offering protection of some fundamental

veznim i stvarnopravnim odnosima u zračnom prometu) OG Nos. 132/98, 63/08, 134/09 and 94/13 (indirect protection).

⁵⁸ See E. Mišćenić, *Croatian*, title 2.1.2.2.3.3.1.

⁵⁹ Protection of Market Competition Act (*Zakon o zaštiti tržišnog natjecanja*) OG Nos. 79/09 and 80/13.

⁶⁰ Energy Act (*Zakon o energiji*) OG Nos. 120/12, 14/14, 95/15, and 102/15; Electricity Market Act (*Zakon o tržištu električne energije*) OG Nos. 22/13, 95/15, and 102/15; Act Regulating Energy Related Activities (*Zakon o regulaciji energetske djelatnosti*) OG No. 120/12; Public Utilities Management Act (*Zakon o komunalnom gospodarstvu*) OG Nos. 36/95, 70/97, 128/99, 57/00, 59/01, 26/03 – revised text, 82/04, 110/04, 178/04, 38/09, 79/09, 49/11, 84/11, 90/11, 144/12, 56/13, 94/13, 153/13, 147/14, and 36/15; Gas Market Act (*Zakon o tržištu plina*) OG Nos. 28/13, 14/14, and 16/17; Thermal Energy Market Act (*Zakon o tržištu toplinske energije*) OG Nos. 80/13, 14/14, 102/14 and 95/15; Postal Services Act (*Zakon o poštanskim uslugama*) OG Nos. 144/12,

consumer rights in all legal transactions, such as the Act on the Right of Access to Information⁶¹ or the abovementioned Act on Protection of Personal Data that is soon to be replaced by the GDPR.

Despite the regulation of relations between the CPA and OA, and the CPA and more special legal acts in Art. 4 CPA described above⁶², such a level of legal fragmentation affects the enforcement of consumer rights to a great extent. Not to mention the rules on enforcement of consumer protection themselves, which are spread all over the Croatian legislation. Depending upon the form of dispute resolution the consumer chooses or agrees with the trader, he might be subject to the CPA, Alternative Dispute Resolution Act, Mediation Act, various Ordinances of dispute resolution bodies, Arbitration Act, Civil Procedure Act etc. It is therefore not surprising that undetected procedural rules have created a serious obstacle in the enforcement of consumer rights in the case Franak. What is also not surprising, is the fact that Croatian enforcement bodies very often neglect relevant consumer protection rules coming from some more special legal act, while they are incorrectly interpreting and applying irrelevant provisions in B2C disputes, such as in the case Geneza or in the opinion of the Ministry competent for consumer protection⁶³.

2.3. Particularities of Subscription Distance and Off-Premises Contracts

Further diverging rules can be found in some subordinate legal acts in relation to certain special B2C contracts. A completely new set of rules relating to subscription distance and off-premises contracts concluded between consumers and electronic communication services operators entered into the force on January 1, 2017.

153/13, and 78/15; Act on Sustainable Waste Management (*Zakon o održivom gospodarenju otpadom*) OG No. 94/13, and 73/17.

⁶¹ Act on the Right of Access to Information (*Zakon o pravu na pristup informacijama*) OG Nos. 25/13 and 85/15.

⁶² See E. Mišćenić, *Croatian*, title 2.1.2.2.1.

⁶³ *Ibidem*, title 2.1.2.2.4.

These rules are contained in the abovementioned *Ordinance on the Manner and Conditions for Provision of Electronic Communications Networks and Services*⁶⁴, which is, according to its Art. 1, harmonized with the Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services⁶⁵. However, there are some discrepancies between the Ordinance and the Universal Services Directive, clearly indicating that special rules on distance and off-premises contracts are not the result of the harmonization process. Namely, in its recital 30, the Universal Services Directive emphasizes the importance of consumer protection in transactions relating to electronic networks and services, and requires parallel application of the protection offered by the Directive 93/13/EEC and the Directive 97/7/EC that is now Directive 2011/83/EU. On the other hand, the Ordinance introduced a quite questionable definition of the "subscription distance contract" as a contract concluded by means of Internet (Art. 9(1)). It acknowledges the possibility of concluding such contracts by means of telephone, and includes a list of disputable rules, including the one according to which by accepting a telephone offer a user concluded a contract *and* no signature is needed for this contract to be valid (Art. 9(2)). Just few rows below, para. 5 regulates that the contract is concluded when the user receives the confirmation on the conclusion of the contract, and the 14-day withdrawal period starts to run from this moment. These conflicting rules are followed by Article 10 on off-premises contracts that are concluded "on the day when the user signed the documentation", i.e. in following paragraph named as a "Form of the Request for Conclusion of Subscription Contract". By introducing these undoubtedly disputable rules into a subordinate legal act, and in

⁶⁴ *Ordinance on the Manner and Conditions for Provision of Electronic Communications Networks and Services (Pravilnik o načinu i uvjetima obavljanja djelatnosti elektroničkih komunikacijskih mreža i usluga)* OG Nos. 154/11, 149/13, 82/14, 24/15 and 42/16.

⁶⁵ Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) OJ L 108, 24.4.2002, p. 51-77.

combination with the mentioned Art. 66.a CPA, the legislator actually legalized a widely recognized unfair commercial practice of operators of electronic communications in Croatia. In rather poor Croatian case law on consumer protection, the most important role play the cases against operators of telecommunication services⁶⁶. In practice, these are regularly infringing presented CPA rules on pre-contractual information duties as well as those on formal requirements by claiming that contracts have been validly concluded during a phone conversation with a consumer. To other major infringements belongs the limitation of the use of a consumer's legally guaranteed right of withdrawal by demanding the payment of a fee for early termination of contract, and the wide spread use of unfair contract terms⁶⁷. The Ordinance rules are according to the author's view in obvious conflict with the consumer protection *acquis*, which demands trader's active behavior in informing the consumer (*arg. ex Content Services* case)⁶⁸, and prohibit any limitations to the use of the right of withdrawal (*arg. ex Messner* case)⁶⁹. Since the enacted rules are undermining the legal certainty in B2C relations and are in direct conflict with the constitutional guarantee

⁶⁶ See P. Poretti, *National*, pp. 177–178.

⁶⁷ See Judgement of the High Administrative Court of the Republic of Croatia, Us-12546/2011-6 of 12 April 2012 (right of withdrawal); Judgement of the High Administrative Court of the Republic of Croatia, Us-8248/2011-6 of 5 June 2013 (right of withdrawal); judgement of the Municipal Court in Varaždin, Gž-5087/12-2 of 21 August 2013 (unfair contract terms); judgement of Administrative Court in Zagreb, UsI-4002/13-11 of 3 June 2015 (pre-contractual information; right of withdrawal); judgement of Administrative Court in Zagreb, UsI-3562/13-10 of 27 August 2015 (pre-contractual information; formal requirements; right of withdrawal); judgement of Administrative Court in Zagreb, UsI-4304/13-8 of 9 September 2015 (right of withdrawal); judgement of Administrative Court in Zagreb, UsI-1106/14-9 of 27 April 2016 (right of withdrawal).

⁶⁸ Judgement of 5 July 2012, C-49/11, *Content Services*, EU:C:2012:419, paras. 33 and 35.

⁶⁹ Judgement of 3 September 2009, C-489/07, *Messner*, EU:C:2009:502, para. 23 where the CJEU stated that requests for compensation would “deprive the consumer of the opportunity to make completely free and independent use of the period for reflection granted to him by that directive” (97/7/EC, now: 2011/83/EU).

of rights deriving from the *acquis*⁷⁰, they should be questioned for their legality before the Constitutional Court.

3. Concluding Remarks

The presented Croatian legal framework on consumer protection paints a rather colorful picture in which the CPA, despite having the central position, does not constitute the final codification of all relevant consumer protection provisions. The level of legal fragmentation affects seriously the protection of consumer rights and effectiveness of enforcement. However, one cannot help but question how much of this fragmentation is imported into the Croatian legal system by the approximation process? During the short period of Croatian negotiation process for accession to the Union, the legislator was not left with enough time to elaborate more complex legal framework on consumer protection. In addition to short deadlines for implementation of the *acquis*, the lack of experience and knowledge in this special area developing so quickly played a key role. Even experts in the field were often quite astonished when faced with surprising changes, such as the one on the level of approximation moving from minimum to maximum and ending as kind of a mixed harmonization approach, with rules on options of widening the scope of application contained in explanatory provisions of EU Directives preambles⁷¹. One of the leading Croatian legal experts in the field of consumer protection, Professor *Baretić*, therefore asks

⁷⁰ According to Art. 145 of the Constitution of the Republic of Croatia (*Ustav Republike Hrvatske*) OG Nos. 56/90, 135/97, 8/98 (consolidated text), 113/00, 124/00 (consolidated text), 28/01, 41/01 (consolidated text), 55/01 (correction), 76/10, 85/10 (consolidated text) and 5/14 the exercise of the rights arising from the *acquis* is made equal to the exercise of rights guaranteed by the Croatian law and the protection of subjective rights based on *acquis* is guaranteed by the Croatian courts.

⁷¹ In the judgement of 12 July 2012, C-602/10, SC *Volksbank România*, EU:C:2012:443, para. 40, the CJEU acknowledge the possibility of widening the material scope of application of Directives rules at the national level by using the option prescribed in recital 10 of the preamble of the Directive 2008/48/EC.

the right question: “Is the European System of Consumer Contract Law Protection Optimal Regulatory Framework?”⁷².

The nature of the EU consumer protection as horizontal policy that is to be observed within all the other Union policies and activities⁷³ has actually resulted with protection of consumers in vast of EU legal acts. Legal fragmentation created by inexistent systematic approach at the EU level was gradually introduced into our legal system as a direct consequence of respecting the duty to harmonize with the *acquis*. As accentuated by the Supreme Court in the case *Franak*: “there is (however) a duty of Croatian courts to interpret national law in the spirit of the law of the European Union and of her overall *acquis* (what includes among others also a practice of the Court of Justice of the European Union), to what the Republic of Croatia obliged itself by signing the Stabilisation and Association Agreement that was in force from 2005”⁷⁴. Today, this duty is guaranteed, besides by the EU law, also by the Croatian Constitution setting a duty for Croatian courts to guarantee equal exercise of the rights arising from the *acquis* and of those arising from the “origin” domestic law, as well as protection of subjective rights based on *acquis*⁷⁵. Nonetheless, this constitutional duty is often undermined by difficulties in the application of fragmented consumer protection framework and by a lack of knowledge on proper interpretation of consumer protection rules. What often happens is that Croatian courts rule correctly and in accordance with the EU law by applying their own legal logic, rather than by observing the CJEU case law. As seen in the case of the television

⁷² M. Baretić, *Je li europski sustav ugovornog prava zaštite potrošača optimalni regulacijski okvir?* in: *Zaštita potrošača u Republici Hrvatskoj*, red. J. Barbić, Hrvatska akademija znanosti i umjetnosti 2016, pp. 73–103.

⁷³ Art. 12 of the Treaty on the Functioning of the European Union (consolidated), OJ C 202, 7 June 2016; Art. 38 of the Charter of Fundamental Rights of the European Union(consolidated), OJ C 202, 7 June 2016.

⁷⁴ Judgment and order of the Supreme Court of the Republic of Croatia of 9 April 2015, Revt-249/14-2, p. 23.

⁷⁵ Art. 145 of the Constitution of the Republic of Croatia (*Ustav Republike Hrvatske*) OG Nos. 56/90, 135/97, 8/98 (consolidated text), 113/00, 124/00 (consolidated text), 28/01, 41/01 (consolidated text), 55/01 (correction), 76/10, 85/10 (consolidated text) and 5/14.

transmitter, the Municipal court in Varaždin interpreted correctly the rule on the content of notification on the non-conformity of goods (Art. 406 OA). The court found that the consumer is not obliged to clearly identify the cause of the material defect⁷⁶, which was the same conclusion of the CJEU reached in the case *Faber* three years later⁷⁷. However, it is not always a pure luck or their own legal experience that the Croatian courts should rely on when protecting consumer rights. A final confirmation of this conclusion came from the Constitutional court in the case *Franak*, which clearly established that the Croatian courts misinterpreted consumer protection rules deriving from the Directive 93/13/EEC, was paid by scarifying consumer rights⁷⁸.

STRESZCZENIE

Prawo o ochronie konsumentów w Chorwacji: od harmonizacji po fragmentację prawa (część II)

Druga część artykułu poświęcona jest przedstawieniu zasad ochrony konsumentów uregulowanych poza ustawą o ochronie konsumentów jako *lex generalis* w zakresie ochrony konsumentów. Harmonizacja przepisów z poszczególnymi dyrektywami UE dotyczącymi ochrony konsumentów doprowadziła do powstania rozległej liczby przepisów w tym zakresie obecnych w całym chorwackim systemie prawnym. Niestety nadmierne uregulowanie tej materii nie skutkuje ochroną chorwackich konsumentów. Jak zostanie wykazane w niniejszym opracowaniu, fragmentacja chorwackiego prawa ochrony konsumentów wydaje się jednym z głównych powodów istnienia luk w jego egzekwowaniu. W połączeniu z brakiem doświadczenia organów

⁷⁶ Judgement of the Municipal court in Varaždin, Gž. 339/12-2 of 18 April 2012.

⁷⁷ Judgement of 4 June 2015, C-497/13, *Faber*, EU:C:2015:357, para. 65.

⁷⁸ See E. Mišćenić, *Order of the Supreme Court of the Republic of Croatia in the case Franak – 3 October 2017, Revt 575/16-5 – consumer credit agreements denominated in Swiss Francs (CHF)*, EUCP, Cases, Materials and News on European Civil Procedure, available at: <http://sites.unimi.it/EUCivilProcedure/index.php/2017/11/07/order-of-the-supreme-court-of-the-republic-of-croatia-in-the-case-franak-3-october-2017-revt-57516-5-consumer-credit-agreements-denominated-in-swiss-francs-chf/> (access: 25.07.2018).

odpowiedzialnych za egzekwowanie prawa w zakresie ochrony konsumentów fragmentacja prawa ochrony konsumentów doprowadziła do niepewności prawnej w stosunkach B2C.

Słowa kluczowe: chorwacka ustawa o ochronie konsumentów; ustawa o ochronie konsumentów; ustawa o zobowiązaniach państw członkowskich; harmonizacja prawna; fragmentacja prawna; egzekwowanie praw konsumentów

SUMMARY

Croatian Consumer Protection Law:

From Legal Approximation to Legal Fragmentation (Part II)

The second part of this paper is devoted to presentation of rules on consumer protection regulated outside of the Consumer Protection Act as *lex generalis* for consumer protection. Approximation with various EU Directives on consumer protection resulted in vast of consumer protection rules spread all over the Croatian legal system. However, this overregulation of consumer protection unfortunately has not resulted in overprotection of Croatian consumers. As it shall be demonstrated in this paper, the legal fragmentation of the Croatian consumer protection law seems to be one of the main reasons for the loopholes in its enforcement. Combined with a lack of experience of the enforcement bodies competent for consumer protection, fragmentation of the consumer protection law has led to legal uncertainty in B2C relations.

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

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