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First Regional Conference, Cavtat, 2010

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BEOGRAD, 2010.

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VI

MODERN TYPES OF CONTRACTS

Country Reporter for the Republic of Croatia
Mr. *Ana Keglević*, LL.M.*

MODERN CONTRACTS

FRANCHISING*

1) Fundamental Concept of Franchising

1.1. History and commercial background

The franchising concept is relatively new in Croatia. It started to become a larger part of the Croatian economy in the early 1990's. It was firstly introduced by foreign franchisors (the first one was *Mc Donald's*) and it still continues to be preserved as a foreign type of business. In the next years several others companies entered the market like US franchise *Subway* and Hungarian *Fornetti*, which is now the biggest one with more then 400 franchisee all over Croatia. According to the assessment of the Croatian franchise association there are currently around 150 franchises operating in Croatia from which around 30 domestic ones and they operate on the near 1000 locations and employ more than 16000 people.[1] Although franchising is still not developed as in the other countries of Europe, especially France and Germany, the tendency of growth is noticeable over the last years.

1.2. Legal framework

The main feature of Croatian franchising is that there is currently no legal regulation explicit to franchising. Some brief provisions for franchise agreements are existent in some specific regulation, such as competition and antitrust law.

For that reason, dependent on the particular case and the intention of the parties, the franchising agreement shall most usually comprise of several types of agreements and cordially several different laws or regulations shall apply. As a complex agreement it shall mostly encompass the elements of sale and purchase agreement, licence agreements, lease and purchase agreement, distributorship agreement, loan agreement, work agreement, agency agreement, etc. Therefore, apart from general rules on contract law deriving from the Croatian Code of Obligations (OG 35/05, 41/08, hereinafter: CO), the special laws (*lex specialis)* governing specific issues in those agreements shall apply.

Despite the fact that there is no explicit regulation, it is still possible to identify the basic element of franchise agreement. The content and configuration of the franchise agreements in Europe was greatly shaped by the business practice and competition law regulation. The same could be stated for the Republic of Croatia. At the moment the only Act dealing more

* Original text is written in English language. Translation from English to Serbian is provided by the GTZ Belgrade, Serbia. The author holds no responsibility for the translation.

[1] Last available official data are for the year 2007.

explicitly with franchise agreement is the *Croatian Competition Act* (OG 122/03, hereinafter: Competition Act) and the *Regulation on block exemptions granted to certain categories of vertical agreements* (OG 51/04, hereinafter: Block exemption Regulation). Both are strongly based on the EU competition legislation.

Following the famous *Pronuptia case*[2] the European Commission has adopted two Regulations, which are of great importance for franchising. First is the *Commission Regulation (EEC) 4087/1988 on the application of the Art 85(3) of the EC Treaty to categories of franchise agreements*[3] *(*hereinafter: Franchise Regulation 1988). It was a sector specific regulation for franchise agreements with the expiration date on 31 December 1999. This Regulation was replaced in 1999 by the C*ommission Regulation (EC) 2790/1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices*[4] (hereinafter: EC Block exemption Regulation 1999) with expiration date on 31 May 2010. The latter Regulation provided for a less formalistic, less prescriptive, and more economics-based application of the criteria provided for in Article 81(3) of Treaty (ex Art 85(3)) to vertical agreements including franchise agreements. It is accompanied by the *Commission's Guidelines on Vertical Restraints*[5] (hereinafter: EC Guidelines) which serve as guidance on the interpretation of the Regulation. The EC Block exemption Regulation 1999 contains no longer sector approach only to franchising. It is much broader and relates to wider scope of vertical agreements but franchising is treated specifically in the Regulation's Guidelines Additionally, although the Franchise Regulation from 1988 seized to be applicable, the basic concepts for franchise agreements defined there are still left unchanged.

In the light of Croatian accession to the EU, the possible (and future) solutions offered by the Croatian legislation should always be observed in close relationship and coordination with the EU legislation.

1.3. Voluntary regulation

Under the voluntary regulation one can consider various Codes of Ethics from the Franchise Associations regulating rules of behaviour for their members - franchise practitioners. Croatian Franchise Association (www.fip.com.hr, hereinafter: Association) was established in 2002 as nonprofits, nongovernmental association with main objectives to promote and advertise franchise business in the Republic of Croatia and the region. Two more institutions can provide assistance and expert advice to franchisers: Franchise centre *Pro maturo* in Zagreb (www.promaturo.hr) and *Franchise centre* in Osijek. (www.fransiza.hr). Croatian franchise association adopted the *European Code of Ethics for Franchising* and is a member of *European Franchise Federation* (www.eff-franchise.com).

The Code of ethics contains provisions on the definitions of franchising and know-how (Art 1.), guiding principles (Art 2.), recruitment, advertising and disclosure (Art 3.), selection of individual franchisees (Art 4.), the franchise agreement (Art 5.) and the relationship of

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[2] *Pronuptia v Schillgalis*, C 161/84 of 26 Januar 1986, ECR 353.

[3] Commission Regulation (EEC) 4087/1988 of 30 November 1988 on the application of the Art 85(3) of the Treaty to categories of franchise agreements, OJ L 359/46, 28/12/1988, pp 0046-0052.

[4] Commission Regulation (EC) 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to the categories of vertical agreements and concerted practices, OJ L 336, 29/12/1999, pp 0021-0025. In relation to this Regulation, the Commission also adopted the Regulation 1/2003, which significantly changes the procedural application of Article 81(3) and which results in changes in the procedural application of Commission Regulation (EC) 2790/1999, but not the substance itself.

[5] C*ommission Notice, Guidelines on Vertical Restraints,* OJ 2000, C 291/1, pp 0001-0044.

Code to master franchise agreements (Art 6.). Particularly interesting are provisions on pre-contractual disclosure, which rely greatly on the UNIDROIT Model disclosure Law 2002.

Article 5. of the Code regulates **franchise agreement**. The franchise agreement must comply with the national law, European Union law and mentioned Code of Ethics (Art 5.1). Among others, Code of ethics provides the necessary minimum content requirements for the franchise agreement (Art 5.4.):

- the rights granted to the franchisor;
- the rights granted to the individual franchisee;
- the goods and/or services to be provided to the individual franchisee;
- the obligations of the franchisor;
- the obligations of the individual franchisee;
- the terms of payment by the individual franchisee;
- the duration of the agreement which should be long enough to allow individual franchisees to amortize their initial investments specific to the franchise;
- the basis for any renewal of the agreement;
- the terms upon which the individual franchisee may sell or transfer the franchised business and the franchisor's possible pre-emption rights in this respect;
- provisions relevant to the use by the individual franchisee of the franchisor's distinctive signs, trade name, trademark, service mark, store sign, logo or other distinguishing identification;
- the franchisor's right to adapt the franchise system to new or changed methods;
- provisions for termination of the agreement;
- provisions for surrendering promptly upon termination of the franchise agreement any tangible and intangible property belonging to the Franchisor or other owner thereof.

Although Code of Ethics applies only to the members of the Association and the failure to meet the requirements may not result by the legal invalidity of the agreement (but only denunciation of membership in the Association), this Code could be a valuable and practical guideline.

2) Nature and Extent of Rights Granted and the Relationship of the Parties

2.1. Definition

There is no statutory definition of franchise agreement in Croatia, nor could it be found in the case law. However, the franchising is accepted in Croatian literature[6] and some parts of the Competition Law. *Croatian Competition Act* in Article 11 provides the general rule that the franchise agreements may be subject of the approval to block exemptions, while the *Block Exemption Regulation* includes description of franchise agreement (without regulating the substance of the agreement).

[6] For example: D. Mlikotin Tomić, *Pravo međunarodne trgovine*, Školska knjiga, Zagreb, 1999; V. Gorenc, *Zakon o obveznim odnosima s komentarom*, RRiF, 1998; D. Mlikotin Tomić, *Ugovor o franšizingu*, Informator, Zagreb, 1986. (Ph.D. Thesis), D. Mlikotin Tomić, *Ugovor o franšizingu - instrument sigurnog uspjeha ili promašaja*, Računovodstvo, revizija i financije, 6/2004; B. Vukmir, *Ugovor o franšizi*, Pravo i porezi, 5/2002; N. Kukić, *Računovodstvo franšize*, Računovodstvo, revizija i financije, 6/2004, H. Horak, *Uredba o skupnom izuzeću vertikalnih sporazuma i hrvatski Zakon o zaštiti tržišnog natjecanja*, Zbornik Ekonomskog fakulteta u Zagrebu, 1/2004, etc.

In accordance with the Block Exemption Regulation „Franchise means a vertical agreement where one party (franchisor) provides the other party (franchisee), in return for direct or indirect fee, with the right to use the franchise, i.e. the package of industrial or intellectual property rights for manufacture and/or marketing purposes of particular products. Industrial intellectual property rights package relates to names and trade marks or signs, know-how, models, designs, copyright, industrial knowledge or patents, for the use and distribution of contract products to end user" (Art 3(6) Block Exemption Regulation). The „product" means „goods and/or services". (Art 2 Block Exemption Regulation) This definition is greatly in line with definition from the Franchise Regulation 1988 and the EC Guidelines.

2.2. Basic elements - extent of rights granted

The franchising agreement is a complex agreement. It comprises of many different elements which all must be negotiated in advance together in so-called 'package deal'. Main elements of package deal are:

1. granting the right to use franchise, business method or know-how, this mostly includes package of industrial and intellectual property rights (the business package).
2. granting the right to use and/or distribute products, including sale of products (distribution contract) in the certain territory to the end user;
3. granting the right to use industrial intellectual property rights package relating to the use of names, trademarks or signs, models, designs, copyright, industrial knowledge or patent;
4. providing commercial or technical assistance during the life of the agreement;
5. controlling the usage of the franchise;
6. payment of direct or indirect financial fee - remuneration to franchisor.

Additionally the parties may agree on other issues such as exclusivity, sub-franchising clause etc. The Franchise Regulation 1988 explicitly provides that the elements numbered above under 1, 3, 4 are minimal contractual elements of the agreement. Croatian legislation regulates for the same elements. Although the content and extent of rights granted may vary depending on the whish and intention of the parties, in any case, the basic requirements from the Croatian Code of obligations regarding the general validity of agreement must be met.

2.3. Nature and the relationship of the parties

In the classical two tire franchise agreement both parties are in direct contractual relationship. Both parties are equal and independent and both act in their own name and in their own account.

As to the question of nature, the franchising agreement could be identified as the innominate contract of Croatian law developed by and taken over mostly from the foreign business practice. Innominate contracts (contracts *sui generis*) as well known in all civil law jurisdictions are not specially regulated as a specific contract type but the parties are free to determine the content and the structure of the agreement thus tailoring it to their specific business needs and intentions. In all times the parties are bound to observe the mandatory provisions of law. In the absence of a law regarding franchising, the contract is thus the essential document in the relationship between the franchisor and the franchisee. The questions not explicitly defined by the agreement shall be regulated by the rules of *lex specialis* or the general rules of contract law.

As to the relationship with other agreements is concerned, the content of the package deal and the basic elements has direct influence on the nature of the franchise agreement. It

allows us to determine weather a certain contractual relationship is to be classified as a franchise agreement or not. It could be considered as indicator of the nature of the contractual relationship. If some of the basic elements from the package deal are missing such contract can be considered as pseudo or false franchising agreement. In other words, dependent of the absence of certain elements, the agreement could be classified as the commercial agreement as well. In business practice, the clear distinction should often be made to distribution and agency agreements.

2.4. Types of franchise contracts

In the Croatian literature several types of franchise can be distinguished according to their object: 1. industrial franchise concerns the manufacturing and sale of goods in accordance with the intellectual property rights of franchisor, 2. distribution franchise concerns only the sale of goods (with a name, trade mark or sign of franchisor), and 3. service franchise concerns the supply of services also in accordance with the transferred intellectual property rights of franchisor and under the name, trade mark or sign of franchisor.

3) Term of the Agreement and Conditions of Renewal

There is no explicit provision as to the term of the agreement in the Croatian law but from the nature of the contractual relationship and the fact that the franchisee will need some time to develop and return its investment it is expectable that franchise agreements should be concluded for a longer period of time. Same is provided by the Code of ethic (Art 5.4.) and the UNIDROIT Guide. According to the general rules of contract law from the Croatian Code of Obligations there are no limits as regard to the term and duration of the (franchise) agreement. Parties are free to agree on any term and period of duration, as long as the agreement is not contrary to the public policy and mandatory rules of law. (Art 2. CO)

Agreements concluded for a **limited period of time**, terminate on the last day of the expiry of term period, unless it is otherwise agreed by the parties or provided by the law. (Art 211. CO). Parties may always agree on the renewal. Sometimes, even tacit continuation of exercising the rights and obligations from the franchise agreement might have effect of the renewal of agreement for an unlimited period of time. Example of such is the licence agreement. (Art 721-723. CO)

Parties may agree on the renewal of the agreement with or without discussing/agreeing on the new conditions of renewed agreement such as the fee, difference of treatment and other benefits, implementation of the new developments of know-how but also responsibilities for claim damages, payment of renewal fee etc. Negotiations for the renewal of the agreement must be conducted before the termination of the agreement, unless otherwise agreed by the parties.

According to the general obligation rules, agreements concluded for an **unlimited period of time** may be terminated by giving adequate notice of cancelation. Such notice must be delivered to the opposing party and must not be served in bad timing for other party. The agreement terminates after the expiry of a cancelation period agreed by the parties or otherwise provided by the rules of law or business practice. Agreement may be terminated with or without stating of the reasons of termination, depending on the agreement of the parties. (Art 212. CO) In the franchise agreements it is expected for the agreement to be terminated only for reasonable grounds while it is in the (financial) interest of both parties to jointly exercise the franchising business. However it is advisable for the parties to agree on those issues (reasonable period of notice or substantial reasons of cancelation) in the time of the signing.

Some restrictions on the term in franchise agreements may arise from the specific legislation (*lex specialis*.) especially in relation of licensing and transfer of intellectual property rights (hereinafter: IP Rights). For example the licence agreement may be concluded for an unlimited term, although in the case of patents and models the licence agreement my not be concluded for a period longer than the period of legal protection of those rights, which is for example for patents 20 years. Hence, one always has to take into consideration the duration of the IP rights (See chapter 10.). It would be ideal that the term of franchise agreement coincides with the duration of IP rights, but there is no restriction to agree otherwise.

4) Financial Matters

1. Franchisee fee

Under Croatian law there is no explicit statutory regulation as to the financial matters in franchise agreements. The Block exemption Regulation only states that franchisor provides franchisee. „in return for a direct or indirect fee", the right to use franchise. (Art 3.6. Block exemption Regulation.) Almost the same is provided in the EC Guidelines (199 Guidelines), Code of ethics (Art 1.) and the UNIDROIT Guide. In the business practice and Croatian literature it is accepted that the franchisee has to pay two types of fees to franchisor:

a) **Initial franchise fee** - must be determined in the franchise agreement and in substance constitutes the initial payment for the use of business method. It is usually fixed amount, which covers the licensed or transferred rights including assistance and training for setting up the business. Experience of the Croatian business practice is showing that the Croatian franchisees are reluctant to invest initially more than 50.000 EUR.

b) **Royalty or continuing franchise fee** - is paid throughout the performance of the agreement for the continuous use and exploitation of franchise, licensed rights and ongoing assistance. This periodical payment is usually calculated in the percentage of franchisee turnover - income or gross sales, unless otherwise agreed by the parties (per product sold, as fixed fees, as percent of purchase as opposed to sales etc). This fee is usually calculated on a periodical basis, quarterly or in periods of three to six months adapting it to inflation and other fluctuations on the market. It is also possible to determine periodical fee in some later stage of agreement, because sometimes it is simply objectively impossible to establish the system of payment at the moment of the conclusion of agreement. Unless agreed otherwise, the fee is usually determined by the franchisor. In that case it is advisable for the franchisee to agree some protective clauses against unilateral determination by the franchisor and the misuse of his discretion power. In any case the parties must always act in accordance with the general principle on the equality of the value of obligations in contractual relationship, which may be, according to Croatian Code of obligation reason for the declaration of the agreement null and void (Art 7., Art 375. Code of obligations)

On the issue of price determination, the Croatian case law shows that the analogy is made with sale and purchase agreements. If the price is not agreed nor agreement contains elements for the price to be determined, the agreement shall have no legal effect. If the price is considered to be determined unilaterally, it is considered as not specified. In latter case the price is to be determined in accordance with the rules of law. This will be 1. the price calculated on the basis of the elements of the agreement, 2. than the usual price, or 3. the reasonable price and 4. finally it may be determined by the court. (Art 384-385. CO)

2. Fiscal consideration

In the Republic of Croatia franchise agreements are recognised in a tax specific legislation (*lex specialis*). Taxation aspect is subject to an International Accounting Standards No 18, which form part of Croatian accounting system according to the Article 14. of the Croatian Accounting Act, then VAT Act and Ordinance on VAT application and partially other laws in the field.

In accordance with the Article 18 of the International Accounting Standards franchise is considered to be „a delivery of goods, services and equipment including a know-how for the revenue…" and therefore is subject to a taxation as income earning. The calculation itself is dependent on a different type and performance of franchise agreement. Double taxation shall be avoided.

5) The Role of the Franchisor

The rights and duties of the parties are dependent on the single individual content of the agreement. Since the object of the agreement may vary (distribution and sale of goods and services, licensing of trade marks, transfer of know-how etc.) the duties and the roles of the parties vary accordingly. Most of the obligations contained in the franchise agreements can be assessed as being necessary to protect the IP rights or maintain the common identity and reputation of the franchise network.

Prior to the conclusion of the agreement, franchisor has a duty to provide franchisee, with the adequate and timely **information** about the franchisor company and experience, franchise network and market experience, relevant know-how, IP rights, financial conditions and other terms of the contract (pre-contractual information duty).

In Croatia there is no explicit regulation as to the pre-contractual information duty of franchisor nor Croatia adopted any legislation based on the UNIDROIT model franchising disclosure law. However such duty exists as a general obligation according to the Croatian Code of obligations. It is also explicitly specified in the Code of ethics. Failure to fulfil precontractual information duty may result with the liability for damages (*culpa in cotrahendo*).

After the conclusion of the agreement, the following obligations are generally considered to be necessary for the franchise agreement:

1. Obligation to grant the right to business method or **know-how.** The franchisor has to provide franchisee with know-how that is necessary for franchisee to be able to perform the particular business under the franchise agreement. (see chapter 11)
2. Obligation to grant the right **to use and distribute products**, including sale of products, in the specific territory (city, region, entire country etc.) to the end user (consumer). Franchise agreements usually contain a combination of different vertical restraints concerning the products being distributed.
3. Obligation to grant right to use (to licence) **industrial and/or intellectual property rights** package relating to the use of names, trademarks or signs, models, designs, copyright, industrial knowledge or patents. (see chapter 10)
4. Obligation to provide **commercial or technical assistance** during the life of the agreement **- the ongoing assistance**. This obligation varies greatly depending on the franchise agreement and is more practical in its nature. Obligation of assistance consists of obligation to advise, instruct, provide training and supervise franchisee on major decisions concerning financial planning, marketing and advertising. In

particular this considers sales promotion, training of the staff and general appearance of the business premises without additional charge.

5. **Information during the performance**. Franchisor shall have an obligation to inform and update franchisee on new market developments and conditions, new products or the new characteristic of the products, prices and terms of supply including the general information on the new business concepts and demands. There is no explicit statutory obligation under Croatian legislation on this issue. However, under Croatian code of obligations the latter obligation follows from the general doctrine of good faith and duty of co-operation. As this duty might constitute a substantial element of franchise agreements, the non-performance of such (if fundamental) could be a valid reason for the termination of the agreement.
6. Obligation to **control the usage of the franchise** during the whole duration of the agreement. It is a protective measure while it preserves the value, common identity and the reputation of the franchise business as a whole. As this obligation is considered as a substantial element of franchise agreements, the non-performance constitutes (if fundamental) a reason for the termination of the agreement.
7. Obligation to demand and receive **direct or indirect financial fee** in accordance with the agreement.

These obligations are explicitly regulated by the EC Guidelines on vertical restraints. (paragraphs 30, 35, 37-45, 199-202) and UNIDROIT Guide on master franchise agreements.

6) The Role of the Frenchesee

The role of franchisee, in individual franchise agreements, most usually mirrors the role of franchisor. Therefore, some of the main duties of franchisee are:

1. Obligation to use the business method and **know-how** in accordance with the franchise agreement, in the agreed territory and for the agreed purpose and to accept all possible future changes of know-how.
2. Obligation to **use and distribute products**, including the sale of products, in the specific territory (city, region, entire country etc.) to the end user in accordance with the franchise agreement.
3. Obligation to use **industrial** and/or **intellectual property rights package** in accordance with the agreement. In the case of the name, trademarks and signs this specifically encompass the obligation, during the operation of business, to use and label the name, trademarks and signs of the franchisor including the information on franchising. In business practice it is common to use wording: „franchised by..." The franchise agreements are characterised by strong uniformity because in the eyes of the consumer there must be no difference between the franchisor and the franchisee.
   Under the EC Guidelines and the Croatian practice and literature accordingly the following IP Rights related obligations are generally considered to be necessary to protect the franchisor:
   a. an obligation on the franchisee not to engage, directly or indirectly, in any similar business;
   b. an obligation on the franchisee not to acquire financial interests in the capital of a competing undertaking such as would give the franchisee the power to influence the economic conduct of such undertaking;

c. an obligation on the franchisee not to disclose to third parties the know-how provided by the franchisor as long as this know-how is not in the public domain;
d. an obligation on the franchisee to communicate to the franchisor any experience gained in exploiting the franchise and to grant it, and other franchisees, a non-exclusive licence for the know-how resulting from that experience;
e. an obligation on the franchisee to inform the franchisor of infringements of licensed intellectual property rights, to take legal action against infringers or to assist the franchisor in any legal actions against infringers;
f. an obligation on the franchisee not to use know-how licensed by the franchisor for purposes other than the exploitation of the franchise;
g. an obligation on the franchisee not to assign the rights and obligations under the franchise agreement without the franchisor's consent.

4. Obligation to comply with ongoing commercial or technical assistance and to ask any additional assistance if necessary in accordance with the agreement. Additionally, franchisee is under obligation to inform the franchisor on claims and infringements by third parties located in the local market where franchise operates, including all other facts and developments relevant for the performance (information during the performance).
5. Obligation to allow franchisor to carry out control and inspection over the performance of the franchise business, the business premises, quality of goods sold or services provided and execution of the agreement in general during the whole duration of the agreement. Sometimes this obligation includes the control of the inventory, accounts and accounting books of the franchisee. Because the franchisee is independent entrepreneur inspection of accounting books must be carried out within limits imposed by the independency status of the franchisee. Under Croatian law this obligation may be interpreted under the doctrine of good faith.
6. Obligation to pay direct or indirect financial fee to franchisor in accordance with the agreement.

7) The Sub-franchise Agreement

There is no specific regulation for the three tier franchise agreements in the Croatian legislation. However, the sub-franchising agreement must always be observed in relation to the possibility of licensing and transfer of the industrial and IP rights package within the three-tier system. It is advisable that the parties in the franchising agreement agree on the licensing of those rights also in case of sub-franchise agreement. (For issues of licensing and transfer IP Rights see solutions of the Croatian legislation in chapter 10.)

8) Advertising and the Control of Advertising

There are no explicit provisions on these issues in Croatian legislation. However, the business practice and literature is showing that the franchise agreements most usually contain clauses under which franchisor undertakes the obligation to control advertising and promotional activities. The uniformity is a key factor for the franchise network and it may be accomplished only if all the members of the network follow the same guidelines of business. In the eyes of the consumer there should be no difference between franchisor or franchisee business premises. Issues that need to be agreed in advance are the approval and use of the

promotional materials, providing advertising guidelines or standards and translation. Most usually the decisions on those issues are in the power of franchisor, unless agreed otherwise. The advertising campaigns may be conducted on international, national and regional level. Usually, the franchisor initiates campaign on highest level and then other members follow the uniform advertising and campaign to the regional levels. Although originally collected from the franchisee fees, the costs of advertising, and maintaining the reputation of franchise are to be bear by the franchisor. For the franchisee these costs are usually included in the periodical payments, unless otherwise agreed (especially for the advertising on the local level).

In Croatia there is no explicit statutory obligation on the issue of advertising but this obligation may derive from the general rules of obligations. Although, this element is in the domain of party autonomy the parties must always act in good faith and fair dealing. The parties must always take care of the general purpose of the franchising agreement and maintain the identity and reputation of one of the franchisor.

9) Supply of Equipment, Products and Services

The supply of equipment, products and services to franchisee may be performed either directly from the franchisor or from the supplier designated by the franchisor. Thus, position of the franchisor tends to create monopolistic position on the market and tends to define conditions for franchisor's own benefit. Other side of the coin poses the question whether franchise is allowed to approach to suppliers other than the ones designated by the agreement for the equipment, products or services needed for his franchise business.

In the Croatia the regulation of monopolistic positions on the market and competition is subject to a Competition Act. Generally monopolistic position is prohibited unless exempted by the law. The Regulation on block exemption granted to a certain categories of vertical agreements sets out the conditions which must be fulfilled in order for an agreement to be exempted from the application of the provisions on prohibited agreements as set out in Competition Act. In Croatia Block exemption shall apply to franchise agreements, with the exemption of industrial (technology) franchise agreements, subject to the following conditions:

a) Market share:

(1) The block exemption shall apply to the vertical agreements, provided that the market share held by the supplier does not exceed thirty per cent (30%) of the relevant market on which it sells the contract products.

(2) In the case of vertical agreements containing exclusive supply obligations, the block exemption provided for in this Regulation shall apply on condition the market share held by the buyer does not exceed thirty per cent (30%) of the relevant market in which it purchases the contract products. (Art 5-6. Regulation)

b) Total annual turnover:

(1) The block exemption shall also apply to vertical agreements entered into between an association of undertakings at the retail level and its members, or between such an association and its suppliers, if:

   a. the members of such an association are distributors selling contract products to final consumers;
   b. no individual member of such an association together with its connected undertakings has a total annual turnover exceeding 50,000.000 (fifty million) HRK.

(2) Furthermore, the block exemption shall apply to vertical agreements entered into between competing undertakings, but only where competing undertakings enter into a non-reciprocal vertical agreement which does not grant equivalent rights and obligations on each of the parties, and if:
   a. the supplier is a manufacturer and a distributor of products, while the buyer is a distributor not manufacturing substitute products; and/or
   b. the supplier is a provider of services at several levels of trade, while the buyer does not provide substitute services at the level of trade where it purchases contract services; and/or
   c. the buyer has a total annual turnover not exceeding 50,000.000 (fifty million) HRK. (Art 7-8. Regulation)

In other words, the Croatian legislating is not allowing absolute tie-up franchisee to franchisor in connection to supply of equipment, products and services. But no matter of the supplier the franchisee shall always be in obligation to distribute and sell the products or services in accordance with their characteristic set by the franchise agreements.

10) Intellectual Property

„Industrial or intellectual property rights package relates to names and trade marks or signs, know-how, models, designs, copyright, industrial knowledge or patents, for the use and distribution of contract products to end user" (Art 3(6) Block Exemption Regulation). This definition is in line with the description from the EC Guidelines in relation to the interpretation of the EC Block exemption Regulation *1999.* It is generally considered that franchise agreements contain „licences" of intellectual property rights for the use of distribution of goods and provision of services.

In Croatia the legal base for the licensing of IP rights is the **licensing agreement** regulated by the Code of obligations (Art 699-725. CO) or the provisions of the special laws on IP rights. The licensing agreement grants the licensee a right to use intellectual property of the licensor to a certain extent (exclusive or non-exclusive licence) in a certain territory, for a remuneration paid by the licencee. Licence agreement must be in written form. The licence agreement may be concluded for a indefinite term, although in the case of patents and models the licence agreement may not be concluded for a period longer than the period of legal protection of those rights, provided by *lex specialis*. The following IP rights may be subject to licence agreement: patents, know-how, trademarks, samples and models. It is important to distinguish that the licence under the licensing agreement may not result with the transfer of IP rights, but only with the permission to use those rights. The licensor is still owner of the rights and he may exercise his rights according to the licence agreement. Business names, signs, designs, copyright, industrial knowledge, as well as trade secrets are not subject to a licensing agreement.

The Croatian specific legislation on IP rights is fully harmonised with the current EC *acquis*.[7] In that respect one could state as follows.

1. Trademarks and signs are subject to the Trademarks Act (OG 173/2003, 76/2007, hereinafter: Trademarks Act). Trademarks must be registered in the Register held by the State intellectual property office of the Republic of Croatia (hereinafter: Office). Only registered trademarks are protected for the time of 10 years from the date of filling the registration. This

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[7] For the legal texts in both Croatian and English translation see web page of the State Intellectual Property Office of the Republic of Croatia, www.dziv.hr

period is renewable for an indefinite time, ten years each. Any sign identical or similar to registered trademark is not allowed to be used by another entrepreneur without the consent of the owner in regard to the goods and services identical, similar or not similar to those covered by registered trademark.

2. Trade name of the franchisor is not being subject to a licensing agreement. Under the Croatian Company Act (OG 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08, 137/09) the franchisor company name may not be licensed or transferred to a third person (franchisee) for the use and distribution of contracts products to end user. Trade name must be registered in the Register of the Commercial court and it must be in Croatian language unless the trade name consists of trademark, which contains international wording. Thus, in the most cases in practice, the company name shall be imputed as a part of the trademark and shall be licensed together with other trademarks and signs in accordance with the licence agreement and the provisions of the Croatian Trademarks Act.

3. Copyright and related rights may not be subject to a licensing agreement. The Copyright and related rights Act (OG 167/03, 79/07, hereinafter: Copyright Act) contains provisions for specific types of agreements related to a different copyright and related rights issues. Copyright shall include moral rights, economic rights and other rights of the author provided by law. The author may not renounce or transfer his copyright to another person. He may only grant the exclusive or non-exclusive right of exploitation of copyright, usually for remuneration, by means of concluding the Copyright agreement. This agreement must be in written form. The holder of the exclusive right of exploitation may, on the basis of his right, transfer or grant to a third person right of exploitation only with the written authorization of the author (for example from franchisor to franchisee or to sub-franchisee). The author may not refuse to give his authorization, if it would be contrary to conscientiousness and fairness. The authorization shall not be necessary if the right of exploitation has been granted only for the sake of its exercising for the benefit of the author. Copyright and other related rights protection does not require any formal registration. The copyright protection is generally granted during the lifetime of an author and 70 years after his death, unless otherwise provided by the Copyright Act. For other copyright related rights the special rules from the Copyright Act shall apply.

4. In Croatia **patents** are regulated and protected by the Patent Act (OG 173/03, 87/05, 76/06, hereinafter: Patent Act). The conditions for the invention to be protected by the patent are that the invention is new, inventive and is eligible to be used in the industry. Patents must be registered in the Register hold by the State Intellectual Property Office. Only registered patent owner shall be entitled to exploit the protected invention. In case of franchising patent may be the subject of a transfer, complete or in part. The right to exploit the protected invention shall be assigned to a licensor in a form of licence agreement. Registered patents are protected for 20 years from the date of filing an application (only consensual patent shall be protected for 10 years). Patent holders may prevent anyone from exploiting and infringing their patent. The actions against infringement are provided by the Patent Act.

5. Designs are regulated and protected by the Industrial Design Act (OG No. 173/03, 76/07, hereinafter: Industrial design Act). A design shall be protected by an industrial design to the extent that it is new and has individual character and as long as not contrary to public interests or accepted principles of morality. Designer may transfer or license his industrial design rights, but may never transfer his moral rights. If the design was created on the basis of a commission contract, the right to initiate the procedure and to acquire industrial design rights shall vest in the commissioner of the design, unless otherwise specified by contract. Design must be registered in the Register hold by the State Intellectual Property Office. Only registered patent owner shall be entitled to a protection against third party use or exploitation.

Industrial design protection shall last for a period of 5 years as from the date of filing of the industrial design application. It may be renewed for periods of 5 years each, up to a total term of 25 years. In case of franchising usually the designs shall be licensed to another person in entirety or in part, for the whole or part of the territory of the Republic of Croatia. A license may be exclusive or non-exclusive and must be registered to have effect towards third parties. Licensing agreement must be drawn up in written form. The industrial design right holder and exclusive-licensee may prevent anyone from exploit and infringe their patent. Non-exclusive licensee may initiate proceedings for infringement only with the consent of the industrial design right holder, unless otherwise provided in licensing agreement. The actions for infringement are provided in the Industrial design Act.

11) Know-how and Trade Secrets

The term of know-how in Croatia is provided by the Block Exemption Regulation. For the purposes of that Regulation know-how „means a package of non-patented, technical information, resulting from experience and testing by the supplier, which is secret, substantial and identified. **Secret** means that the know-how package as a body, or in the precise configuration and assembly of its components, is not generally known or easily accessible. **Substantial** means that the know-how includes information which is indispensable for the use, sale or resale of the contract products, and especially for the presentation of the products while selling them, methods of influencing users, technically skilled staff and finance management. **Identified** means that the know-how must be presented in a sufficiently comprehensive manner, as to make it possible to verify whether it satisfies the criteria of secrecy and substantiality." (Art 10.6.) This definition is in line with the definition from the EC Block Exemption Regulation 1999 and the EU Guidelines. Although Code of ethics contains slightly different definition the main features: confidentiality, substantiality and identification are still unchanged.

In the franchising business know-how is usually transferred through licensing agreement by means of „operating manual", which represents integral part of the agreement. Operating manual contains detailed instructions on the operation and conduct of business and it must be in writing. This document is protected as a business secret and must not be disclosed to third parties even after expiration of franchise agreement.

According to the business practice know-how is also a broader concept. It additionally includes obligation of franchisor to provide franchisee with other knowledge and assistance on operation of business through ongoing assistance, instructions, education of employees and providing advice in all phases of conduct of business (usually performed orally). Know-how should be provided during the entire period of contractual relationship and if the know-how is during that period changed or updated, the franchisor must communicate those changes to franchisee.

In current Croatian legislation there is no explicit provision on trade secrets or on the actions against the misuse of know-how. In practice the franchisor's know-how is usually protected by the confidentiality clauses contained in the franchise agreements. However, the parties always have a right of protection in accordance with the general rules of law.

12) Remedies for Non-performance

For the infringement and the non-performance of the intellectual property rights remedies are provided in corresponding special legislation (*lex specialis*). They are usually explicitly listed in the corresponding Acts (see chapter 11.).

As regard to the non-performance of other obligations, there are no explicit statutory provisions on this issue. The general rules on non-performance from the Croatian Code of obligations shall apply, unless otherwise agreed by the parties (Art 360-368. CO). If one party is in breach of obligations other party must first demand the party in breach to fulfil due obligation giving certain additional time period. If the obligation is not performed not even in this additional time period the party shall have the right to terminate agreement. Additional time period may not be necessary if it is obvious that the party shall not be able to perform the due obligation even with the additional time period or if the time-fixed obligation is in question. The agreement may not be terminated in case of non-performance of the insignificant part of obligation. In some cases it might be possible to ask the court to order the party in infringement to perform the obligation. In addition to those remedies the parties shall always have a right to claim damages. General rules for the compensation of damages are provided by the Code of Obligations Art 1045-1110. Because of the nature and purpose of franchising agreements, it would be advisable for the parties first to reach some joint agreement and to use the termination as the last resort option.

13) The End of the Relationship and its Consequences

a) Most usually the contractual relationship will end in one of the following ways:

1. Expiration of the agreement.
   - The agreement with the fixed time period shall terminate after the expiry of that period, unless otherwise agreed. Usually the renewal of agreement is at the sole discretion of the franchisor, unless the option of renewal or extension is specifically agreed.
2. Termination/cancellation of the agreement by one party.
   - Termination is possible in accordance with the agreed terms or due to the non-performance or the breach of contractual obligations, change of contractual circumstances (exceptional aggravating circumstances), bankruptcy, insolvency or liquidation of the party.
   - In case of contract cancelation, the reasons for cancelation must be serious due to the investments into business.
   - Voluntary termination or termination by mutual agreement of both contracting parties is also possible depending on the intention of the parties.

b) Legal consequences

Generally, after the end of the relationship both parties shall seize to exist as contractual parties and will be released from their contractual obligations (except responsibility for damages). All individual rights must be correctly terminated and if needed licensed back. This is especially so in relation to the transfer of industrial and intellectual property rights package and know-how.

In case of expiration ideal situation would be that the expiration of franchise agreement coincides with the expiry of the IP rights. If that is not the case all intellectual property rights shall be assigned back to the franchisor and the changes in the Register need to be performed, if it is so required by the special legislation (*lex specialis).*

In case of termination or cancelation, according to the general rules on obligations the legal consequences are the following. Unless otherwise agreed, both parties are free from their contractual obligations, except the liability for damages. Both parties shall return to one

other what they gained on the basis of the agreement, including the paid fees and other gains from the agreement. The party recovering the monetary obligation must also recover the interest rate from the day of its payment. (Art 368. CO). The general principle and inclination of the lawmaker is thus the fulfilment of contractual obligations.

In addition to those remedies the parties shall always have a right to claim damages. General rules for the compensation of damages are provided by the Articles 1045-1110 of the Code of Obligations.

Other consequences may include: the franchisee's obligation to keep trade secrets and confidentiality of data, to restrain from operating the competition business, for the franchisee to remove all signs and name of the franchise, franchisee may exercise buy-out option for the equipment or assets, both parties will need to comply with provisions on bankruptcy, insolvency legislation etc.

Other Generally Used Clauses

– to be discussed

Suggested Literature:

Books and Articles:

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– *Draft Common Frame of Reference*, Book IV, Part E, Chapter 4: Franchise contracts, 2009.
– V. Korah, *The future of vertical agreements under EC Competition Law*, ECLR, 1998.
– M. Martinek, *Moderne Vertragstypen, Band II: Franchising, Know-How, Management und Consultingverträge*, C.H. Beck, 1992.
– M. Mendelson, *Franchising Law*, Richmond, 2004.

Legal texts - sources in the Republic of Croatia:

– Narodne Novine - Official Gazette web page: www.narodne-novine.hr
– For legislation in the area of Competition law see web page of the Croatian Competition Agency www.aztn/eng/zakonodavni_o.htm (both Croatian and English translations are provided)
– For legislation in the area of Intellectual Property Rights see web site of the State Intellectual Property Office of the Republic of Croatia www. dziv.hr/en/
(both Croatian and English translations are provided)
– For other legislation generally and the process aligning Republic of Croatia with EU *acquis* see web page of the Croatian Ministry of Foreign Affairs and European Integration www.mvpei.hr

FACTORING*

1) Fundamental Concepts and Elements

In the Republic of Croatia there is no explicit definition and legal regulation of factoring. It is an innominate agreement shaped by business practice and mostly governed by the general rules on obligations and legislation in the field of finance and banking. In the developing economies, factoring is at first place method of financing available to banks and finance houses. Reports from the Croatian Financial Services Supervisory Agency (www.hanfa.hr, hereinafter: the Agency) are showing that there are 14 factoring companies currently operating in Croatia and the volume of factoring activities amounts 2.736.001 thousand HRK for the year 2009 (app 375.000.000 thousand EUR).[8] Latter number of factoring companies is related to companies that perform factoring activities and are in obligation to submit their financial reports to the Agency. However the Agency holds no power to license them (unlike leasing companies) but is authorised, according to the Agency Law (OG 140/05) only to perform supervision.

Factoring in Croatia is mentioned by the following regulation: Code of Obligations (OG 35/05, 41/08) within the assignment of rights, Banking Act (OG 84/02, 141/06), whereas it is specified the banks are allowed to perform activities of factoring, Instructions on the application of the Ordinance of bank capital adequacy (OG 195/03, 41/2006, 130/2006, 14/2008, 31/2008, 33/2008, 18/2009) and Law on foreign exchange (OG 96/03, 140/05, 132/06, 150/08, 92/2009, 153/2009) whereas factoring is mentioned as one type of credit financing and the Instructions on the application of the Ordinance of the conditions and procedure of money transfer with foreign countries (OG 136/05, 176/04, 88/05, 18/06, 24/06, 132/07) whereas it is recognised that a foreign bank may perform factoring operations in the Republic of Croatia. Additionally, Croatian national program for the accession to the EU specifies factoring as one type of financial services.

Republic of Croatia is not a signatory of the UNIDROIT Convention on International Factoring (Ottawa, 1998) but the more or less the same solutions could be found in our legislation. Where it is so needed relationship to the UNIDROIT Convention shall be closely discussed.

A. Meaning of factoring

Factoring agreement is an agreement concluded between one party (the supplier) and another party (the factor) pursuant to which the supplier sells and assign its receivables arising from the agreements of sale of goods and services made with third persons, his customers (the debtors) in exchange for remuneration with the purpose to finance his continued business.

The main functions of factoring are: financing, recourse responsibility (*delcredere*) and providing other services directly or indirectly related to factoring (such as investigation of credit health of debtors, taxation, bookkeeping, advertising of services etc).

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* Original text is written in English language. Translation from English to Serbian is provided by the GTZ Belgrade, Serbia. The author holds no responsibility for the translation.

[8] This amount represents the cumulative amount of purchased invoices at factoring operations for the first six months of 2009 on the basis of reports of 14 factoring companies.

In its core factoring is actually sale and purchase agreement of receivable with the recourse basis, unless otherwise agreed by the parties. **Fundamental element of factoring is assignment of rights**, which is **in Croatia governed by the provisions of Articles 80-90 of the Code of obligations** (hereinafter: CO).

Factoring is a complex agreement. It is comprised of the following **basic elements**:

1. **Pre-agreement (**pre-contract) obliging parties to enter into the main agreement:
   - Pre-agreement means an agreement between the supplier and the factor pursuant to which the supplier takes an obligation to offer the factor all or any of its receivables (debts) arising from the agreements made with the debtors, while factor takes over the obligation to „purchase" those receivables if he is satisfied with the credit health of the debtors. Usually both of the parties are in continuing and tie-up relationship. Whether the factor needs to purchase all or any of the supplier's receivables of supplier depends on the agreement of the parties.
   - In order for the pre-agreement to be valid both the terms of the main agreement and the object of factoring must be defined or at least definable. (Art 268. CO)
2. **Main agreement** concluded between the supplier and the factor:
   - Main agreement is usually concluded when the receivables may be defined and/or at the time when they come to an existence. Usually, the supplier makes an offer by sending a factor an invoice with the specified receivable and the due date.
   - The legal base for the receivable may be any agreement but most usually in practice shall be the sale and purchase agreement.
   - Factor is usually prepared to purchase receivables on a „recourse basis" from the supplier, before due date and for a lower price then the receivable itself. Here the factor holds the right to require unpaid receivables (debts) to be bought back by the supplier and therefore the supplier bears the risk of the final debt payment.
   - It is also possible for the parties to agree otherwise - purchase of receivables on a „non-recourse basis" where factor holds no rights of recourse (buy back) from the supplier. In this case the factor bears the risk of the debt payment.
3. **Assignment of rights** from seller to factor as a core element of factoring. According to the Croatian law assignment is regulated as follows:
   - All (global assignment) or any (individual assignment), existing or future receivables may be assigned (Art 80. CO).
   - Assignment of rights is the agreement between supplier and factor and therefore the approval of the debtor is not a condition for the validity of the assignment, but:
   - **notice** of the assignment of the receivables needs to be given to the debtor, in order for such assignment to be legally binding for the debtor. If a notice of assignment is not given, nor the debtor is aware of the assignments, the debtors shall be relieved from its obligations by fulfilling the obligation to the supplier. (Art 82. CO) In all other cases the debtor will be relieved from his obligation only by fulfilling it to the factor.

- in case of multiply assignment of the same receivable, debtor is in obligation to fulfil its obligation to the assignee of whose existence he was firstly notified, or to the person who first requested the payment of the debt. (Art 83. CO)
- **assignment shall not be effective against** the **debtor** if, at the time of conclusion of agreement of sale of goods, supplier and debtor agreed (*pactum de non cedendo*) on prohibition of such assignment (absolute prohibition) or if they made an assignment condition to a previous consent of a debtor (relative prohibition). (Art 80.2.) From the linguistic interpretation of the law and view of some authors assignment agreements contrary to the prohibition shall be valid toward factor (regardless his knowledge on prohibition), but shall not have any legal effect against debtor. In that case the debtor shall be relieved from its obligation by fulfilling the obligation to the supplier or in the case the supplier refuses to receive obligation by depositing the object of obligation in the court.
- However, in Croatian literature there are opinions that in a case of global assignment, assignment of all receivables of one supplier both prohibited and not prohibited ones, as it is usually the case with the factoring shall not be valid without the consent of a debtor.[9] The Law is silent on this issue.

4. **Form** - form of the assignment and the form of notice are two separate questions.
   - according to Croatian law assignment of rights is not a formal agreement. However, if it is connected or accessory to some previous agreements (usually sale and purchase agreement), it is considered in the Croatian literature, it should follow the form of the main agreement (parity of form).
   - This obligation of form does not relate to a notice of notification. As to the form of notice the Law contains no explicit provision on this issue, it could be concluded that the notice could be given in any form, including orally. The same position towards notification is taken by the Croatian literature and the case law. This solution differs from the UNIDROIT Convention, whereas the notice needs to meet written elements from the Article 1 of the Convention.

B. Scope of the contract of factoring

The rules on assignment from the Croatian Code of Obligations apply whenever the receivables assigned pursuant to the factoring agreement are governed by the provisions of a Croatian law. In case of a factoring agreement with international element the applicable law shall be determined in accordance with the conflict of law rules.

C. The object of factoring

In accordance with Croatian legislation the object of factoring may be all or any existing or future receivables arising from the agreement with the debtor, except the receivables:

- whose assignment is prohibited by law (such as tax, custom or other public bodies receivables),
- receivables of strictly personal in nature (closely connected to a legal personality or identity of a person, such as receivables from the health insurance, alimony etc.)

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[9] V. Gorenc, *Zakon o obveznim odnosima s komentarom*, RRIF, 1998, p 567.

– or receivables generally not assignable by its nature (monetary compensation for injury etc). (Art 80.1.CO)

Both, existing or future receivables may be assignable including the receivables under condition and obligation capable to be divided and fulfilled in parts. All future receivables need not to be specified at the time of conclusion of the agreement, but must be defined and fixed at the time of the assignment. A (pre)agreement shall be valid if the receivables are not defined at the time of conclusion but are definable (if (pre)agreement contains elements on basis of which the receivables may be defined at the time when they come to an existence or at the time of assignment).

At the moment of assignment of receivable all other accessory rights such as mortgage, lien, charges, guarantee, priority in payment, interest rate etc. shall be assigned together with the receivables. All interest due by the time of assignment shall be also subject to an assignment together with the receivables. (Art 81. CO)

D. Parties in the factoring contract

There is no statutory regulation as to the parties of a factoring agreement in Croatia. From the current literature and business practice it could be concluded that the parties to a factoring agreement shall be:

– **Seller or supplier of right** - shall be any natural or legal person or entity capable to conclude agreements and enter into other legal transactions.
– **Debtor** - shall be any natural or legal person or entity capable to conclude agreements and enter into other legal transactions.
– **Factor** - shall be a legal entity, a bank or finance house - a company registered for performing factoring activities. In accordance with the Agency Act factor is in obligation to submit final reports to the Agency for authorisation. Factor is not a subject to a previous licence approval by the Agency. In the Croatian practice for a long time there was a dispute weather the banks were allowed to perform factoring activities on the Croatian market. This uncertainty was put to an end by the new Banking Act. Now, it is explicitly allowed for the banks to perform factoring activities (Art 6.2.) subject to a previous approval from the Croatian National Bank.

2) Types of Factoring Contracts

There are no explicit rules as to the types of factoring agreement. Influenced by foreign experience Croatian business practice and literature recognises the following main types of factoring agreements:

a) Disclosed or undisclosed - depending whether the notification is provided to the debtor or not.
b) Recourse or non-recourse - depending whether the supplier bears the risk in case of debtor's failure to pay or not and is supplier responsible for damages if a debtor defaults.
c) Direct or indirect factoring - depending whether there is only one or more factors in the relationship („factor of a factor").

d) Domestic and international - whether factoring agreement contains international element or not.

e) Croatian legal literature additionally only mentions Old Line Factoring, Conventional Factoring, Maturity Notification Factoring, Import-Export Factoring, taken from the UNIDROIT Study and Report on factoring, although there is no evidence that these types of factoring agreements are existent under those names in Croatia.[10]

As the factoring business practice in Croatia is still undeveloped factoring agreements are usually concluded without formal categorisation. However, from their substance, depending on a contractual clauses and agreement of the parties they could be categorised in some of the mentioned types.

3) Rights and Duties of the Parties in a Factoring Transaction

a) Rights and duties **between supplier and factor**:

– In case of pre-agreement for existing or future receivables both parties are in obligation to conclude the main agreement and assign the rights when the required conditions are fulfilled (if so agreed by the parties);
– The factor is in obligation to pay the supplier the agreed fee for the assigned receivables (factor provision shall be most usually included);
– The supplier is in obligation to serve the factor with the original invoice, receipt or other proof of the acknowledgement and identification of the assigned receivables. In case the receivable is only partly assigned to factor, supplier must serve factor with the dully certified transcript of such invoice, receipt or other proof of receivable; (Art 85. CO)
– The receivable is assigned to factor in the same quality and quantity as it was by the supplier, unless otherwise agreed by the parties.
– If the assignment of receivables is performed in exchange for remuneration, the supplier shall be liable for the existence of receivables (the factor shall have a right to a recourse from the supplier (Art 86. CO)). This is a dispositive provision and the parties may agree otherwise.
– The supplier is liable to the factor for the solvency of debtor only if it so explicitly agreed but even then only up to the amount of the fee paid by the factor including interests and other costs of assignment. More strict liability of the supplier may not be agreed. (Art 87. CO)
– After assignment, the supplier is in obligation to serve the debtor with the notice of the assignment of the receivables. A failure to serve debtor with the notice of assignment or assignment against prohibition shall not effect the validity of the assignment agreement. The supplier shall be liable to the factor for the fulfilment of the obligation on the basis of assignment agreement. (Art. 82. CO)
– At the same time the supplier shall be liable to the debtor in case of any breach of the terms of the main sale and purchase agreement, especially in respect of the prohibition of assignment. (Art 82. CO).

[10] B. Vukmir, *Factoring u poslovnoj praksi i teoriji*, Pravo i porezi, 7/2006, p 4-5.

- In any case parties to an agreement must always comply with the general rules of good faith and fair dealing. (Art 4-5. CO)

b) Rights and duties as to the **debtor**:

- The main rule is the debtor may not be put into worse position as he was before the assignment.
- After the assignment agreement, the factor holds all suppliers' rights deriving from the sale and purchase agreement (which supplier was holding before the assignment (Art 84.1. CO)). This also includes the claim against non-performance, defective or late performance. If so agreed the factor shall in any case have a right to a recourse from the supplier.
- In case of a claim against the debtor, the debtor may set up against the factor all defences arising under that agreement of which the debtor could have availed itself if such a claim has been made by the supplier including all debtor's personal defences against the factor arising under some other relationship. (Art 84.2.)
- If the debtor is notified or has any other knowledge of the existence of factor, he is under obligation to make the payment to the factor. The debtor shall not be discharged from his obligation if he makes the payment to the supplier. (Art 82. CO)
- The debtor shall be discharged from his liability if the payment to the supplier is effective before the notification, other knowledge of the existence of the factor or other person's superior right. (Art 82. CO)

4) Securities in Relation of Factoring Contract

According to the Croatian legislation the basic rules as regard to the transfer of security rights are:

1. All accessory rights such as mortgage, fix and floating charges, lien, hypothec, guarantee, priority in payment, interests etc. shall be transferred *ex lege* (Art 81. CO) to the factor together with the receivables at the moment of assignment.
2. Non-accessory rights such as fiduciary transfer of ownership, as a rule, are not transferable and it should be extinguished with the assignment of the receivables. However, there is no clear position on the question on non-accessory security rights in Croatian literature especially in regard to the land.

Generally, all interests and security rights in land have to be recorded in the Land Register in accordance with the provisions of the Land registration Act and Property and other real rights Act. Therefore transfer of securities in relation to factoring shall always have to be observed in relation to the special legislation governing securities.

5) Succession of Credits

There is no clear statutory regulation on succession of credits nor the prohibition of succession. In that case the general rules for assignment of rights shall be applicable accordingly.

6) The Registry of Factoring

There is no Register of factoring in the Republic of Croatia.

7) Other Issues Relevant to Factoring

– to be discussed

Suggested Literature:

Books and Articles:

- V. Gorenc, *Ugovor o faktoringu*, Računovodstvo, revizija i financije, 9/2007.
- B. Vukmir, *Factoring u poslovnoj praksi i teoriji*, Pravo i porezi, 7/2006.
- V. Gorenc, *Zakon o obveznim odnosima s komentarom*, RRiF, 2008.
- B. Vukmir, *Ugovori o factoringu i fortfaitingu*, Računovodstvo, Revizija i financije, 5/2006.
- Z. Koprivčić, *Promet novčanih tražbina*, FiP, 1/2008.
- UNIDROIT *Convention on International Factoring*, Ottawa, 1998.
- UNIDROIT, *Report on Contract of Factoring*, Study LVIII-Doc 1. March 1976.
- N. Ruddy, S, Mills, N. Davidson, *Salinger on Factoring*, Sweet&Maxwell, 2005.
- E.A. Kramer, *Neue Vertragsformen der Wirtschaft: Leasing, Factoring, Franchising*, Verlag Paul Haupt Bern-Stuttgart-Wien, 1992.
- H.R. Haseler, F. Greßl, *Leasing und Factoring*, LexisNexis ARD Orac, 2006.

Legal texts - sources in the Republic of Croatia:

- Narodne Novine - Official Gazette web page: www.narodne-novine.hr
  Zakon o obveznim odnosima - Code of obligations, OG 35/06, 41/08.
- For legislation in the area of Financial services see web page of the Croatian Financial Services Supervisory Agency www.hanfa.hr
  (both Croatian and English translations are provided. Translation should be taken *for orientation purposes only!*)
- For other legislation generally and the process aligning with EU *acquis* see web page of the Croatian Ministry of foreign affairs and European integration www.mvpei.hr

FINANCIAL LEASING*

1) Fundamental Concepts and Elements

In the Republic of Croatia the financial leasing is regulated by the Leasing Act (OG 135/06, hereinafter: the Act). This Act came into force on the 13 December 2006 and applies to all leasing agreements concluded after this date. The agreements concluded before this date shall stay in force until their expiration, but may not be renewed. All registered legal entities and companies participating in leasing activities may continue operating as leasing companies in compliance with the Act, but must harmonize their leasing operations and comply with new regulation, especially in relation to statutory provisions. Provisions in connection to the member state entrepreneurs participation in leasing activities shall become applicable on the date of the Croatian membership in the EU. Until that date member states will be regarded as a third state's.

Leasing Act regulates: statutory requirements and operations of leasing companies, leasing agreement, rights and obligations of the parties to a financial leasing transaction, financial reports, supervision of leasing companies activities and risk management. (Art 1.) The Act applies to both financial and operative leasing. (Art 7.)

This Act represents a new step of development in Croatia. Its adoption means that the significance and need for a regulation of financial leasing in general and the leasing agreement in particular were finally recognized as necessity. Leasing agreement changed legal status from innominate to a nominate agreement, many issues from the scope of leasing agreement, obligations of the parties, property issues and the conditions for leasing transaction, which were not clear earlier, are now regulated. The database of the Croatian Financial Services Supervisory Agency (www.hanfa.hr) reports that there are 27 leasing companies currently operating in Croatia[11] and that the financial leasing activities represented almost 6% of Croatian financial market at the moment of adoption of the Leasing Act.[12]

The Republic of Croatia is not a signatory of the UNIDROIT Convention on International Financial Leasing (Ottawa, 1998) but the basic principles from the Convention are incorporated in the Croatian Leasing Act. The Relationship to UNIDROIT Convention shall be more closely discussed in the chapter on the scope of application.

A. Meaning of financial leasing - Definition

Article 7. of the Leasing Act provides: **Leasing transaction** shall be a legal transaction whereby 1. the lessor based on the sale and purchase agreement of the object of the leasing concluded with the supplier, acquires the right to ownership of the object of leasing (hereinafter: supply agreement) and whereas at the same time 2. the lessor based on the leasing agreement with the lessee grants lessee the right to use (*ususfructus*) the object of leasing for a fixed period of time, in return for a specified fee (hereinafter: leasing agreement) (Art 7.1.) Depending on its features, leasing may be financial leasing or operating leasing. (Art 7.2.)

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* Original text is written in English language. Translation from English to Serbian is provided by the GTZ Belgrade, Serbia. The author holds no responsibility for the translation.

[11] Last visit 01.02.2010.

[12] See Government of the Republic of Croatia - explanation of the final proposal of the Leasing Act, www.sabor.hr/Download/2006/11/15/PZ_539.pdf, for the Aggregate Balance Sheet of the leasing companies, see www.hanfa.hr

Financial leasing transaction shall be a legal transaction referred to in previous paragraph whereby the lessee pays a specified fee to the lessor for the use of the leased object during fixed time period and whereas such fee takes into account the total value of the object of leasing and other costs. The lessee shall bear the costs of amortization of the leased asset, and by applying a purchase option the lessee may acquire the ownership of the object of leasing for a specified price, which, at the moment of exercising such option, is lower than the actual value of the leased asset at that moment. (Art 7.3.) The supplier and the object of a leasing agreement shall be designated by the lessee.

Distinction should be made to operating leasing. **Operating leasing transaction** shall be the legal transaction as referred to in paragraph one of this chapter whereby the lessee pays a specified fee to the lessor for the use of the leased object during fixed time period and whereas such fee does not have to take into account the overall value of the object of the leasing. The lessor shall bear costs of amortization of the object of leasing and the lessee shall not have a purchase option of the leased object and the leasing transaction may be terminated under in advance specified conditions. (Art 7.4.)

B. Scope of financial leasing.

Unlike UNIDROIT Convention (which is applicable only to international financial leasing transactions) Croatian Leasing Act is applicable to both financial and operating leasing transactions and to both domestic and international leasing transactions while.

Provisions on financial leasing apply to all financial leasing transaction in accordance with the definition provided by the law. Financial leasing transactions also include activities directly or indirectly related to leasing transactions such as agency sales and sale of the leased objects aquired on the basis of leasing agreement. The leasing company may not approve credits or loans. (Art 8.).

Financial leasing transaction may be performed only by the dully authorized and registered leasing company (lessor) within of the meaning and under conditions provided by the law. Lessee may be any natural or legal person, including consumer (Art 88-91.) UNIDROIT Convention excludes consumer transactions - when the equipment is to be used primarily for the lessee's personal, family or household purposes.

Object of leasing transaction may be any movable or immovable asset governed by the provisions of the Property and other property rights Act. The UNIDROIT Convention is applicable only to equipment - plant, capital goods and other equipment and excludes leasing of real estates, vessels and aircrafts. Therefore the scope of application of Croatian law is much broader than Convention.

Like UNIDROIT Convention „option to buy" is not mandatory element of the financial leasing agreement, but it is indirectly implied through the definition of financial leasing provided by the Act. It is also stated that the value of leased object, costs of amortization including all other costs and fees shall be paid-off by the lessee during the agreement term.

Fiscal and tax questions are regulated by the Croatian fiscal and tax legislation. Parties may not exclude the application of the mandatory provisions of the law. Issues that are not expressly settled by the Leasing Act shall be settled in conformity with the general rules of law.

C. The object of financial leasing.

Object of leasing may be any movable or immovable asset governed by the rules on the property and other real rights (rights *in rem*). (hereinafter: leased object) In Croatia the latter are governed by the Property and other property rights Act (OG 91/96, 73/00, 114/01, 79/06,

141/06, 146/08, 38/09, 153/09). Additionally, the Ordinance on the manner of keeping the register of leased assets (OG 24/07, 72/2007, hereinafter: Ordinance) provides that the following data should be entered into the Register: description of „vehicles, real estate, vessels, aircrafts, plant and machinery, office equipment and other equipment, various". (Art 4.) This list is not exhaustive for the parties.

D. Parties in financial leasing

The parties to a financial leasing are: lessor, lessee and supplier. (Art 4.)

a) **Lessor** shall be any person that holds a right to perform leasing activities pursuant to the provision of the Act. Such activity may now only be performed by:

1. a domestic leasing company - company duly registered at the Croatian Commercial Court Registry for leasing activities on the basis of a license issued by the Competent Authority as a precondition. Duties of Competent authority is performed by the Croatian Financial Services Supervisory Agency (hereinafter: Agency);
2. a leasing company of the member state - company established in any EU member state authorized and registered for the leasing activities;
3. a Croatian branch of the leasing company of the member state or a third country authorized and registered for the leasing activities;
4. a bank registered under the Croatian law, a bank registered in any EU member state or their Croatian branches and a bank registered under a law of any third country, but only limited - under the terms and conditions defined in the Croatian banking regulations. (Art 6.1.)

Contrary to the previous regulation, now the lessor could not be any more the natural person or legal entity which is not registered and licensed for leasing activities. This is a significant change in regulation. If we additionally take into account the strict statutory provisions for leasing companies from Art 7-29. (for example: minimum capital is now 1 million HRK, which is app 7.3 million EUR) the new regulation thus clearly narrowed the circle of potential lessors.

b) **Lessee** shall be any person, based on a lease agreement, which obtains the right to use the leased object in return for a payment of an agreed leasing fee. Lessee may be any legal or natural person, company or the vendor subject to provisions of the Croatian Company Act (OG 111/93, 34/99, 118/03, 146/08, 137/09). In case the lessee is a consumer the Croatian consumer legislation shall be applicable.

c) **Supplier** is not a party to a leasing agreement but is a party of a supplier agreement, which constitutes integral part of a leasing transaction within the meaning provided by the law. Supplier shall be any natural person, company or the vendor subject to provisions of the Croatian Company Act or other specialized legislation in the field of trade. Supplier is by default entering into supply agreement with the lessor for the leased object and has a duty to deliver leased object directly to the lessee on the basis of instructions from the lessor. On the basis of supply agreement the lessor will gain the right of ownership of the leased object, unless the supplier and the lessor are the same person.

E. Basic principles governing financial leasing.

Some of the basic principles governing financial leasing are:

- elements of financial leasing should be clearly defined;
- distinction to other types of agreements should be clearly made (especially to operative leasing, lease and credit agreements, purchase agreements with retention of title or purchase agreements with the payment of purchase price in installments);

- financial leasing should balance the interests of all contractual parties;
- leasing transaction is complex transaction - it involves relationship between three parties and combines two different agreements;
- supply agreement and leasing agreement are two obligatory constitutive elements of financial leasing;
- in financial leasing contractual relationship a lessee specifies the object of the agreement and sometimes the supplier, the leased object is acquired by the lessor and the leased object is delivered by the supplier directly to the lessee;
- lessor should be professional - entity or entrepreneur which is performing leasing activities as a profession;
- lessee can be any person or individual with the capacity to hold the right to use leased object. Lessee shall be responsible for any damages caused by the use of leased object;
- supplier shall be liable for any material deficiency of the leased object, including the failure of delay in delivery;
- as opposite to operative leasing, financial leasing should aim that the lessee exercise purchase option after expiry of leasing agreement.

2) Commercial Nature of Financial Leasing

Financial leasing shall be governed by the provisions of the Leasing Act. All other matters not expressly regulated by the Leasing Act shall be governed by the general principles of law from the Croatian Code of Obligations. Statutory provisions of leasing companies and liquidation shall be subject to the provisions of the Company law Act, unless otherwise provided by the Leasing Act. Bankruptcy and forced execution issues are governed by the Bankruptcy Act and Forced Execution Act. Accountant and taxation issues are governed by the specific legislation (*lex specialis*). Taxation aspect is subject to International Accounting Standards, which form part of Croatian accounting system according to the Article 14. of the Croatian Accounting Act, then VAT Act and Ordinance on VAT application and partially other laws in the field. Custom aspect is governed by the Croatian Custom Act and Ordinance on the conditions and assessment of custom base, as well as some other laws in the field.

In defining international leasing the Leasing Act does not use the nationality of the parties as connecting element, but the principal place of business and habitual residence. Leasing Act contains no explicit provision on direct application of accepted business practice and standard contract terms. The Act only directly points to the application of general rules of contract law from the Code of obligations.

3) Terms in Financial Leasing

Financial leasing agreement is concluded for a fixed period of time, which must be agreed at the moment of the signing. This is an obligatory element of the leasing agreement. Failure of parties to agree on this issue will result with the agreement to be null and void.

As to the duration of term, there are no explicit provisions on the minimum or maximum duration. Theoretically this would mean the parties are free to agree on any term. However, the parties must always behave in accordance with the purpose of leasing agreement and

must bear in mind the coordination between the duration of the agreement and payment of the leased object value, costs of amortization and all other fees.

4) Domestic and International Financial Leasing

Financial leasing transactions in Croatia may be either domestic or international depending on weather the leasing transaction contains international elements or not and weather activity leasing operates between the parties with their principal place of business (registration) or habitual residence in the same or in different states.

Domestic leasing companies may operate financial leasing activities outside the Republic of Croatia directly or through a branch office in one of the member states or only through a branch office in a third state subject to the rather complex previous notification procedure (for member state) and/or approval procedure (for third country) performed by the Agency (Art 29- 30.)

Member state's leasing companies authorised for leasing activities may operate financial leasing activities in the Republic of Croatia directly or through branch office, while third state leasing companies authorised for leasing activities may operate leasing activities in the Republic of Croatia only through the branch office. In both cases, rather complex, previous notification and/or authorisation procedure from the Agency is required. Registration and operation of the branch office is subject to the provisions of the Leasing Act, Company Act and other relevant legislation. (Art 31-35.)

As the **applicable law** if the lessee is established or has habitual residence in the Republic of Croatia the lease agreement shall be governed by the provisions of the Croatian law. If the lessee is established or has residence in a member state, the lease agreement shall be the subject to the law of that member state. If the law of that member state so allows the parties may choose the law of any other country to be applicable. Notwithstanding of the latter provisions the parties may always choose the law of the country of citizenship of the lessee, if the law of that country allows so. (Art 94. Act) Only substantive provisions of the foreign law shall be applicable. Parties may not exclude the application of the mandatory provisions of Croatian law and principles of *ordre public.* (Art 91-92.) In all other cases the law applicable to an international lease agreement shall be determined in accordance with the provisions of the Croatian Act on conflict of laws (OG 53/91, 88/01)

5) Form and Basic Clauses of Financial Leasing

1. A financial leasing agreement must be **in writing** in clear and understandable way.

2. a) Financial leasing agreement **must** contain following **provisions (obligatory elements)**:

1. The business name and the main office of the lessor;
2. The business name and the main office, or full name and address of the lessee;
3. Specification of the leasing transaction (financial or operating leasing);
4. Detailed description of the leased object;
5. Total value of the leased object;
6. Total sum of fees (pay off amount);
7. Amount of each single instalment (single payment);

8. Duration of lease agreement;
9. Terms and conditions for early termination of agreement.

Additionally, as regard to the payment of fees, an agreement must particularly clearly state:

1. The share of each single payment in the total value of the leased object;
2. Amount, number and term-periods of a single instalment payment - including the payment sheet (payment table) in attachment;
3. Actual (current) annual interest rate. The method of calculating the actual annual interest rate including all elements of calculation shall be performed in accordance with the Ordinance of the Agency.

b) In addition to those obligatory provisions the lease agreement **may** also **contain** other provisions (**additional, non-obligatory provisions**) such as provision on the risks against which the leased object must be insured and the class of insurance; time, place and manner of the take over of the leased object in possession; transport charges and installation charges in cases of a complex object of the leasing; maintenance expenses of leased object, option for training of the employees of a lessee, as well as other conditions subject to the party disposition. This list is not exhaustive for the parties.

6) Rights and Duties of the Parties in the Financial Leasing

The following duties of the parties may be identified:

a) Rights and obligations of the lessor:

1. Acting upon the request of lessee, the lessor shall acquire the object of the leasing from the supplier designated by the lessee and in accordance with the lessee's specifications. For the purpose of direct delivery the lessor shall notify the supplier that the object is obtained for leasing purposes and shall specify the lessee.
2. The lessor is liable for any third person's superior titles, rights or claims which may exclude, diminish or limit the right to a free use and quiet possession of the leased object by the lessee unless the lessee is aware of those rights and agreed to it (liability for legal deficiences). (For consequences see chapter point 7.2.d.)
3. The lessor shall not be responsible to the lessee for any damages incurred during the use of the leased object.
4. The lessor may exercise the right to terminate agreement due to the failure or default in payment of the lease instalments. (For consequences see chapter point 7.2.b.)
5. The lessor may exercise the right to exclude the leased object in the event of forced execution over lessee's assets. (For forced execution see chapter point 11.1.a.)
6. The lessor may exercise the right to exclude the leased object from bankruptcy estate in the event of the lessee's bankruptcy. (For bankruptcy see chapter 11.2.a.)

b) Rights and obligations of the lessee:

1. The lessee shall take over in possession the leased object in a manner, time and place stipulated buy the agreement.
2. The lessee shall be liable for the payment of the lease fee in instalments, time limits and in a manner stipulated by the agreement. He is not in obligation to pay any fee until the leased object is being delivered. (For consequences in failure of payment see chapter point 7.2.b.)

3. The lessee shall have a right to use the lease object in accordance with the agreement and the purpose of the leased object.
4. The lessee shall use the lease object with proper care and in a reasonable manner, otherwise he will be responsible for the damage caused by the use of the leased object contrary to the leasing agreement and the purpose of the leased object. Any modifications on leased object shall be subject to the agreement of both parties.
5. The lessee may assign the use of a leased object to a third person condition to a written consent of the lessor. (For consequences of assignment see chapter point 8.2.c.)
6. After the expiration of the agreement the lessee shall have the right to exercise the purchase option (buy clause) of the leased object for a specified price, which, at the moment of exercising such option, is lower than the actual value of the leased asset at that moment. In that case he shall have a right to keep the object of the leasing in his possession or otherwise if such option is not exercised he is in obligation to return the object of leasing. Most usually this shall not be the case while the lessee have any economical interest not to exercise the purchase option and acquire the right of ownership over the leased object after the expiry of the leasing agreement.
7. The lessee may exercise the right to refuse the reject the delivery of the leased objects and terminate agreement due to failure or delay in delivery, material deficiencies or non-conformity of the leased object with the leasing agreement. (For consequences see chapter point 8.2.a.)
8. The lessee may exercise the right to terminate agreement or lower the leased fee in case of legal deficiencies and existence of the third person's superior titles, rights or claims which may exclude, diminish or limit the right to a free use and quiet possession of the leased object, but in any case he has a right for a compensation for the damage suffered. (For consequences see chapter point 7.2.d.)
9. The lessee shall be liable for any loss, termination, damage or loss of purpose of the leased object. In those cases he may not be released from his obligations stipulated in the lease agreement.

c) Rights and obligations of the supplier:

1. The supplier shall deliver the leased object directly to the lessee in a way stipulated by the leasing agreement, unless it is agreed that the lessor shall personally deliver the leased object to the lessee.
2. The supplier shall be liable for any delay or failure of delivery of the leased object including material deficiencies and non-conformity of the leased object with the agreement to the lessee in the same way as he would be liable to the lessor and as if he would have been in the contractual relationship with the lessee. This presumption would mean that supplier is liable to the person (lessee) with who he does not have any contractual relationship for the contractual damage. In any case, he may not be liable for the same damage to both, lessor and lessee. (For consequences see chapter point 8.2.a.)
3. If the leased object is to be designated by the lessor, the supplier and lessor shall be jointly responsible for the damaged caused by the delay, failure of delivery and material deficiencies of the leased object.

7) Termination of Financial Leasing

The financial leasing may terminate in one of the following ways:

1. expiration of leasing agreement - fulfilment of contractual obligations
2. termination of the agreement - in accordance with the provisions of the Leasing Act due to the:
    a) failure of delivery, delay, material deficiencies and non conformity of the leased object. (Art 44.)
    b) failure or default in payment of the lease instalments. (Art 45.)
    c) assignment of right to use the leased object to a third party without written consent of the lessor. (Art 47.)
    d) legal deficiencies and/or superior title, rights or claim of a third person. (Art 41.)
3. termination of the agreement - under the terms and conditions for early termination explicitly agreed in the leasing agreement.
4. termination of the agreement - in accordance with the general rules of obligations provided in the Code of obligations.
5. termination of the agreement - in accordance with the special regulation such as bankruptcy or forced execution.

8) Consequences of Termination of Financial Leasing

Depending on the termination the consequences are the following:

1. Agreement with a fixed time period shall terminate after the **expiry** of that period, unless otherwise agreed (Art 211. Code of obligations). After the expiration of the agreement the lessee shall have a right to exercise his right to purchase the leased object for a specified price, which, at the moment of exercising such option, is lower than the actual value of the leased asset at that moment. In that case he shall have a right to keep the leased object of in his possession or otherwise if such option is not exercised he is in obligation to return the object of leasing.
2. **termination** of the agreement due to the:
    a) failure of delivery, delay, material deficiencies and non-conformity of the leased object with the leasing agreement.
    The supplier shall be liable for any delay or failure of delivery of the object including material deficiencies and the non-conformity of the leased object with the agreement to the lessee in the same way as to lessor and as if he would had been in the contractual relationship with the lessee. If the leased object is designated by the lessor, supplier and lessor shall be jointly responsible for the caused damage. (Art 44. Act)
    b) default in payment of the lease instalment - lease fee.
    The lessor may exercise the right to terminate the agreement if the lessee is in default of payment on two consecutive/sequel instalments of the leased fee. The lessor may claim to recover the possession of the leased object and to request the payment of due instalments and all other fees that might arise out of the leasing agreement. Although not explicitly said, the lessor shall certain-

ly have the right to claim indemnity for any damages suffered in that respect, in accordance with the general rules of law. The lease agreement shall remain valid if the lessee makes the payment of due instalments prior to the acceptance of termination notice. (Art 45. Act)

c) in case of the assignment of the right to use the leased object to a third party without lessor's written consent the lessor may terminate the leasing agreement and request the compensation of damages. (Art 47. Act)

d) The lessor is liable for any legal deficiencies of the leased object against the third person's superior titles, rights or claims which may exclude, diminish or limit the right to a free use and quiet possession of the leased object by the lessee unless the lessee is aware of those rights and agreed to it.

3. The parties may early terminate agreement due to the some other terms and conditions **explicitly agreed in advance by the leasing agreement**. This is a mandatory clause of the leasing agreement. In all other cases, according to the general rules of law „the fixed term agreements cannot be terminated, unless otherwise agreed by the parties" (Art 211. CO).
4. In accordance with the **general rules** on obligation the consequences of termination are:
   Unless otherwise agreed, both parties are free from their contractual obligations, except the liability for damages. Both parties shall return to one another what they gained on the basis of the agreement, including the paid fees and gains/profit. The party recovering the monetary obligation must also recover the interest rate from the day of its payment. (Art 368. CO). Because of those consequences the general principle and inclination of the law is the fulfilment of contractual obligations. In addition to those remedies the parties shall always have a right to claim damages. General rules for the compensation of damages are provided by the Articles 1045-1110 of the Code of Obligations.
5. For forced execution see chapter point 11.1., for bankruptcy - see chapter point 11.2.

9) Sub-financial Leasing

The lessee may enter into sub-leasing agreement with a third party only with the written consent of the lessor. The right to use the leased object may be transferred to a third party fully or partially. Additionally, assignment of the leased object for the use to a third party shall not release the lessee from his obligations stipulated in the lease agreement. Failure to acquire written consent of the lessor results with the lessor's right to terminate the agreement and he may additionally request the compensation of damages. All other provisions regulating lease agreement shall be in analogy applied to a sub-leasing agreement.

10) Registry of Financial Leasing Contracts

The Agency shall keep a register of leased assets (hereinafter: the Register). Leasing Act and Ordinance on the manner of keeping the register of leased objects proscribes that the Register must contain the following information about the lease agreement:

1. The business name and the main office of the lessor;
2. The business name and the main office, or full name and address of the lessee;
3. Specification of the leasing transactions (financial or operating leasing);
4. Detailed description of the leased object;
5. Total value of the leased object;
6. Amount of each single instalment (single payment);
7. Date of concluding leasing agreement;
8. Date of delivery of the leased object to the lessee;
9. Duration of lease agreement;
10. Expiry of the lease agreement;
11. Amendments to the agreement;
12. Status of the leased object (Active – leased object is being leased; Non-active – leased object is not being leased);
13. Data about supplier;
14. Date of leasing agreement;
15. Internal number of the leased object.

The lessor is in obligation to submit latter information within eight days from the day the conclusion, modification or termination of the agreement. Failure to deliver listed information may not result with the invalidity or nullity of the leasing agreement but only with the penal offence.

The **Ordinance** and the **Technical Instructions** for entering data in the Register of leased objects provides following. The Register shall be kept in electronic form. The application for entry in the Register shall be submitted in a properly filled electronic application, which can be found on the website of the Agency. Data from application shall be entered in the Register automatically after the person authorised to enter data appointed by lessor has confirmed the entry. An electronically generated certificate shall be issued. It shall be valid without a stamp and signature. The printout of the certificate shall serves only as the proof that the data has been entered in the Register.

Legal effects and functions of the Registry:

1. The data entry shall have the effect of a **declaratory statement**. (Art 52.4. Act) In other words, Registry only makes visible to the public that the leasing agreement has been concluded, modified or terminated, what asset is being leased and for how long (duration of agreement). Entry into Register has no constitutive character.
2. Registry holds **publicity** function only. The Register only serves as proof that the certain data has been entered in the Register. It has no influence on the creation or termination of third person's rights or any possible legal procedures such as bankruptcy and/or forced execution.
3. Register is only **partially public**. Only the description of the leased objects and the duration of leasing agreement shall be made available to the public. All other information shall be available only to the contracting parties and to the Agency (Art 52.5. Act)
4. The Register of leased assets **is not a „Public Register**". The Agency shall not be responsible for the accuracy and truthfulness of publicly available data entered in the Register (Art 16. Ordinance), nor shall issue official transcripts.
5. Register has **no influence on the validity** of leasing agreement. Omission to enter data into Register may result only with the penal offence.

11) Forced Execution in Financial Leasing

1. Forced execution

In Croatia, there are no explicit provisions on the forced execution in financial leasing either in the Leasing Act or in the Act of forced execution (OG 57/95, 29/99, 173/03, 194/03, 151/04, 88/05, 121/05, 67/08, hereinafter; Execution Act). Forced execution over the leased object shall be governed in accordance with the general provisions of the Execution Act. The fact that **the lessor keeps the ownership of the leased object until the termination of the financial leasing agreement** is a key factor for the exercise of forced execution.

Here two possible situations may be identified:

a) If the forced execution is performed **against the asset of lessee**, the lessor's real rights on the leased object shall be valid against the lessee's creditors who have obtained an attachment or execution. In other words he may exercise the right to exclude the leased object from the forced execution over lessee's asset.

b) If the forced execution is performed **against the asset of lessor,** the lessee will have no real right to exempt the leased object from the execution. If the object of execution is in lessee's possession he has a right to refuse to turn over the leased object. In that case the court may only transfer lessor's right to request the return of possession of the leased object on the creditors. (Art 131. Execution Act). However, one must always bear in mind that the lessee is even than protected by the general provisions of quiet possession.

2. Bankruptcy

Bankruptcy procedure in Croatia is subject to a Bankruptcy Act (OG 44/96, 29/99, 129/00, 123/03, 82/06). Here two situations may be differentiated:

a) Bankruptcy of lessee - The lessor's real rights on the leased object shall be valid against the lessee's trustee in bankruptcy and creditors. „Lessee's trustee in bankruptcy" includes a liquidator, administrator or other person appointed to administer the lessee estate for the benefit of the general body of creditors. In international leasing agreement the applicable law shall be law where the leased object - asset is situated or registered (ship, aircraft, movable equipment ect).

b) Bankruptcy of lessor - is a more complex issue. During a leasing agreement the lessor holds the real rights on the leased object. On the date of opening bankruptcy procedure the leased object becomes part of lessor estate administered by the bankruptcy administrator, who then holds the right to terminate or continue the leasing agreement. While the business practice clearly shows general intention towards continuation of all contractual relations and the general principle of Bankruptcy Act is fulfilment of contractual obligations, the administrator shall in most cases continue with the execution of leasing agreement. However in case the administrator decides to sell the object of the leasing and terminates the agreement, the lessee may ask for return of paid amount and compensation of damages together with other creditors from the lessor's estate.

Suggested Literature:

Books and Articles:

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- Jasna Brežanski, *Ugovor o leasingu - novo zakonsko uređenje*, Zbornik Pravnog Fakulteta Sveučilišta u Rijeci, 1/2008.
- Z. Barac, *Plaćanje PDV-a pri privremenom uvozu dobara (leasing) i iznajmljivanju brodova* (charter), Porezni Vijesnik, Zagreb, 9/2001.
- *UNIDROIT Convention on International Financial Leasing*, Ottawa, 1998.
- *World Leasing Yearbook 2010*, Euromoney Institutional Investor PLC, 2009.
- E.A. Kramer, *Neue Vertragsformen der Wirtschaft: Leasing, Factoring, Franchising*, Verlag Paul Haupt Bern-Stuttgart-Wien, 1992.
- H.R. Haseler, F. Greßl, *Leasing und Factoring*, LexisNexis ARD Orac, 2006.

Legal texts - sources in the Republic of Croatia:

- Narodne Novine - Official Gazette web page: www.narodne-novine.hr
  Zakon o leasingu - *Leasing Act,* OG 135/06,
  Zakon o obveznim odnosima - Code of Obligations, OG 35/06, 41/08.
- For legislation in the area of Financial services - leasing see web page of the Croatian Financial Services Supervisory Agency www.hanfa.hr
  (both Croatian and English translations are provided including the Leasing Act. Author notes that the *translation* of the Leasing Act is *not identical to original text* and some parts of text are *missing, therefore translation should be taken for orientation purposes only!*)
- For other legislation generally and the process aligning with EU *acquis* see web page of the Croatian Ministry of Foreign Affairs and European Integration www.mvpei.hr

National Report Republic of Macedonia
Prof. Dr. *Goran Koevski**

MODERN CONTRACTS
(Franchising, Factoring, Leasing)

Franchising and factoring fall into the category of unnamed contracts of autonomous commercial law. Leasing agreements, which were previously unnamed, were transformed into named contracts, with their regulation in the Law on Leasing from 2002.

However, since they are agreements of the modern commercial practice, when incorporating them into the national legal system, we must always call to assistance the basic principles of obligations law and consider the possible analogous application of provisions on named contracts, above all those that have their legal basis in order contracts or in so-called agreements on continuous commercial services, such as, e.g., the commercial representation agreement.

Legal practice, as a non-formal source of law, of course also has a major role in the legal profiling of these agreements.

I. FRANCHISE AGREEMENTS

1. Appearance and Significance of Franchising and the Franchise Agreement

Franchising is:

- an original, more sophisticated system for distribution and sale of goods and services; and
- a relatively new method of modern distribution and sale of goods and services, appearing on all market levels.

1.1. Background of the business concept of franchising

The business concept of franchising can be traced back many centuries, above all in China and Japan, and most prominently in the licensing of Mai Toi restaurants and Norenkai stores.[1]

* Original text is in local language

[1] See: Schulz Albrecht, "Selective Distribution, Franchising and EU Competition Law" in the Study Group International, "Agency and Distribution Agreement" (Seminar materials) 1997.

Modern franchising appeared in US business practice in the 19 century, and the concept became known in Europe also in the 19 century.[2]

The most famous example of franchising in history is Coca-Cola Co., which has a bottling system throughout the world, whereby the company sends its franchisees a ready-made concentrated formula, which they only dilute in water and bottle. Later franchising became popular in the automobile industry (1898), when responsibilities were divided: producers, responsible for design and production, on one side, and dealers, responsible for (pre)sale and post-sale service, on the other; after which it spread in the hotel business.[3]

Proof that franchising is becoming ever more deeply rooted in international business practice come from the fact that this year marks the 50 anniversary of the establishment of the International Franchise Association (IFA, 1960) in Washington, DC.[4]

1.2. Legal Regulations on Franchising and the Franchise Agreement

The franchise agreement is an unnamed contract of autonomous commercial law, whose legal content is defined, above all, through case law in USA and in Europe, and through definitions and interpretation provided by professional franchising associations.

On the international stage, efforts to unify regulation on franchising are being made in UNIDROIT (International Institute for the Unification of Private Law), which in 2002 published a Model Franchise Disclosure Law that is still relatively unknown in the business practice in the Republic of Macedonia.

First regulation in the area of franchising was adopted in USA, [5] first and foremost in order to protect small entrepreneurs from dishonest franchisors, who wanted to unilaterally cancel or refused to renew existing franchise agreements without justifying cause.[6]

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[2] In 1840, several bier producers in Germany gave a franchise to a number of guesthouses to serve their bier, and the exclusive right to sell it. In 1851 the company for production of sewing machines Singer starting issuing franchises for the sale of their machines. In 1880 larger European cities started issuing exclusive franchises to tramway companies, and to companies for water supply, waste water disposal, gas and, later, electricity supply.

[3] Historically, the development of franchising in the USA took the following course: 1886: Coca-cola, 1930 – Harlin Sanders, gas pumping stations; 1952 – KFC; 1955 – McDonalds; 1964 - 7-Eleven; 1974 – Subway; 1980 - Mail Boxes; 1995 – Curves; 2001 - Geeks On Call.

[4] This is a non-profit trade association that represents the interest of more than 1300 franchising systems, more than 10,000 franchisees and more than 500 companies that supply goods and services in the industry. The IFA Code of Ethics aims to create a framework for implementation of best practices by its members. For more on IFA, please visit: http://www.franchise.org/aboutifa.aspx

[5] See: Automobile Dealers Day in Court Act (1956), Presale Registration Process Act (1970), Proposed Rule Involving Disclosure Requirements and Prohibitions Concerning Franchising (1979) The Federal Trade Commission Act, Uniform Franchise and Business Opportunities Act (1987), Petroleum Marketing Practices Act.

[6] For more information on franchising and franchise agreements, see: Milkotin-Tomić Deša Dr. Sc., Pravo međunarodne trgovine, Školska kjiga, Zagreb, 1999, pp.234-235, Zlatko d-r Stefanović, Privredno ugovorno pravo, drugo izdanje, Pravni fakultet Univerziteta Union u Beogradu, Javno preduzeće „Službeni glasnik“, Beograd 2007, pp 272-274 and Goran Dr. Koevski, Pojam i pravna priroda ugovora o distribuciji u uporednom pravu, Dissertation, Univerzitet u Novom Sadu, Pravni Fakultet, May 2000, pp. 34-35, 298-327.

Within the European Union, franchise agreements are regulated, above all, from the viewpoint of competition,[7] namely regulation mostly regards vertical agreements.[8] However, despite their primary connection to competition law, these legislative acts also contain relevant definitions and guidelines on franchise agreements, their subject, essential elements, other relevant contents etc.

It is worth to mention the Regulation on the law applicable to contractual obligations from 2008[9], whose Article 4 paragraph 1 lettere), which regulates that, in the absence of determined applicable law, the law of the country where the franchisee has its habitual residence, shall be applied.

In the Republic of Macedonia, franchise agreements are regulated in the Law on Protection of Competition.[10] Article 5, paragraph 1, line 14 provides the definition of a franchise agreement, whereby a „franchise agreement" shall mean an agreement by which the beneficiary of the franchise assumes the obligation to permanently, in its own name and for its own account, sell goods and/or services, produced or developed by the issuer of the franchise, and consequently, to use the exclusive rights to use the know-how, trademark and services that are conveyed to the issuer of the franchise for certain remuneration.

On the basis of Article 8 paragraph 2 of the Law on Protection of Competition, the Government of the Republic of Macedonia adopted a Regulation on Block Exemption of Vertical Agreements on Exclusive Distribution Rights, Selective Distribution Rights, Exclusive Purchasing Rights and Franchising.[11] This regulation regulates the condition for block exemptions of vertical agreements, including the franchise agreements, the characteristic vertical agreements, the provisions those agreements must contain, limitations or conditions that those agreements must not contain, and other conditions that must be met for the purposes of block exemption. Pursuant to Article 3 paragraph 2 letter e) of the Regulation, franchise shall mean a vertical agreement, whereby one enterprise, the franchisor, in exchange for direct or indirect monetary compensation, gives the franchisee the right to use the franchise, i.e. a package of intellectual property rights, for the purposes of marketing specific goods and/or services and resale of goods or provision of services to end consumers/users.

1.3. The Concept of Franchising

From an etymological viewpoint, the word „franchise" stems from the French language and means „concession" or „privilege". However, this is a relatively imprecise term, so that there are no specific legal consequences if a distribution network is named a „franchise network". The type of agreement for each respective case depends primarily on the specific contents of the agreement, i.e. the concrete rights and obligations of the contractual parties.

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[7] The reason why the European Commission started reviewing in detail vertical contracts, including franchise agreements, was the case 161/84 Pronuptia de Paris GMBH v Pronuptia de Paris Irmgard Schillgalis [1966] ECR 353, [1986] 1 CMLR 414.

[8] See: Commission Regulation (EEC) No 4087/88 of 30 November 1988 on the application of Article 85(3) of the Treaty to categories of franchise agreements (OJ EEC L 359/46 of 28 December 1988) replaced by Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (Text with EEA relevance) (OJ EC L 336/21 of 29 December 1999. For more, see: http://www.unidroit.org/english/guides/2007franchising/country/eu.htm#NR104

[9] See: Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008, on the law applicable to contractual obligations (Rome I).

[10] See: Official Gazette of the Republic of Macedonia, nos. 4/2005, 70/2006 and 22/2007.

[11] See: Official Gazette of the Republic of Macedonia, no. 91/2005.

1.4. Definition of Franchising and the Franchise Agreement

A Franchise agreement is a (1) bilaterally binding agreement between (2) the issuer of the franchise (Franschisegeber in German or franchisor in English speaking countries) and (3) one or more individual beneficiaries of the franchise (Franschisenehmer in German or franchisee in English speaking countries), which, as (4) a distribution system for goods and services, is (5) used by legally and financially independent enterprises (business undertakings) (6) that have joined their know-how and capital in a vertical form of cooperation.

Elements of the Definition of the Franchise Agreement:

- The franchisor gives the franchisee the right to sell specific (1) goods (clothes, shoes, fast-food, toys etc.) or to provide specific services (2) (consulting services regarding computer software, hotel services, rent-a-car services etc);
- The franchisor licences the franchisee to use a commercial formula (business and technical methods and the enterprise management model), as well as a standardised, uniform and complete system for sale of goods and/or services;
- The System for marketing of goods and services is standardised through an appropriate operational programme for the separation of responsibilities between the partners;
- The franchisees fully adopt and continuously replicate and use the commercial policy and recognisable image owned by the franchisor;
- Franchisees are offered continuous commercial and technical support in conducting activities, which are subject of the franchise; and
- Franchisees generate secure and continuous profit, and in return provide own financial and other investments and pay the franchisor a determined monetary reward.

1.5. Elements of the Franchise Agreement

- Full legal independence of the parties to the agreement;
- Transfer of, i.e. providing a licence for the right to use a world-renowned and uniform business method and image;
- Cooperation between the parties to the agreement on a continuous and long-term basis;
- Continuous support provided by the franchisor; and
- An intuitu personae character of the agreement, i.e. exceptionally close professional relationship of trust between the franchisor and the franchisee, so that the development of a sub-franchising network shall be subject to full control and approval of the franchisor.

2. Legal nature of the Franchise Agreement

The franchise agreement contains elements of many other named and unnamed commercial law contracts:

- sales agreement,
- agreement on commercial representation,
- distribution agreement,
- licensing agreement regarding intellectual property rights,
- know-how agreement, regarding exchange of technical, operational and other practical and relatively confidential information,

– supply agreement,
– Contractual joint venture etc.

However, this type of agreement is a specific combination and composition of all those elements, whereby they lose their autonomy and separateness. This means that the franchise agreement is not a mixti iuris contract, but a new sui generis unnamed contract of autonomous commercial law.

3. Subject of the Franchise Agreement

Subject of the franchise agreement is the business method, image and formula, namely the uniformity and standardisation of the sale of goods or provision of services, while the goods and/or services themselves can be seen as a secondary subject of the agreement.

4. Types of Franchising and Franchise Agreements

4.1. According to the manner in which the franchising network is established, following types of franchising are possible:

– Direct franchising; and
– Conclusion of a master franchise agreement.

4.2. Depending on the subject of the franchise, three basic types of franchising are distinguished, even though it is quite difficult to draw a clear dividing line between them in practice.

– Industrial or manufacturing franchise;
– Service franchise; and
– Distribution franchise.

4.3. Finally, according to exclusivity, franchise agreements may be divided in exclusive and non-exclusive.

Today the term „franchising" has come to signify mainly the model of distribution franchising, also known as business format franchising.

5. Advantages and Disadvantages of Franchise Agreements

5.1. The advantages of franchise agreements may be summarised as follows:

– Franchising combines the advantages of a coherent distribution network, on one hand, and those of having independent and interested retailers, on the other;
– Franchising provides a more rapid, cheaper and less risky penetration on foreign markets;
– A less developed distribution infrastructure is an advantage for the franchisor, so that it may establish a stronger and more centralised control over the independent franchisees;
– The franchisor receives compensation in the form of franchise and royalties, and increases revenue from intellectual property;
– Franchisees prefer to run their small business under the umbrella of a globally established and renowned name and/or image;
– Political and administrative problems affecting the efficient entry of foreign capital in the host country are overcome; etc.

5.2. Disadvantages of the Franchise Agreement:

Franchise agreements do, however, contain some disadvantages, namely:

- After successful training of the master franchisee, it may decide to cancel the agreement and continue operating as an independent entity, thereby becoming an effective competitor on the market targeted for entry by the franchisor;
- It is very difficult to select the legal entities for the conclusion of the master franchise agreement, and the control of the sub-franchising network, developed by the master franchisee, is even more difficult;
- If the franchisee is trained in management on a sufficiently high level, the costs for control and oversight over the franchisee will rise;
- Relatively high costs for starting and developing a new business on the side of the franchisee;
- Franchise agreements are being used as a tool for economic colonisation of the world by the large multinational companied from developed countries, etc.

6. Form of the Franchise Agreement

Comparative law does not know specific rules regarding the form of the franchise agreement; in business practice, however, it is concluded in writing and ad probationem.

7. Rights and Obligation of the Parties to the Franchise Agreement

7.1 Obligations of the Franchisor

- The franchisor shall disclose as much information as possible in the appropriate documentation, through which the franchise business concept is materialised – the so-called *corpus mechanicum* (operational manuals, training programme, materials for franchise marketing, brochures, applications, public announcements, operational manuals of the franchisor, application for franchisee registration etc.);
- The franchisor shall transfer to the franchisee the commercial formula as a complete and uniform system;
- The franchisor shall offer the franchisee continuous support.
  - Support in installing and maintaining the formula;
  - Support in transfer and implementation of know-how;
  - Obligation to deliver the goods regularly, if the franchisor is the manufacturer of the goods or conducts pre-selection of the goods to be distributed.

7.2 Rights of the Franchisor

- Right to control and oversight of system operations;
- Right to protection of the intellectual property rights package;
- Right to a non-compete clause for a period of time after termination of the franchise agreement;
- Right to compensation for the provided business formula and the inclusion as an integral part of a single distribution franchising network.

7.3 Obligations of the Franchisee

- Obligation to promote the franchisor's business method;
- Payment of the appropriate compensation to the franchisor, both for the initial inclusion in the network (entrance fee), as well as compensations related to the use of intellectual property rights (royalties);
- Covenant not to compete with the franchisor for a period of time after termination of the agreement;
- Sub-licensing of the business formula shall be completely prohibited of shall be allowed only upon prior approval of the franchisor;
- Regular reports to the franchisor;
- Obligation to protect trade secrets;
- Obligation to participate in advertising costs;
- Obligation to continuously disclose the fact that it is a independent entity;
- Obligation for membership in a local franchising association, if such exists; etc.

7.4 Rights of the Franchisee

- Right to an undisturbed use of the transferred package of rights contained in the business franchising formula;
- Right to non-interference by the franchisor regarding the manner in which it utilises the transferred package of rights contained in the franchise, except concerning franchisor's right to control and oversight of system operations and of the franchising network;
- Right of the franchisee to demand appropriate compensation for the duration of the non-compete clause after regular termination of the agreement.

8. Duration of the Franchise Agreement

- The agreement may be concluded for a definite or an indefinite period of time; however, trends in practice show that these agreements are usually concluded for a definite period of time;
- Upon conclusion of the agreement, an initial period of time shall be determined, during which the franchisor may not terminate the franchise agreement. This initial period is the time, in which investments of the franchisee should generate an appropriate return.

9. Compensation for Damages in Franchise Agreements

- Compensation for damages or lost profits due to unfounded premature termination of the agreement;
- Compensation of damages due to a short period of cancellation given by the franchisor to the franchisee;
- Compensation of damages if the franchisee uses the rights contained in the franchise package after termination of the agreement, thereby creating the illusion that it is still a member of the franchising distribution network; and

– Compensation of damages due to unauthorised use and/or transfer of the rights to intellectual and industrial property by the franchisee to competitors of the franchisor.

Regarding the issue of whether the franchisee has the right to compensation of damages for lost clients and/or goodwill, as well as to compensation for investments in the development of the franchise, comparative legal practice varies, with the exception of Germany, where there is a tendency to a more extensive analogous application of regulation regarding protection of commercial representatives.

10. Obligations of the Parties after Termination of the Franchise Agreement (Post-Term Clauses)

– Obligation of the franchisee to return the entire property and all assets (documentation regarding the rights contained in the franchise package) to the franchisor;
– Obligation of the franchisee to stop using and to remove from its business premises the trade name, mark, stamp or logo of the franchisor and to stop creating the impression that it is still part of the franchising chain of the franchisor;
– Obligation of the franchisee to keep as trade secrets all information and know-how, which it obtained on the basis of the franchise agreement, for a period of time in which the rights in the franchise agreement are protected by law;
– Furthermore, the franchisee shall respect all obligations stemming from the post-term non-compete clause; etc.

The franchisor, on its part, shall buy back all goods that remained in position of the franchisee after termination of the agreement (buy-back clause) at a price previously determined in the agreement or according to assessment by an independent expert or shall allow the franchisee to keep selling those goods, but without the right to refer to a trade mark or a logo of the franchisor in its business premises.

11. Legal Practice in the Republic of Macedonia regarding Franchise Agreements

Unlike other transformation countries, where franchising is a business model that is becoming ever more present, [12] franchisees in Macedonia are the exception, rather that the rule. At the moment, following brands are present in the country, as subject of a franchising network: Mango, McDonalds, Diners, Forneti and the only Macedonian industrial franchisor Alkaloid, which managed to sell its brand Kafetin in Russia.[13]

There is no developed legal practice in the Republic of Macedonia regarding franchise agreements.

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[12] From the transformation countries that are now members of the European Union, the advantages of franchising s a business model were first accepted by Hungary, where at the moment there are 400 franchising chains, than Poland, Slovenia and Croatia, with 120 franchises each, while the Czech Republic has 55 companies operating on the basis of a franchise. See: Kapital, issue 438, from 10.04. 2008 http://www.kapital.com.mk/DesktopDefault.aspx?tabindex=0&tabid=0&EditionID=618&ArticleID=14518

[13] See: Kapital, issue 438, ibid.

II. FACTORING AGREEMENT

1. Introduction

Generally speaking, factoring is a financial (not exclusively bank) service that improves the cash flow of the client's business.

As a type of commercial, financial service, factoring is implemented, i.e. realised in practice through the factoring agreement

2. Definition

The factoring agreement is defined as (1) a long-term contractual relationship between one party – the seller (client) and another party – the factoring institution (factor), whereby a) the client transfers to the factor, at a discount, its short-term contractual monetary claims before their due date, which result from contracts for the sale of goods or provision of services between it – the client, and its buyer (debtor), except regarding those goods and services that were purchased for personal, family or domestic use; b) the factor, for a certain fee, accepts to collect those claims, if it finds that the solvency of the client's debtors is good, by informing the debtors of this transfer, regardless of whether the client or the factor bears the risk for the collection of said claims.

3. Background[14]

Factoring appeared in the USA as commission work of gents (factors), who acted on their own behalf, and for the account of their clients. Services of American factors (both on the domestic market and abroad, primarily in Europe – Germany and Switzerland) were mostly used by European exporters in the 1960s, because American factors guaranteed that buyers in the USA would pay for imported goods.

Today, there are global chains of factoring institutions, such as The Factor Chains International, established 1968 and operating in more than 30 countries worldwide.

A turning point in the development of factoring was the entry of powerful global banks in the business (Citibank, Chase Manhattan Bank, Bank of New York)

4. Parties to the Agreement

4.1. Client

The client is a person, most commonly a legal entity operating on a for-profit basis (company), which transfers to the factor its undue contractual short-term monetary claims at a discount.

4.2. Factor

The factor is a person that buys other person's debt (monetary claim), with the aim of generating profit from the collection of said debt.

Factors are usually banks or specialised factoring institutions; however, even when banks step into the role of a factor, factoring *is considered an alternative to*, and not a special type of bank loan.

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[14] See: Kapor dr Vladimir i Slavko dr Carić, Ugovori robnog prometa, X izdanje, Centar za privredni konsalting, Novi Sad, 2000, pp. 481-485.

The factor is the contractual party conducting the characteristic performance according to this agreement.

The factor undertakes the obligation to perform at least two of the stated function for the client (Article 1 of the Convention):

1. Provide financial means for the client by means of advance payment;
2. Keep records (books) regarding the accounts receivable;
3. Collect the accounts receivable;
4. Take appropriate measure in the case of delay of payment from the client's debtors.

As a general rule, the factor has no recourse against the client regarding inability to collect the claims (this is considered one of the essential elements of the factoring agreement); however, in practice there are cases of recourse factoring agreements.

4.3. Client's Debtor

This is the third party that is obliged to pay the monetary claims to the factor, on the basis of the underlying legal transaction, i.e. the contracts for sale of goods or provision of services with the client.

5. What is the Legal Nature of the Factoring Agreement?

The factoring agreement includes elements of the following types of contract:

- cession,
- commission,
- guarantee,
- representation,
- service contract,
- preliminary agreement, as a basis for the conclusion of main agreements or framework agreements, which, on their part, are the basis for future individual agreements for the transfer of short-term undue monetary claims,
- sale of receivables,
- contract for Lombard loan.

Factoring, as a separate business activity, stands close to loans, but is differentiated from loans according to the following criteria:

- Factoring places the emphasis on the structure of client's assets (the quality of accounts receivable, part of client's assets, which are subject to transfer), while a bank loan places focus on collateral (given as security, although a claim can be put as collateral, according to the Law on Contractual Pledge), and the amount of the loan depends on the collateral;
- Thus, the amount of a loan, given by a loan contract, depends on the collateral, while, in the case of factoring, the monetary claim itself is the collateral;
- Short-term claims are of no interest when considering a bank loan for the client, while in factoring they are essential for the conclusion of the factoring agreement;
- A traditional loan does not offer additional services, outside of the main legal transaction, while factoring agreements do provide for such services; etc.

It may be concluded that factoring is a specific combination and composition of all those elements, whereby they lose their autonomy and separateness, so that this is not a *mix-*

ti iuris contract, but a new *sui generis* unnamed contract of autonomous commercial law, present primarily in the area of banking law, although the transaction can be carried out by non-financial institutions. This is simply an unnamed contract of autonomous commercial law, or, to put it in other words, a contract that is not regulated in any law, but spontaneously appeared in business practice.

6. How can accounts receivable be transferred (legal instruments for implementation of factoring)?

- By cession according to civil law;
- By a documentary letter of credit, if this manner is provided for in the financial clause of the sale contract;
- According to the rules for endorsement of bills of exchange.

The manner of transfer of receivables depends on the legal, i.e. the financial instrument, in which the short-term monetary claim has been incorporated or is planned to be incorporated.

7. Which contractual claim may be ceded?

Although monetary claims from any contract may be ceded, most common in practice are those from contracts for sale of goods or provision of services, other that such claims that originate from the sale of goods for personal, family or domestic needs.

Leader in factoring transactions in Europe is Great Britain, with the amount of 161 billion EUR at the end of the 20 century.

Therefore, it may be concluded that factoring is most appropriate for businesses with a large number of buyers that regularly use their services.

At the opposite end of the spectrum, factoring, as an alternative source of financing, is most rare in construction and sale of medical equipment (due to their long-term and uncertain nature these agreements are not common between participants in trade operations).

A factoring agreement usually refers to the total contractual monetary claims of the client, rather than to individual receivables („global cession”).

Thus, factoring is considered a perpetual contractual relationship, since it includes receivables with different due dates and referring to different debtors, based on the underlying legal transaction - sale of goods or provision of services.

8. What type of receivables should be subject of an agreement?

The transferred monetary claims are usually short-term (30 – 120 days), and primarily, but not exclusively, in domestic trade.

This is to say that there must be a time lag between the moment of delivery of goods or provision of service and payment.

Due to the short-term nature of the receivables, these are rarely secured.

9. Agreement Form

Since the factoring agreement is a contract of autonomous commercial law, there are no specific rules regarding the form; however, it is customary that it is concluded in written, ad probationem form, for the purposes of proving the rights and obligations of the parties to the agreement.

A known rule in commercial law is that short-term contractual relationships may be informal, while long-term relations require a stricter form, due to the danger that agreed upon provisions might be forgotten.

Factoring is, due to its form, in our opinion, a framework agreement – global cession towards a specific debtor, which is implemented through an undetermined number of future agreements, as debt become due; thus the need for a stricter ad probationem form.

10. How does implementation of the factoring agreement look in practice?

Before the conclusion of a factoring agreement, there are several actions that must be conducted in advance.

The factor requires approximately two weeks to review the contractual monetary claims to be transferred, that is purchased. This period is considered sufficient to check the solvency and financial ability of the client (legal and financial due diligence).

In addition to checking the client's solvency, the factor checks the solvency of the client's debtors and their ability to fulfil their contractual obligations to pay in a timely manner.

Hence, it should always be understood that the main source of payment from the factor to the client is the client's debtor and its solvency, and not the client itself.

Some factors have a predetermined minimum amount of monetary claims of the client against third parties, necessary for the conclusion of a factoring agreement. Other factoring companies determine a maximum amount, for which a factoring agreement with one person may be concluded for a certain period of time (with the aim of diversifying risks related to a single client).

Thus, client's debtor or debtors are the main focus of the factor. Factoring is based on the quality of the receivable, from the viewpoint of its collectability, and not on the quality of the client itself.

In the case of recourse factoring, the factor will, most often, require the transfer of all client's receivables from all contracts, as a guarantee for the client's obligation towards it.

Factoring is, therefore, considered an appropriate source of alternative financing for new businesses that are so new that they haven't built up reliability regarding their financial standings.

Not until after these previous actions does the factor make the decision to conclude a factoring agreement, i.e. to accept the client's offer.

Step 1. The client delivers the goods or services and submits the original invoice to its business partner (debtor on the basis of the underlying legal transaction). The original invoice contains an order for payment of the amount stated in the invoice to the factor (disclosed factoring). Thus, in the case of disclosed factoring, the debtor is immediately informed of the existence of the factor, regardless of whether the factoring agreement is a recourse or a non-recourse agreement. The client submits a copy of the original invoice to the factor.

Step 2. After receipt of the invoice and other forwarding documents, the factor takes over the account receivable in line with the factoring agreement.

The factor processes the invoice, usually within 24 - 48 hours. The factor immediately provides a credit line for its client, usually in the amount of 70 – 90% of the invoice amount, from which the client may immediately draw a certain amount. This percentage of the

invoice value is known as „advance", and represents the first of a total of two payments by the factor.

The remaining 10 – 30% is placed on a separate reserve account the client may not dispose of and serve as a security for the factor, in the case of liability of the client regarding the existence of the ceded monetary claim.

Step 3. The business partner – client's debtor pays the invoice value to the factor on the date the receivable becomes due. In the case of delayed payment, the factor initiates the appropriate judicial procedure for collection of the debt and remains a party in this procedure until its completion. In the case of recourse factoring, the factor has the right of recourse against the client for each receivable it has not succeeded in collecting, while in non-recourse factoring, the factor bears the risk of the receivable not being collected, unless there is an insurance of the receivable secured by the factor.

Step 4. On the date of full payment, the factor credits the client's account with the difference (reduced by the advance and the factor's fee).

11. Factors Fee (Commission)

The factor's commission, also referred to as the „discount rate", is the amount that the factor charges for its services and the use of own funds.

There are two variables or indicators for the calculation of the fee:

1) the gross invoice amount and
2) the deadline for payment of the invoice.

There are, however, factors that charge a pre-determined amount of the gross invoice amount, and, of course, depending on the amount of the receivable.

12. Functions of Factoring

Factoring generally has three basic functions:

12.1. Financing, i.e. securing cash through the advance payment.

The factor places at the disposal of the client a certain amount of money, and it is very important that there is a determined time period, known in advance, between the date of payment by the factor, i.e. the date, on which the factor places the determined amount at the disposal of the client, and the date, on which the factor will have the opportunity, i.e. the right, to collect payment from the client's debtor.

The client does not have a debt to the factor, and thus is not obliged to submit proof of solvency.

12.2. Securing collection del credere (guarantee for third person's liability)

The factor takes upon itself the obligation to collect, i.e. the risk of insolvency of the client's debtor. What level of risk *in concreto* the factor assumes, depends on the specific factoring contract, since the taking over of the *del credere* obligation does not necessarily mean that the factor agreed to take upon itself all possible risks regarding collection of the claim. There are, however, especially in the American practice, factoring agreements, in which the factor takes upon itself the *del credere* obligation, not only for the financial risk, but also for the political risks regarding collection of the claim, the risks regarding delivery of goods etc.

After the client has delivered the goods, the factor may not, under any circumstances, cancel the assumed *del credere* obligation. The client is entitled to payment of the full amount of the ceded monetary claim, excluding factor's commission, regardless of the (in)solvency of its (the factor's) debtor.

12.3. Receivables Management

This is a function and service not contained in the previous two functions. Within the framework of this function, the factor shall:

- file suits or through other means secure payment of transferred receivables;
- offer consulting services to its clients;
- protect its clients from bad (non-collectable or difficult to collect) debts;
- keep the accounts;
- calculate commission and tax; etc.

13. Types of Factoring Agreements

Factoring contract can be distinguished according to various criteria:

13.1. According to the scope of assumed risk regarding collection:

a) True factoring (old line factoring, echtes factoring): the factor undertakes the entire account receivable, together with all risks regarding collection of the receivable (*del credere* factoring), which is the most prevalent form of factoring in international operations;
b) Quasi factoring – when the factor does not assume the *del credere* risk regarding collection of the account receivable. This means that „untrue" factoring looses one of its main functions – the *del credere* function.
c) Factoring payable after maturity of the account receivable. This is a type of factoring that lacks its financing function. The factor buys client's short-term accounts receivable on their due date. There is no advance, as is the case in true factoring agreements;
d) Recourse and non-recourse factoring. In the case of recourse factoring, the factor retains the right of recourse against its client, if it is unsuccessful in collecting the debt from its client's debtor; this type of factoring is not considered true factoring.[15]

13.2. Territorial criterion

a) According to this criterion, factoring agreements can be divided into such for domestic and for international factoring. In the case of international factoring, there

[15] If factoring is implemented through cession, than the issue of whether it is recourse or non-recourse factoring should be viewed through the prism of Article 432 of the Law on Obligations, regarding the special cases of transfer of accounts receivable (cession). That is transfer instead of performance or for the purposes on collection. When the debtor, instead of paying its account payable, transfers to the debtee its account receivable, or a part thereof, with the conclusion of the transfer contract, the debtor account payable shall be deemed settled in the amount of the transferred account payable. However, if the debtor transfers its accounts receivable to the debtee solely for the purpose of collection, then its account payable shall be deemed settled or reduced only after the debtee has collected the transferred account receivable.

is a greater number of parties to the agreement: seller – client, its domestic factor, buyer abroad (client's business partner) and corresponding factor in the buyer's country. International factoring increases the number of services provided by the factor: foreign trade operations, foreign exchange operations, services regarding taxation and customs etc. The client is offered support regarding problems with differences in legislation, customs, languages etc. This characteristic of factoring has lead to the need to unify and harmonise this subject matter.

13.3. Disclosed vs. non-disclosed factoring, depending on whether the client informs the buyer of the transfer of its accounts payable to the factor.

14. Advantages of the Factoring Agreement

- Increase of liquidity (cash flow of free monetary assets) of small and medium-size enterprises, and especially enterprises that dispose of relatively limited free monetary assets;
- Appropriate method to stimulate and finance export-oriented small and medium-sized enterprises, especially when the costs for factoring are lower than the cost for a bank loan until the due date of the account payable;
- Appropriate for small and medium-sized enterprises that do not have a well developed creditworthiness or solvency needed to apply for a bank loan;
- The client clears its accounting, deletes uncollected accounts payable and increases its solvency towards other entities.

15. Regulations regarding factoring agreements in international and domestic legislation

15.1. International sources

International sources of regulation regarding factoring include:

- UNIDROIT (The International Institute for the Unification of the Private law), the Convention on International Factoring, signed in 1988 in Ottawa, which has not been signed and ratified by the Republic of Macedonia;
- International Factoring Association Rules;
- The Factor Chains International Rules;
- 2004 United Nations Convention on the Assignment of Receivables in International Trade, the draft of which was prepared by the United Nations Commission on International Trade Law (UNCITRAL) and the European Bank for Reconstruction and Development (EBRD). However, this Convention is still not in effect.

15.2. Domestic sources

It can be concluded that regulations regarding factoring and factoring agreements in the Republic of Macedonia are not clearly defined, which does not allow interested entities (sellers, buyers and financing institutions) to fully utilise the advantages of these, relatively new business transactions. Perhaps some tax concession could be offered for these transactions, so that they would become more attractive to the interested entities.

There is no specific law on factoring in the Republic of Macedonia, which does not mean that there is absolutely no legal framework for this type of contractual relationship – factoring.

In February 2007, a Study on Factoring in the Republic of Macedonia was prepared, which tried to give answers to some of the questions and dilemmas related to the development of factoring in RM.

Factoring, as a financial service, is at the moment offered by a few companies in the Republic of Macedonia: a) *Prvi Faktor*, Factoring Company doo Skopje, a joint company of NLB d.d. and SID Bank d.d., which offers several types of factoring: domestic, export factoring etc.; [16] b) EOS Matrix doo Skopje, which is part of a leading group in debt management in South-eastern Europe and offers services in the area of receivables management and debt collection, in both B2B and B2C relationships[17]; and c) FINEA Factoring, Factoring Company doo from Maribor, Republic of Slovenia, which is gradually becoming the leading company in factoring on the markets of former Yugoslavia.

Factoring is mentioned in the following laws in the Republic of Macedonia:

– Law on Banks; [18]
– Law on Prevention of Money Laundering and Other Proceeds from Crime and Financing of Terrorism; [19]
– Law on Foreign Exchange Operations; [20]
– Law on Establishing the Macedonian Bank for Development Promotion; [21]
– Company Law; [22]
– Law on Contractual Pledge; [23] and
– Law on Obligations of the Republic of Macedonia.[24]

16. Legal Practice in the Republic of Macedonia regarding Factoring Agreements

There is no developed legal practice in the Republic of Macedonia regarding factoring agreements.

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[16] See: www.prvifaktor.si/mk/mkd/

[17] See: www.eos-matrix.com.mk/en

[18] See: Official Gazette of the Republic of Macedonia, nos. 67/2007 and 90/2009.

[19] See: Official Gazette of the Republic of Macedonia, no. 4/2008.

[20] See: Official Gazette of the Republic of Macedonia, nos. 34/2001, 49/2001, 103/2001, 51/2003 and 81/2008

[21] See: Official Gazette of the Republic of Macedonia, nos. 24/98, 6/2000 and 109/2005.

[22] See: Official Gazette of the Republic of Macedonia, nos. 28/2004, 84/2005, 25/2007 and 87/2008.

[23] See: Official Gazette of the Republic of Macedonia, nos. 05/2003, 4/2005 and 87/2007.

[24] See: Official Gazette of the Republic of Macedonia, nos. 18/2001, 78/2001, 04/2002, 59/2002, 05/2003, 84/2008 81/2009 and 161/2009.

III. LEASING AND LEASE AGREEMENT

In its wider sense, the term *leasing* refers to a newer type of commercial activity, used by commercial entities (usually small and medium enterprises) to address a specialized leasing institution in order to take a lease on investment equipment for a certain time and considerations.

In its narrower sense -*sui generis* - the term refers to a type of agreement, according to which

- one of the parties in the agreement - the lessor, (1) gives the object specified in the agreement for use of the other party and (2) takes every necessary action to make sure the object specified in the agreement is properly used by the other party in the agreement
- the lessee is obliged to pay the lessor the defined considerations, i.e. the leasing installment.

Hence, leasing stands for a way of financing; the lease agreement is an instrument to realize the arrangement between the lessor and the lessee.

Among the modern agreements in Macedonia, only the lease agreement is regulated by a special law, namely, the Law on Leasing.[25] Article 2 of the Law on Leasing defines leasing as: „The Law on Leasing is an agreement in a written or electronic form, made between the lessor and the lessee, which obliges the lessor to lease the object under the conditions stated in the agreement for a defined period of time."

What is really important is to define the ownership over the lease object - i.e., to define the lessor as the proprietor of the object. Ownership is a dangerous luxury; however, economic ownership (usage and management) is considered far more important than legal ownership.

This agreement encompasses an arranged transfer of the right to use the latest technical and technological investment equipment; the right can also include license elements and/or „know-how".

2. Reasons for the Emergence of Leasing

The reasons for the emergence of leasing are related to the need to develop new, alternative financing methods; to the need to find a new way of financing the small economy and the lack of trust banking institutions express towards the small, medium and new enterprises on the market; then, the lack of a proper national policy to help and support the development of small economy, and many other.

Historically, leasing resulted from the American business practice. In 1877, the Bell Telephone company from USA was the first to lease its telephones, instead of selling them.

Leasing is the third most important financing source in the world; the first two are loans and bonds. It is mostly used for the procurement of means of transport, hardware and software, construction machinery and so forth.[26]

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[25] See: Official Gazette of the Republic of Macedonia, No. 4/2002, 49/2003, 13/2006 and 88/2008

[26] According to data from the International Financial Corporation (IFC), in 1994 1/8 of the total private investments in the world were conducted through leasing systems; in the member countries of the Organization for European Cooperation and Development (OECD, financing via leasing took 1/3 of the total amount of investments, and, in the end, in the USA, the investments in leasing are estimated at 350 billion dollars. See: *Kapital*, April 18, 2002, p. 18

3. Legal Regulations of Leasing in the Republic of Macedonia

On an international level, it is important to take notice of the UNIDROIT Convention on International Financial Leasing (1988, Ottawa), which came into force on May 1st, 1995. From the title itself, it is obvious that the Convention is specifically about financial leasing. This Convention has not been ratified in the Republic of Macedonia, regardless of the fact that a considerable number of the Convention's provisions have been included in the Macedonian Law on Leasing.

As we have already mentioned, a special Law on Leasing has been adopted in Macedonia. For a trading company to be able to conduct leasing activities, it has to acquire permission from the Ministry of Finance. This permission should be requested by trading companies willing to do financial leasing. The granting of this permission is regulated by a by-law act - Rulebook on the Methods and Conditions for Gaining Permission to Conduct Financial Leasing, passed by the Minister of Finance.[27] Leasing is also mentioned in the Law on Banks[28]; the Law on Obligations is another highly relevant element[29]. To be more precise, Article 1-a from the Law on Leasing clearly specifies that the lease agreements are subject to the provisions of the Law on Obligations, if not stated otherwise in the Law on Leasing as *lex specialis*.

The first financial institution in Macedonia which adopted the leasing system was the saving bank „Mozhnosti". Today, the market of financial leasing is still just a small segment of the financial system of the Republic of Macedonia; nevertheless, it gives satisfactory results and shows a tendency of continuous development. Including the report from 01.10.2009, the market in Macedonia has 11 (eleven) active leasing companies[30].

The experience of active leasing companies in Macedonia has so far shown that the biggest interest lies in the car leasing. However, by raising the awareness about leasing as a financial service, there is an increasing interest in the leasing of equipment and real estate. Leasing is mostly used by legal persons, although it is also becoming more popular among natural persons.

The main reasons for the slow development of real estate leasing in Macedonia are: a) double taxation in case of realization of the option to transfer ownership to the lessee, and b) single payment of the total amount of the Value Added Tax (VAT) by the leasing company, which, in turn, collects the amount from clients, instead of giving the leasing company the opportunity of deferred payment of the VAT.

Regardless of the decrease of leasing business in Macedonia, the global financial crisis took its toll, and last year there was an increase in the turnover of this business. This happened mostly because banks adopted stricter conditions for loan approvals, which caused their clients to turn to leasing companies.

Heavy commercial vehicles are increasingly used as lease objects, as well as the supply of fixed assets. This increase is especially noticeable regarding basic herds (cattle, pigs, sheep), since they are considered as fixed assets, and in accordance with the policy of the Macedonian government for promotion of cattle breeding as a strategic development branch.

The court practice in the Republic of Macedonia regarding lease agreements is fairly poor. So far there has only been one case at the Basic Court Skopje 2, Skopje[31]; the accused

[27] See: No. 11- 14902/1- May 4, 2006

[28] See: "Official Gazette of the Republic of Macedonia" Nos. 67/2007 and 90/2009.

[29] See: „Official Gazette of the Republic of Macedonia" Nos. 18/2001, 78/2001, 04/2002, 59/2002, 05/2003, 84/2008 81/2009 and 161/2009.

[30] The information was found on the web-page of the Ministry of Finance: http://www.finance.gov.mk/files/u11/registar_lizing_drustva_web_0.pdf

[31] See: XIII ПС No. 1863/07 from 03.07.2008.

claimed that the lease he had been paying for certain business premises was actually supposed to be treated as a lease agreement with a purchase option clause (option to purchase) after the end of the term. The court found out that there was no lease agreement in the first place, so there was no possibility to confuse rent payment with payment of the leasing installment. Interestingly, in the explanation of the verdict, the court referred to the Law on Obligations regarding sales with retention of title[32], which in itself proves that the court practice does not have a clear stand, i.e., whether the expiry of lease agreement must include the transfer of property rights of the leased asset.

4. Parties to the Agreement

Both domestic and foreign trading companies could function as lessors, only if they (in compliance with the Law on Trading Companies) have established a branch office in the Republic of Macedonia and (in compliance with the Law on Leasing) have acquired permission from the Ministry of Finance to do financial leasing.

A lessee could be any domestic or foreign natural person having the capacity to agreement, or a legal person registered in an appropriate registry, which accepts to use the leased asset.

5. Rights and Responsibilities of the Parties to the Agreement

Regarding the rights and responsibilities of the parties to the agreement, a distinction should be made between rights and responsibilities defined by law and rights and responsibilities defined by the parties to the agreement. The rights and responsibilities are defined by law for the sole purpose of protecting the weaker party to the agreement, until the activity of this type is fully developed.

5.1. The Lessee:

- has the right to use the leased asset for economic use;
- has factual possession over the asset, but is not the legal proprietor;
- should pay the lessor the agreed leasing installment.

5.2. The Lessor:

- is the legal proprietor of the leased object;
- allows the lessee to use, have in possession and draw economic benefits from the leased object;
- has the right to collect leasing installment.

6. Lease object

A lease object is any movable and real estate object which the lessee has the right to use, except objects whose usage as lease objects is limited by law.

Possible objects of financial leasing are: Industrial equipment, heavy equipment, means of transport, automotive equipment, telecommunications equipment, office furniture, fitness equipment, construction equipment, dry cleaning equipment, printing equipment, restaurant equipment, computer equipment and software, agricultural equipment, etc.

The type of equipment which will be leased depends on the offer of the lessor and the need of the lessee, defined in the lease agreement.

The leasing practice in Macedonia gave rise to some dilemmas, which had to be addressed by legal changes. Hence, with the changes of the Law on Leasing made in February 2006, regarding the regime of the lease object, it is clearly provided that:

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[32] See: Article 528 of the Law on Obligations

- The lessor has exclusive right as a legal proprietor over the lease object in case of bankruptcy of the lessee;[33]
- In case of bankruptcy of the lessor, the bankruptcy manager can: (1) to consider the lease agreement as immediately due by transferring the ownership rights to the lessee; (2) to transfer the lease agreements under certain conditions to a different lessor - the transfer is conducted on the basis of public call with an agreement between the bankruptcy manager and the new lessor; (3) to renew the lease agreement
- The answer to the question whether the lessor can offer the lease object as a guarantee is positive, only if there is a written consent by the lessee; the consent should be submitted to the Pledge Register;
- The object is registered for tax purposes according to the tax regulations. The tax should be paid by the legal proprietor and not by the economic owner. Hence, the lessor would be the taxpayer, since the lessor is obliged to register the object in a special register under the Central Register (Article 12), although the usage insurance for the lease object should be paid by the lessee (Article 13); the user is also obliged to cover the expenses for maintenance of the lease object (Article 9); these obligations towards the provider are fulfilled if not stated otherwise in the agreement (namely, these are dispositive legal rules).
- From an accounting point of view, in the age of the leasing revolution in the USA, during the seventies of the last century, leasing did not appear on balance sheets. In the balance sheet statement, i.e. income sheet, leasing appeared neither as an asset nor as an obligation; it was only present in the form of a footnote in the financial report. Today, things look different. According to the DAD (FABS) accounting standards, leasing should be presented as an obligation on the right side, and an asset on the left side of the financial report. When it comes to registering leasing, trading companies for economic and tax consulting in Macedonia specifies that in the preparation of an end-of-year account and a financial report, leasing should be treated as rent.

7. Legal Nature of the Lease Agreement

Leasing encompasses elements and institutes from various other agreements:

- credit agreement;[34]
- rent agreement;
- loan agreement,[35]
- sales agreement,[36]

[33] Regarding this exclusive right of the lessor there is one relatively nebulous and absurd decision of the bankruptcy manager during the bankruptcy proceedings of the trading company Swedmilk to deny the leasing, i.e. the ownership of the equipment in the factory, which was acquired by Hypo Alpe-Adria-Leasing. See: http://www.a1.com.mk/vesti/default.aspx?VestID=117124

[34] The credit component for the lessor is either the finance provider or it involves a third party to finance the purchasing of the lease object, and is covered through the collection of increased leasing installments.

[35] Etymologically, the word is derived from the English word *to lease*, which means *to hire* or *to rent*. In legal terminology, we cannot consider *lease* and *rent* as equal, since rent never implies a possibility to transfer ownership, whereas in the lease agreement such possibility is present, although it is not the main cause. The word *creditbail* is used in French terminology.

[36] Leasing cannot be compared to a sales agreement, since sales presumes transfer of ownership in its full legal capacity, which means the right to hold, use and dispose, whereas the point of a lease arrangement is just to transfer the right to use certain equipment for a given period of time.

- deferred-payment purchase and sale agreement or retention of title in agreements of purchase and sale (*pactum reservati domini*), etc.

One of the main economic and legal features of leasing is the possibility to foresee one of the three alternatives after the agreement expiration:

(1) to return the lease object to the lessor
(2) to continue the use of the lease object under more favorable conditions, negotiated after the expiration, or
(3) the lease object to become property of the lessee.

However, the lessee does not acquire ownership of the lease object automatically, i.e. by paying the total amount as defined in the lease agreement (Article 10).

8. Form of the Lease Agreement

According to Macedonian positive law, the lease agreement is a strictly formal agreement *ad validitatem*, which, besides its obligatory content, has to be verified by a notary.

9. Transfer of Rights and Responsibilities Derived from the Lease Agreement

The lessor is free to transfer rights and benefits from the lease agreement, only if:

- the right of the lessee to use the lease object is not completely restricted and the lessee has the possibility to completely fulfill their obligations, unless:
    1. stated otherwise in the agreement
    2. this is against the laws of the Republic of Macedonia

The transfer of rights by the lessor does not free the lessee from their obligations as specified in the lease agreement.

The lessee can transfer their user rights or responsibilities of the lease object only after they have acquired written consent from the lessor.

10. Termination of the Lease Agreement (Article 11):

According to the Macedonian Law on Leasing, the agreement can be terminated if:

- any of the parties to the agreement does not fulfill its obligations as defined with the agreement; a written notice should be given five days before the termination.

The lessee has the right to terminate the agreement if (a) the lease object is not delivered on time, or (b) some material or legal defect has not been removed on time (eviction).

The lessor has the right to terminate the agreement if: (a) there are defaults in making payment; (b) the lessee has given the lease object to a third party without receiving written consent form the lessor or against the agreement regulations; (c) the lessor notices a chance that the lease object will be taken out of the country, and the agreement specifies that such actions are forbidden; (d) the lease object negligently and unethically treated.

11. Advantages of Leasing

- It can be used by every economic subject, regardless of their size and activity;
- It facilitates the development of small economy;

- It offers easier and more flexible financing of investment needs. Namely, there is a simplified procedure for procurement of means through leasing arrangement. Leasing companies do not require such exhaustive paperwork as banks do; for the leasing companies, the most important thing is the capability to generate cash flow. The key advantage of leasing is the prompt cash approval; money is far more valuable when it is urgently needed.
- A large amount of cash is not committed in order to pay for the new equipment. The essential feature of the arrangement is the small amount of down payment at the beginning of the lease term. For example: 10% of the equipment bought through leasing. Such arrangements give the opportunity to use the latest technology;
- Protection against the risk of obsolescence of the leased equipment;
- The lease fee is paid from the actual revenue gained by using the lease object;
- The lessee does not reduce their credit standing, since it neither uses own funding sources, nor has any credit debts, i.e., their balance sheet is not changed;
- Flexibility of the leasing agreement - the parties to the agreement have greater freedom when negotiating the agreement, with the chance to agree upon alternative possibilities regarding the dynamics of the leasing payment (deferred payment, seasonal payment, fluctuation of the leasing rate in relation to the market conditions for the products of the lessee);
- No special guarantees needed for the lessor, since the leased equipment itself serves as a guarantee and the treatment of a exclusive bankruptcy creditor in case of bankruptcy of the lessee;
- Unlike banks (where it is very difficult to effectuate mortgage operations and other such securities by their requests), lease agreements usually do not involve the court in case of failure to respond to the most important agreement obligations;
- The lessor has exclusive right over the lease object in case of bankruptcy of the lessee;
- A possibility to give the lessee not only equipment, but also appropriate knowledge and experience (know-how);
- The lessors (lease companies) give the opportunity to follow the prices of investment equipment and to procure low-price necessary means for work;
- On a macroeconomic plan, the financial sector is developed through the expansion of the range of available instruments offered for financing of the trading subjects; and other.

12. Disadvantages of Leasing

- As a financing instrument, it is more expensive compared to bank credits;
- Inequality between the parties to the agreement; the stronger party to the agreement imposes its will;
- Inflexibility of a lease agreement after its conclusion regarding the end of the term, the amount of the lease fee, the payment period, the possibility of early termination of the agreement;
- It has negative impact regarding the opportunity for the user to renew and modernize the fixed assets (technical and technological equipment), since more than often, after the expiry of the lease agreement, the user either buys the equipment or makes a second lease agreement (second-hand leasing).

13. Types of Lease Arrangements, i.e. Lease Agreements

In practice, leasing can be classified on the basis of various criteria:[37]

13.1. According to the features of the lease object:

a) Leasing of durable consumer goods (rent-a-car cars, durable household goods);
b) Investment leasing or equipment leasing (equipment, machines etc.)
c) Real estate leasing and leasing of movable property; and
d) Second hand leasing (leasing of used objects), as opposed to first hand leasing (when the lease objects are new goods)

1*3.2. According to the length of the lease agreement:*

a) Short-term or operating leasing, when the lease objects are multiple-use products. In principle, this type of lease agreement can be terminated at any time. It is also known as service leasing, since the leasing provider (usually the manufacturer of the object) has the responsibility to maintain (provide service for) the object. The duration of the agreement depends on the length of the economic life of the product. The advantages of operating leasing are the minimum initial investments; and
b) Long-term or finance leasing, when the lease objects are valuable goods with durable use. In this case, the lessor is obliged to procure the equipment defined with the agreement from a third party (deliverer or manufacturer). This type of leasing predicts a basic fixed term, which is of the same duration as the economic life of the object or the equipment. Therefore, this type of leasing presumes complete depreciation. With this arrangement, there is a minimum initial down-payment, there are possibilities for Greenfield investments, flexibility of the agreement (which means that the payment of installments can be adjusted to the needs of the user), and there is a possibility to transfer ownership after the end of the term. As we have already mentioned, Macedonian legal regulations require that the finance, long-term leasing is registered with a special lease register, which functions within the framework of the Central Register.

In theory, it is still debatable how to make a clear distinction between short-term and long-term leasing. Article 2, Paragraph (3) of the Law on Leasing defines operating leasing as each and every leasing that is not finance leasing.

13.3. According to the position of the lessor:

a) A case of leasing where (a) the manufacturer of the lease object and (b) the lessor are separate persons or lease through a leasing company;
b) Concern leasing, when the leasing company connects (through concern) with manufacturers, dealers and financial institutions (mostly banks) in a single process of leasing services
c) Manufacturing leasing, when the manufacturer of the lease object is at the same time the lessor;
d) Sale-and-lease-back leasing. This type of leasing involves three parties. The manufacturer sells the product to the subject, who will later become the lessee. In the

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[37] See: Kapor, Dr Vladimir and Slavko, Dr Carić, Ugovori robnog prometa*,* X Izdanje, Centar za privredni konsalting, Novi Sad, 2000, p. 265-272.

relation with the manufacturer, the subject only plays the role of a buyer. Later, the subject enters into a leasing relation with the leasing company for the aforementioned object; the subject transfers the ownership of the object to the leasing company, but continues to benefit from the economic use of the object included in the leasing arrangement.

e) Manufacturing - finance leasing, which is very similar to production leasing. However, in this case the lessee does not make direct contact with the manufacturer of the lease object, but with the bank which provides credit for the lease receiver regarding the responsibilities from the lease agreement; and many others.

In practice, the most important types of leasing are investment leasing and finance leasing.

13.4. Finance Leasing

The finance leasing involves three parties:

1) The lessor, who is most often the finance provider; it can take the form of a specialized leasing company or bank or an insurance company,
2) The lessee and
3) The manufacturer of the lease object.

Actually, two agreements are concluded:

(1) a lease agreement, between the lessor and the lessee, and
(2) purchase and sale agreement between (a) the lessor (finance provider) and (b) the manufacturer/supplier of the lease object

In this regard, we can make a sub-subdivision of the lease agreements regarding the contracting parties:

(1) direct leasing, in which case the lessor is the manufacturer of the lease object;
(2) indirect leasing, in which case the lessor is not the manufacturer/supplier of the lease object. The result of this financial operation is the conclusion of two agreements: purchase and sale agreement between the lessor and the supplier of the lease object, and a lease agreement between the lessor and the lessee.

Features of the finance leasing:

– This type of leasing is mid-term or (mostly) long-term leasing, depending on the economic and technical use value of the lease object (according to the Law on Leasing, movable objects have a use value of at least one year, and immovable objects have a use value of at least two years);
– The lease agreement usually does not encompass services;
– The lease object remains property of the leasing company at all times and the agreement temporarily covers the amortization period of the lease object;
– The lessor is paid in full for their capital expenditures and is completely irrevocable;
– Only the lessee bears an investment risk;
– In most cases, after the end of the term, the ownership of the lease object is transferred to the lessee.

Republic of Serbia:
Prof. Dr. *Jelena Perović**

MODERN CONTRACTS

General Introduction

The Serbian Law on Contracts and Torts regulates contracts which are typical or usual in legal transactions, as well as those that, due to their significance, require regulation by law. The majority of contracts are regulated by law and may be classified as named contracts. Thus, for example, the Law regulates contracts on sale, barter, lease, loan, intermediation, commercial agency, etc. The rules of the Law of Contracts and Torts are mostly of non-mandatory nature, meaning that the Law, for the most part, allows the parties to regulate their contractual relationship in accordance with the principle of party autonomy. In addition to the non-mandatory rules, the Law comprises a certain number of provisions that are of mandatory character, providing a general framework of legal security in legal transactions. For a certain number of contracts that have been regulated by the Law of Contracts and Torts in general, there are also specific laws regulating them in detail (insurance, transportation, pledge, etc). On the other hand, certain contracts, due to their specific nature, are not regulated by the Law of Contracts and Torts but are provided for by other, particular laws. Thus, for example, the contract on establishment of a company is regulated by the Law on Companies, concession contract is regulated by the Law on Concessions, and the financial leasing agreement by the Law on Financial Leasing.

In addition to named contracts, in the Serbian legal system there are certain contracts which are not regulated by statute - unnamed contracts (*contrats innommés*). Existence of unnamed contracts is a consequence of the fact that life and business are always more diverse than the law, so the law can hardly encompass all the contractual relationships that may appear in legal transactions. Firstly, these are contracts „tailored" to the parties, which are atypical in legal transactions and express the specific needs of the contracting parties. The parties determine the content of these contracts themselves, whether by combining elements of two or more named contracts, or by defining a completely new, „original" content. Furthermore, the unnamed contracts are the contracts which are quite usual in legal transactions, but have been created in the contemporary legal practice - the so-called modern contracts, so they could not have been encompassed by the law as they had not been common, or even known, at the time the law was adopted. Thus, for example, in the Serbian legal system, franchise, factoring and forfeiting contracts are unnamed contracts, as was the financial leas-

* Original text is in local language.

The English translation of this text is made by GTZ.

ing agreement until the adoption of the Law on Financial Leasing in 2002. A great number of other, so-called mixed contracts, comprising elements of different types of contracts, resulting from the needs of contemporary business transactions, are also classified into this category. Unnamed contracts, according to the principle of party autonomy, *can be validly concluded* , subject to requirements of public policy, mandatory rules and good trade usages. If they meet the requirements for validity, these contracts are protected by the court regardless of the fact that they are not regulated by Law.

Where a contract is regulated by law, parties do not have to regulate their relationship in detail. It suffices to reach agreement as to the essential elements of the concrete contract so that the relevant statutory provisions apply to it. On the contrary, an un-nominated contract, since there are no statutory provisions which replace or supplement the parties' intention, has to be formulated with special care, so that the parties' intention be expressed precisely, correctly and with no ambiguity. In case of dispute, the court/arbitration shall apply the general rules and principles of contract law, as well as the rules relevant for similar contracts (analogy) regulated by the Law of Contracts and Torts. [1]

The subject of this study is an analysis of the Franchise Contract, Factoring Contract and Contract on Financial Leasing in the Serbian legal system.

FRANCHISE

1) General concept

The Franchise Contract, as a relatively new commercial contract which derives from *lex mercatoria*, is not regulated by law in the Serbian legal system and is thus classified as an unnamed contract.[2] The situation is similar in other national legal systems[3] since this transaction, established in the USA, was only developed significantly in the mid-twentieth century and was introduced to Europe, primarily, by American companies (McDonald's, Coca-Cola etc).[4] In addition, franchise transactions, due to their mixed legal nature, relate to differ-

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[1] On unnamed contracts, see S.Perović, *Obligaciono pravo ("Law of Contracts and Torts")*, Belgrade, 1990, pp.192-194; J.Perović, *Međunarodno privredno pravo ("International Commercial Law"),* Belgrade, 2009, pp.209-211. On the need and proposals for the regulation of new commercial contracts in the Serbian Civil Code, see *Rad na izradi Građanskog zakonika Republike Srbije, Izveštaj Komisije sa otvorenim pitanjima ("Development of the Civil Code of the Republic of Serbia, Report of the Commission with Unresolved Issues"),* Belgrade, 2007, pp.277-308.

[2] On the issue of legal regulation of the franchise contract in the Serbian legal system see P. Šulejić, *Franšizing, lizing, faktoring – otvorena pitanja kod regulisanja ovih ugovora u Građanskom zakoniku Srbije ("Franchise, leasing, factoring - unresolved issues in regulating these contracts by the Serbian Civil Code"),* pravo i privreda, no.5-8/2008, p.500. and onward.

[3] List of countries that have regulated franchise by law, see in *Rad na izradi Građanskog zakonika..., suppra,* p.291.

[4] On franchise in Serbian literature, see, e.g., M.Draškić, *Ugovor o franšizingu ("Franchise Contract"),* Belgrade, 1983; M.Draškić, *Međunarodno privredno ugovorno pravo ("International Commercial Contract Law"),* Belgrade, 1990, pp.358-365; M.Vasiljević, *Trgovinsko pravo ("Commercial Law"),* Belgrade, 2006, pp. 267-273; R.Vukadinović, *Međunarodno poslovno pravo ("International Business Law")*, Kragujevac, 2009, pp.263-277; M.Parivodić, *Pravo međunarodnog franšizinga ("International Franchise Law"),* Belgrade, 2003.

ent legal fields such as contract law, representation and distribution of goods, financial investments, intellectual property, competition law, company law, fiscal law, consumer protection law and liability for damages from products, insurance law, labour law, technology transfer, foreign investment law, etc, representing a special difficulty in the attempts to regulate this contract by law.[5]

Pursuant to its legal properties, the franchise contract is an unnamed, mutually binding pecuniary contract, a contract with subsequent execution of payment, and a contract concluded *intuitu personae.* In practice, this contract is usually concluded in writing and may become formal if the contracting parties prescribe written form as a prerequisite of its validity. Pursuant to the technique of conclusion, the franchise contract is, as a rule, concluded as a contract of adhesion.

In the Serbian legal system, the franchise contract is subject to the general rules of business, the general principles of the Law on Contracts and Torts, as well as to the rules stipulated by the Serbian Law of Contracts and Torts for other related contracts (licence contract, sales contract, lease contract, contract on commercial representation, etc).[6]

In the development of the Civil Code of Serbia, which is underway, the question arose on whether the franchise contract should be regulated by law. In this respect, viewpoints were heard on how it would be preferable if this contract be regulated by national regulations, given that the franchisor, in the master agreement, in the clause on the selection of the competent law, usually imposes their own law, which could place both the local franchisor and the franchisee into a subordinate position. In addition, it was stated that invoking other similar contracts in resolving a dispute arising from a franchise contract was not a preferred solution, since in this case elements of different contracts would have to be combined (licence, sale, representation, etc). On these grounds, editors of the Civil Code opened a discussion on this yet unresolved issue and presented a possible Draft of the provisions of the franchise contract (hereinafter: Draft).[7]

2) Definition, contents and form of the franchise contract

In Serbian legal doctrine there is no uniform definition of the franchise contract.[8] Pursuant to the Draft, the franchise contract is a contract in which one side – the franchisor - grants exclusive rights of sale of goods or provision of services to the other party – the franchisee, authorising the franchisee to act under his registered name (brand), to use his licences (commercial names and trademarks) and other distinguishing marks, to use their technical and

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[5] UNIDROIT, Annex 3 au Guide sur les Accords Internationaux de Franchise Principale, www.unidroit.org.

[6] It is generally considered that principal international legal sources for this contract comprise the general terms and conditions of business, formulated contracts, legal guidelines and model contracts. At the European Union level, the Commission has, within the regulations related to competition, adopted its Ordinance 4087/88 pertaining to a block of exceptions to the categories of franchise agreements of November 30, 1988. A significant role in regulating franchise is also played by the European Code of Ethics for Franchise, adopted by the European Franchise Federation on September 23 1972, terms and conditions of business transactions by the International Franchise Association (IFA) and the ICC model Contract on Franchise. Within the UNIDROIT, the Legal Guideline for the International Master Franchise Agreements was developed in 1988 and revised in 2007, as well as the Model Law on Disclosure in Franchise in 2002. Franchise rules are also comprised in the *Draft Common Frame of Reference*.

[7] *Rad na izradi Građanskog zakonika..., suppra*, p. 292 and onward.

[8] See, e.g, M.Draškić, *suppra*, p,358; R.Vukadinović, *suppra*, p.266; M.Vasiljević, *suppra*, p.268.

commercial methods of conducting business, know-how, marketing, with the provision of expert services and assistance in training and operation of the franchisee, also including the right to constantly provide instructions and monitor the operation of the franchisee, while the other party - the franchisee - pays the adequate fee to the franchisor for the rights granted and services provided (Art.1).[9]

As the franchise contract is not regulated by law in the Serbian legal system, its content is determined by the contracting parties, pursuant to the principle of autonomy of will.

The draft prescribes that a franchise contract must comprise: identification of the contracting parties; the commercial activity in question; exclusive rights transferred by the contract; the amount, deadlines and method of payment of the fee; the rights and obligations of the contracting parties, including the rights and obligations following the termination of the contract; liability of the parties for failure to fulfil contractual obligations or for fulfilling them with delay; the method of handling disputes, the territory on which the exclusive rights are used; the duration of the contract and the conditions under which the provisions of the contract may be modified, extended or their effect terminated; other conditions required by the contracting parties (Art. 2).[10]

In addition to the mandatory content of the franchise contract, the draft, in a dispositive provision, prescribes that this type of contract may stipulate the following: the obligation of the franchisor not to transfer the exclusive rights that are the object of the franchise contract,, to be exercised on the territory of the franchisee, to third parties, as well as to refrain from performing activities of such kind on the same territory themselves; the obligation of the franchisee not to compete with the franchisor in the use of the transferred rights outside of the territory to which his franchise contract extends; the obligation of the franchisee to refuse to accept any rights analogous to those granted to them through the franchise contract, from competitors (potential competitors) of the franchisor; the obligation of the franchisee to adhere to the norms on the determination of prices provided by the franchisor, providing that there is no contractual norm of behaviour with regards to the actual application of these prices; the obligation of the franchisee to set a location, in agreement with the franchisor (business premises, shops) in which the exclusive rights defined in the franchise contract are to be realized, as well as their external and internal appearance; the obligation of the franchisee to sell the goods or perform the services defined in the franchise contract solely on the agreed premises, equipped in the manner prescribed by the contract.

Still, these limitations may be declared void at the request of an anti-monopoly body or another interested party, if they are in conflict with the anti-monopoly legislation due to the market behaviour or economic position of the contracting parties.

On the other hand, the Draft prescribes, in an imperative provision, that the contractual limitations are to be considered void if they lay down the following: that the franchisor has the right to determine the price at which the franchisee sells the goods, or the price of labour

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[9] Compare the definition of the franchise contract in the Draft Common Frame of Reference, pursuant to which: "*This Chapter applies to contracts under which one party, the franchisor, grants the other party, the franchisee, in exchange for remuneration, the right to conduct a business (franchise business) within the franchisor's network for the purposes of supplying certain products on the franchisee's behalf and in the franchisee's name, and under which the franchisee has the right and the obligation to use the franchisor's tradename or trade mark or other intellectual property rights, know-how and business method."* (Art. 4: 101).

[10] An almost identical solution is prescribed by the UNIDROIT model law on disclosure in franchise.

(services) of the franchisee, or determines the lowest or highest price; the franchisee has the right to sell goods or supply services solely to a distinct category of clients, or solely to clients on a specific territory.[11]

Provisions of the franchise contract are formulated depending on the type of franchise contract concluded in each particular case. In the theory and practice of comparative law, there are different classifications of this transaction.[12] Thus, for example, the American practice differentiates between three types of franchise transactions: unique or direct, multiple or complex, and the master franchise agreement. A special type is *joint venture franchising.* In the European Union Law, the distinction is made between: industrial or production franchise, distribution franchise or the franchise of goods, and service franchise.[13]

Given that it is not regulated by the law, the franchise contract may become a formal contract only by the will of the contracting parties. In other words, the contracting parties may stipulate the conclusion of this contract in a specific form, either in such a way that the form is a prerequisite of its validity (form *ad solemnitatem*), or in such a manner that it represents evidence of the existence and content of the contract, but not a condition for its validity. Nevertheless, franchise contracts are generally concluded in writing[14], primarily due to the need to prove their contents. In addition, this being a long-term and complex contractual relationship for which there are no auxiliary legal provisions, the rights and obligations from this relationship should be defined in the contract precisely and in detail, to avoid any potential ambiguous situations that would be a basis for different interpretations and thus, as a rule, lead to disputes. Finally, an important reason for concluding franchise contracts in writing lies in the fact that they usually comprise a clause on arbitration; in most national laws and international conventions, written form is a prerequisite for the validity of such a clause. The Draft prescribes the mandatory written form of the franchise contract (Art. 3).

In most cases, franchisors conclude standard contracts with their partners from a single franchise system, which are prepared in advance as forms to be filled out and which, in terms of the technique of conclusion, represent contracts of adhesion.[15] Therefore, the franchise contract is, as a rule, concluded as a typical contract, by filling out a pre-set form composed by one of the contracting parties. This means that the other contracting party adheres to the pre-defined elements and conditions of the contract, which, as a consequence, leads to the application of general rules of the Law on Contracts and Torts, stating that in such a case, unclear provisions are to be interpreted in favour of the party that adhered to the contract (the *contra preferentem* rule).[16] On the other hand, contracts of this type usually point to general conditions. In this respect, the Law on Contracts and Torts prescribes a general rule pursuant to which general conditions are mandatory for a contracting party if that party was aware of them at the time the contract was concluded.[17] This is a refutable assumption and the party claiming not to have been aware of the general terms and conditions must prove this claim. In the context of general rules of franchise contracts, special attention should be paid to the possibility for the Court to nullify certain provisions of the general terms that are „contrary

[11] Art. 9. of the Draft.

[12] V. M.Vasiljević, *suppra*, p. 269 and onwards.

[13] For more see R.Vukadinović, *suppra*, p. 263 and onwards.

[14] For more see M.Draškić, *suppra*, p. 359.

[15] For more see M.Draškić, *suppra*, p. 359 and onwards.

[16] Art. 100.

[17] Art. 142 par. 3.

to the objective of the contract itself or good business practices...” or to refuse to apply the provisions that „deprive the other party of the right to object, or cause that party to lose contractual rights or miss deadlines, or are generally unjust or too stringent towards the other party”’[18]. When a certain provision of the contract is nullified, the whole contract is not nullified if it can remain valid without the nullified provision, i.e. if this provision was neither a prerequisite for this contract, nor the principal motive for its conclusion. However, even when the nullified provision was a prerequisite or principal motive for the conclusion of the contract, the contract will remain in force in those cases in which the provision was nullified for the very reason of eliminating that provision from the contract and effecting its further validity without it.[19]

3) *Duration and renewal of the franchise contract*

The franchise contract, as a contract with subsequent execution of payment, is concluded for a prolonged period of time, of defined or undefined duration.

Pursuant to the Draft, duration of the franchise contract is defined by the contracting parties, depending on the needs of distribution of goods or services that are the subject of the contract. If the duration of the contract has not been determined or exceeds ten years, each of the contracting parties has the option of terminating the contract with the obligation of giving a six-months notice, if the contract does not prescribe a longer notice period. If an extension of the contract following its expiration has not been prescribed and the contracting parties continue to meet their contractual obligations, the contract is extended, tacitly, each time for a two-year period. Once the contract is terminated due to its expiry, the receiver is obliged to return all the leased assets to the franchisor. He is also obliged to stop using the words, elements, trademarks and all the other brand distinctions that he was granted to use by the franchisor, pursuant to the franchise contract, in the business transactions of his company (Art. 11).

With regards to renewal of franchise contracts, the Draft prescribes that the franchisee, having fulfilled his contractual obligations, is entitled, following the expiration of the franchise contract, to conclude the contract for a new period of time under the same conditions. The franchisor may refuse to conclude the franchise contract for a new period of time, with the proviso that he will not enter into analogous franchise contracts with third parties, the effects of which would extend to the territory that was subject to the expired franchise contract, for a period of three years following the expiration of the franchise contract. If the franchisor decides to transfer the rights that were the object of the expired contract to a third party prior to the expiry of this three-year period, he is obliged to propose to the franchisee the conclusion of a new contract, or to compensate them for the losses incurred. The conditions of the new contract may not be any less favourable for the franchisee than the terms of the expired contract (Art. 12).

4) *Financial issues*

The basic obligation of the franchisee is reflected in the payment of a fee for the transferred rights and services. The contracting parties, based on the principle of autonomy of will, define the type and manner of compensation. In practice, it is common to set an initial fee and a fee depending on turnover. In contracts for the franchise of services, as well as con-

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[18] Law on Obligations, Art. 143.

[19] Rules on partial nullity, Art. 105 of the Law on Obligations.

tracts between wholesalers and retailers, when it comes to the franchise of goods, it is usually stipulated that the franchisee is obliged to pay a fee depending on turnover (*royalty fee*). In addition, a single payment at the beginning, or upon adhesion (*initial fee*) is also defined, as well as the minimum amount that the franchisee must pay if the fee is calculated depending on turnover. The fee may be included in the sales price of the product that the franchisor is selling to the franchisee.[20] With regards to the obligation of the franchisee to pay a fee, the Draft prescribes that the franchisee is obliged to pay a fee for the transferred rights, the amount of which is determined, in general, according to the percentage of realised profit or turnover (Art. 8).

5) Obligations of the franchisor

The main obligation of the franchisor from the franchise contract is to grant, to the franchisee, an exclusive right of sale of products or a group of products or supply of services, as well as the right to use the trademark or service marks and other intellectual property rights pursuant to the terms agreed on in the contract. This obligation encompasses the obligation of the franchisor not to grant this right to other persons on the agreed territory, nor to open branches for the sale of the goods or services on the territory covered by the contract, nor deliver the goods or services under the franchise to other businesses on the given territory. Other forms of intellectual property rights that the franchisor may grant to the franchisee encompass the right to use other distinguishing marks of goods and services, such as symbols, outer packaging, labels of geographic origin, industrial shaping, design of the building, business premises, and interior decoration and equipment. Intellectual property rights must be free from demands or aspirations of third parties. The franchisor is also obliged to transfer certain knowledge and experiences, pertaining, mostly, to know-how. Another group of obligations pertains to the services that are provided in order to make it easier for the franchisee to begin operations and to increase the efficiency of his business, for the activities defined in the franchise contract (assistance in the selection of materials and equipment of business premises, to ensure the uniform appearance conforming to the franchise system, assistance in the selection of adequate premises, staff training, assistance in managing the company, the disclosing of business information and innovations, as well as commercial and technical assistance, etc). Finally, the franchisor must guarantee the franchisee that he will provide an adequate and regular supply. On the other hand, the franchisor reserves the right to control the business operations of the franchisee and the right to be informed on all the issues pertaining to the quality and progress of the franchise. The franchisor also has the right to demand that the franchisee sell only the franchisor's products and the right to influence the price, but does not have the right to fix the price, whether directly or indirectly, as this would be contrary to Art. 81 (1) of the Contract on Association of the European Community.[21]

In this respect, a special provision in the Draft prescribes the basic obligations of the franchisor. Pursuant to the Draft, the franchisor is obliged to allow the franchisee to use his exclusive rights, for the purpose of exclusive sale of goods or services. These rights include: the right to use the brand name, the right to use the trademark or service marks, models and other distinguishing marks, marketing methods and all the other knowledge and experience in the promotion and sale of goods and services. To ensure the realisation of the contracted business activities, the franchisor is obliged to constantly keep the franchisee informed of

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[20] M.Draškić, *suppra,* p. 362.

[21] R.Vukadinović, *suppra,* p. 271.

any facts that enable the successful conduct of business, to organise training and professional development courses for the franchisee's employees in taking up and managing business transactions, to assist the franchisee in case of dispute in the process of trademark registration and licensing. The franchisor is obliged to supervise the operations, in order to protect the trademark and control its use, as well as to protect the rights transferred to the franchisee in case of any demands put forth by third parties (Art. 6). The franchisor is responsible for the existence and content of the transferred rights, as well as for the information provided to the franchisee for the realisation of programs included in the transferred rights. In case this responsibility is violated, the franchisee is entitled to terminate the contract or to reduce the fee owed to the franchisor, in the percentage determined by an independent expert (Art. 7). Finally, the franchisor holds a subsidiary responsibility in third party claims against the franchisee, in case of non-uniformity of characteristics of goods or services sold to third parties by the franchisee, pursuant to the franchise contract. In third party claims towards the franchisee, relating to the products manufactured by the franchisor, the franchisor assumes joint liability with the franchisee (Art. 10).

Similarly, the Draft of the Common Framework prescribes obligations of the franchisor related to the following: the transfer of intellectual property rights (an imperative provision), the transfer of know-how (an imperative provision), assistance to the franchisee through the organisation of training courses, management, counselling etc., providing the franchisee with products (an imperative provision), keeping the franchisee informed throughout the duration of the contract, informing the franchisee on any restrictions to supply (an imperative provision), as well as protecting the network reputation and advertising (Art. 4: 201-207).

6) Obligations of the franchisee

Franchisee's obligations may be classified into those regarding the payment of the fee, and those pertaining to the manner of using the franchise.

The main obligation of the franchisee is the payment of a compensation to the franchisor for the granted rights, and is analyzed in chapter 4 of this study on franchise.

The following are, as a rule, the obligations of the franchisee relating to the manner of franchise use:

1) to sell exclusively the franchisor's goods defined in the contract on the business premises stipulated in the contract;
2) to refrain from performing a similar business activity outside of the territory defined in the contract for the duration of the contract or following contract termination in the agreed period of time;
3) to invest his best efforts into the sale of goods or the supply of services that are the subject of the franchise;
4) to maintain the building, business premises, equipment and assets pursuant to the contract and the corresponding standards;
5) to sell the goods produced exclusively by the franchisor or a third party defined by the franchisor and, in the case this is impractical due to the nature of the goods, to apply objective quality standards;
6) to refrain from engaging, directly or indirectly, in similar business activities on any territory which poses competition to the members of the franchise network;
7) to sell to end consumers, other franchisors and resellers through other distributive channels only the goods supplied by the franchisor or with his consent;

8) to keep, as a business secret, all the information disclosed to them by the franchisor;
9) to protect the know-how and preserve the common identity and reputation of the franchise network, selling only the goods that meet the quality standards set by the franchisor;
10) to use all the transferred rights only in the business unit defined in the contract, according to the prescribed standards and in the manner specified in the contract;
11) to use the know-how solely for the purposes of exploiting the franchise;
12) to inform the franchisor of any infringements of industrial or intellectual property rights, and to undertake action against any person committing such infringements or assist the franchisor therein;
13) to inform the franchisor of all the experiences gained in his exploitation of the franchise.

In addition to these, the franchisee may take on other obligations prescribed in the contract.[22]

With regard to the franchisee's obligations, the Draft primarily prescribes the obligation of paying a fee for the transferred rights, the amount of which is determined, in general, in accordance with the percentage of the profit gained or turnover. Furthermore, the franchise contract may also impose additional obligations on the franchisee, such as, for example, the procurement of goods from the franchisor or persons named by him, implementation of all the instructions and standards of operation, as well as technological procedures in the production or supply of services, obligation of specific investments, the uniform external appearance of the business seat, etc (Art. 8). In addition, the franchisee is obliged not to disclose to any third parties confidential information or business secrets of the franchisor that were disclosed to him during the term of the contract. This obligation continues to apply even after the termination of the franchise agreement (Art. 17).

The Draft of the Common Framework also prescribes the franchisee's obligation of compensation, as well as obligations related to reporting to the franchisor for the duration of the contract, the business methods, instructions and control by the franchisor (Art. 4: 301-4: 304).

7) Sub-franchise

With regards to sub-franchise, the Draft offers a solution whereby the franchise contract may prescribe the right of the franchisee to transfer exclusive rights, or a part of such rights that were transferred to them under the franchise contract to a third party, with the franchisor's consent. The contract may bind the franchisee to transfer these rights to a certain person and for a defined period of time. A contract on sub-franchise cannot be concluded for a period of time exceeding the duration of the franchise contract. The nullity of the franchise contract imposes the nullity of the sub-franchise contract as well. The franchisee has a subsidiary liability for damages caused to the franchisor by the actions of a sub-franchisee, unless otherwise specified in the contract. The sub-franchise contract is subject to the rules of the Draft of the Franchise Contract, unless the nature of the sub-franchise imposes other rules (Art. 5).

8) Advertising and control of advertising

With regards to the obligation of advertising under the franchise contract, the Serbian legal system has no special regulations, including the Draft, which comprises no specific pro-

[22] R.Vukadinović, *suppra,* p. 271 and onwards.

vision on the matter. Nevertheless, franchise contracts concluded in practice regularly comprise a clause regulating this matter. This clause most frequently prescribes that the franchisor is obliged to invest his best efforts in promoting and preserving the reputation of the franchise network. They are, among other things, obliged to design and harmonise the advertising campaigns aimed at promoting the franchise network. Any activities relating to the promotion and protection of reputation of the franchising network are conducted at the expense of the franchisor.[23]

9) Supply of equipment, products and services

The obligation of supplying equipment, products and services is not laid down by any special regulations in the Serbian legal system, but rather prescribed under the contract based on the principle of free will. In this respect, it is a widely accepted rule that if the franchisee is obliged to procure products from the franchisor or from a supplier appointed by him, the franchisor undertakes to supply the franchisee with the ordered products in a reasonable time frame. This rule is applied even when the franchisee is not bound by the contract to procure the products from the franchisor or a supplier appointed by them but is, in practice, directed to procure the products in such a way.[24] In general, the franchisor, as a supplier, is obliged to supply the franchisee in sufficient quantities and regularly; any breach of this obligation is subject to the general rules of the Law on Contracts and Torts. With regard to this obligation of the franchisor, the Draft prescribes that the franchisor bears subsidiary responsibility in third-person claims against the franchisee in the case of non-uniformity of goods or services sold by the franchisee under the franchise contract. The franchisor shares joint responsibility with the franchisee in third-party claims against the franchisee, with regards to the goods produced by the franchisor (Art. 10). If the franchise contract prescribes the procurement of goods, as a rule, general rules of delivery and payment for these goods are appended to the contract and represent its constituent part which includes explicit provisions on payment guarantees and consequences of delay.

10) Intellectual property rights

One of the principal obligations of the franchisor is to transfer the right of use of trademarks or service marks , as well as other intellectual property rights to the franchisee, in line with the contractual conditions. Other forms of intellectual property rights that may be transferred to the franchisee by the franchisor include the right to use other distinct marks, such as symbols, external packaging, marks of geographic origin, industrial design, design of the building, business premises and interior decoration and equipment. The franchisor has to transfer to the franchisee the right to use intellectual property to the extent necessary for the performance of the franchise business. In that respect, the franchisor must grant to the franchisee an unhindered, continuous use of these rights, so long as the aforementioned rights are free from third party claims or aspirations. Within the general provision on franchisor liability, the Draft holds the franchisor responsible for the existence and content of the rights transferred to the franchisee, as well as for the information disclosed to the franchisee necessary for the realisation of the programs defined in the rights transferred. In case of an infringement of this obligation, the franchisee is entitled to terminate the contract or to reduce the fee owed to the franchisor to the amount determined by an independent expert (Art. 7).

[23] See the Common Framework Draft Art. 4:207.

[24] See the Common Framework Draft Art. 4:204.

11) Know-how and business secret

The franchisor is obliged to transfer certain knowledge and experience (know-how) to the franchisee, which the franchisee requires for the conduct of the franchised business activities.[25] This obligation includes not only the technical know-how (secret production methods, the use of recipes, formulae, specifications, procedures and methods of production), but also the so-called commercial know-how, including the knowledge on winning over the consumers, on marketing and turnover, as well as the knowledge on the basic financial management and calculation, including the methods of training commercial associates.[26]

The obligation of the franchisee to protect the information and data on the franchisor and his business as classified information, i.e. as a business secret, is regularly prescribed by franchise contracts (*confidentiality clause*). However, it should be emphasized that this obligation exists in the Serbian legal system even if it is not explicitly prescribed in the contract, as it derives from the general principles of the Law on Contracts and Torts, primarily the principle of good faith and honesty. The obligation of keeping business secrets is explicitly stipulated in the Draft as well, according to which the franchisee is obliged not to disclose to third parties any confidential information or business secrets of the franchisor, which they obtained during the term of the contract. This obligation continues to be valid following the termination of the franchise contract (Art. 17).

12) Legal instruments in case of default of contractual responsibilities

Breach of contract occurs in case of default of contractual responsibilities, and in the case the responsibility was met, but in a manner not prescribed by the contract. The Serbian Law on Contracts and Torts does not recognise the concept of a „major breach of contract" prescribed by the Vienna Convention[27], nor of „major default" adopted by the UNIDROIT Principles and Principles of European Contract Law. Instead, the Law, like most European civil codes, prescribes a rule on default of contractual obligations as the principal basis of breach of contract. Pursuant to the general rules of the Law on Contracts and Torts on the termination of contracts due to default, when one contracting party fails to meet their obligations, the other party may, unless it is differently stipulated, demand the fulfilment of the obligations or, under the conditions prescribed by the Law, terminate the contract by a simple statement, if the termination does not occur by the force of Law itself; in either case, that party is entitled to the compensation for damages (Art. 124). Within the scope of the general rules, legal consequences of a breach of franchise contract as a contract not legally regulated will depend, primarily, on what the parties have prescribed, in accordance with the principle of autonomy of will. If this is not prescribed by the contract, Serbian courts, if these contracts are subject to Serbian law, will apply the general principles and rules of the Law on Contracts and Torts, as well as the rules of this Law pertaining to other, similar contracts.

The Serbian Law, as well as the majority of national legal systems and uniform rules of contract law, recognises the principle of out-of-court termination of a contract due to default. In this respect, the general rule is that the contract is terminated through a simple statement

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[25] See the Common Framework Draft Art. 4: 202.

[26] M.Draškić, *suppra*, p. 360.

[27] UN Convention on Contracts for the International Sale of Goods. For a comparative analysis of uniform rules on the termination of contracts on one side and relevant rules of the Serbian Code on Obligation, see, J.Perović, *Fundamental Breach of Contract, International Sale of Goods*, Belgrade, 2004.

of termination, which the creditor is obliged to submit to the debtor without delay.[28] The statement on termination, in general, does not have to meet any requirements as to its form and can be submitted in writing or orally; when it comes to the franchise contract, as a lasting and complex contractual relationship, it is recommended that this statement be submitted in writing to ensure legal security. What is important in this issue is that the intent on termination of the contract is expressed in a clear manner and that the other party is notified of this intent. The moment in which the statement on termination takes legal effect is related, in the Law on Contracts and Torts, pursuant to the accepted theory of receipt[29], to the moment in which the debtor has received the information on termination of the contract.

The Law on Contracts and Torts provides for a consensual termination of contract by Law itself (*ipso facto, de plain droit*) only if the fulfilment of an obligation in due time is an important element of the contract (fixed contract).[30] If fulfilment in due time is not an important element of the contract, the creditor must allow the debtor a reasonable time frame to fulfil the obligation,[31] unless the debtor's conduct indicates that they will not meet this obligation in the extended period either.[32]

Regardless of whether the creditor demands the fulfilment of the obligation or the termination of the franchise contract, they are entitled to compensation for damage in view of the general rules of the Law on Contracts and Torts on contractual liability.

13) *Termination of the contractual relationship and legal consequences of this termination*

Termination of the franchise contract is subject to general rules of the Law on Contracts and Torts, pertaining to termination of contracts. In addition to the general grounds for contract termination, specific properties of the franchise contract dictate the inclusion of special rules on the termination of this type of contract. In this respect, the Draft prescribes the rules on the termination of franchise contracts due to the expiration of the contractual period, the expiry of the franchisor's exclusive rights, and enforced liquidation or insolvency.

With respect to the termination of contract due to the expiration of the contractual period, the Draft prescribes that the duration of the franchise contract is determined by the contracting parties, depending on the needs of distribution of goods or services which are the subject of this contract. If the duration of the contract has not been determined or exceeds ten years, each of the contracting parties has the option of terminating the contract with the obligation of giving a six-months notice, unless the contract prescribes a longer notice period. If an extension of the contract following its expiration has not been prescribed and the contracting parties continue to meet their contractual obligations, the contract is extended, tacitly, each time for a two-year period. Once the contract is terminated due to its expiry, the franchisee is obliged to return all the leased assets to the franchisor, as well as to stop using the words, elements, marks and all the other brand distinctions that he was granted to use by the franchisor, pursuant to the franchise contract, in the business transactions of his company (Art. 11).

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[28] The expression „without delay" is construed so that the creditor that intends to terminate the contract must inform the debtor on his intentions as soon as possible, pursuant to the circumstances of the case and common practices in the domain of the business activity in question. For more, see J.Perović, *Fundamental Breach of contract…., suppra*, p. 322-323.

[29] See Art. 31 of the Law.

[30] Art.125.

[31] Art.126.

[32] Art.127.

When it comes to the expiry of the franchisor's exclusive rights, the Draft prescribes that in case the right to use a brand name and other trademarks expires, and they are not replaced by a new brand name or trademark, the franchise contract shall cease to take effect. If there is a change in the brand name and other trademarks of the franchisor, the franchise contract shall produce legal effects with regard to the new brand name or trademarks, if the franchisee does not request termination of the contract and compensation for damage. If the contract is extended, the franchisee may demand a proportional reduction of the compensation paid to the franchisor (Art. 13).

Finally, pursuant to the Draft, the franchise contract ceases to produce legal effects in the case of enforced liquidation or insolvency of either the franchisor or the franchisee (Art. 14).

A special rule of the Draft relates to the case of substitution of the holder of exclusive rights. Pursuant to this rule, transfer of any exclusive right, transferred pursuant to the franchise contract to the franchisee, to any other person, does not lead to the modification or termination of the franchise contract. If case of the franchisor's death, his rights and obligations from the franchise contract are transferred onto his legal successors, if they accept their inheritance within six months and, if they do not, the franchise contract ceases to produce legal effect.

The Serbian legal system does not provide for any specific regulations on the legal consequences of termination of the franchise contract, so the general rules of the Law on Contracts and Torts shall apply.

14) Other common clauses

To be discussed.

FACTORING

1) Basic concept

A) The concept of factoring

The Factoring Contract, as a modern contract relating to business transactions derived from *lex mercatoria*, is not legally regulated in the Serbian legal system. In the drafting of the Serbian Civil Code, which is underway, the question was raised on whether franchise contracts should be regulated by law, and the editors of the Civil Code presented a possible Draft of the Provisions of Factoring Contracts (hereinafter: Draft).[33]

Legal sources for this type of contract include general terms and conditions of operation of factoring companies, typical contracts and contracts in forms to be filled in, commercial practice as well as general rules of contract law. At the international level, factoring is regulated by the UNIDROIT Convention on International Factoring of 1988.

According to its legal characteristics, the factoring contract is an unnamed, mutually binding and pecuniary contract, contract with subsequent execution of payment, and a contract concluded *intuitu personae.* In practice, this contract is usually concluded in writing and may become formal, if the contracting parties agree on the form as a condition of validity. In terms of the technique of its conclusion, the franchise contract is, as a rule, concluded as a

[33] *Rad na izradi Građanskog zakonika..., suppra*, p. 303-307.

contract of adhesion. The legal nature of the factoring contract is mixed (elements of cession contracts, loan contracts, guarantee contracts, *locatio operis* etc). [34]

The Draft emphasizes that difficulties in defining the factoring contract arise from the different types of factoring operations, especially since the factor can assume the obligation of collecting the transferred receivables from the debtor, whether by buying them, as in the so-called recourse factoring, whether by taking on the obligation of guaranteeing payment to the client, the so-called non-recourse factoring.[35] For these reasons, the Draft proposes three alternative definitions of factoring contracts. Alternative no. 2 in the Draft adopts the solution from the UNIDROIT Convention on International Factoring, which comprises the following definition: „Pursuant to the factoring contract, one party, which is the supplier of goods or services (client) is obliged to transfer to the other party (the factor) existing or future receivables towards a third party arising from the contract on the sale of goods or the supply of services, or from the labour performed, while the factor is obliged, with a compensation of costs and a fee, to fulfil a minimum of two of the following obligations: 1. to provide an advance payment to the client (payment of receivables before they are due, including the loan and advance payments related to the claims in question); 2. to charge the transferred receivables; 3. to guarantee, to the client, that these receivables will be paid (taking on the risk of paying the receivables in case of debtor insolvency), 4. to keep records on the client's receivables" (Art. 1, alternative 2 of the Draft).

B) Content and form of the factoring contract

Pursuant to the Draft, the factoring contract, under the threat of nullity, comprises: the names and business seats of factors and clients; the receivables being transferred; the information on the time the receivables are due, the method, time and location of the payment; amount and method of calculating remuneration charged by the factor for the services provided. In addition to the mandatory elements, the Draft states, *exempli causa*, that the factoring contract may also comprise elements pertaining to: the debtor from the principal business transaction, security instruments, applicable law, method of solving disputes arising from the contract and other elements agreed on by the contracting parties (Art. 2). The Draft requires, as a condition of validity, that the factoring contract be in writing (Art. 3).

C) Subject of the factoring contract

With regards to the general rules of the law on contracts and torts regarding contract validity, the subject of a factoring contract must be possible, permitted, defined or definable. The subject of a factoring contract is the repurchase of receivables that have not yet matured. The subject of the contract, as a rule, can comprise not only existing and periodic receivables, but also future and any other receivables that the factor's client may have or will have towards third persons. These are mostly short-term receivables that become due within 90 to 120 days. Pursuant to the grounds that they derive from, the receivables may originate from contractual relationship of the factor's client, and not from transferable bonds.[36]

Pursuant to the Draft, the client transfers to the factor one or several existing or future

[34] For more on the factoring contract in Serbian legal literature, see M.Vasiljević, *Trgovinsko pravo ("Commercial Law")*, Belgrade, 2006, p. 290-293; R.Vukadinović, *Međunarodno poslovno pravo ("International Business Law")*, Kragujevac, 2009, p. 414-427.

[35] *Rad na izradi Građanskog zakonika..., suppra*, p. 303.

[36] R.Vukadinović, *suppra*, p. 417.

receivable, defined or definable, in whole or in part, individual or grouped. The contract is valid if the receivable is defined, or if it comprises information based on which the receivable may be defined at the latest at the time it falls due. A future receivable must be defined at the latest at the moment it arises, in which case a new document on the transfer of the receivable is not necessary. The subject of a claim may also be a conditional receivable and, once the conditions are met, a new contract is not necessary. With the transfer of receivables, auxiliary rights are also transferred to the factor (the right to prior payment, pledge rights, rights to ,interest, contractual penalty etc), in the manner and in the scope prescribed by the franchise contract (Art. 4). Existing receivables are transferred to the factor at the moment the factoring contract is concluded, except if otherwise specified in the contract. Future receivables that are the subject of the factoring contract are transferred to the factor at the moment they arise, unless otherwise prescribed in the contract. The clause in the contract between the client and the debtor, prohibiting the transfer of claims, has no legal effect in the relationship between the client and the factor. Transfer of financial receivables to the factor is valid even when there is an agreement between the client and his debtor on limiting or prohibiting the transfer of receivables. The stated rule does not liberate the client from liability for breach of contract towards the debtor (Article 5).

D) Contracting Parties

In an export factoring transaction, there are three contracting parties: the exporter, or seller of goods and services, the factoring organisation or factor, and the buyer, i.e. importer or receiver, or the user of the services. A factoring contract is concluded between the factor and the exporter, designated as the client. In practice, banks and similar financial institutions usually appear as factors. In general, any person with an interest to perform this activity may act as a factor, but it is assumed that this person has significant financial means at their disposal. Clients are persons with valid outstanding receivables, on any grounds, towards foreign persons, but when it comes to export factoring, they are sellers or exporters of goods or services. In addition to these persons, another party to the transaction is the debtor from the original transaction, who maintains this position towards the factor as well. Even though he is not a contracting party, pursuant to the solution common in practice and accepted by the UNIDROIT Convention, the debtor must be informed of the transfer of claims.[37]

2) Types of franchise contracts

In the comparative law doctrine, factoring contracts are classified by different criteria.[38] We will present the most commonly used classifications of factoring transactions. Pursuant to the territorial criterion, there are domestic and international factoring. In international factoring[39], as a rule, there are four participants: the seller (client), his domestic factor, the foreign buyer (debtor) and the corresponding factor in the buyer's country. Pursuant to the criterion of the subject of obligation and factoring function, there are recourse factoring and non-recourse (quasi) factoring. Recourse factoring (*Old Line Factoring; Conventional Notification Factoring*) is the type of contract in which the factor buys the client's account receivable with a discount, once it becomes due or prior to its maturity, whereby they supply a cred-

[37] R.Vukadinović, *suppra*, p. 416-417.

[38] For more, M.Vasiljević, op. cit, R.Vukadinović, op. cit.

[39] See the classification of the international character of this activity in the UNIDROIT Convention on International Factoring.

it or other factoring services. In this type of factoring, the factor does not appear as a guarantor, as the account receivable is definitely bought, while on the other hand, pursuant to a special provision in the contract, the party transferring the receivable (the client) may guarantee the factor the recoverability of the receivable form the debtor. Non-recourse factoring is factoring in which the factor takes over the receivable just to collect it for the client, and, as a rule, guarantees the its recoverability.[40] According to the type of the basic activity from which the receivable that is the subject of the transfer derives, factoring can be classified into export factoring (general factoring activities) and factoring in other activities (special factoring activities). In terms of the transparency of the factoring activity with regard to information passed to the debtor from the basic activity on the transfer of receivables, factoring can be classified into open and concealed factoring.[41]

3) Rights and obligations of the contracting parties

The principal obligation of the client from the factoring agreement is to transfer the receivable to the factor. This transfer is performed through a cession contract. With the transfer of the principal receivable, auxiliary rights are also transferred to the factor (the right to prior payment, pledge rights, rights to interest, contractual penalty, etc). The consent of the debtor is not required for the validity of the transfer of receivables to the factor, but the debtor must be informed of the matter. In this respect, the Draft prescribes that the debtor must be notified in writing and that this written document must comprise: the information and documents according to which it can be established, unambiguously, which receivables have been transferred; information on the factor or successive factor; instructions and information on the bank account that the debtor should pay the debt into. This notification is deemed delivered even if sent by telegram, fax, e-mail or other common means of communication, providing evidence of the content of the notification and the definite identification of the sender, as well as the proof that the debtor has received the notification. The debtor is not obliged to pay the factor, or successive factor, for the receivable transferred if they had not been notified in the prescribed matter, but his obligation towards the client remains. Fulfilment of an obligation towards the client prior to receiving the notification on transfer is valid and frees the debtor from the obligation, but in this case, the client is obliged to transfer the collected amounts, pertaining to the receivables transferred to the factor, without delay (Art. 9). The debtor is entitled to any objections towards the factor that he could put up to the client up to the time at which he was notified of the transfer. The debtor may object to setting off his receivable only if the debtor's receivable became due no later than the time when the notification on the transfer of receivables to the factor is received (Art. 10). The client is liable to the factor for the existence of receivables that are subject to transfer at the time when the transfer is already performed and for the recoverability of the transferred receivables, except if it was agreed otherwise. The client is liable for the recoverability of the receivables due, at the time they are transferred and for the outstanding receivables, at the moment when they mature (Art. 8).

The factor's obligations differ depending on the type of the factoring activity taking place. In general, the factor's obligations pertain to the payment of receivables, providing credits, guaranteeing payment and performance of other services.[42]

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[40] Classification taken from M.Vasiljević, *suppra,* p. 292.

[41] For more, see R.Vukadinović, *suppra*, p. 415 and onwards.

[42] M.Vasiljević, *suppra*, p. 291.

With regards to the factor's rights, the Draft comprises provisions on the right of the factor to collection from the debtor, on the risk of collecting the receivables from the debtor and on successive factoring.

Pursuant to the Draft, if a transfer of receivables for payment has been agreed by the parties to the factoring contract (purchase of the agent's receivables towards the debtor), the factor is entitled to all amounts received from the debtor for the payment of the transferred receivable, and the client is not liable if those amounts are smaller than the price at which the receivables were transferred to the factor. On the other hand, if the receivable has, pursuant to the factoring contract, been transferred to the factor only for collection (securing the payment) and the contract on the transfer of receivables does not prescribe otherwise, the factor is obliged to submit to the client a balance sheet of the amounts paid and transfer to them the amount exceeding the amount of the client's debt towards the factor under the factoring agreement. If the funds charged from the debtor are less than the claim of the factor towards the client pursuant to the transfer of receivables, the client is obliged to pay the remainder of the debt to the factor (Art. 6).

If a transfer of receivables has been agreed in the factoring contract for the collection of payments, the factor assumes the risk of collecting the transferred receivables. In case of this type of collection, the client will, as an exception, assume the risk of collection after the transfer of the receivables: 1) if the client, at the time the contract with the debtor was concluded, knew or should have known that the debtor is incapable of paying the debt; or 2) if the client did not submit to the factor, or informed them of, all the information and documents that were in his possession or that he knew about,, which are relevant to the determination and calculation, as well as collection of the payment, at the latest at the time of transfer. If the transfer of receivables has been agreed on under the factoring contract solely for the purpose of collection (securing the payment), the risk of collecting the payment may also be regulated in a different manner (Art. 7).

The factor may transfer the transferred receivable further to the next factor (successive factoring) only if it is permitted by the factoring contract. The successive factor is the legal successor from the contract concluded between the factor and the client, or between two factors, and he takes on all the rights and obligations from the previous factor's contract. The aforementioned obligation of notifying the debtor applies to successive factoring as well (Art. 12).

4) Security instruments in factoring contracts

General rules of the Law on Contracts and Torts and lien apply to security instruments in factoring contracts, depending on the type and nature of the instrument used. When it comes to lien, in the Serbian legal system, chattel mortgage is regulated by the Law on Contracts and Torts (Articles 966 - 988), registered pledge on moveable assets is regulated by the Law on Pledges on Moveable Assets Listed in the Register[43] while mortgage is regulated by the Law on Mortgage.[44] Pursuant to the general rule of the Law on Contracts and Torts regarding the transfer of receivables by a contract (cession), auxiliary rights are transferred to the receiver together with the receivables, such as the right to prior payment, mortgage, pledge, rights from contracts with guarantors, rights to interest, contractual penalty, etc. Still, the party transferring the right may transfer the object of the pledge to the receiver solely if the pledgor consents to it, otherwise it remains in the possession of the transferor for safe-

[43] "Official Gazette of the Republic of Serbia", May 30, 2003, no.57.

[44] "Official Gazette of the Republic of Serbia", 115/2005.

keeping, on behalf of the receiver (Art. 437 par. 1 and 2). With regards to special rules on the factoring contract, the Draft prescribes that auxiliary rights are transferred to the factor (the right to prior payment, pledge rights, rights to interest, contractual penalty, etc) together with the transfer of receivables, in the manner and the scope prescribed by the factoring contract (Art. 4 par. 5).

5) Credit succession in factoring contracts

Serbian legal system has no regulations on this issue.

6) Factoring register

Serbian legal system has no regulations on this issue.

7) Other issues

To be discussed.

FINANCIAL LEASING

1) Legal regulation

Financial leasing in the Serbian legal system is regulated by the Law on Financial Leasing of 2003.[45] By regulating this relatively new field of economic and legal relations, this Law attempts to introduce a high level of legal security in these relations, without limiting the possibility of their further development, but rather encouraging and stimulating such development. Therefore, the Law establishes a general framework for leasing activities in its provisions, allowing the contracting parties to regulate their relationships within that framework through mutual agreement. In this way, the principle of autonomy of will, as an expression of centuries-long evolution of contract law and the imperative of compliance with contracts, embodied in the principle of *pacta sunt servanda*, have found their full expression and application in this Law.[46]

Given that financial leasing has developed into a significant and commonly applied business transaction over the last two decades, its regulation by law was deemed necessary for legal security purposes. Existence of legal rules in this field is in the interest of potential participants in financial leasing activities, who should, prior to engaging in this activity, be familiar both with norms that must be applied (imperative rules) and norms to be applied when certain issues in their relationships are not regulated by mutual agreement (dispositive rules). In this respect, by regulating this transaction by law, a necessary degree of legal security is instilled into relationships arising from financial leasing, expressed in the fulfilment

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[45] "Official Gazette of the Republic of Serbia", May 27, 2003. no. 55.

[46] On the Law on Financial Leasing of the Republic of Serbia, see J. Perović, *Komentar Zakona o finansijskom lizingu (Commentary on the Law on Financial Leasing),* Belgrade, 2003; J. Perović, *Financial Leasing in Serbia: an Overview of Recent Legislation,* Uniform Law Review, UNIDROIT, 2005-3, Rome, p. 503-516; J. Perović, *Finansijski lizing kao faktor podsticanja investicija (Financial Leasing as an Investment Stimulating Factor)*, *Oživljavanje privrede i završetak tranzicije* (Revival of the Economy and Completion of Transition"), Kopaonik business forum 2004, Belgrade, 2004, p. 140-152.

of two main requirements – creation of conditions for an efficient and unhindered performance of financial leasing activities and legal protection of the economically weaker contracting party.

With regard to the issue of whether financial leasing should be prescribed by the Law on Contracts and Torts or by a separate law, arguments in support of the latter were accepted. In this context, it should be kept in mind that the leasing agreement represents only a part of a complete financial leasing transaction as this transaction includes significant aspects outside the field of contracts and torts – status-economic (status of the lessor and lessee), procedural-legal (procedure of acquiring possession over the leasing object), customs, tax and accounting, as well as the aspect of necessity of existence of a financial leasing register to ensure the security of legal transactions. All these aspects of financial leasing could not be encompassed by the Law on Contracts and Torts whose provisions pertain to the field of contracts and torts. Moreover, these issues could not be subject of any other general law either.

All the above circumstances pointed to the necessity of adopting a separate law that would encompass the majority of issues relevant to financial leasing transactions. In terms of legal security and from a practical viewpoint, it is generally more acceptable to regulate an institute within a single legal act than to have it regulated, in its different segments, by numerous different laws and bylaws, allowing for the possibility that these might conflict. The requirement for unique regulation of financial leasing does not contradict the need to regulate customs, tax and accounting issues by adequate public legal regulations due to specific features of the matter they pertain to, provided they are harmonised with the general solutions of the Law that, as the principal source, regulates financial leasing.

The principal legal source used in this Law in defining financial leasing transactions, its basic characteristics and rights and obligations of parties to these transactions was the UNIDROIT Convention on International Financial Leasing.[47] A comparative analysis of this Law and the Convention shows that the Law, especially with regard to its basic issues, contains a large number of solutions from the Convention, thus transposing internationally accepted standards into national legislation, in accordance with the entire national legal system, legal tradition and fundamental legal principles.

In addition to the UNIDROIT Convention, a significant legal source in drafting this Law were the solutions of the Serbian Law on Contracts and Torts pertaining to legal transactions related to financial leasing. Thus, the Law on Contracts and Torts regulates rental agreements (Art. 567–599), agreements on sale with reservation of title – *pactum reservati dominii* (Art. 540–541), sale with payment in instalments (Art. 542–551), agreements on loans (Art. 557–566) as well as credit agreements (Art. 1065–1071).[48]

Finally, in drafting the Law, rules of national laws of other countries regulating financial leasing were also taken into consideration, as well as doctrine views and judicial practice in comparative law.

All these different legal sources were harmonised through minor or major modifications, so that in their mutual relationships, as well as in their relationships with the main principles of the Serbian legal system, they form a harmonious whole.

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[47] *Unidroit Convention on International Financial Leasing.* The Convention was adopted in Ottawa on May 28, 1998 and came into force on May 1, 1995.

[48] On the aforementioned contracts, for further details see *Komentar Zakona o obligacionim odnosima (Commentary on the Law on Contracts and Torts)*, Ch. ed. Prof. dr Slobodan Perović, Savremena administracija, Belgrade, 1995; S. Perović, *Obligaciono pravo (Law on Contracts and Torts)*, Belgrade, 1990.

2) Basic concept and elements

A) The concept of financial leasing

For the purposes of the Serbian Law on Financial Leasing, a financial leasing transaction is a transaction in which the lessor:

1) enters into an agreement with the supplier of the leasing object chosen by the lessee, pursuant to the specifications provided by the lessee and under the terms approved by the lessee so far as they concern his interests, under which the lessor acquires title to the leasing object (supply agreement);
2) enters into a financial leasing agreement with the lessee, granting to the lessee the right to possession and use of the leasing object for the agreed period of time in return for the payment of the agreed fee in the agreed instalments by the lessee (financial leasing agreement).

The Law on Financial Leasing defines a financial leasing transaction, whereby this transaction has been given a precise legal determination in the Serbian legal system. In essence, this transaction involves two agreements – supply agreement and leasing agreement, which, by their mutual interaction, form the financial leasing transaction as a whole. The concept of financial leasing, thus defined, represents a wide legal formula encompassing different forms of this transaction which often include different legal regimes, but which are, nevertheless, dominated by certain common characteristics allowing for the possibility of formulating a definition such as this. These are general characteristics that have set themselves apart in practice from numerous different, less typical forms, making it possible to conclude with certainty that they are the determinants establishing the specific nature of financial leasing.

These characteristics are reflected primarily in the three-dimensional relationship of financial leasing, with three parties engaged in the transaction: the lessor, lessee and supplier, as well as in the rule that the compensation paid by the lessee to the lessor for the use of the leasing object (leasing fee) is established by taking into account primarily the depreciation of the whole or the most important part of the value of the leasing object. These two specific features, in synergy, represent the main characteristics of financial leasing and are, at the same time, the key starting points for distinguishing financial leasing from other related legal transactions.

Within the three-dimensional relationship between the parties to financial leasing, the lessor concludes two agreements – the supply agreement and the financial leasing agreement.

The supply agreement is the agreement concluded between the lessor and the supplier (manufacturer) selected by the lessee, pursuant to the specifications provided by the lessee and under the terms approved by the lessee (so far as they concern the lessee's interests), under which the lessor acquires title to the leasing object. Even though this is, essentially, a sale, this agreement has been designated as the supply agreement in the Law, taking into consideration, first of all, that instead of sale, some other contractual relationship could be established between the lessor and the supplier, which would entail complete disposal of the leasing object and in which the lessor, under the conditions prescribed by the Law, would acquire title to the leasing object (e.g. exchange agreement). In addition, the term *supply agreement* contributes to a clearer distinction of mutual relationships between parties to financial leasing, bearing in mind their complexity and their mutual causal relationships.

Still, regardless of its name, what sets this agreement apart from the „classic" bilateral contractual relationship is that it implies the participation of a third party – the lessee, who is

not a party to the supply agreement. This is reflected in the fact that the lessee, as a rule, establishes the supplier to conclude an agreement with the lessor, prepares specifications to be used by the lessor to acquire the leasing object from the supplier and, finally, approves the agreement terms pertaining to his interests as the lessee.

The lessee's participation in the contractual relationship established between the lessor and supplier is a logical consequence of the specific nature of financial leasing transactions in which the lessor, as a rule, appears simply as the party financing the transaction. As such, he *de facto* is not involved in the selection of the manufacturer, type, amount and quality of the equipment that is the object of financial leasing, nor in the issues of its delivery, unless prescribed by the agreement that the lessor performs the delivery. Therefore, the lessee, as a rule, approves those clauses in the supply agreement that pertain to the type, amount and quality of the equipment leased, method, time and location of the delivery of the leasing object (unless specified in the agreement that the lessor performs the delivery) as well as other clauses related to the leasing agreement that the lessee concludes with the lessor. On the other hand, however, the lessee may not interfere with those clauses in the supply agreement which have a pure *inter partes* effect and pertain exclusively to the mutual rights and obligations of parties to this agreement (e.g. conditions under which the lessor acquires title to the leasing object). The lessee's participation in the contractual relationship established between the lessor and the supplier, i.e. departure from the classic rule on *inter partes* effect of agreements, represents one of the main specificities of financial leasing transactions that result in a number of significant legal consequences.

The financial leasing agreement is the agreement concluded by the lessor and lessee, obliging the lessor to transfer the authorisation to possess and use the leasing object to the lessee for the time period agreed in the agreement, while the lessee is obliged to pay the agreed fee in agreed instalments.

If this agreement is to be observed separately from the whole financial leasing transaction, it could be concluded *prima facie* that this is a classic rental agreement or, depending on the contents of the agreement in question, one of its modified forms (for example, rental with a repurchase right). It is exactly in this fact that the fundamental features of the financial leasing transaction are reflected, setting it apart from other related legal transactions. What clearly sets a rental agreement apart from a leasing agreement is that the leasing agreement always represents a *part* of the entire financial leasing transaction, i.e. the part whose creation, effects and termination are inseparable from the relations arising from the supply agreement that represents the other constituent part of the financial leasing transaction. In other words, the financial leasing agreement may not be concluded or exist independently of the supply agreement because financial leasing, *per definitionem*, represents a symbiosis of these two agreements, the mutual conditional relationship of which represents the main determinant of the transaction.

The specific nature of financial leasing transactions causes the financial leasing agreement, just like the supply agreement, to yield legal effects that are an exception to the rule on *inter partes* effects of an agreement, extending the effects to a third party – supplier, who is not a contracting party. The most significant of these effects is that the supplier, and not the lessor, is liable to the lessee for any material defects on the leasing object, unless agreed otherwise (Art. 16). Further, there is the rule that the lessee, even though he has not concluded an agreement with the supplier, may, in case of failure of delivery, delay in delivery or delivery of a faulty product, use the same legal instruments towards the supplier that he would be entitled to if he was a party to the agreement, pursuant to the Law on Contracts and Torts,

with the exception of termination or cancellation of the agreement and request for a discount (see Art. 38 and Art. 24 related thereto).

With regard to the obligations of parties to the financial leasing agreement that have a pure *inter partes* effect, it seems that the mere concept of the financial leasing agreement points to the fundamental obligation of the lessor to transfer the authority to possess and use a certain moveable non-consumable object to the lessee, so that the lessee could use it over the agreed period of time and by paying the agreed fee in agreed instalments. In order to transfer these authorisations to the lessee, the lessor must first acquire the leasing object (acquire title to it), in accordance with the lessee's specification, from the supplier who, as a rule, is named by the lessee (Art. 14). This means that rights and obligations of parties to the financial leasing agreement must always be observed in light of the whole transaction. In addition to the aforementioned obligation of transferring authorisations, the lessor is obliged to provide protection to the lessee from legal defects of the leasing object, i.e. to provide the lessee with unhindered possession of the leasing object (see Art. 18, 19, 20 and 21). Therefore, the financial leasing agreement inevitably produces two obligations of the lessor towards the lessee: obligation to transfer the authorisation to possess and use the leasing object and obligation to provide protection in case of legal defects.

On the other hand, the lessee, for the benefit acquired via the financial leasing agreement, is obliged to pay to the lessor an adequate fee, which, in this transaction is *per definitionem* paid in instalments – this is his contractual obligation (Art. 27). In addition, he is obliged to take over the leasing object in the manner, time and in the location specified in the agreement, regardless of whether it is the supplier or the lessor who makes the delivery (Art. 23). Since the financial leasing agreement entitles the lessee to use the leasing object over a certain period of time, the lessee is obliged to use the object in the manner prescribed in the agreement or in the manner derived from the purpose of the object itself, to treat the object with the diligence of a good businessman, i.e. diligence of *bonus pater familias* (Art. 25), as well as to maintain the object in good condition and perform all necessary repairs (Art. 26). After the expiration of the financial leasing agreement, the lessee is obliged to return the leasing object to the lessor since the right of ownership is not transferred by this agreement, but only the authorisation to hold and use the object over a defined period of time. Still, this is a dispositive norm as the Law allows the contracting parties to prescribe the right of the lessee to repurchase the leasing object after the expiry of the agreement, or to extend the financial leasing agreement – the so-called „option" (see Art. 33 and Art. 42). Finally, in the majority of cases, the obligation of insuring the leasing object rests with the lessee, although it can be prescribed otherwise by the agreement (Art. 34). The parties to the financial leasing agreement may undertake other obligations as well, as an expression of agreement of their autonomous wills. The Law prescribes only the aforementioned obligations as they are general and characteristic of all financial leasing agreements.

B) Scope of application

The Law on Financial Leasing regulates financial leasing transactions, financial leasing agreements, the rights and obligations of parties to a financial leasing transaction and the financial leasing register. In cases not governed by the Law, the provisions of other laws apply to the parties and legal relations arising from financial leasing transactions concluded in accordance with the Law (Art. 1 of the Law). The scope of application of the Law as a whole is determined by the formulation that in cases not governed by the Law, the provisions of other laws apply to the parties and legal relations arising from financial leasing transactions concluded in accordance with the Law. It is thus established that the Law is applied as *lex specialis*, which means that:

a) this Law applies in cases where this Law and another law of general character contain different rules on a specific issue relating to financial leasing. This rule is especially important when it comes to the Law on Enforcement Procedure, Law on Companies and Law on Bankruptcy Proceedings.
b) the provisions of other laws applicable to entities and relationships that are not governed by this Law, which is especially important when it comes to the subsidiary implementation of the Law on Contracts and Torts, whose provisions apply to all matters relating to contractual-legal aspects of financial leasing that are not regulated by the Law on Financial Leasing. In other words, the Law on Financial Leasing regulates only those issues that are specific to the institute of financial leasing, while other, general issues that fall within the field of the Law on Contracts and Torts are left to the relevant general principles and rules of the general part of the Law on Contracts and Torts and the norms of agreements whose content is closest to the concrete contractual relationship (the inception and validity of agreements, general rules on the rights and obligations of contracting parties under the agreement of sale such as the transfer of objects, material and legal defects, general rules on termination of agreement, general rules on causing injury and liability for damages, etc). In the same sense, when it comes to the economic-status aspect of financial leasing, the rules of this Law are applied on financial leasing entities that fall under application of the Law on Companies, except in the area that the Law on Financial Leasing specifically regulates. Finally, due to the nature of the subject matter that they refer to, tax, customs and accounting aspects of financial leasing remain outside the framework of this Law. In terms of tax, customs and accounting treatment that is of practical importance for the operation of financial leasing, other corresponding laws are relevant.

C) The financial leasing object

Pursuant to the Serbian Law on Financial Leasing, the financial leasing object may be only movable, durable goods (Article 4).

D) Parties to the financial leasing transaction include the lessor, the lessee and the supplier of leasing object

The lessor is a person who transfers the right to possession and use of the leasing object to the lessee for the agreed period of time in return for the agreed fee, while retaining the title to the leasing object. According to the original text of the Law, the lessor is a company that performs financial leasing transactions in accordance with the legislation of the country of its establishment, and whose minimum monetary part of fixed capital is €100,000 (Article 10). Following the amendments to the Law on Financial Leasing of 2005, the lessor is a company established in accordance with the law regulating the status of companies, whose monetary part of fixed capital may not be below €100,000 in the dinar equivalent at the average exchange rate of the National Bank of Serbia on the day of payment, and which has obtained a license of the National Bank of Serbia to perform financial leasing transactions in accordance with the Law on Financial Leasing. The lessor may perform only the financial leasing activity and is obliged to ensure that in his business activity his core capital is always in the amount not below the specified amount of €100,000 (Article 10 of the Law after amendments in 2005).

For the purposes of the Law, the lessee is a legal or natural person to whom the lessor transfers the right to possession and use of the leasing object for the agreed period of time in return for the agreed fee (Art. 11). With regard to the status of the lessee, the Law stipulates that the lessee may be a legal and natural person who concludes the financial leasing agreement in accordance with provisions of this Law. In this context, two facts are important: a) as opposed to the lessor, the lessee, in accordance with this Law, may be any legal person, regardless of whether it is an organisation registered to gain profit; b) the lessee, in terms of this Law, may also be a natural person, irrespective of whether he or she performs a registered activity in order to gain profit.

Pursuant to the Law, the supplier of the leasing object is a legal or natural person who transfers the title to the leasing object to the lessor, for the purpose of delivery of the leasing object to the lessee for possession and use, for the agreed period of time and in return for the agreed fee (Art. 12).

E) The basic principles of financial leasing

The principle of autonomy of will as an expression of the centuries-long evolution of contract law and the imperative of compliance with contracts embodied in the principle *pacta sunt servanda* have found its full expression and implementation in the Serbian Law on Financial Leasing. In financial leasing transactions, special importance is given to the principles of the Law on Contracts and Torts, in particular to the principle of equality of the parties, principle of good faith and honesty, principle prohibiting the creation and exploitation of a monopoly position, principle of equivalence of mutual contributions and principle of application of good business practice.

3) Commercial character of financial leasing

The financial leasing agreement that is concluded in accordance with the Serbian Law on Financial Leasing is a commercial agreement in terms of the Law on Contracts and Torts, except in cases where the lessee is a natural person not conducting a registered business activity for profit (Art. 8 of the Law).

One of the biggest dilemmas raised during the preparation of this Law related to whether the application of the Law was to be limited to business operation in which the object of financial leasing was to be used for professional purposes, so that the lessee can only be an economic entity or person who performs a registered business activity for profit, or whether its application should be extended to individuals not conducting business activities for profit.

As the most important argument in favour of the first thesis, it was pointed out that the main purpose of this Law is stimulation of economic activity, and that there was no reason for individuals not conducting business activities to use the favourable regime provided by this Law for financial leasing transactions. In addition, it was also underscored that the rules of this Law are adapted to the economic activities performed by professionals, who, given that such activities are a part of their profession, are acquainted with the importance and consequences of a financial leasing arrangement. In contrast, natural persons who are not professionals in the field and therefore lack necessary knowledge, may be exposed to the risk of abuse by the lessor as the economically stronger party, particularly in the absence of legislation governing consumer protection.

However, based on a detailed analysis of the solutions of domestic and comparative law and opinions of the legal doctrine on the one hand, and on extensive discussions with representatives of domestic and international business practice on the other, the authors of the Law

favoured the second argument, allowing the lessee to be a natural person not conducting an economic activity in the form of profession. This solution was supported mainly by the needs of the domestic legal system.

Primarily, even though the immediate objective of this Law is stimulation of economic activity and economic development in general, its general purpose is not exhausted solely in the field of commercial operations. The mission of the Law is to build legal security, fair business practices and good customs in the relations arising in the field of financial leasing, regardless of the different status of parties in these relations. The final, practical outcome of this Law is the improvement in the living standard of the population in general, the prerequisite for which is that its use covers the widest possible range of legal entities. For these reasons, the legislator tried to find a flexible solution that should provide for legal certainty in this kind of contractual relationships, but at the same time not close the path to the entirety of positive effects that this Law brings, but rather promote these effects.

With the exclusion of natural persons not engaged in economic activities within the field of application of this Law, the opposite effect would be achieved: this category of persons for whom financial leasing, due to all the benefits that it brings, is an economically favourable business, would be, in case they enter into this type of contractual relationship, devoid of legal certainty provided by legal regulation of this legal institute. This means that financial leasing agreements where the lessee is a natural person not performing an economic activity would be left to arbitrary practices, which creates the basis for possible abuse by the lessor as the economically stronger party.

In this regard, the authors of the Law were guided primarily by the principles of the Law on Contracts and Torts, which contains the principle of uniform regulation of contractual relations, according to which its rules apply equally to all the relations that arise from goods and services transactions, and include both relations between legal entities and relations between natural persons, as well as relations between all these entities. Exceptionally from this principle, the Law in certain cases envisages special rules for agreements in the economy (commercial agreements) as the very nature of these agreements requires specific regulation of certain issues.

In the context of the Law on financial leasing, this duality realises a double function.

Since financial leasing is primarily a commercial business that will in most cases be entered into by economic entities, it is of particular importance that the Law on Contracts and Torts recognises special rules that correspond to the nature and needs of commercial contracts. These rules of the Law on Contracts and Torts shall apply to financial leasing agreements in cases not regulated by the Law on Financial Leasing, if the parties are commercial entities.

In contrast, when the lessee is a natural person not performing a registered activity for profit, the cases not regulated by the Law on Financial Leasing will be governed by general provisions of the Law on Contracts and Torts not related to commercial agreements and the law governing consumer protection.

4) Duration of financial leasing agreement

In terms of its legal nature, the financial leasing agreement belongs to the category of agreements with permanent execution of obligations (rent, partnership, concession, insurance, etc.). The fact that the execution of the agreement always involves a certain length of time and that a financial leasing transaction implies that the period of depreciation of the leasing object is longer than the period of validity of the leasing agreement (the so-called golden

rule of leasing) presupposes specific rules on the minimum period for which the financial leasing agreement is to be concluded. According to the Law on Financial Leasing, the minimum term of the leasing agreement may not be less than two years from the date of conclusion of the agreement (Art. 3).

5) Internal and international financial leasing

If concluded as an internal legal transaction, a financial leasing transaction is subject to the Law on Financial Leasing, Law on Contracts and Torts and other relevant laws of the Republic of Serbia. On the other hand, if financial leasing is of international character, it is necessary to draw attention to the amendment to Article 10 of the Law on Financial Leasing of 2005, according to which the lessor is a company established in accordance with the Law on Companies, which has obtained a license of the National Bank of Serbia to perform financial leasing transactions. In other words, the lessor is considered to be only a Serbian company, which implies that this Law does not apply to cases of international financial leasing, i.e. to such leasing transactions where the lessor is a foreign company. However, in terms of general rules, the contractual relations of international financial leasing are governed by the Serbian Law on Financial Leasing and the Serbian Law on Contracts and Torts, if the Serbian law is stipulated as the applicable law by the autonomy of will of the parties. In absence of the *electio iuris* clause, these laws will be applied if the corresponding rules of international private law lead to Serbian substantive law.

6) Contents and form of financial leasing agreement

According to the Serbian Law on Financial Leasing, the financial leasing agreement must include the following: precise identification of the leasing object, the amount of fee to be paid by the lessee, the amount of individual fee instalments, their number and time of payment, and the duration of the agreement. In addition to these, the financial leasing agreement may include the following: the place, time and manner of delivery of the leasing object, title to the leasing object, the party obligated to insure the leasing object and insured risks, the manner of termination of the agreement, option to purchase or extend the agreement, the transportation costs of the leasing object, its installation, disassembly and maintenance, parts replacement, servicing, technical and technological improvement, training of the lessee's staff to use the leasing object and other terms on which the parties reach an agreement. The leasing agreement must be concluded in written form (Art. 6).

The aforementioned provision points to three important elements of financial leasing agreements: the object of financial leasing, the leasing fee (total amount and the amount of individual instalments, their number and time of payment) and duration of the agreement. The principle of the autonomy of will allows in this agreement, as well as in any other, that every other element can become an important element of the agreement, when this results from the consent of contracting parties.

In addition to these important elements, the Law states *exempli causa* the elements that the financial leasing agreement may contain and which represent common clauses in agreements of this kind. The *ratio* of this provision is reflected in the legislator's intention, given that the financial leasing agreement is relatively unknown in the local business practice, to refer legal entities (primarily domestic ones) to those clauses which are most likely to occur in this agreement and are a customary but not a necessary part of its content.

For a financial leasing agreement to be valid, it must be concluded in written form. By the requirement for the agreement to be made in writing contained in that provision of the

Law, the financial leasing agreement in the Serbian legal system is classified in the group of formal agreements. These are agreements in which the fulfilment of a certain form is an important, constitutive component of the agreement, which makes the agreement, in case of failure of observance of such form, subject to sanction of absolute nullity (important form, form *ad solemnitatem*). By prescribing the written form as a condition of validity of the financial leasing agreement, the legislator sought to protect, above all, the interests of contracting parties. In fact, the financial leasing agreement, which, as a rule, refers to objects of greater value, is a relatively new and insufficiently known instrument in domestic business operations, which is why in regard to this agreement there are no customary standards or developed case law. For these reasons, the needs for legal certainty of contracting parties require due attention on conclusion of such agreements. Through written form, the existence and content of the financial leasing agreement are reliably determined, which is important both in terms of the interests of parties to financial leasing, as well as from the perspective of legal security in general.

7) Rights and obligations of parties to financial leasing

The lessor

According to the Law on Financial Leasing, the lessor is obliged to acquire the leasing object from the supplier chosen by the lessee, pursuant to the specifications provided by the lessee – *the obligation to acquire the leasing object* (Art. 14). In the event of the lessee's bankruptcy, the lessor has the right to exempt the leasing object (exclusion right) from the lessee's bankruptcy estate, in accordance with the law governing bankruptcy proceedings. The lessee and the court competent for conducting bankruptcy proceedings shall notify the lessor, without delay, of the initiation of the bankruptcy proceedings – *protection in the event of lessee's bankruptcy* (Art. 15). The supplier is liable to the lessee for material defects of the leasing object, unless otherwise provided in the agreement – *exclusion of liability for material defects* (Art. 16).[49] The lessor does not incur any liability to the lessee for damage caused by the leasing object except to the extent the lessee has suffered loss as a result of its reliance on the lessor's skill and judgement, or due to the lessor's participation in the selection of the supplier, or specification of the leasing object, unless otherwise provided in the agreement – *exclusion of liability for damage caused by the leasing object* (Art. 17). The lessor is liable for existence of third party's rights on the leasing object which exclude, reduce or limit the lessee's unhindered possession, and of which the lessee was not informed, nor did he agree to accept the leasing object on such conditions – *liability for legal defects* (Art. 18). The lessee notifies the lessor of any third party's claim of rights to the leasing object referred to in Article 18 and request the lessor to free the leasing object of the third party's right or claim within a reasonable time thereafter. The lessee, who initiated and lost a lawsuit against a third party, may invoke the lessor's liability for legal defects, unless the lessor proves that he had available means to reject the third party's claim. The lessee also has the right to invoke the lessor's liability for legal defects of the leasing object even when he, without notifying the lessor and without entering into lawsuit, admitted a third party's right. If the lessee has paid a certain amount of money to the third party to give up its right, the lessor may be released of his liability if he indemnifies the lessee for the amount paid and the loss suffered – *notifica-*

[49] V. J.Perović, *Odgovornost za nedostatke na predmetu finansijskog lizinga, (Liability for Defects on the Leasing Object),* Pravo i privreda, br. 5-8/2006, Belgrade, 2006, p. 445-458.

tion of the lessor (Art. 19). The leasing agreement is terminated if the leasing object is removed from the possession of the lessee and the lessor does not act according to the lessee's request referred to in the previous provision, unless otherwise stipulated in the agreement. If the lessor does not act according to the lessee's request referred to in the previous provision, where the lessee's unhindered possession is reduced or limited, the lessee has the right to terminate the agreement if the purpose of the agreement cannot be fulfilled accordingly, or has the right to request proportionate reduction of the leasing fee. In both cases, the lessee has the right to claim damages for the loss suffered. The lessee does not have the right to claim damages where the leasing object is taken away from him or his unhindered possession is reduced or limited, if he was aware of such possibility at the time of the conclusion of the leasing agreement – *sanctions for legal defects* (Art. 20). The lessor's liability for legal defects of the leasing object shall not be excluded or limited by the agreement – *limitations or exclusions of the lessor's liability by the agreement* (Art. 21). The lessor may transfer title to the leasing object to a third party. In case of transfer of title to the leasing object, the third party enters the role of the lessor, and the rights and obligations from the leasing agreement are established between him and the lessee accordingly. In this case, the third person cannot request that the lessee delivers the leasing object before the expiry of the agreed period of duration of the leasing agreement. The transfer of title to the leasing object to a third party may be excluded by the agreement or provided otherwise therein – *transfer of title to the leasing object* (Art. 22).

The lessee

The lessee is obligated to take over the leasing object in the manner, at the time and place specified in the agreement – *taking over of the leasing object* (Art. 23). If the supplier does not deliver to the lessee the leasing object, if he delivers it with delay, or if the leasing object has a material defect, the lessee may, in accordance with the law governing contracts and torts, refuse admission of the delivery or terminate the leasing agreement and is entitled to damage compensation. In this case, the lessor may uphold the agreement if he himself delivers the leasing object to the lessee without delay, under the conditions provided by the leasing agreement. Until the delivery obligation is performed in total conformity with the leasing agreement, the lessee has the right to suspend payment of the fee which he would, under the leasing agreement be required to pay to the lessor. If he terminates the agreement, the lessee is entitled to refund the fee he paid in accordance with the leasing agreement, minus the amount equal to the benefit derived from the use of the leasing object (reasonable amount) – *termination of agreement due to non-delivery* (Art. 24). The lessee shall use the leasing object with the diligence of a good businessman, i.e. diligence of *bonus pater familias*. The lessee shall use the leasing object in accordance with the leasing agreement or in accordance with the purpose of the leasing object. The lessee is liable for losses suffered by the use of the leasing object contrary to the leasing agreement or contrary to the purpose of the leasing object, regardless of whether the leasing object was used by him or a person authorized by him, or any other person whom he enabled to use the leasing object – *use of the leasing object* (Art. 25). The lessee is obliged to maintain the leasing object in good condition and perform all necessary repairs on the leasing object. The lessee is liable for losses suffered due to the failure to maintain the leasing object in good condition – *maintenance of the leasing object* (Art. 26). The lessee is obliged to pay the lessor the leasing fee in the amounts, at the time and in a manner provided by the leasing agreement – *payment of leasing fee* (Art. 27). The risk of accidental loss or damage of the leasing object shall be borne by the lessee. The risk shall pass to the lessee at the time of taking over the leasing object, unless otherwise

provided by the agreement – *risk of accidental loss or damage to the leasing object* (Art. 32). The lessee shall, upon termination of the agreement, return the leasing object intact, with all parts and attachments, to the lessor or the person whom the lessor designates, unless the leasing agreement stipulates that the lessee has the right to purchase the leasing object or to extend the leasing agreement. The lessee is not liable for the wear and tear of the leasing object due to its regular use or for any modifications of the leasing object – *obligation to return the leasing object* (Art. 33). The lessee shall insure the leasing object against risks specified in the leasing agreement, if not otherwise provided in the agreement – *insurance obligation* (Art. 34). The lessee may give the leasing object, in entirety or its parts, to any third party for use, with the written consent of the lessor. The lessor may terminate the agreement and claim damages if the lessee, without his written consent, gave the leasing object to any third party for use. The special procedure for repossession of the leasing object prescribed by this Law may also apply in case of termination of the agreement. Transfer of the leasing object to be used by any third party shall not relieve the lessee of his obligations to the lessor under the leasing agreement. Transfer of the leasing object for use by a third party may be excluded by the agreement or otherwise stipulated therein – *transfer of the leasing object to third party for use* (Art. 35).

The supplier

The supplier is obliged to deliver the leasing object to the lessee in good condition, with any parts and attachments, in the manner, at the time and place specified in the supply agreement, unless the leasing agreement provides that the leasing object is to be delivered by the lessor – *delivery of the leasing object* (Art. 36). If the lessee agreed to the contents of the agreement concluded between the lessor and the supplier, under which the lessor acquired title to the leasing object, subsequent changes to this agreement will not affect the lessee's rights, unless he consented to them – *amendments to the agreement* (Art 37). If the supplier does not deliver the leasing object to the lessee, if he delivers it with delay, or if the leasing object has a material defect, the lessee has the same rights he would have had under the law governing contracts and torts as party to the agreement with the supplier. Exceptionally to this rule, the lessee is not entitled, without the lessor's consent, to terminate or annul the agreement concluded between the lessor and the supplier, or the right to claim a price reduction. The supplier shall not be responsible both to the lessor and the lessee for the same damage – *supplier's liability to the lessee* (Art. 38). If the supplier was chosen by the lessor, he is jointly with the supplier responsible to the lessee if the leasing object is not delivered to the lessee, if delivered with delay, or if the leasing object has a material defect – *joint liability of the lessor and the supplier* (Art. 39).

8) Termination of financial leasing agreement

The general rules on termination of the agreement for failure to fulfil obligations prescribed by the Serbian Law on Contracts and Torts (Art. 124–132) apply to termination of the financial leasing agreement. In addition to general rules of the Law on Contracts and Torts, the Law on Financial Leasing envisages special rules: (i) on termination of the financial leasing agreement by the lessee due to non-delivery of the leasing object, delay in delivery, or material defects in leasing object, (ii) rules on termination of the financial leasing agreement by the lessor for failure to pay the leasing fee, (iii) rules on termination of the financial leasing agreement by the lessor in the event of unauthorised delivery of the leasing object by the lessee to a third party.

Rules on termination of the financial leasing agreement by the lessee are provided in Article 24 of the Law on Financial Leasing:

„If the supplier does not deliver to the lessee the leasing object, delivers it with delay, or if the leasing object has material defects, the lessee may, in accordance with the law governing contracts and torts, refuse admission of supply or terminate the leasing agreement, and is entitled to damage compensation.

In the case referred to in paragraph 1 of this Article, the lessor may uphold the agreement if he himself delivers the leasing object to the lessee without delay, under the conditions provided by the leasing agreement.

Until the delivery obligation is performed in total conformity with the leasing agreement, the lessee has the right to suspend payment of the fee which he would, under the leasing agreement be required to pay to the lessor.

If he terminates the agreement, the lessee is entitled to refund the fee he paid in accordance with the leasing agreement, minus the amount equal to the benefit derived from the use of the leasing object (reasonable amount)."

The delivery of the leasing object is one of the primary obligations in the financial leasing transactions. It consists of: 1) delivery of the leasing object at the time, manner and place specified by the leasing agreement, 2) delivery of the leasing object whose characteristics match those agreed. In this sense, the basis for breach of obligation of delivery, as a rule, is met by the failure of delivery, delay in delivery and delivery of the leasing object with a material defect. In financial leasing, the supplier performs the delivery obligation, unless otherwise agreed.

In case of failure to meet the delivery obligation, the lessee may: 1) refuse to receive the delivery and demand fulfilment in accordance with the agreement, 2) terminate the financial leasing agreement. In both cases, the lessee is entitled to compensation for damage suffered. These legal remedies of the lessee are subject to general rules of the Law on Contracts and Torts.

The lessee may opt to terminate the agreement as the strongest sanction for default on contractual obligations in three cases: when delivery is not made, when delivery is made with delay, or when the leasing object has a material defect that constitutes the basis for termination of the financial leasing agreement.

The answer to the question of whether the failure of delivery within the deadline gives the right to the lessee to terminate the agreement is reflected in the importance that the delivery period had for the lessee. In the assessment of this significance lies the answer to the delicate question of terminating the leasing agreement due to delay in delivery; except in cases where the importance of the agreement is expressly provided, i.e. when it apparently stems from the nature of the operation or the circumstances of the case, the lessor can, as a rule, oppose the termination, claiming that delivery within the deadline is not an essential element of the agreement. For these reasons, the lessee who does not intend to provide for another deadline for the fulfilment of the deadline, must pay particular attention to whether the conditions provided by Article 125 of the Law on Contracts and Torts for automatic termination are met, because in the opposite case, the termination could be disputed and the lessee liable to compensation.

In the context of the lessee's right to terminate the agreement due to material defect, the crucial question relates to conditions to be met for a specific defect to represent the basis for terminating the agreement, these conditions being the importance of the defect, its nature and

the moment of its existence.[50] As the nature of the defect, i.e. the visible and hidden defects, as well as the need for their being present at the time of transfer of the risk are general rules of the contracts and torts legislation, the focus at this point will be placed on the *importance* that a material defect must have so as to represent the grounds for terminating the financial leasing agreement.

According to the rules of the Law on Contracts and Torts relating to the sale agreement, the basic criterion to be taken into account when determining if the buyer has the right to terminate the agreement due to the existence of a material defect is reflected in the seriousness, i.e. gravity of the defect in question. In principle, the seller is responsible for all defects of assets that reduce their value or utility in view of the purpose envisaged by the agreement or arising from circumstances or intentions of contracting parties. However, the right to termination does not ensue from any defect, but only the one due to which the customer cannot achieve the expected benefits, but in the manner which materially frustrates the purpose of the agreement. Although the Law on Contracts and Torts in the context of the customer right to terminate the agreement does not expressly stipulate the requirement of seriousness of the defect, this requirement stems from the rules on termination of the agreement due to partial defects (Art. 492). According to the Law, partial defects relate to cases when only a part of assets has been delivered and when a smaller than contracted quantity of assets has been delivered. In each of these cases, the buyer may terminate the agreement only in respect of the part that has defects, i.e. only in respect of the part or the quantity that is missing (Art. 492, paragraph 1). The buyer can terminate the entire agreement only if the agreed quantity or the delivered asset represent a unit, or if he otherwise has a legitimate interest to receive contracted assets or the quantity as a whole (Art. 492, paragraph 2).

The above rules for terminating the agreement of sale due to material defects, in the context of financial leasing agreements, give room to the conclusion that the basic criterion for assessing permissibility of termination of an agreement on these grounds is the *purpose* for which the agreement was concluded. It is therefore necessary that this is a material defect due to which the lessee cannot achieve the benefit he reasonably expected from the agreement to such an extent that the purpose of the agreement cannot be achieved for the lessee. This is corroborated by another rule contained in the Law on Contracts and Torts according to which a slight material defect is not taken into account (Art. 478, paragraph 3), as well as the general rule that the agreement cannot be terminated for failure to fulfil an insignificant part of obligation (Art. 131).

According to the Law on Contracts and Torts, contracting parties may, by consent of their will, limit or exclude the seller's liability for material defects altogether. However, this provision of the agreement will be void if the defect was known to the seller and he did inform the buyer about it, and when the seller imposed this provision using his monopoly position. The buyer renouncing the right to terminate the agreement due to a material defect retains other rights relating to defects (Art. 486). These rules apply to the financial leasing agreement accordingly (see Art. 16).

Article 24 paragraph 2 of the Law on Financial Leasing, upholding the principle of *favor contractus* as one of the most important principles of this Law, stipulates that if the lessee chooses to terminate the agreement due to late delivery or non-uniform delivery, the lessor may maintain the agreement in force if he delivers the leasing object to the lessee without delay, under the conditions provided by the leasing agreement.

[50] V. J.Perović, Odgovornost za nedostatke na predmetu finansijskog lizinga, (Liability for Defects on the Leasing Object), Pravo i privreda, br. 5-8/2006, Belgrade, 2006, p. 445-458.

As the obligation to pay the leasing fee by the lessee is equivalent to his authority to possess and use the leasing object, Article 24 paragraph 3 stipulates that the lessee has the right to suspend payment of the leasing fee until the fulfilment of the delivery obligation which is in total conformity with the financial leasing agreement.

The rules on termination of the financial leasing agreement by the lessor for failure to pay the leasing fee are given in Article 28 of the Law on Financial Leasing:

„The lessor may terminate the agreement if the lessee is late in payment of the first instalment.

If after the first instalment payment, the lessee delays payment of one or more successive instalments whose total amount reaches a quarter of the total fee, the lessor may terminate the agreement or require the lessee to pay the remainder of the fee together with interest.

Notwithstanding the provisions of paragraphs 1 and 2 of this Article, if the lessee does not pay one instalment, the lessor may terminate the agreement in respect of any future payment obligations, if the given circumstances clearly indicate that they will not be met.

The lessor who wishes to terminate the agreement for reasons specified in paragraphs 1 to 3 of this Article shall fix an additional period of time of reasonable length for the performance by the lessee of his obligations.

If the lessee does not fulfil the obligation within the deadline from paragraph 4 this Article, the leasing agreement is terminated as a matter of law.

In cases referred to in paragraphs 1 to 3 of this Article, the lessee may uphold the agreement by providing adequate assurances.

Termination of the agreement for failure to pay the leasing fee may be differently regulated by the agreement in compliance with mandatory legislation, public order and good customs."

The payment of the leasing fee, made in individual instalments, is the lessee's basic obligation under the financial leasing agreement. The execution of this obligation is subordinate to certain rules, according to which the lessee shall pay to the lessor the leasing fee in the amounts, terms and manner specified by the financial leasing agreement (see Art. 6 par. 1, Art. 7 and Art. 27).

According to this Law, legal consequences of the delay, i.e. non-payment of instalments are different, depending on the manner and significance of the particular breach of this obligation by the lessee.

Thus, if the lessee has not paid the first instalment due, or if he is in delay with payment, the lessor may terminate the agreement. By paying the first instalment, the lessee demonstrates his serious intent to execute the agreement. As opposed to this, the fact that he is already overdue when the *first* instalment matures indicates his general unwillingness to fulfil his contractual obligations. In this context, the lessee may act in different ways: he may behave as if the agreement had never been concluded, i.e. do not undertake any action to meet the payment obligation; he may declare that he refuses payment; he may, as it is more often the case, raise various objections – that the agreement is not signed, that it is not valid, that the instalment is not due for payment, that he is currently in a difficult financial situation, etc. In such a case, if the lessee fails to fulfil his obligations even within the additional time that the lessor provided, the lessor may terminate the agreement on the basis of Article 28 paragraph 1 of this Law, in accordance with the general rules of the Law on Contracts and Torts relating to termination due to breach of obligations (Art. 124 onward).

If the lessee has paid the first instalment due, the lessor may terminate the agreement if the lessee is in delay with payment of one or more consecutive instalments that make up at least a quarter of the total leasing fee. In addition, rather than terminate the agreement, the

lessor may require the lessee to pay all of the remaining leasing fee together with interest. This rule takes into account the value of obligations that the lessee has already met through payment of individual instalments, as well as his willingness to continue to fulfil his obligations. In essence, this is the general rule of the Law on Contracts and Torts, under which the agreement cannot be terminated due to the failure to meet an insignificant part of obligation (Art. 131). This in principle means that there are no grounds for termination of the agreement due to the partial default on obligations if the purpose of the agreement is not essentially frustrated, and if the debtor shows willingness to fulfil his obligation in its entirety since he has already partially fulfilled it. Transferred to the field of financial leasing, it seems that the above request for the seriousness of the breach is realised in the case when the lessee is delinquent in the payment of the number of successive instalments whose total amount reaches a quarter of the total leasing fee. In this case, the lessor may terminate the agreement on the basis of Article 28, paragraph 2 of this Law, in accordance with general rules of the Law on Contracts and Torts relating to termination due to breach of obligations (Art. 124 onward).

In addition to termination of the agreement due to delay in payment of the first instalment and/or delay in payment of one or more successive instalments constituting at least a fourth of the total leasing fee, the lessor may terminate the agreement even when the lessee does not pay only one instalment, provided the current circumstances indicate the future payment obligations will not be met either. By contrast to previous cases, the lessee has not paid *only* one instalment (which is not the first one), which implies a partial fulfilment of obligation.

According to the general rules of the contracts and torts legislation, the agreement cannot be terminated for failure to fulfil an insignificant part of the obligation. This means that a partial fulfilment of the obligation may be the reason for terminating the agreement only when due to such fulfilment the purpose of the agreement cannot be achieved, or when it causes such injury to the other party that it substantially deprives that party of what it reasonably expected from the agreement. However, in certain cases, exceptions to this rule are allowed, meaning that termination is possible even when the failure to fulfil a specific obligation does not constitute grounds for terminating the agreement, but which, when viewed from the standpoint of the agreement as a whole, creates the basis to conclude that no further contractual obligations will be met. In this regard, the Law on Contracts and Torts stipulates the following rule: „when in a contract with successive obligations one party does not fulfil an obligation, the other party may, within a reasonable time, terminate the contract in respect of all future liabilities, if the circumstances indicate that no further obligations will be met" (Art. 129, paragraph 1). This rule of the Law on Contracts and Torts is the source of the provision of Article 28, paragraph 3 of the Law on Financial Leasing.

This rule enables the lessor who acted in accordance with the agreement in all respects to timely react and protect himself against future defaults on agreement. In addition, the *ratio* of this rule is also reflected in the reduction in damage caused by the default, which of course does not affect the lessor's right to claim damages.

In that sense, if the lessee has not paid one instalment due and the concrete circumstances clearly indicate that he will not pay any future instalments, the lessor does not have to wait for new instalments to become due in terms of paragraph 2 of this provision, but can terminate the agreement as soon as such circumstances become evident, after the unsuccessful expiry of the subsequent deadline for fulfilment. What constitutes grounds for terminating the agreement in this case is not default on payment of one instalment, but specific circumstances that clearly indicate that no future payments of the leasing fee will be made, i.e. that the agreement as a whole will not be executed.

As condition for terminating the agreement, the Law requires that the circumstances be such that it could be reasonably assumed that a contractual obligation that is essential for the lessor will not be met, while the issue of whether the lessee is guilty is irrelevant for estimating the right to termination. What circumstances are these is a factual issue decided by the court on a case by case basis. They can be both objective – demise of a company due to force majeure, embargo, war, introduction of foreign exchange control, insolvency proceedings, as well as subjective – not taking any action in terms of execution of payments, raising unsubstantiated objections, etc.

The formulation of the Law – „if given circumstances *clearly* indicate that any future payment obligations will not be fulfilled" undoubtedly results in the request for applying *objective* criteria in creating assumptions about the future breach of the agreement. This means that the lessor's conviction is not enough, but a standard of a sensible person is required, i.e. evaluation by an objective and impartial observer that the debtor in all likelihood will not execute the agreement, i.e. according to general opinion, there is an evident risk of default on future contractual obligations.

In that sense, if all such requirements are met, the lessor may terminate the agreement on the basis of Article 28, paragraph 3 of this Law, in accordance with the general rule of the Law on Contracts and Torts relating to termination of agreements with successive obligations (Art. 129).

Finally, in case of mistaken assessment of circumstances, when there are no grounds for terminating the agreement, a notice of termination will be unfounded and the lessor loses the right to invoke it. In addition, it can be construed that by the unjustified notice of termination, the lessor refused to perform his contractual obligations and thereby created the basis for the lessee's right to terminate the agreement.

If conditions for terminating the agreement due to delay in payment of the first instalment (paragraph 1), due to delay in payment of one or more successive instalments that constitute at least a quarter of the total leasing fee (paragraph 2), or due to the fact that the lessee did not pay one instalment and the concrete circumstances clearly indicate that no further payment obligations will be met (paragraph 3), the lessor may terminate the agreement if he gave the lessee an appropriate additional period for the fulfilment of obligations (paragraph 4). If the lessee does not fulfil his payment obligation even within the subsequent adequate deadline, the financial leasing agreement is terminated as a matter of law (*ipso iure*). This means that the agreement is deemed terminated automatically by the very expiry of the additional deadline for fulfilment and that the lessor is not obliged to subsequently inform the lessee of termination of the agreement (paragraph 5).

In this respect, the Law provides for the possibility of keeping the agreement in effect if the lessee provides adequate assurances (paragraph 6). The following types of collateral are taken into account: pledge, surety, etc, assuming that the specific collateral is appropriate for the removal of the existing risk of default. Although this is usually regulated by contracting parties' consent of wills, the Law expressly provides for this possibility in rules on terminating the agreement for failure to pay the leasing fee, thus protecting the lessee and giving him the possibility to maintain the agreement in force. In this way, in line with the principle of *favour contractus*, the Law promotes maintenance of the agreement and the achievement of its purpose, while protecting both parties, since, if the debtor provides adequate collateral (real or personal), the lessor's interests, as rule, cannot be questioned from the viewpoint of breach of a concrete obligation.

Finally, we should bear in mind that the rules of the Law on terminating the agreement for failure to pay the leasing fees are of *dispositive* character, which means that contracting

parties, by consent of their will, may also regulate this issue otherwise. The contracting parties may, above all, provide different terms for terminating the agreement on these grounds, whereas these conditions must always be within the limits of public order, mandatory regulations and good customs. With regard to termination itself, we should bear in mind the general rule of the Law on Contracts and Torts under which the agreement is terminated by the law when fulfilment of obligations within a certain period is an important element of the agreement and the debtor fails to fulfil the obligation within that period, as well as when the nature of activity is such that timely execution represents an important element of the agreement (Art. 125). This means that the financial leasing agreement may be terminated automatically, by force of the law, without the obligation to fix a subsequent deadline and inform the lessee of termination, in two cases – when contracting parties have stipulated that the agreement will be terminated if not executed within the stipulated deadline (*clausula irritatioria*) and when all the circumstances of the case and the nature of the work indicate that the execution within the deadline is an important element of the agreement.

The rules on termination by the lessor in case when the lessee delivers the leasing object to a third party without authorisation are elaborated in the section of this study dealing with the rules of delivery of the leasing object to a third party for use.

9) Effects of termination

The lessee who terminates the financial leasing agreement for non-delivery, delay in delivery or material defects on the leasing object is entitled to a refund of the fee he paid in accordance with the financial leasing agreement, minus the amount that represents compensation for the benefit he derived from the leasing object (Art. 24, paragraph 4 of the Law on Financial Leasing). If the lessee derived some benefit from the leasing object before termination of the agreement, this fee will be reduced by the amount that represents compensation for such benefit – reasonable amount (see Art. 132, paragraph 4 of the Law on Contracts and Torts). In accordance with general rules of the contracts and torts legislation on effects of termination of the agreement, the lessee also has the right to compensation of damages. The amount of the fee is determined according to the criterion of a positive contractual interest, which means that the fee should place the lessee in the position in which he would have been if he had fulfilled his obligations in accordance with the agreement.

The lessor who terminates the agreement due to default on payment of the leasing fee shall be entitled to the recovery of the leasing object and to the right of compensation for damage suffered (Art. 29 of the Law on Financial Leasing). This provision represents a general rule of the contracts and torts legislation relating to legal consequences of termination of a bilateral agreement due to failure to fulfil obligations, consisting of the restoration to status quo ante and the compensation of damages.

In the context of the financial leasing agreement, this means that if the agreement is terminated for reasons set by the will of contracting parties or by force of the Law on Financial Leasing, the main cause of the agreement ceases to exist and each party is relieved of their obligations other than the obligation to compensate for damages. However, if both parties have partially fulfilled their obligations or if the lessor has fulfilled his obligation and the lessee has not, the termination shall have a retroactive effect, meaning that there will be restitution of what is given on the basis of the agreement. Thus, if both sides partially fulfilled their obligations, there is mutual recovery – the lessee must return the leasing object or the part thereof that he received up to the point of termination of the agreement and the lessor has to return the amount received up to that point in the name of payment of the leasing fee. On the

other hand, if the lessor fully or partially executed the agreement and the lessee did not, the obligation to restitute shall exist only on the part of the lessee (see Art. 132, paragraphs 1, 2 and 3 of the Law on Contracts and Torts). In addition to restitution, each party owes the other the compensation of the benefits they had from what they need to return or reimburse, and the party that returns money (the lessor) is obligated to pay penalty interest from the date when payment is received (see Art. 132, paragraphs 4 and 5 of the Law on Contracts and Torts). In the event of termination of the agreement, the lessor, in addition to restitution, has the right to compensation for damages.

In the event of terminating the agreement for failure to pay the leasing fee, the lessor, in addition to the right to recover the leasing object, has the right to compensation for damage suffered (Art. 31 of the Law on Financial Leasing). In determining the amount of damages, the Law adopted the criterion of positive contractual interest, which means that this compensation should put the lessor in a financial position in which he would have been if the agreement had been duly executed. The Law permits contracting parties to provide for the manner in which the amount of compensation will be calculated, provided that this amount may never exceed the amount that would be due if the criterion of positive contractual interest was used. It is a rule of imperative character, which is of particular importance for the protection of the lessee as an economically weaker contracting party.

10) Delivery of the leasing object to third party for use

According to the Law on Financial Leasing, the lessee may give the leasing object, in its entirety or in parts, for use to any third party with the lessor's written consent. The lessor may terminate the agreement and demand compensation for damages if the lessee, without his written consent, delivered the leasing object to a third party for use. The special procedure for obtaining possession of the leasing object, envisaged by this Law, may also be applied in the event of terminating the agreement. Delivery of the leasing object to a third party for use shall not relieve the lessee from his obligations to the lessor under the agreement. Delivery of the leasing object to a third party for use may be excluded by the agreement or otherwise arranged (Art. 35).

The lessee has the right to hold and use the leasing object during the contractual time and this is his fundamental right under the financial leasing agreement. In those terms, he is authorised to use the leasing object directly by using it himself and deriving benefit from it. However, in view of the lessee's authority to deliver the leasing object to a third party for use, a distinction should be made between two situations.

The first is provided in Article 35 paragraph 1 and refers to the case when the lessee, retaining his contractual status from the financial leasing agreement, delivers the leasing object, in whole or in individual parts, to a third party for use. The lessee may do so on a variety of bases – rent, one-off use, etc. In this case, a special contractual relationship arises between him and the third person with the rights and obligations applying only to the parties and being, in principle, independent of the relationship between the lessor and the lessee under the financial leasing agreement. This means that in this case, as a rule, there are three types of contractual relations: 1) relationship between the lessor and the supplier under the supply agreement, 2) relationship between the lessor and the lessee under the financial leasing agreement, 3) relationship between the lessee and a third party under the agreement by which the lessee delivered the leasing object to a third party for use.

What is important in this provision is the fact that the lessee remains a party to the financial leasing agreement, which means that the lessee is directly responsible to the lessor for all

obligations under the financial leasing agreement. The agreement concluded between the lessee and the third person remains outside the scope of financial leasing and in principle has no legal effect on the rights and obligations of contracting parties under the financial leasing agreement. As a rule, the lessor may only require from the lessee to fulfil his obligations under the financial leasing agreement and the lessee is required to fulfil this obligation. In this case, the agreement entered into between the lessee and the third person represents to the lessor *res inter alios acta* (a thing done between others) and has no impact on the lessor's interests as long as the lessee properly fulfils his obligations under the financial leasing agreement. This does not affect the rights of the lessor as the owner of the leasing object nor the possibility to stipulate, by the contracting parties' consent of wills, that the lessor is entitled to directly address the third party for the purpose of collecting his claims towards the lessee, arising from the financial leasing agreement.

However, in some cases, the lessor will have a substantial interest not to allow the delivery of the leasing object to a third party for use. As a rule, this will be the case when the lessor concluded the agreement having in mind primarily the personal characteristics of the lessee and counting on the fact that the leasing object will be used by the lessee personally – an *intuitu personae* agreement. This interest, however, may exist beyond the scope of the *intuitu personae* agreement when the lessor estimates that a particular third person is not eligible to use the leasing object, i.e. when due to such use by a third party there is a substantial risk of damage to the lessor (the third person is not qualified to use the leasing object – does not have necessary expertise, adequate premises, necessary supporting equipment, a sufficient number of staff, etc; or the third person is commonly known in business circles as unconscientious and negligent in fulfilling his contractual obligations – the third party is „disreputable"; the third party is insolvent or does not have adequate liquidity). For these reasons, the Law envisages that the delivery of the leasing object to a third party for use requires the lessor's consent. This consent, so as to avoid contentious situations, must be given in writing.

Bearing in mind the importance of the above obligation, the legislator envisaged termination of the agreement as a sanction for its breach. In other words, if the lessee delivers the leasing object to a third party for use without the lessor's written consent, the lessor may terminate the agreement and demand compensation for damages suffered.

Since in case of termination of the agreement on these grounds due to prevention of greater injury there is an urgent need for the recovery of the leasing object from the third person in whose possession it is found, the special procedure for obtaining possession of the leasing object prescribed by this Law may be applied in this case of termination as well.

Another situation that raises the question of the lessee's right to deliver the leasing object to a third party for use is provided in Article 35 paragraph 4. It refers to the case when the lessee transfers all rights and obligations under the financial leasing agreement to a third party, whereby the third party becomes a party to the agreement (assignment of the agreement). This is not a customary delivery of the leasing object to a third party for use through rental or one-off use, but rather assignment of the agreement that causes a change in the personality of the lessee, i.e. the third person becomes the lessee in the financial leasing agreement (see Art. 145 of the Law on Contracts and Torts). This means that in this case, unlike the previous one, there are still two types of contractual relations: 1) that of the lessor and the supplier under the delivery agreement, and 2) that between the lessor and the lessee under the financial leasing agreement, bearing in mind that due to the assignment of the agreement on the part of the lessee, a change occurs in the personality of the lessee – instead of the person with whom the lessor entered into agreement, the lessee becomes the third person.

This Law excludes such a situation, envisaging that the delivery of the leasing object to a third party for use does not relieve the lessee from obligations that he has towards the lessor under the financial leasing agreement. This exclusion is prescribed for two reasons. The first stems from the general rule of the Law on Contracts and Torts relating to the assignment of agreements, under which, in bilateral agreements, the assignment of the agreement to a third party requires the consent of the other contracting party (Art. 145, paragraph 1). The second reason stems from the presumption that the financial leasing agreement is concluded with regard to personal characteristics of contracting parties – *intuitu personae*, whose main characteristic is strictly personal execution of obligations, which means that the execution of the obligations in these agreements cannot be transferred to another person. In fact, when it comes to the financial leasing agreement, the lessee's personal characteristics are, as a rule, of particular importance to the lessor, and the change in the personality of the lessee can significantly affect the realisation of his rights.

In this case, the lessor is found in a situation that is significantly different than the one envisaged in paragraph 1 of this Article. In the previous situation, even though the leasing object is *de facto* used by a third party, the other contracting party remains the same, which means that for all obligations under the financial leasing agreement the lessee remains responsible to the lessor. The other situation is, however, significantly more difficult for the lessor as it regards the *change* in the personality of contracting parties and implies that a third party enters into the legal status of the lessee who is to be liable to the lessor for obligations contained in the financial leasing agreement. For these reasons, Article 35 paragraph 4 excludes the possibility of placing the lessor in such a situation, envisaging that the delivery of the leasing object to a third party for use shall not relieve the lessee from his obligations to the lessor under the financial leasing agreement. At the same time, in accordance with the general rules of the contracts and torts legislation, a change in the personality of the lessee will be possible if the lessor agrees to it.

Finally, it is necessary to note that the rules of this Law that relate to the delivery of the leasing object to a third party for use are of *dispositive* character, meaning that this issue may be regulated otherwise by mutual agreement of contracting parties.

11) Enforcement procedure

One of the most important and most frequently asked questions during the preparation of this Law related to the lessor's ability, in the event of termination of the agreement due to the lessee's non-fulfilment of obligations, to recover the leasing object in an efficient and legally secure manner. It is a matter of great practical importance since an effective action for the recovery of the leasing object is a *conditio sine qua non* when leasing companies decide to enter into the business of financial leasing in a certain country.

In this regard, the legislator's intention was to simplify and shorten the process of recovery of the leasing object, while keeping it within the bounds of a *judicial procedure*, which is a necessary condition for the provision of legal security. To this end, the legislator opted for a special procedure for obtaining possession of the leasing object, which is applied as a *lex specialis* in relation to the general rules of other relevant laws.

According to the rules of Article 30 of this Law, the contracting parties may, before a competent court, in non-contentious proceedings, establish by a *record of agreement* that they have agreed that in case of the lessee's failure to pay the leasing fee on the maturity date in accordance with the agreement, the lessor has the right to take possession of the leasing object. A signed record of agreement between the parties has the power of court settlement

which is an enforceable document in terms of relevant provisions of the Law on Enforcement Procedure. In this way, the lessor is given the possibility, without initiating civil proceedings, to address an enforcement court and, based on such an agreement which is an enforceable document, require the recovery of the leasing object. In this context, it should be noted that, in case of introducing public notaries into the legal system of Serbia, this issue would be considerably simplified, since certification by the notary could be the basis for direct recourse to the enforcement court.

If the lessee does not fulfil the obligation to pay the leasing fee in accordance with the agreement and does not voluntarily deliver the leasing object, the lessor may, by signing the record of agreement of contracting parties, submit to the enforcement court the request for adopting the decision on the seizure of the leasing object from the lessee or person in whose possession it is found, and on handing over the leasing object to the lessor.

The court is obliged to decide on the lessor's request within *three* days of the day of the request, and if it adopts the request, it has additional *three* days to conduct the procedure of seizing the leasing object. Short time limits for reaching the decision on enforcement were not an exception even before the adoption of this Law and most judges respected them; the problem regarded the carrying out of the enforcement itself. In other words, even when the court decided on the enforcement, its implementation would often take months, even years. For these reasons, it was necessary for the Law to envisage short time limits, not only for reaching a decision, but for its implementation as well.

The lessee may, within *three* days of receipt of the decision, raise an objection that he has performed the payment obligation, which ensures his protection from possible abuse by the lessor. Written evidence must be submitted along with the objection. An objection raised in this manner has no suspensive effect, i.e. it does not suspend the execution of the decision on seizing the leasing object.

Further proceedings on the objection take place in accordance with the general rules of the Law on Enforcement Procedure. Special rules of provision of Article 30 apply, as stated above, only in cases envisaged by this Law and do not have a general character.

12) Financial leasing register

The Law on Financial Leasing also provides rules relevant to the financial leasing register (Arts. 43-51). Entry of data from financial leasing agreements into this register *has no constitutive character*, which means that the financial leasing agreement is concluded legally and exists regardless of registration. The financial leasing register is envisaged by this Law to preserve legal security of business operations. The Law contains only general rules on the financial leasing register, while its functioning and operation will be more closely regulated by relevant secondary legislation.

The Law stipulates that the financial leasing register is a public register created for the purpose of entering data on concluded financial leasing agreements. The register is a unique electronic database that should enable quick and easy access to the database and provide users with relevant and reliable data. Functioning of the register as a whole is adapted to electronic form, which is founded on a central database that stores all data entered in the register.

The Law establishes the principle of availability (publicity) of data on financial leasing agreements, entered in the financial leasing register. The data entered in the register are available to any person, regardless of domicile, residence or seat of the person addressing the register or the location of the leasing object. Efficient access is provided through a central electronic database. In addition to the principles of accessibility, the Law defines the principle of

the publicity of the financial leasing register. According to the Law, everyone is entitled to make a query in the financial leasing register and all its data and to request the issuance of certified statements, prescribed by law. The possibility to gain insight into the register and obtain the appropriate statement is not conditioned on the existence of legal interests of persons requesting access and obtainment of statements. Finally, the Law upholds the principle of trust in the financial leasing register, implying that third persons are acquainted with the existence of financial leasing agreements based on their entry in the register. In this sense, a person who relies on these data is considered to be in good faith and cannot bear negative consequences if the register is incomplete or incorrectly reflects the real situation. On the contrary, a person who claims that the data on financial leasing entered in the register were unknown to him is considered in lack of good faith and bears all legal consequences that may arise. Unlike the entry in the land register, the entry of data from a financial leasing agreement into the financial leasing register may not be evidence of existence of ownership rights, validity of the financial leasing agreement or any other legal operation. Entries in the register are made only for the purpose to inform third parties that a particular object is a financial leasing object.

Financial leasing agreements, amendments and supplements to these agreements, as well as instances of their termination are entered in the financial leasing register, i.e. all data relevant for informing third parties about a particular object being the financial leasing object.

The legislator opted for the lessor as the party required to perform registration, bearing in mind that this is primarily in the lessor's interest. However, this provision is of dispositive character and the leasing agreement may provide that the obligation of registration falls on the lessee. The obligation of registration must be fulfilled within seven days from the day of concluding the financial leasing agreement, amendments and supplements to the agreement or its termination, which is a term during which it is reasonable to expect that the requirements for registration have been met. The lessor and the lessee are jointly liable for damages suffered bona fide by the third party due to failure to fulfil the registration obligation, which means that each of them is responsible to the third party for the entire amount of damage and the third party may require compensation from any of them.

The request for registering leasing agreements in the register shall in particular contain: data on the identity of the lessor and the lessee, precise definition of the leasing object, duration of the leasing agreement, signature of the person submitting the request for entry of the leasing agreement in the register. These data are entered in the register at the moment of submitting the request for registration. The lessor, lessee and supplier may request that a note on the existence of a dispute relating to the leasing object be recorded in the register.

Country reporter for Bosnia and Herzegovina:
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MODERN CONTRACTS

FRANCHISING

1) Basic concept

Franchising contract in the law of Bosnia and Herzegovina is an entire novelty, or rather a contract and legal matter that is not legislatively regulated.

This contract comes under contracts of recent times and in the law of Bosnia and Herzegovina it is included in unnamed contracts; that means that it is neither planned nor explicitly regulated by the law of Bosnia and Herzegovina despite the fact that it is mentioned in some regulations, especially those adopted by the Competitive Council of Bosnia and Herzegovina[1].

Possibility of concluding such a contract in Bosnia and Herzegovina is derived from the principle of general freedom of the contract making, regardless the absence of the provisions on this contract in the positive law of Bosnia and Herzegovina.

In addition, franchising transactions, due to their legal nature, encompass various fields of the law such as contract law, representation and distribution of goods, financial investments, intellectual property, competition law etc., which, along with other difficulties, represents a particular obstacle for Bosnia and Herzegovina in its legislative regulation.[2]

In the legal system, of the both entities in the BandH, , the general rules of the obligations law apply to the franchising contract, primarily those principles that are prescribed by the Law on Obligatory Relations that were envisaged for other, related contracts (licence contract, sales contract, lease contract, commercial representation contract etc).

From the past practice, can be observed that the most significant characteristics of the franchising contracts concluded in Bosnia and Herzegovina are business transactions with the right of use of another's trade name, trademark or appearance of goods.[3]

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* Original text is in local language.

[1] Decision on group exemption of agreements between commercial entities operating on various levels of production or distribution (vertical agreement) – „Official Gazette of Bosnia and Herzegovina" number 18/06 Decision on group exemption of agreements on distribution and servicing of motor vehicles – „Official Gazette Bosnia and Herzegovina" number 16/06.

[2] UNIDROIT, Annex 3 au Guide sur les Accords Internationaux de Franchise Principale, www. unidroit. org.

[3] Some examples are the contracts signed for the territory of Bosnia and Herzegovina by exclusive distributors and car traders like VW, Seat, Scoda, Porsche, etc

The beginning of the legislative regulation of the franchising contract at the territory of Bosnia and Herzegovina are found in the draft of the Law on Obligation from 2003, which is still waiting to enter the Parliament enactment procedure at the BandH level. Mentioned Draft comprises special provisions on franchising in the Articles 934-941, where it defines this type of contract, general obligations of the franchisor, liability of the franchisor, as well as general obligations of the franchisee and obligation of mutual reporting, as well as prescribing the written form as mandatory for this type of contract, in both its conclusion and termination, as well as provisions on competition.

2) Definition, content and form of franchising contracts

In Bosnian and Herzegovinian, legal practice or theory, there is no unfied viewpoint or definition of the franchising contract. Pursuant to provisions of the Draft Law on Obligations the franchising contract binds one entrepreneur (franchisor) to lastingly provide to another entrepreneur (franchisee) all obligations for his operation, while the franchisee is bound to pay specific compensation for this action. Objects of the franchising contract may include franchising services, franchising production and franchising trade. Objects of franchising contracts are, in particular, trade goods, trademarks, brands, forms of business operation, placement methods, know-how and the right to trade in certain services and goods.

The Draft of the Law on Obligations, in its Article 935, prescribes general obligations of the franchisor.

The franchisor is obliged to give to the franchisee technical and business documents and other necessary information essential for the franchisee to execute the rights granted by this contract and inform the franchisee and his employees about the issues associated with the execution of such rights.

The franchisor is obliged to submit to the franchisee all licenses prescribed by the contract and to provide a draw up of related documents in the manner prescribed by law.

The franchisor is obliged to protect the program of overall undertakes from third persons' actions and continually to develop it. He should constantly provide technical and advisory support to the franchisee, which includes education and professional development of the franchisor and his employees.

Franchisor is liable for the existence of rights and knowledge related to the franchising obligations, pursuant to general regulations.

If the franchisor violates other contracting obligations, the franchisee has the right to decrease the compensation.

On the other hand, the franchisee is obliged to apply the franchising (obligation) program actively and, with the awareness of a good entrepreneur, to procure goods and services via the franchisor or persons that he indicates, if it is stipulated by the contract or if it is directly related to the purpose of this contract.

Contracting parties are mutually obliged to be informed about the business situation regarding franchising and overall mutual informing according to principles of awareness and honesty. They are obliged to safeguard confidential information even if the contract is not concluded..

The franchising contract shall be made in written form.

The contract shall contain a full description of franchising-obligations.

3) Duration and renewal of the franchising contract

Franchising contract is concluded for a prolonged period, with a defined or undefined duration.

Pursuant to the Draft *Law on the Obligations,* the contractual relation ceases upon expiration or cancellation. Unless otherwise agreed, terms that are valid for regular lease contract cancellations apply to franchising contract cancellations. Apart from this, there is a possibility of an exceptional cancellation for important reasons.

Even after cessation of their contractual relation, the parties are mutually bound to loyalty in competition. In this framework, a locally limited ban on competition could be imposed on the franchisee and this ban cannot exceed a period of one year.

If competition ban unsuitably restricts the former franchisee in performance of his business activities, the franchisor must provide appropriate compensation, regardless of the reason for contract termination.

4) Financial issues

The Draft *Law on the Obligations* does not define, or regulate, some of financial issues crucial to the franchising contracts. Nevertheless, we would like to point out that the obligation of the franchisee, reflected in the payment of compensation for rights and services granted, in practice usually encompasses by the agreement on an initial compensation and a compensation dependant on the turnover. The compensation, if the contractual parties so agree, can be included in the final sales price of the product that the franchisor sells to the franchisee.

5) Sub-franchising

Concerning sub-franchising, the Draft does not provide any solutions, although there is no obstacle in the general freedom of contract making to prescribe, in the franchising contract, a right of the franchisee to transfer his exclusive rights granted to him by the franchisor, or a part thereof, to third parties.

We feel that this issue also needs legislative regulation and that this possibility should be defined precisely; we also feel that other details of sub-franchising should be determined as well (time period for which it is concluded, consequences of such a contract etc).

6) Advertising and control of advertising

When it comes to the obligation of advertising from the franchising contract, in the legal system of the BandH there are no special regulations. However, this issue is indirectly partly regulated by the Draft, *Law on obligations;* in its provisions prescribing that the franchisor is obliged to protect the program of overall obligations from any actions of third parties and to keep developing it continually. He must constantly provide technical and advisory support to the franchisee, which includes education and professional development of the franchisee and his employees.

7) Intellectual property rights

One of franchisor's fundamental obligations is to transfer to the franchisee the right to use a trademark or service brand, as well as other intellectual property rights pursuant to conditions stipulated in the contract. This is the general direction taken in the solutions provided, although modestly, in the Draft *Law on Obligations*, pursuant to which the franchisor is obliged to transfer to the franchisee all licences prescribed by the contract and to provide for the elaboration of documents thereon in the manner prescribed by the law.

8) Know-how and business secrets

The franchisor is obliged to transfer to the franchisee the „know-how" necessary for the performance of the franchising activities.

The franchisee is obliged to safeguard information and data on the franchisor and his operations as confidential, i.e. as a business secret, as is regularly prescribed in the franchising contracts (*confidentiality clause*). Still, it should be pointed out that in the legal system of the BandH and in the Draft *Law on Obligations,* there is no explicit definition of this obligation, even though the parties to the contract should be warned about it, as it would have existed regardless of whether or not it is explicitly defined. Obligation of keeping business secrets is prescribed in the Draft *Law on Obligations*, pursuant to which the parties are mutually obliged to inform one another with the business circumstances related to the franchising and to keep each other informed pursuant to the principles of diligence and honesty. They are also obliged to safeguard confidential information even if the contract is not concluded.

9) Legal remedies in case of non-compliance with contractual obligations

Pursuant to the general rules of the *Law on the Obligatory Relations* pertaining to the termination of the contract due to non-compliance, when one contractual party fails to meet its obligations, the other party may, unless otherwise prescribed, demand that the obligations be met or, under conditions prescribed by the Law, terminate the contract through a simple statement. If the contract is not terminated by force of law; in any case, the injured party has a right to the compensation of damages. Hence, legal consequences of failure to comply with obligations from the franchising contract is not defined by the Law, and depend on what the contractual parties have prescribed in their contract, pursuant to the principle of freedom of will. If the contract comprises no such provisions, in case of a dispute the general principles and rules of the *Law on the Obligatory Relations* would apply, as well as the rules prescribed by this Law for other, similar contracts.

In addition, the Bosnian and Herzegovinian law accepts the principle of termination of contracts due to non-compliance without Court mediation. Therefore, the general rule is that a simple statement of termination terminates the contract, that the creditor is obliged to sub-

mit to the debtor without delay[4]. In line with the adopted theory of reception[5], in the , *Law on the Obligatory Relations* the moment in which the statement of termination produces legal effects is related to the moment in which the debtor receives the notification on contract termination.

10) Termination of the contractual relation and its legal consequences

Termination of the franchising contract is subject to general rules of the *Law on the Obligatory Relations* on contract cessation.

There are no particular regulations in the legal system of the BandH pertaining to the legal consequences of contract cessation; therefore, the general rules of the *Law on the Obligatory Relations* apply.

FACTORING

Factoring is an increasing external financing source for corporations and small and medium enterprises and allows very risky suppliers to transfer their credit risk to solid buyers. Factoring is, particularly, useful in the countries with poor legal judgment enforcement and incomplete evidence of support to priority of claims as claims are sold rather than being covered by the collateral. Claims that are the subject of factoring are not part of property of small and medium bankrupt enterprises. Statistics shows that factoring is more usual in the countries with higher economic development and growth and with developed credit information bureaus.

In Bosnia and Herzegovina, factoring is just at its beginning stage, but it has a potential to bring significant benefits to the business community of Bosnia and Herzegovina and to contribute to better business environment. This might be one of the most flexible financial instruments supporting trade and a driving force for further growth of Bosnia and Herzegovina's economy. Factoring with regress is technology that could ease the problem of lack of transparency in business environment with poor information infrastructure, but only in the case when the subject of factoring are claims from very sound buyers. Factoring allows faster circulation of resources and enables liquidity and solvency of real economy. Introduction of factoring as a very broad financial service in Bosnia and Herzegovina would facilitate faster turnover of resources.

While factoring services are being introduced, it is expected that the size of the factoring market will be around 0,4% of the Gross National Product (GNP). According to information from the Central bank of Bosnia and Herzegovina (CBBandH)), 2007, GNP in Bosnia and Herzegovina was 21,641 million KM. This suggests that Bosnia and Herzegovina could

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[4] The term „without delay" is construed to mean that the creditor intending to terminate the contract must inform the debtor on this fact as soon as possible, in line with the circumstances of the particular case and common practices of the particular commercial branch. For more information, see J.Perović, *Fundamental Breach of contract….,* op. cit., pp.322-323.

[5] See art. 31 of the Law

expect a factoring market of around 86 million (0,4% of GNP) even short term (1-2 years). In the middle-term period (3-5 years), the factoring market is expected to reach around 432 million KM (i.e. 2% GNP) based on GNP projected growth.

If banks in Bosnia and Herzegovina could secure adequate crediting of the private sector, including short-term credit lines, the need for factoring would be likely small. As far as introduction of factoring as a new financial product in Bosnia and Herzegovina is concerned during the current global economic crisis, financial institutions can wait for more stable times before offering factoring services to the business community. In another case, they can start offering factoring as a new product and showing their clients to work in their best interest by helping them to secure liquidity and solvency during present hard times.

The above details speak in favor of urgent legislative factoring regulations that have been omitted in Bosnia and Herzegovina. It is still another of many unnamed contracts and is signed based on principles of general rules of obligation law.

FINANCIAL LEASING

1. Legislative Leasing Framework (Basic Concept and Elements)

Bosnia and Herzegovina, until entity leasing laws were brought, fell among the countries that did not have a whole and systemically regulated legal leasing business (operating or financial leasing), but there existed rules that indirectly related to leasing.

In such legislative environment the leasing contract was made as an unnamed contract whose contents, proceeding from the principle of freedom of contract-making, was determined by contracting parties.

Since the time when the leasing law in both entities of Bosnia and Herzegovina (the Leasing Law of the Federation of Bosnia and Herzegovina was published in the Official Gazette of the Federation of Bosnia and Herzegovina number 85.98 and came into force on 3 January 2009; the Leasing Law of the Republic of Srpska was published in the Official Gazette of the Republic of Srpska number 70/07) Bosnia and Herzegovina fell among the group of countries having a separate leasing law.

Before special laws in Bosnia and Herzegovina were brought there was limited regulation of leasing business.

Limited regulation was made by the Foreign Trade Law (the Official Gazette of the Federation of Bosnia and Herzegovina number 2/95), whereby any enterprise could temporarily export, or import and lease equipment for use in the production process and for rendering services. The leasing contract obligatorily contains the term of leasing. The leasing contract can stipulate that the lessee becomes the owner of temporarily exported or imported equipment upon expiration of duration of the agreed term. Leasing was also incorporated in International accounting standards and Accounting standards of the Federation of Bosnia and Herzegovina. Accounting standards emphasize the difference between operating and financial leasing with various ways of accounting statements.

Apart from this, the Law on Standard Classification of Activities has stipulated the activity of financial leasing. Application of the leasing contract is stipulated by the Rules on the procedure of contract-making regarding enterprise management and leasing of enterprise property during privatization process.[6] The leasing contract, in accordance with these Rules, is made with the lessee that is selected by public invitation or direct offers by potential lessees to the authorized privatization agency.

The Outline Law on Pledges[7] is also one of the laws influencing leasing and regulates registration and the priority right and lease provider.

With regard to broad application and importance of leasing contracts in international trade, it is essential to point to complete regulation of this institute through uniform rules of the international business law. The international legal framework for the application of financial leasing is provided by UNIDROIT Convention on International Financial Leasing). The Convention was adopted in Ottawa on 28 May 1988. However, the Convention regulates leasing only partially as it standardizes only one type of leasing, financial leasing. Bosnia and Herzegovina is not a signatory party to this Convention, nor has it joined it after dissolution of the Socialist Federative Republic of Yugoslavia.

The Convention on international financial leasing was used as a basic source of laws when making and bringing entity leasing laws of Bosnia and Herzegovina although its influence in the actual laws is insufficient.

1.1. Meaning of financial leasing in entity laws

In the two-entity positive law of Bosnia and Herzegovina financial leasing is defined as one of manifested forms of leasing contracts in addition to operating leasing. It is determined by Article 5, paragraph 2 and 3 of the Leasing Law of the Federation of Bosnia and Herzegovina, or by Article 6 of the Leasing Law of the Republic of Srpska.

Federal Law determines financial leasing as a legal business operation in which the lessee, in the period of possession and use of the object of leasing, pays the agreed lease compensation with an option to buy and acquire the right of ownership over the object of leasing and bears the costs of the lease object depreciation. The same Article of this Law beforehand defines leasing as a legal business operation in which the lessor transfers the right of possession and use of the object of leasing to the lessee for a specific period of time. In return, the lessee is obliged to pay the lessor the agreed lease compensation.

The Leasing Law of the Republic of Srpska, in Article 6, provides a somewhat different but essentially identical definition of financial leasing describing it as a legal affair in which the lessor:

a) Concludes a contract with the supplier of the object of leasing designated by the lessee about delivery based on which it acquires the right of ownership of the object of leasing in accordance with the lessee's specifications and on terms that, if related to the interests of the lessee, are subject to the lessee's approval.
b) Concludes a financial leasing contract with the lessee by which it undertakes to transfer to the lessee the authority to keep and exploit the object of leasing over the contracted period and the lessee undertakes to pay the agreed compensation to the lessor.

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[6] Official Gazette of the Federation of Bosnia and Herzegovina, number 5/98, 66/03 and 15/04.

[7] the Official Gazette of Bosnia and Herzegovina, number 28/04.

c) Lease compensation is determined based on overall depreciation or that of the vital part of the value of the object of leasing.

It is important to underline here that the legal nature and more distinct conceptual definition of the leasing contract (financial or operating) are not given in any legal text although it is one of the issues to be certainly raised in theory and practice. Its aim would be, in the first place, to separate this legal business from related legal affairs such as hire contracts or purchase/sale contracts with payment by installments known in theory and judicial practice in Bosnia and Herzegovina. Also, this is necessary as entity laws direct to the application of the Law on Obligatory Relations in the matters that are not regulated by those laws (the Law on Obligatory Relations – Official Gazette of the Socialist Federative Republic of Yugoslavia numbers 29/78 and 39/85, Official Gazette of the Republic of Bosnia and Herzegovina numbers 2/92, 13/94).

1.2. Area of application of financial leasing

Article 6 of the Federal Law on Leasing reads as follows: „Leasing is reserved only for leasing societies that are founded and operate in accordance with this Law on the territory of the Federation of Bosnia and Herzegovina (hereinafter: F BandH) and for branch offices of leasing societies with seats in the Republic of Srpska (hereinafter: RS) and Brcko District of Bosnia and Herzegovina (hereinafter BD) or exceptionally for the bank whose seat is in BandH, or its organizational division with its seat in RS or BD under the conditions and in the manner laid down by rules regulating bank operations in BandH.

The following provisions of this Law apply to the societies defined by this Article that perform financial leasing operations:

a) leasing contract,
b) rights and duties,
c) leasing registration,
d) violations by banks.

Similar provisions relating to leasing operations are contained in Articles 10 and 11 of the RS Leasing Law.

1.3. Subject of financial leasing contract

As far as the object of the financial leasing contract is concerned, entity laws do not offer an explicit definition of nor does it define the object of leasing. But, extensive interpretation of law provisions it can be concluded that the object of leasing could be all mobile and immobile items that are not outside trade and are not restricted in trade.

The F BandH Leasing Law stipulates that the object of leasing is specified by the lessee (Article 35) and by the supplier of the object of leasing . Similar stipulation is prescribed by Article 25 of the RS Leasing Law although this Law prescribes an additional requirement for the lessor to secure the object of leasing indicated in the specification by the lessee and to inform it about delivery of the object of leasing before the contract has been concluded.

In this way, laws do not deal with precise definitions or with determination of the leasing subject matter. In practice, however, the object of financial leasing have most often been mobile items (motor vehicles, equipment, etc.) whereas real estate has rarely been the case in leasing business although there are no legal restrictions or obstacles for this.

1.4. Subject matters of financial leasing legal business

Juridical designation of objects or participants in the financial leasing legal transaction follows designation of objects in the International Convention on Financial Leasing and most national legislations in Europe. The lessor, lessee and object of leasing supplier are designated as objects in both laws in BandH.

The F BandH Leasing Law specifies that the lessor is a legal person with its seat on the F BandH territory registered for leasing transactions. The lessee is any person that based on the leasing contract acquires the right of ownership and use of the object of leasing. The supplier of the object of leasing is any person that based on the contract or any other legally prescribed manner transfers the right of ownership of the object of leasing to the lessor, only if the supplier of the object of leasing and the lessor are not the same person.

The RS Leasing Law, unlike the F BandH Leasing Law, does not deem the contract in which the lessor and supplier of the object of leasing as the financial leasing contract. It defines it as an operating leasing contract (Article 7 of the RS Leasing Law).

The above differences between entity laws lead to the conclusion that the change of one object of the financial leasing contract can result in the change of the nature of the leasing transaction so that the financial leasing transaction in RS might have a treatment of a legal business of operating leasing and this is not the case with the Law in F BandH.

We are closer to the assumption that the change or unification in one person of the lessor and supplier of the object of leasing should not alter the nature the legal transaction of leasing, especially if the conclusion of the contract on financial leasing is the primary aim of contracting parties.

2. Concept of Leasing – Legal and Economic – Financial Nature

The legal nature of the leasing contract in theory is disputable. There are difficulties in designation of the legal nature of leasing and this has also resulted from the fact that various forms of leasing contracts are used and that a number of leasing categories have emerged in business practice. Opinions vary from leasing, modified leasing contracts, purchase/sale contracts to a new sui generic contract. This is contributed by the fact in some legislations it is classified as „leasing rental" and in theory as „special lease".[8]

Some authors think that „leasing is somewhere between hire and loan and as such is an original type of contract whose principles, however, should be determined by doctrine and court practice in the absence of legislative intervention"[9].

„Closeness" between leasing and hire is especially distinct in operating or direct leasing on which provisions of the leasing contract mostly apply.

The disputable nature of the leasing contract has led to different definitions of this contract and there is a number of them in legal and economic literature.

With a special aspect to the economic-financial significance, definition of leasing, as an overall structure, is definition as a special method of financing various mobile and fixed capital goods that are leased to the lessee based on the contract with specific compensation and for a specific period of time. Compensation is specified so that those goods can be depreciat-

[8] Vasiljevic Mirko, Business Law, Belgrade 2001, page 759.

[9] Radomir Djurovic-International Commercial Law with Contract Forms – Belgrade 2000.

ed with this lessee over a period longer than the term of the leasing contract. As the leasing structure has a three-dimensional relation between the supplier-lessor and lessee, the leasing contract is only one part of the whole leasing structure.

Designation of leasing in the manner prescribed by the Convention has been similarly done in the RS and F BandH Law on Financial Leasing although designation in the manner referred to in Article 6 of the RS Law is closer to designation in the Convention.

The leasing contract, as a part of the whole leasing business transaction, with a special aspect to rights and duties of contracting parties, can be defined as a contract whereby the lessor undertakes to give to the lessee a specific object for temporary use and to perform specific actions relating to this use. The lessee undertakes to pay compensation in contracted installments and, upon expiration of the contracted term, to return the object to the lessor or to extend use or purchase it.

The economic ratio of the leasing contract is to allow acquisition of equipment or other objects to persons having insufficient funds, over a specific period of time, with an undertaking to pay compensation and the contract's essential elements arise from such contract definition.

Esentialia negotii are the elements on which the contracting parties must reach agreement so that the contract could generate legal effects. It is actually a minimum necessary for its existence.

3. Terms in the Financial Leasing Contract

The financial leasing contract is a **bilateral mandatory contract.** Both the lessor and the lessee must execute specific contractual duties. The lessor undertakes to give the subject matter of leasing, if so agreed, and is responsible for the maintenance of the subject matter of leasing and legal shortcomings relating to the subject matter of leasing. The lessee is obliged to pay leasing compensation and use the subject matter of leasing in accordance with the contract, etc.

The financial leasing contract belongs to **formal contracts** and it is required that it be concluded in written form. The written form of the contract can help accurately establish the existence and contents of the contract and this has great significance, above all, from the aspect of protection of interests of contracting parties.

The working version of the Draft Law on Obligatory Relations in Bosnia and Herzegovina of 2003, has not yet been sent to go through the parliamentary procedure as well as entity laws on leasing that prescribe the written form of leasing contracts.

The financial leasing contract is an **encumbered contract** and for the obligation of one contracting party a counter-obligation of the other contracting party is given. The lessor is thus obliged to give the subject matter of leasing to the lessee. The lessee undertakes to execute the counter-obligation of payment of leasing compensation.

The financial leasing contract is a **lasting contract** and is concluded for a specific period of time determined by contracting parties in the contract. Entity laws differently regulate the term of the financial leasing contract. The minimum term for which the contract may be concluded may not be less than two years from the contract conclusion date (Article 9 of the RS Law), or not less than 6 months (Article 36 of the F BandH).

4. Domestic and International Financial Leasing

Leasing societies in Bosnia and Herzegovina, pursuant to entity laws, can perform financial leasing transactions only if they have been founded and operate in accordance with entity laws.

Laws in both entities lay down the process of foundation, work and business activities of leasing societies subject to previous work permit (license) issued by the competent entity

Banking Agencies. Branch offices can set up leasing societies on the territory of the other entity pursuant to the Agency's permit.

It is important to underline that the F BandH Law does not prescribe an explicit likelihood of foundation and work of the leasing society branch office outside the F BandH territory (except for the RS and BD territories), whereas Article 20 of the RS Law prescribes a possibility of business transactions of the leasing society from RS on the territory outside RS. In this case there is an obligation for such societies to, within 8 days from the foundation of a business unit outside RS, inform the Agency with details about the person authorized to represent the business unit, name, address of the business unit and the business plan of the business unit for the initial three years.

Having in mind such legislative solutions, the issue of business transactions of leasing societies from the F BandH territory outside the F BandH territory remains open.

However, in addition to the status issue, there is an open issue of application of international or domestic law on leasing relation in which contracting parties come from different state territories.

Entity laws, namely, do not contain provisions regulating the issue of application of domestic or international law for financial leasing contracts when contracting parties come from regions with different jurisdictions and their seats are on the territories of two or more different countries.

This fact leaves a very broad area of issues regarding application of domestic or international law on the financial leasing contract with an element of foreignness and shows an evident need for additional standardization and specification of application of domestic or international laws in such relations.

Proceeding from legislative solutions in entity laws one can conclude that the financial leasing contract with an element of foreignness has not been regulated at all. For designation of the applicable law in so concluded contract, there are no direct or indirect provisions and the contracting parties in the financial leasing contract with an element of foreignness are found in the position of legal insecurity.

In Bosnia and Herzegovina, this issue will have to be paid special attention due to the fact that Bosnia and Herzegovina and other countries in the region aim to join the European Union and those opportunities for such contracts are intensifying.

It is important to stress that the Law on resolving a conflict of laws with the rules of other counties in particular relations undertaken from the former Socialist Federative Republic of Yugoslavia (the Law of 1983) is in force in Bosnia and Herzegovina. Until full standardization and designation of the competent law for financial leasing contracts with an element of foreignness, one should have in mind the provisions of the aforesaid Law and in particular Article 19. Under this Article the competent law for contracts is the law chosen by contracting parties unless otherwise established by this law or international agreement.

However, the situation becomes complicated when contracting parties do not conclude contracts under the competent law, or if there is no international agreement for their relations. With such international agreement a particular law would apply to the financial leasing contract and this law would be competent for this contract and prescribed by the international agreement.

Until full standardization and designation of the competent law, we believe that the provision under Article 20 of the Law of the former Socialist Federative Republic of Yugoslavia applicable in Bosnia and Herzegovina could suffice. This Law prescribes that for sale contracts relating to mobile objects, the competent place is that where the seat or residence of the seller is located at the time of receipt of the offer. Nevertheless, it is obvious that this provision has not resolved a number of other open issues concerning financial leasing contracts and relate to the financial leasing of fixed property and other issues regarding the legal nature of the leasing contract. As emphasized above, such contract contains elements both of the sale contract concerning mobile objects, fixed property, elements of the lease contract, etc.

Such situations require a full and extensive regulation in order to overcome evident legal insecurity for contracting parties coming from different state territories.

5. Form and Basic Provisions of Financial Leasing Contract

Entity laws, in a unified manner, specify the written form of the financial leasing contract and provisions that such contract must contain.

Article 36 of the F BandH Law prescribes the form and contents of the leasing contract according to which such contract must be concluded in written form and contain the following elements:

a) details of objects of the leasing contract,
b) determination whether the financial or operating leasing contract is in question,
c) detailed determination of the leasing object,
d) value of the object of leasing,
e) term of leasing that cannot be less than six months,
f) total value of leasing compensation,
g) amount, number and maturity of particular leasing compensation,
h) possibility of the buy up or extension of the leasing contract,
i) the right to give the object of leasing to someone else for use,
j) cases to be treated as the non-fulfillment of duties by the lessee,
k) rate of default interests paid in case of non-fulfillment of duties.

Apart from this, Article 37 of the same Law prescribes separate provisions for the financial leasing contract, which specifies that the financial leasing contract under Article 36 must contain the following provisions:

a) amount of down payment in the total value of the object of leasing,
b) effective interest rate used to calculate leasing compensation.

Similarly, provisions about the form and contents of the leasing contract are laid down by the RS Law (Article 9).

6. Rights and Duties of Contracting Parties in Financial Leasing Contract

Entity laws stipulate the rights and duties of the contracting parties in the leasing contract.

The F BandH Law stipulates individual rights and duties of the lessor and lessee in Articles 40-50.

The lessor has duties to acquire the object of leasing, according to the lessee's request, from the supplier of the object of leasing that has been designated by the lessee.

Apart from this, the lessor is obliged to inform the supplier of the object of leasing that the object of leasing is acquired because of the execution of the leasing contract and to indicate the lessee, only if the lessor and supplier of the object of leasing are not the same persons. The lessor is obliged to communicate information to the supplier of the object of leasing by the overtaking of the object of leasing at the latest.

The lessor also, in case that the contracted leasing compensation is variable, is obliged to inform the lessee in written form about any change of this compensation before it becomes applicable.

When responsibility for legal and material shortcomings of the object of leasing is concerned, it is important to emphasize that the supplier of the object of leasing is responsible to the lessor for legal and material shortcomings of the object of leasing according to general rules of responsibility for material and legal shortcomings.

The lessor, after the leasing contract has been concluded, assigns to the lessee any demands it has against the supplier of the object of leasing based on legal and material shortcomings, unless otherwise agreed by the leasing contract (Article 43 of the F BandH Law). If the object of leasing has some material or legal fault and the lessee has failed to execute the assigned rights against the supplier of the object of leasing, the lessee does not have any rights toward the lessor based on material or legal faults and especially not the right to cancel the contract or to lower leasing compensation.

The lessor is not responsible to the lessee or third person for the damage that has occurred by using the object of leasing, unless other wise agreed b y the leasing contract (Article 43 of the F BandH Law). However, the aforesaid provision does not apply if the damage has occurred due to a defect or fault of the object of leasing. The lessee is entitled to reimburse the supplier of the object of leasing. The lessor can assign this right to the lessee and it is deemed that this has been done on the date when the leasing contract has been concluded, unless otherwise agreed by this contract.

In financial leasing, pursuant to Article 44 of the F BandH Law, the risk of accidental loss or damage of the object of leasing is borne by the lessee since the moment when the object of leasing has been overtaken for possession, unless otherwise agreed by the leasing contract.

It is also important to mention the provision in Article 46 of the F BandH Law, in the part relating to delivery of the object of leasing by the supplier. If the supplier of the object of leasing does not deliver the object of leasing in the contracted term due to the reasons for which the supplier bears responsibility, and the term is not an essential part of the contract, the lessee must set down a reasonable subsequent term and inform the lessor. If the leasing supplier has not fulfilled his obligation in the subsequently designated term, the contract between the lessor and lessee is cancelled by law. The lessee is entitled to seek from the lessor compensation for the damage experienced due to contract cancellation and the lessor is

entitled to seek from the supplier of the object of leasing compensation for the damage experienced because of contract cancellation. The lessor can assign to the lessee his right to damage compensation against the supplier of the object of leasing. If this has been accepted the lessee cannot seek any damages from the lessor.

If the lessor has chosen the supplier of the object of leasing, there is a joint solidary responsibility toward the lessee, if the object of leasing has not been delivered to the lessee, or if it has been delivered with delay or if the object of leasing has some material defect.

The lessee is obliged to overtake the object of leasing in the manner designated by the leasing contract and, unless otherwise agreed, the lessee is obliged to inspect the object of leasing in order to establish that the object of leasing does not have any visible defects. The lessee has to confirm in writing that he has received the object of leasing. The leasing contract is enacted on the date of receipt of the object of leasing and since this date the lessee is obliged to pay leasing compensation (Article 48 of the F BandH).

The lessee, in accordance with the contract or aim of the object of leasing, is obliged to economically use the object of leasing.

The lessee is obliged to maintain the object of leasing in good condition and to bear all costs of such maintenance, unless otherwise agreed by the leasing contract.

The loss of the object of leasing or the loss of its function caused by the use of the object of leasing does not exempt the lessee from his duties specified by the leasing contract.

The lessee is obliged to pay to the lessor compensation in amounts, terms and in the manner specified by the leasing contract.

The lessee, upon termination of the leasing contract, is obliged, without delay, to return the object of leasing to the lessor in the manner and condition specified by the leasing contract. The only exception is, in accordance with the leasing contract, if the lessee has acquired the right of ownership of the object of leasing, the right of extension of the leasing contract or if a new leasing contract has been concluded for this object.

Following cancellation of the leasing contract the lessee is obliged to return to the lessor, or to the person specified by the lessor, the object of leasing with all parts and additional elements.

The lessee is not responsible for the wear of the object of leasing arising from its regular use nor for any changes carried out by agreement with the lessor.

The lessee is responsible for damage caused by the use of the object of leasing contrary to the contract or aim of of the object of leasing regardless whether the object of leasing has been used by the lessee, the person working under his order or the person that has been allowed by the lessee to use the object of leasing.

7. Termination of Financial Leasing Contract

Pursuant to Article 56 of the F BandH Law, the leasing contract ends:

a) upon expiration of the term for which it has been concluded,
b) with transfer of the ownership right from the lessor to the lessee,
c) with the purchase of the object of leasing,
d) with cancellation of the leasing contract,
e) with destruction of the object of leasing due to *force majeure*,
f) for other reasons in accordance with the rules regulating obligatory relations.

In those cases the lessor is obliged, within 15 days after the date of termination of the leasing contract, to submit an application for deletion of entered rights from the competent register.

Similar provisions regarding termination of the leasing contract are contained in Article 50 of the RS Law.

8. Consequences of Termination of Financial Leasing Contract

As we have already underlined the leasing contract can end in one of the manners laid down by Article 56 of the F BandH Law, or Article 50 of the RS Law.

In addition to the cessation of the contract upon expiration of the period for which the contract has been concluded, all other aforesaid cases have been prescribed as well as other reasons foreseen for termination of the contract under general rules regulating obligatory relations.

We shall focus our attention to the provisions of entity laws regulating the manner and consequences of termination of the leasing contract if the contract has been broken.

Article 54 of the F BandH Law prescribes that the lessor has the right, unless otherwise agreed by the leasing contract, to break the leasing contgract if the lessee:

a) is late with payment of the first leasing compensation,
b) after payment of the first compensation is late with two consecutive leasing compensations,
c) without the lessor's written agreement gives the object of leasing for sub-lease to the third party,
d) considerably violates provisions of the contract that relate to use and maintenance of the leasing object.

Notwithstanding provisions under a) and b) of this Article, the lessor is entitled to break the leasing contract if the lessee does not pay one of leasing compensations within the agreed term on condition that the circumstances clearly show that other compensations will not be paid.

In order to break the leasing contract for reasons referred to under a) and b) the lessor is obliged to inform the lessee about his intention to break the contract, unless he receives due payments and sets down a subsequent reasonable term for fulfillment of his commitments. The leasing contract remains in force if the lessee pays due compensation before he receives the information about the break of the contract.

The basic consequence of the break of the contract by the lessor is his right to have the object of leasing returned as well as the right to damage compensation although the legislator has not clearly specified what should be deemed as damage for which the lessor is entitled to compensation. This is regardless of the fact that the legislator has envisaged, as a modality of determination of damages, a possibility that calculation of damages in case of the break can be prescribed by the very leasing contract and damages cannot exceed the interests of fulfillment of the contract. It is an open and unresolved question as to what interests of fulfillment of the contract are in a given case.

The other consequence of the contract break lies in the losss of the right of the lessor of possession and use of the object of leasing and paid leasing compensations shall not be deemed as payment of the object of leasing and do not give the right to the lessee to a part of ownership of the object of leasing (Article 55 of the F BandH)

It is obvious that the legislator has not envisaged cases in which the right to the contract break belongs to the lessee nor a possibility of damages for the lessee if the lessor violates any of the contractual duties, although for such cases the lessee can refer to general rules regulating obligatory relations as laid down by Article 52 and 53 of the Law.

The RS Law offers a somewhat different framework of contract termination by way of its break and at the same time gives a more precise definition with regard to the F BandH Law.

Pursuant to Article 39 of the RS Law, namely, the lessor has the right to break when the lessee has not paid the first leasing installment (compensation).

When the lessee is late with payments of two consecutive leasing installments, the lessor has the right to break the contract or to be paid the residual compensation together with interest.

Also, the lessor has the right to break the contract if the lessee does not pay one of the leasing installments during the prescribed term on condition that the circumstances indicate that other compensations will not be paid as well.

In all above cases the lessor undertakes to leave to the lessee a reasonable subsequent term to fulfill his duties. If, within this term, the lessee does not fulfill his duties the contract will be broken by law.

The fundamental consequence of the contract break, like in the F BandH law, is the right to the recovery of the object into possession of and damages to the lessor (Article 40 of the RS Law.)

Unlike the FandH Law, the RS Law foresees a possibility of the contract to remain in force by the lessee if he offers to the lessor specific protection acceptable to the lessor.

On the other hand, the lessor has the right to break the contract even when, without his agreement, the lessee has given the object of leasing to third person for sublease (Article 45 of the RS Law).

Unlike the BandH Law, the RS Law foresees the right of the lessee to break the contract and in such a case he has the right to demand from the lessor recovery of compensation he has paid until the contract break under the financial leasing contract, but lowered by the amount that is a reasonable compensation for benefits that he has had by using the object of leasing (Article 35, paragraph 5 of the RS Law).

9. Sublease

Pursuant to Article 51 of the F BandH Law, the lessee can, under the lessor's written agreement unless otherwise specified by the leasing contract, to transfer the object of leasing or its parts to third party for use.

Transfer of the object of leasing to third party for use does not exempt the lessee from his duty toward the lessor in accordance with the leasing contract.

The right of transfer of the object of leasing to third party for use can be excluded by the leasing contract. Also, the leasing contract can differently regulate this right.

A similar solution is contained in the provisions of Article 45 of the RS Law.

10. Registration of Financial Leasing Contract

Article 58 of the F BandH Law foresees registration of right based on the leasing contract and depending whether the object of the contract is immovable property or a movable item.

If the object of leasing is immovable property, the right of ownership of the object of leasing and the rights based on the leasing contract of the object of leasing are entered in accordance with the rules regulating entries of rights to immovable property.

If the object of leasing is a movable item for which the law prescribes annual registration, i.e. motor vehicles, registration of the right of ownership is performed in accordance with the law that defines registration of ownership of vehicles.

If the object of leasing is a movable item, the lessor is obliged to submit an application for registration of the right based on the leasing contract (especially the proprietary right) and other details from the leasing contract in accordance with the rules regulating registration of pledge within seven days after delivery (Article 59 of the F BandH Law).

When immovable property is in question, the lessor is obliged to submit an application for entry in the land register of the proprietary right and rights from the leasing contract within 30 days after fulfillment of all requirements for entry in the land register.

The lessor is obliged to submit an application for a change or deletion from the competent register within 15 days after any fact has come up conditioning such change or deletion.

Similar solutions are contained in the provision of Articles from 52 to 75 of the RS Law.

The Outline Law on Pledges, brought at the level of Bosnia and Herzegovina and published in the Official Gazette of Bosnia and Herzegovina number 28/04, falls among those particularly significant laws treating and regulating the matter of conclusion of leasing legal business transactions.

This law is important from the aspect of the very important operation of registration of the leasing contract that offers to the lessor a higher degree of legal security during and after conclusion of leasing legal transactions.

Registration of the leasing contract, namely, guarantees and provides priority for the Lessor over other creditors in possible proceedings of execution relating to the lessee's property. The Contract so registered has a nature of a public document and as such, it allows exclusion of objects leased from the lessee's property over which execution proceedings could possibly be performed.

With regard to the aforesaid, particularly stressed is a need for registration of the Leasing contract aimed at adequately protecting the Lessor. In this way, the Lessor can exclude the object leased from the Lessee's property over which execution proceedings can be raised and performed. Contrary to this, without registered Leasing contract the object leased could be recovered only in lawsuit proceedings when one would have to prove the existence of the legal title (Leasing contract) based on which recovery of items is sought. All aforesaid embraces a long and insecure process for recovery of items and a possible execution very them that would bring the Lessor to a very bad position.

It is also necessary to underline that the Outline Law on Pledges is important from the aspect of implementation of proceedings for recovery of items to the Lessor that are the subject of the Leasing contract.

An extensive interpretation could mean that this is a law that as *lex specialis* for leasing legal business transactions allows that the proceedings could be implemented sooner in relation to the proceedings under the provisions of the Law on civil procedure and the Law on executive procedure.

However, provisions in the above Law on execution relate in principle to the pledge law and without an authentic interpretation of those provisions of this Law there can be no discussion of such possibility as those provisions require such interpretation. If the authentic

interpretation (interpretation by the legislator) would show that the provisions on execution could also apply on legal leasing transactions, this would be another „step" of the Lessor's higher legal security and protection and the Lessor could recover the leased object in a more efficient and quicker manner by comparison with actions in civil and executive procedures.

11. Enforcement in Financial Leasing

Entity leasing laws do not contain separate provisions on enforcement over the object of leasing or based on the leasing contract.

Enforcement over the object of leasing will be thus implemented in accordance with general rules and provisions of the F and BandH Law on executive procedure (the Official Gazette of the Federation of Bosnia and Herzegovina number 32.03), or the RS Law on executive procedure (the Official Gazette of the Republic of Srpska number 59/03).

Pursuant to those entity rules, the object of execution could be movable items and immvable property and rights. The object of the leasing contract could be movable items and immovable property and it can be thus concluded that the object of leasing could be the object of enforcement in the manner and in situation determined by the provisions of the Law on executive procedure.

11.1. Bankruptcy and liquidation

When the bankruptcy or liquidation procedure is implemented over the lessee's property, the F BandH Law, in Article 50, prescribes the Lessor's protection and accordingly the lessee is obliged to inform the lessor without delay about the start of the bankruptcy and liquidation procedure.

In case of the lessee's bankruptcy, the lessor is entitled to exclude the object of leasing (exclusion right) from the lessee's bankrupt's estate in accordance with the rules regulating bankruptcy proceedings.

The law has not stipulated the lessee's rights in case of the lessor's bankruptcy or liquidation although it has foreseen by special provisions that bankruptcy or liquidation can be implemented over the leasing society's property pursuant to special bankruptcy or liquidation laws (Article 84 and 85 of the Law of the Federation of Bosnia and Herzegovina).

Similar solutions are contained in the RS Law (Article 25 of the Law of the Republic of Srpska).

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MODERN CONTRACTS IN MONTENEGRO

I. FINANCIAL LEASING[1]

Even though The Law on Obligations from 1978 had stipulated the Financial Lease Contract, the emergence of the enourmous number of this specific credit construction of financial lease in Montenegro has generated the need to more precisely and more thoroughly stipulate this contract in the specific law on financial leasing. The Parliament of Montenegro passed the Law on financial leasing in December 2005. Since 2005 this contract has become more popular and used in Montenegro.[2]

1) Fundamental Concepts and Elements

A. Meaning of financial leasing.

Financial leasing transaction shall mean a legal transaction where the financial lessor shall:

1) stipulate with the supplier of the leased object- the supplier, the provision of acquiring the ownership right on the leased object, pursuant to the specification provided by the lessee and under the terms approved by the financial leasing lessee (the lessee), unless the lessor and the supplier are the same person;
2) stipulate with the lessee the provision regarding financial leasing transaction granting to the lessee the right to possession and use of the leased object for the agreed period of time in return for the payment of the fee in the specified installments.[3]

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* Original text is written in English language

[1] This part of the report on Financial Leasing is based on comparative analysis of both the provisions of Montenegro law on Financial Leasing and the UNIDROIT Convention on International Financial Leasing (Ottawa, 28 May 1988) which Montenegro has not ratified yet.

[2] Ministry of finance - In 2006 in Montenegro 1147 (65 bilion euros) financial leasing contracts were concluded, whereas in 2009 there were 2491 (115,6 bilion euros), which is about 117 % enhancement. Lease of the movable properties (automobiles, vehicles –different ones) has been most represented in this kind of transaction (70%) whereas the lease of the immovables has been structuring about 30 % of the lease.

In Montenegro there are four leasing houses – Hypo Alpe Adria, S –leasing, Porsche Leasing and NLB - leasing. Departments of the three banks offer leasing services – Montenegrin Commercial bank, First Bank of Montenegro and Opportunity bank.

[3] Art.2 of THE LAW ON FINANCIAL LEASING (hereinafter: The Law), Official Gazette of the Republic of Montenegro, No 81/05 dated the 29th, December 2005.

B. Scope of financial leasing.

Financial leasing must define at least one of the following legal situations:

1) acquisition of ownership right on the object of financial leasing, upon the expiration of the period the contract is concluded for, or
2) acquisition of right to purchase the leased object during or at the end of the leasing period at the agreed price, or
3) obligation to return the leased object to the lessor after the payment of all leasing installments.[4]

C. The object of financial leasing.

Article 4 of the Montenegrin Law provides that the object of financial leasing may be movable unexpendable asset (equipment, plants, vehicles, and similar) or immovables (land, buildings and similar).[5] The object of financial leasing under Montenegro law differs from the object of financial leasing that may be subject to UNIDROIT law. The Montenegro law covers both movables and immovables from the start of the transaction.

On the other hand, under Article 1 of the UNIDROIT law, the financial leasing agreement covers equipment, defined as „plant, capital goods or other equipment." There may be uncertainty as to whether immovables (land, buildings and similar) are subject to the UNIDROIT law since Article 1 seems to contemplate purely movables. However, Article 4 covers situations where the movable equipment becomes attached to an immovable (transforms to an immovable). In this case, there may be a transformation in the nature of the object from movable to immovable. When this occurs, the provisions of the Convention shall not cease to apply „merely because the equipment has become a fixture to or incorporated in land." The question of whether or not the equipment has become a fixture to or incorporated in land, and if so the effect on the rights *inter se* of the lessor and a person having real rights in the land, shall be determined by the law of the State where the land is situated. However, UNIDROIT law does not specifically provide for situations where the object is an immovable from the start and not just one transformed to an immovable by attachment or incorporation to land.

D. Parties in financial leasing.

Under the Montenegrin Law,in the financial leasing transaction, there are three clearly defined parties:

The lessor, shall mean a person who owns the leased object and transfers the authorization to possess and use the leased object to the lessee under the contract terms. The lessor may be a domestic or foreign legal entity or physical person, or a business organization and entrepreneur.[6]

The lessee, shall mean a domestic or foreign legal entity or physical person, or a business organization and entrepreneur paying the agreed leasing fee to the lessor for the authorization to possess and use the leased object, in accordance with the terms of the contract.[7]

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[4] Art.3 of The Law.

[5] Art.3 of of The Law.

[6] Art. 6 of The Law.

[7] Art. 7 of The Law.

The supplier of the leased object, shall mean a domestic or foreign legal entity or physical person, or a business organization and entrepreneur transferring the ownership of the leased object to the lessor in accordance with the agreed terms.[8]

The lessor and the suplier may be the same person.[9]

E. Basic principles governing financial leasing.

The Law on Financial leasing has been drafted in the way that it represents the general framework for the financial leasing, allowing the contracting parties to regulate their business relations to them in the most proper way. Therefore, there are two main principles incorporated in the text of this law – the AUTONOMY OF CHOICE (Volition) and the *PACTA SUNT SERVANDA* (Agreements must be kept).

2) Domestic and International Financial Leasing

The Law on Financial Leasing does not contain separate provisions on either domestic or financial leasing but the parties to the financial lease can be either domestic or international. Thus,the law presupposes that on all financial leases where either domestic parties or one of the parties are domestic entities or legal person, the Montenegro Law on Financial Lease can apply. However, when there is an international element involved, and the contracting parties have not stipulated the governing law, the rules of the international private law will be applicable.

Article 6 provides that, „lessor shall mean a person who owns the leased object and transfers the authorization to possession and use of the leased object to the lessee under the contract terms." For the purposes of this Law, the lessor may be a domestic or foreign legal entity or physical person, or a business organization and entrepreneur. Also, Article 7 also provides that „for the purposes of this Law, the lessee shall mean a domestic or foreign legal entity or physical person, or a business organization and entrepreneur paying the agreed leasing fee to the lessor for the authorization to possess and use the leased object, in accordance with terms of the contract."

The UNIDROIT Convention on International Financial Leasing (Ottawa, 28 May 1988)

Article 3 provides that: „ (1) This Convention applies when the lessor and the lessee have their places of business in different States and (a) those States and the State in which the supplier has its place of business are Contracting States; or (b) both the supply agreement and the leasing agreement are governed by the law of a Contracting State (2) A reference in this Convention to a party's place of business shall, if it has more than one place of business, mean the place of business which has the closest relationship to the relevant agreement and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of that agreement." Consequently, if one of the parties to the financial leasing in Montenegro is a signatory to the Convention, the contract can stipulate that the UNIDROIT Convention applies. Otherwise, Montenegro law applies.

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[8] Art. 8 of The Law.

[9] Art. 2 of The Law.

3) Form and Basic Clauses of Financial Leasing

The financial leasing contract must include the following: identification data on the contractual parties; a precise definition of the leased object; place, time and manner of delivery of the leased object; date of concluding the contract, signatures of the parties to the contract; duration of the financial leasing contract; total amount of the leasing fee to be paid by the lessee; amount of individual fee installments, their number and time of payment and rate of agreed default interest; option of acquiring the ownership or purchasing the leased object; manner of termination of the financial leasing contract.[10]

When the lessor is a business organization or bank an important element of the financial leasing contract, is also the rate of agreed regular interest.[11]

In addition, the financial leasing contract may also include other elements such as the following: contracting party responsible to insure the leased object and risks the leased object should be insured against, indication of the contracting party undertaking the obligation to pay expenses and operating burdens (transportation costs, assembling, disassembling, technical improvement, replacement of parts, service, technical and technological improvements), training of the lessee's personnel to use the leased object, as well as other elements agreed on by the contracting parties.[12]

Financial leasing contract must be concluded in writing.[13]

4) Rights and Duties of the Parties in the Financial Leasing

I. The rights and obligations of the lessor:

The lessor shall be obliged to acquire the leased object compliant with the specification provided by the lessee, and shall be liable to the lessee for legal deficiencies of the leased object. The supplier shall be liable to the lessee for material deficiencies of the leased sobject, unless otherwise contracted. The lessor shall be obliged to inform in writing the supplier who is liable for material deficiencies of the leased object on name or company name of the entity that is lessee under the contract of leasing, at the latest within 3 business days as of the day of concluding a contract of leasing. In the same way, the lessor shall be entitled to transfer the ownership right on the leased object to a third party, in which case the third party (new owner) assumes the role of the lessor and all rights and obligations from the financial leasing contract. The lessor shall be obliged to inform the lessee with no delay and in writing of the transfer of ownership right of the leased object to a third party.[14]

II. The rights and obligations of the lessee:

The lessee shall be entitled and obliged to take into possession the leased object in the manner, at the time and place set forth in the financial leasing contract. Also, the lessee shall be obliged to pay the lessor a leasing fee in the amounts, deadlines and the manner prescribed

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[10] Art.5 para 1 of The Law.

[11] Art.5 para 2 of The Law.

[12] Art.5 para 3 of The Law.

[13] Art.5 para 4 of The Law.

[14] Art.9, 10, 11, 12 of The Law.

by the financial leasing contract. Modifications of the leased object made by the lessee that can be separated from the leased object shall be in the ownership of the lessee, unless otherwise contracted. If the lessee, without damaging the leased object, makes modifications at his own expense and with the written consent of the lessor, which cannot be separated from the leased object, he shall be entitled to compensation of the expenses incurred by such modifications upon cancellation of the financial leasing contract, unless otherwise contracted. The lessee shall be obligated, unless otherwise contracted, to maintain the leased object in a proper condition, make all necessary repairs on the leased object and cover maintenance costs.[15]

Right of Lessee to Terminate the Contract for Late Delivery or Nonconforming Delivery of Lessor

The UNIDROIT Convention on International Financial Leasing (Ottawa, 28 May 1988), Articles 12 and 13 give both the lessor and the lessee the right to terminate the contract in certain situations. Article 12 gives the lessee the right to reject the equipment or terminate the leasing contract where the equipment is not delivered or is delivered late or fails to conform to the supply agreement. Under the UNIDROIT law, the lessor has the right to remedy its failure to tender equipment in conformity with the supply agreement. The lessee shall be entitled to withhold rentals payable under the leasing agreement until the lessor has remedied its failure to tender equipment in conformity with the supply agreement or the lessee has lost the right to reject the equipment. When the lessee has exercised a right to terminate the leasing agreement, the lessee shall be entitled to recover any rentals and other sums paid in advance, less a reasonable sum for any benefit the lessee has derived from the equipment. The lessee shall have no other claim against the lessor for non-delivery, delay in delivery or delivery of non-conforming equipment except to the extent to which this results from the act or omission of the lessor.

The UNIDROIT law also preserves the lessee's rights against the supplier under Article 10. Article 10 provides that the duties of the supplier under the supply agreement shall also be owed to the lessee as if it were a party to that agreement and as if the equipment were to be supplied directly to the lessee. However, the supplier shall not be liable to both the lessor and the lessee in respect of the same damage. The lessee cannot, however, terminate or rescind the supply agreement for any breach by the supplier without the consent of the lessor.

The Montenegro law allows only the lessor to terminate the contract for failure of the lessee to make payments or for substantive violation of contractual provisions relating to the use and maintenance of the leased object. Article 16 provides that the lessor shall be entitled to cancel the financial leasing contract in the cases where lessee: 1) defaults payment of the first installment; 2) after the payment of the first installment, defaults one or several installments for the period of at least 90 days as of the day of their maturity; 3) substantively violates contractual provisions relating to the use and maintenance of the leased object. The lessee is not given the right to terminate the contract for material deficiencies. However, Article 11 of the Montenegro law provides that the supplier shall be liable to the lessee for material deficiencies of the leased object, unless otherwise contracted. The lessor shall be obliged to inform in writing the supplier who is liable for material deficiencies of the name or company name of the entity that is the lessee under the contract of leasing. The notice by the lessor must be submitted at the latest within 3 business days as of the day of concluding a contract of leasing.

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[15] Art. 13, 14, 15 of The Law.

Transfer of Rights

The UNIDROIT Convention on International Financial Leasing (Ottawa, 28 May 1988)

Article 14 provides that:

„1. The lessor may transfer or otherwise deal with all or any of its rights in the equipment or under the leasing agreement. Such a transfer shall not relieve the lessor of any of its duties under the leasing agreement or alter either the nature of the leasing agreement or its legal treatment as provided in this Convention.

2. The lessee may transfer the right to the use of the equipment or any other rights under the leasing agreement only with the consent of the lessor and subject to the rights of the third parties."

The Montenegro Law *on transfer of ownership right on the leased object to a Third Party* provided in Article 12: „The lessor shall be entitled to transfer the ownership right on the leased object to a third party, in which case the third party (new owner) assumes the role of the lessor and all rights and obligations from the financial leasing contract. The lessor shall be obliged to inform the lessee with no delay and in writing of the transfer of ownership right of the leased object to a third party. The transfer of the ownership right on the leased object to a third party may be excluded by the contract."

The main difference between the Montenegrin Law and the UNIDROIT Convention is that when ownership rights over the leased object are transferred to a third party, under UNIDROIT, such transfer shall not relieve the lessor of any of its duties under the leasing agreement or alter either the nature of the leasing agreement or its legal treatment as provided in the Convention. Under the Montenegro Law, the third party (new owner) assumes the role of the lessor and all rights and obligations from the financial leasing contract.

5) Termination of Financial Leasing

Grounds for Termination.

The leasing contract shall terminate by the expiration of the period it is concluded for, by transfer of the ownership right from the lessor to the lessee, by purchase of the leased object or by the cancellation of the contract.[16]

Cancellation of the Contract due to Default by the Lessee.

Unless otherwise contracted, the lessor shall be entitled to cancel the financial leasing contract in the cases where the lessee:

1) defaults payment of the first installment;
2) after the payment of the first installment, defaults one or several installments for the period of at least 90 days as of the day of their maturity;
3) substantively violates contractual provisions relating to the use and maintenance of the leased object.[17]

[16] Art. 18 para. 1 of The Law.

[17] Art.16 of The Law.

Devastation of the Leased Object Due to Force Majeure.

The leasing contract shall be terminated, if the leased object is devastated due to force majeure.[18]

6) Consequences of Termination of Financial Leasing

In cases of terminations, the lessor shall be obliged to submit a request for deletion of the registration of the leasing from the adequate registry within three business days as of termination of the leasing contract.[19]

7) Sub-financial Leasing

The new Montenegro Law on Financial Lease does not mention or describe sub-financial leasing. However, Article 2 of the UNIDROIT Convention on International Financial Leasing (Ottawa, 28 May 1988) specifically authorizes sub-financial leasing and for each subsequent sub-leasing transaction, involving the same equipment. The Convention applies to each transaction which is a financial leasing transaction and is otherwise subject to the Convention as if the person from whom the first lessor acquired the equipment were the supplier and as if the agreement under which the equipment was so acquired were the supply agreement.

8) Registry of Financial Leasing Contracts

Registration of Immovable Property as Leased Object.

Financial leasing contract that has immovable property as leased object shall be registered in the Real Estate Registry in accordance with regulations governing registration of rights on immovables.[20]

Registration of Movable Property as Leased Object.

Data from the financial leasing contract that has movable property as the leased object, termination of the contract, as well as other required data, shall be registered in the Pledge Registry of the Republic of Montenegro in accordance with provisions of the law regulating pledge as security for claims.[21]

Registration Obligation.

The lessor shall be obliged to submit a request or an application for the registration of encumbrances and limitations, or data from the financial leasing contract referred to in Arti-

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[18] Art. 19 of The Law.

[19] Art. 18 para. of The Law.

[20] Art. 20 of The Law. Also see, The Law on Pledge, Official Gazette of the Republic of Montenegro, No 38/02, Article 3 para 9.

[21] Art. 21 of The Law.

cles 20 and 21 of the Law, within 3 business days as of the day of concluding the financial leasing contract.[22]

9) Forced Execution in Financial Leasing

If the lessor cancels the financial leasing contract in accordance with the Law and the lessee refuses to return the leased object on a voluntary basis, the lessor may file an application for execution with the court requesting an order authorizing the leased object to be seized from the lessee and returned to the lessor.

On the basis of the application for execution, the competent court shall hold a hearing limited to following issues:

1) whether a legally valid financial leasing contract registered with the competent authority exists;
2) whether the lessee has failed to meet his contractual obligation.

The burden of proof shall be upon the lessee in the case referred to in paragraph 1 of this Article.

Upon a finding favourable to the lessor, the court shall issue an order designating a law execution officer to seize the leased object from the lessee or a person in possession of the leased object and return it to the lessor, without the obligation to previously inform them on execution.

The law execution officer cannot refuse to make or continue a seizure, unless it has been furnished with security that actual seizure costs will be covered. The court shall be obliged to adopt the order on the application for execution referred to in paragraph 1 of this Article at the latest within 3 business days as of the day of its submission. Objection against the execution order shall not be allowed. The leased object shall be seized within three business days as of the day of adoption of the order on seizure in accordance with the Law on Executive Procedure. The appeal against the execution order may be filed with the court of second instance within 5 days as of the day of receiving the order. Filing of the appeal shall not postpone the execution of the order.[23]

II. FRANCHISING

There is no law precisely regulating the modern contract of franchising in Montenegro. Whereas the current law describes licensing and distribution, the concept of franchising is still without regulations in Montenegrin legal system. Because of this situation, answers,,approaches or solutions on franchising typical for Montenegrin legislation cannot be offered. Parties in Montenegro, therefore, usually avoid designating their transactions as franchising and instead opt for licensing and distribution contracts. This has created uncertainties in legal transactions that may actually be considered franchising but have been veiled by the parties under the guise of licensing or distribution contracts.

Although none of the existing laws ordinarily defines this contract, the term „franchise" has been mentioned in some Montenegrin laws in the following manner:

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[22] Art. 22 of The Law.

[23] Art. 17 of The Law.

(1) Trademark Law (*Official Gazette of SM*, No. 61/04, 71/05):

– Art. 44. „Trademark, or the right from the application can be the subject to the contract on transfer of the rights, lease, pledge or franchise. Contract from the above para. has to be in the written form and properly registered on the request of the one contractual party. If the contract is not adequately registered, such a contact cannot produce any effects."
– Art. 53, para. 5, „Using trademark does not assume the payment of the taxes for the extention of the validity of the trademark neither the conclusion of the contract of the transfer of the rights, lease, pledge and franchise."

(2) Law on Legal Protection of Design (*Official Gazette of SM*, No. 61/04):

– Art. 47. „Right to the design and or right from the application can be the subject of the contract of transfer of the rights, lease, pledge or franchise."

(3) Law on Geographical Indications (*Official Gazette of SM*, No. 48/08) applicable as of 1 September 2008:

– Art. 46. „Registered name of the geographical origin and actually registered geographical indications cannot be subject of the contract of transfer of the rights, lease, pledge or franchise."

(4) Foreign Investment Law (*Official Gazette of SM*, No. 52/00)**:**

– Art. 12. „Investment of a foreign investor can also be conducted through a contract on leasing, contract on franchising, contract on management and contract on real estate sale, in accordance with law."

As mentioned earlier, there have been no court cases or disputes involving contracts of franchise.[24] However, several scholars write about franchising in general terms as practiced among businessmen. These scholarly works are based only on general knowledge of franchising and the mechanics thereof but are not rooted on Montenegro law in particular. Their writings based on foreign legal knowledge and terms were not included or used to answer the parts of the report on franchising and factoring. [25]

Only one of these scholars has actually written extensively about franchise contracts that have been entered into and transacted in Montenegro.[26] His perspective, however, analyzed franchise contracts as a key ingredient for economic growth and his analysis did not involve a legal commentary on the consequences of franchising. He mentioned that the main obstacle of development of franchising transactions in Montenegro is that it has not been defined, described and regulated by any law on Montenegro. Franchises existed and mainly have been regulated and understood in Montenegro under licensing and distribution laws or agreements.[27] This is so, because of the legal uncertainty generated by the absence of laws

[24] For the purpose od this report we have contacted all judicial courts: commercial, trial, supreme court and appellate court. They informed that they have no data on actual cases or disputes involving franchise contracts.

[25] Prof. Dr Momir Dragašević, Novi ugovori u medjunarodnoj poslovnoj praksi, Službeni list Crne Gore, Podgorica, 2000.
Dr Mihailo Velimirović, Privredno pravo, „Štamparije Obod" dd Cetinje, Podgorica 1998.

[26] Radivoje Drobnjak, LLM., Franšizing kao faktor privrednog razvoja sa osvrtom na Crnu Goru i SME sektor.

[27] The licensing contract and distributor agreement have been regulated and stipulated in the Law on Contracts and Tort (*Official Gazette of SM*, No. 47/08), Art.883- 905 (Distributor agreement) and, Art.778 - 803 (Licensing agreement)

governing franchise contracts. Some examples of variations of franchise agreements are found in servicing and selling vehicles in the automobile industry (Audi, Toyota, Wolkswagen, Porsche leasing, Renault, Mercedes, Peugeot). Pure franchises are found in DHL, European computer driver licence, brand industry, Benetton (the oldest franchise in Montenegro), clothing industry (Max Mara, Ermenegildo Zegna, Paul Shark), and some service establishments such as Costa Cafe, and Premier Best Western hotel. Although not defined in the national legislation, franchises are a growing commercial phenomenon in Montenegro economy.

III. FACTORING

Montenegro law does not define, describe and regulate factoring. Because of this situation, the required questions on factoring cannot be answered. Although some scholars have analyzed the legal doctrine of factoring, these scholarly works are based only on general knowledge of factoring and the mechanics thereof but are not rooted on Montenegro law in particular. Their writings based on foreign legal knowledge and terms were not included or used to answer the parts of the report on factoring.[28] These are only theoretical knowledge that has been conveyed in the Montenegrin university syllabuses, in the textbooks and monographs of our domestic academics.

Only one specific law mentions factoring, the **Law on Banks**:

Art. 6. „Activities of the bank- Aside the businesses from paragraph 1 of this article, the Bank can undertake and the following deals:

... (2) buying, selling and recovering debts (factoring and forfeiting)…"

When the issue is on the practice and application of this transaction it is to state that, due to the lack of the legal regulation of this contract, factoring has been offered to the Montenegro market only in two out of the eleven existing and functioning commercial banks.[29]

Finally, it is to note that factoring does not have the *proper treatment* in the Montenegro national legislation and due to it, the legal uncertainty has generated poor application of those contracts.

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[28] Prof. Dr Momir Dragašević, Novi ugovori u medjunarodnoj poslovnoj praksi, Službeni list Crne Gore, Podgorica, 2000.

Dr Mihailo Velimirović, Privredno pravo, „Štamparije Obod“ dd Cetinje, Podgorica 1998.

[29] In 2009, according to the Central Bank of Montenegro, the factoring transactions involved Euros 78,000 in the period Jan-Sept. 2009 - Bulletin of Central bank of Montenegro, October 2009, accessed on 12 Feb. 2010 <http://www.cb-mn.org/slike_i_fajlovi/fajlovi/fajlovi_publikacije/biltencbcg/2009/bilten_cbcg1009.pdf>

Country Reporter for the Republic of Albania
Asim Vokshi, LL.M

MODERN CONTRACTS

FRANCHISING

1) Fundamental Concept of Franchising

Under the Albanian civil legislation, and in more concrete terms, under the Civil Code,[1] the contract of franchising is specifically regulated, with this becoming one of the typical contracts prescribed by this Code. Articles 1056 through to 1064 of the Civil Code provide for the basic adjustments in the contract of franchising. Franchise relations are complex relations, which, in terms of the concrete elements of the contract of franchising, have been prescribed very precisely under the specific provisions of the Civil Code. For a correct construction of the different elements of a contract of franchising, other parts of the legislation must also be taken into account, including intellectual property and the agency contracts. The contract of franchising is a new contract under the Albanian legislation. However, it has not yet received a comprehensive and all-inclusive legal regulation. In the following paper, we will see how the Albanian legislation regulates the contract of franchising.

a) *Meaning of franchising*

Under Article 1056 of the Civil Code, the contract of franchising contains an account of continuous obligations by which independent enterprises are mutually obliged to jointly promote and develop trade, and provision of services, in accordance with the separate obligations.

b) *Scope of the contract of franchising*

The scope of the contract of franchising is to establish precisely a juridical relationship characterised by an account of continuous obligations, on the basis of which the parties are mutually obliged to jointly promote and develop trade and provision of services, in accordance with the separate obligations arising from the contract of franchising.

c) *The object of franchising*

The object of the contract of franchising is to make a standard account of immaterial rights, samples, charts, ideas on making profit, trade and organisation, and other suitable knowledge for the development of trade, available to the franchisee.

* Original text is written in English language
[1] Law No 7850 of 29 July 1994 'Civil Code of the Republic of Albania,' as amended.

d) *Parties to a contract of franchising*

The parties to a contract of franchising include:

1. Franchisor
2. Franchisee

The first is a subject that is in the possession of a standard account of immaterial rights, samples, charts, ideas on profit, trade and organisation, and other suitable knowledge for the development of trade.

The latter is a subject receiving the afore-mentioned benefits, while taking on those obligations explicitly stated in the contract of franchising.

2) Nature and Scope of Rights Granted and Relationship of the Parties

The contract of franchising[2] represents an agreement reached between two independent companies, enterprises, or entrepreneurs. If, on the contrary, the companies, enterprises or entrepreneurs were dependent on one another, then we would either have to do with the same person (*for instance, the parent company and its subsidiaries*), or, eventually, would be dealing with an employment contract. We are all familiar with the large retail chains that sell goods and services, consisting of many selling commercial enterprises, which exclusively sell products of a given manufacturer,[3] and carry the same commercial signs and images, and which are nearly identical in how they furbish the store environment. Such selling lines are mostly created in consequence of the contracts of franchising. This would mean that the stores are not relevant to (*as might be assumed*) the manufacturer of the goods that are sold, and those managing such stores are not the manufacturer's employees. On the contrary, as already mentioned earlier on, reference is made to independent commercial entrepreneurs, who, following conclusion of a contract of franchising, become part of the store chain, thus buying the privilege (*franchise*) to market the goods of a given manufacturer by making use of manufacturer's trade mark, and displaying the signs of such person.[4]

Given that they enter into agreements with one another, independent enterprises establish a juridical relationship characterised by rapport of continuous obligations, thereby being mutually obliged towards one another to jointly promote and develop trade and provision of services, pursuant to the specific obligations assumed by them by virtue of a contract of franchising.

Franchising refers to the approach of practising and applying someone else's 'business philosophy' in one's own business. This includes the use of tangible and intangible means (*such as, for instance, advertising and training*), pertinent to someone's business, by another person in the latter's own business. In theory, it is assumed that a contract of franchising is better suited to businesses carrying the following characteristics:

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[2] The contract of franchising is usually a contract containing standard terms and conditions, or otherwise called, adhesion contract.

[3] The so-called brand names.

[4] Manuale di Diritto Privato (*Handbook on Private Law)* (*14th Edition*). Rea Torrente and Piero Schlesinger. *Giuffrè* Editore, p. 549.

– Businesses making large profits;
– Businesses established on a unique or unusual concept;
– Businesses covering a large geographical territory;
– Businesses relatively easy to operate;
– Businesses that do not require excessive management expenses;
– Businesses that may easily grow twice as much[5].

Proceeding from the above, we might say that the basis for the contract of franchising includes the need to efficiently carry on and expand service activities, which are often related to the sale of goods.

Article 1057 of the Civil Code provides that:

'*The franchisor shall be obliged to give the franchisee a standard account of immaterial rights, samples, charts, ideas on profit, trade and organisation, and other suitable knowledge for the development of trade.*

'At the same time, the franchisor shall be obliged to protect all this programme of obligations from infringements by other third parties, to develop it continuously, and support its implementation by the franchisee through instructions, information and improvement.'

Article 1058 of this Code stipulates that, in the negotiations for the conclusion of a contract, the parties have to introduce each other to the state of commercial affairs concerning the contract of franchising, and particularly, the programme of franchise obligations, as well as inform each other on the fiduciary principles. They are obliged to keep these information confidential in accordance with the trade secret, even if the contract is not concluded.

Whatever party infringes this obligation is liable to indemnify the other against the damage. Such right terminates after the elapse of three years from the date of conclusion of the negotiations.

The party participating in the negotiations may require the reimbursement of expenses incurred during the process of concluding the contract contract, which was not concluded through the other party's intentional behaviour.

Article 1059 of the Civil Code explicitly states that, '*A contract of franchising must be concluded in writing, while including,* inter alia*, an unanimous definition of the parties' mutual obligations, the duration of the contract, and its other substantial elements. The text of the contract must contain a full description of the programme and franchise obligations.*'

The preceding article prescribes that the contract of franchising is a formal contract, and that its written form is required for the *ad probationem* effects.

Article 1061 of the Civil Code clearly provides for the requirements of restriction on the competition as a result of the existence of the contract of franchising. In particular, this article stipulates that, even after the termination of the contractual relationships, the parties shall remain bound to foster fair competition.

On this basis, a ban on local competition for a period of up to one year may be imposed on the franchisee.

If a ban on competition results in their reduced professional activity, the franchisee is given an equal financial compensation, notwithstanding the termination of the contract.

[5] An example of the use of franchising includes the big companies (*Coca Cola*, *McDonalds*, and *Sign A Rama*) conducting business in many states.

3) Term of the Agreement and Conditions of Renewal

The contract of franchising may be concluded for a term as agreed upon by the parties. Article 1060 of the Civil Code states that, where no term is specified in the contract or the term is longer than ten years, each and every party is entitled to withdraw from the contract, while giving notice period to the other party one year in advance. Hence, in this case the law provides for certain terms relating to withdrawal from the contract. However, this is related to its duration. Likewise, the Civil Code does not contain any specific provision with reference to the contract renewal conditions, which are left to the parties' free will, subject to the general regulations contained in the contracts.

4) Financial Matters

The Civil Code does not provide for any specific regulation of the financial matters associated with the contract of franchising. These matters are governed by the tax legislation.

5) The Role of the Franchisor

The franchisor's role is provided for in Article 1057 of the Civil Code, and it was expounded in the part on the substance of the relationships established between the parties to the contract of franchising. What is important to point out is that the relationship established between the parties to the contract of franchising allows enough leeway for negotiations, and may indeed determine the contractual terms, which, in the final analysis, shape the franchisor's role, as well.

6) The Role of the Sub-Franchisor

The Civil Code does not contain any specific definitions referring to the sub-franchisor's role. With regard to this subject's position, it is left to the parties to specify his rights and obligations.

7) The Sub-Franchise Agreement

As with the sub-franchisor's role, the Civil Code does not contain any specific definitions of the sub-franchise agreement either.

8) Advertising and the Control of Advertising

With reference to the contract of franchising, advertising and the control of advertising is prescribed to be freely determined by the contracting parties. Legislation does not provide for any specific restrictions in this aspect.

9) Supply of Equipment, Products and Services

As already mentioned earlier on, Article 1057 of the Civil Code states that the franchisor is obliged to give the franchisee a standard account of immaterial rights, samples, charts, ideas on profit, trade and organisation, and other suitable knowledge for the development of trade. At the same time, the franchisor is obliged to protect all this programme of obligations from infringements by other third parties, to develop it continuously, and support its implementation by the franchisee through instructions, information and improvements. Detailed regulations of such supply are not defined, but left to the parties' free will, which may go into detail in the contract.

10) Intellectual Property

The rights derived from intellectual property are pertinent to the franchisor, who, under Article 1057 of the Civil Code, has the obligation to protect all the programme of obligations from any liability of possible violations by other third parties. At this point, it is worth noting that specifications under the Law No 9380 of 28 April 2005 'On the copyright and other rights relating to it' (*as amended*), and the Law No 9947 of 7 July 2008 'On industrial ownership,' have been taken into consideration. The parties to the contract of franchising are free to regulate their relationships in relation to other elements associated with the use of products, which are protected as intellectual property.

11) Know-How and Trade Secrets

The know-how and trade secrets are an inherent part of the relationships established by the contract of franchising. The provisions of the Civil Code expressly state that the franchisor is obliged to give the franchisee a standard account of immaterial rights, samples, charts, ideas on profit, trade and organisation, and other suitable knowledge that are necessary for the development of trade. This statement also includes the know-how and trade secrets. Likewise, under Article 1058 of the Civil Code, during the negotiations for the conclusion of a contract the parties have to introduce each other to the state of commercial affairs concerning the contract of franchising, and particularly, the programme of franchise obligations, as well as inform each other on the fiduciary principles. They are obliged to keep the secret of confidential information, even if the contract is not concluded. On account of the specific character of the contract of franchising, under Article 1061 of the Civil Code the ban on competition extends beyond the termination of the contract. This topic is also exposed in the part on the relationships established on the basis of the contract of franchising. The meaning of the concept of trade secret is explained in Article 18 of the Law No 9901 of 14 April 2008 'On merchants and commercial companies.'[6]

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[6] This article stipulates that, '*1. The trade secret shall include data that are regarded by the company as internal information or document, which the company protects in appropriate ways, and which, if relayed to unauthorized persons, would cause considerable damage to the company's trade interests.*

2. The information, which must be made public under the law, which is about the breach of law, or which must be disclosed on the basis of the best trade practices and the principles underlying commercial ethics, shall not constitute a trade secret. Dissemination of such information shall be considered as being consistent with law, if the intention behind such act is to protect public interest.

12) Remedies for Non-Performance

The franchisor is held accountable for the existence of the rights and knowledge about the programme of franchise obligations. If the appropriate rights were not in place, or the franchisor infringed other contractual obligations by mistake, the franchisee is entitled to a reduced amount of contractual payment obligations. The reduced amount must be determined with competence by an impartial expert. The franchisee has the right to require indemnity of the damage sustained through non-existence of the elements of the programme of obligations, or the faulty breach of the contract, or failure to complete the contractual obligations by the franchisor.[7]

The franchisor has the right to require indemnity of the damage sustained through the faulty breach of the contract, and particularly, through inadequate implementation of the programme of franchise obligations by the franchisee.[8]

Under Article 1058 of the Civil Code, indemnity of the damage sustained may also be required in the course of the pre-contract relationships.

13) The End of the Relationship and Its Consequences

As already mentioned earlier on, paragraphs 2 and 3 under Article 1060 of the Civil Code state that, where no term is provided for in the contract, or where the term is longer than ten years, each and every party is entitled to give up on the contract, while giving notice to the other party one year in advance.

In the case of the termination of the contract as a result of the termination of the term, or withdrawal from it, and prior to actual submission of the report on the state of affairs, the parties, guided by the principles of good faith, make an effort to come to an agreement to renew the contract on equal or amended grounds.

Under Article 1064 of the Civil Code, in the event of infringement of the contractual obligations, which seriously jeopardises the purpose of developing trade, the contracting party is entitled to give up on the contract, without reference to the time-limit.

14) Other Generally Used Clauses

Under the Civil Code, which is the legal framework regulating the contract of franchising overall, no other element in relation to other contractual clauses has been provided for. This means that, while enforcing the legal provisions governing contracts in general, the parties to the contract of franchising are free to insert other contractual clauses, as required, on a case-by-case basis.

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3. The administrators, members of the Board of Directors, supervisory council, members of the employees' council, and the employees' representatives shall be accountable to the company for the damage sustained through the dissemination of the trade secrets about which they have information on account of their functions in the company.

4. Except as otherwise defined by specific laws, a lawsuit against exercise of the company rights must be filed within 3 years from the commitment of breach. Provisions of point 3 under Article 10 of this law shall also be applicable to initiation of a lawsuit against the afore-mentioned persons.'

[7] Article 1062 of the Civil Code.

[8] Article 1063 of the Civil Code.

FACTORING

1) Fundamental Concepts and Elements

Under the Albanian legislation, the contract of factoring is a new contract, which has not so far been widely applied in practice. This is evident if account is taken of the fact that the legal regulation of such contract was only made possible in recent years. In concrete terms,the Law No 9630 of 30 October 2006 'On factoring,' as amended, is the first law regulating such contract. Along with the basic concepts of the relationship of obligation specified in such contract, which are regulated by the Civil Code, the new Law 'On factoring' has provided for further details concerning the relationship established by the contract of factoring. The purpose of the Law 'On factoring' is to regulate the relationships between the parties to the contract of factoring, and the transfer of the client account money. Therefore, the following concepts are outlined in more detail in the specific law.

A. Meaning of factoring

The contract of factoring[9] includes a written contract concluded between the supplier and the factor, on the basis of which:

a) the supplier may sell or sells to the factor the client account money, which exist at the moment of the conclusion of the contract of factoring, and/or which may subsequently be earned, and which have been earned and/or will be earned from the contracts for sale of goods and/or services, concluded between the supplier and its clients, namely, the debtors, except for the contracts for sale of goods and/or services, which are purchased for personal, household or domestic use;

b) the factor carries out, at least, two of the following actions:
   i) provides funding to the supplier, including down payments;
   ii) keeps the books relating to the client account money;
   iii) collects the client account money;
   iv) protects the supplier against debtors' insolvency, as a result of their financial incapacity to pay;

c) the debtor must receive a notice about the transfer of money into the client account.

The contract of factoring is concluded with regard to both local and international funds. The contract of factoring is not a loan contract or a contract for the transfer of money into the client account, which is solely concluded to facilitate collection of money. Under the meaning of this law, a contract, where the factor and the supplier are one and the same subject, is not a contract of factoring.

B. Scope of the contract of factoring

Under Article 2 of the Law No 9630 of 30 October 2006 'On factoring,' as amended, the purpose of the contract of factoring is precisely to ensure the transfer from the supplier onto the factor of the client account money, which exist at the moment of the conclusion of the contract of factoring, and/or which may subsequently be earned, and which have been earned and/or will be earned from the contracts for sale of goods and/or services, concluded between

[9] Article 2 of Law No 9630 of 30 October 2006 'On factoring,' as amended.

the supplier and its clients. The contract of factoring helps promote business activities under the conditions of modern development of the economic transactions, in compliance with the needs dictated by the market economy.

C. The object of factoring

The object of the contract of factoring includes the existing and/or future money for the client account, which has been earned and/or will be earned from the sale of goods and/or services by the supplier to the client (debtor). The money in the client account, object of the contract of factoring, may be either local or international. The client account money may also be transferred prior to the conclusion of contract on the basis of which they will be earned. The client account money, either existent or future, may be transferred as a whole. The transfer of the whole amount of future money held in the client account may only be applicable to the money earned on the basis of contracts, which are concluded within a maximum time-limit of 24 months from the conclusion of the contract of factoring.

The provisions of the contract of factoring are valid even if they do not individually identify the existent or future money in the client account, object of the contract of factoring, if such money are identified in the contract of factoring at the time of its conclusion, or at the time when such money are earned. The provisions of the contract of factoring, which prescribe the transfer of the debatable future money held in the client account onto the factor, are applied immediately, at the moment when the money under discussion are earned, with no need to sign a new contract for the transfer of the client account money. Conclusion of contracts provided for in Article 2 of this law, the object of which includes the same money held in the client account, by a supplier with more than one factor and for the same debtor, is prohibited. If concluded, such contracts are invalid. If it constitutes a penal offence, violation of such provisions is subject to penalty under the provisions of the Penal Code. Conclusion of the contracts of factoring does not run afoul of the law if the afore-mentioned factors have agreed to conclude such contracts.[10]

D. Parties to the contract of factoring

The participating parties to factoring transactions include:
1) factor,
2) supplier,
3) debtor.

The **factor** is a juridical person, which provides the services mentioned in letter 'b' of point 1 under Article 2 of the Law 'On factoring,' and receives payment, which may include a certain amount and/or interest rate for a period of time, as specified in the agreement concluded between the parties.[11]

The following legal entities only may carry on factoring activities:

a) banks and non-banking financial institutions, which are set up in accordance with the existing legislation, and are operating in the territory of the Republic of Albania;
b) commercial companies, the sole object of which includes factoring activities.

If it is established in the territory of the Republic of Albania, under letter 'b' mentioned

[10] Article 3 of the Law No 9630 of 30 October 2006 'On factoring,' as amended.

[11] Article 9 of the Law No 9630 of 30 October 2006 'On factoring,' as amended.

above, the factor must be a commercial company doing business in accordance with the Law No 7638 of 19 November 1992 'On commercial companies,'[12] with the initial capital being not less than Lekë 20 000 000 (twenty million), which must have made a cash payment, at least, to the tune of Lekë 20 000 000 (twenty million).[13]

The **supplier** means any subject conducting business activities established in accordance with the legislation of the country of origin, and which provides goods and/or services to the debtor, and benefits from the factor's services set out in letter 'b of point 1 under Article 2 of the Law 'On factoring,' and receives payment, which includes a certain amount and/or interest rate for a period of time, as specified in the agreement concluded between the parties.[14]

The **debtor** means the legal entity, which purchases goods and/or services from the supplier, and conducts business activities, and is established in accordance with the legislation of the country of origin.[15]

2) Types of Contracts of Factoring

There are three types of the contract of factoring:

a) local factoring, either export or import;

b) factoring without guarantee, where the supplier does not provide a guarantee to the factor in case of the debtor's insolvency. However, the supplier remains accountable and obligated towards the factor, if, for whatever grounds, other than insolvency, the debtor does not fully pay the money into the client account;

c) factoring with guarantee, where the supplier fully guarantees the factor that the debtor will pay the money into the client account.[16]

3) Rights and Duties of the Parties to a Factoring Transaction

The factor's obligations under the contract of factoring are specified by Article 13 of the Law 'On factoring.' In particular, the factor accepts the transfer of the supplier's client account money in accordance with the contract of factoring, as specified in Article 2 of this law. The factor provides services in compliance with the contract of factoring, as specified in letter 'b' of point 1 under Article 2 of the Law 'On factoring.'

On the other hand, the supplier has to meet his own obligations on the basis of the contract of factoring. The supplier is held accountable to the factor for the existence and validity of the money held in the client account, which are object of the contracts outlined in Article 3 of the Law 'On factoring,' and are transferred to the factor free of any charge, disagreement, objection, claim, or any other right pertinent to third parties. On the basis of the contract of factoring, the supplier is obliged, no later than the moment where the factor becomes

[12] This law is repealed by the Law No 9901 of 14 April 2008 'On merchants and commercial companies.'

[13] Article 10 of the Law No 9630 of 30 October 2006 'On factoring,' as amended.

[14] Article 11 of the Law No 9630 of 30 October 2006 'On factoring,' as amended.

[15] Article 12 of the Law No 9630 of 30 October 2006 'On factoring,' as amended.

[16] Article 5 of the Law No 9630 of 30 October 2006 'On factoring,' as amended.

entitled, to make, in accordance with Article 507 of the Civil Code, any data or documents attesting the existence of the client account money, the object of the contract of factoring, available to the factor. If the debtor, even though he has received the notice under Article 6 of the Law 'On factoring,'[17] pays, by mistake or for any other grounds, in favour of the supplier the money held in the client account, which the supplier has transferred onto the factor on the basis of the contract of factoring, the supplier is obliged to immediately transfer the money he has received through payment of funds by the debtor.

The debtor is entitled to receive the notice about the conclusion of the contract of factoring related to the money held in the client account, and the factor's identity. The debtor's rights and obligations outlined in the contract concluded between it and the supplier remain unchanged, notwithstanding the change of the party in whose favour the debtor pays the money.[18]

The debtor is obliged to pay the factor provided only that he is not aware of the priority that another subject must be paid, and provided that the written notice about the transfer of money:

a) is provided to the debtor by the supplier or the factor, with the supplier's consent;
b) identifies, to the extent possible, the client account money transferred in favour of the factor to which the debtor must pay the funds;
c) refers to the client account money received on the basis of a contract for sale of goods and/or services concluded prior to or at the time that the notice is given.

With the notice having been timely provided, the debtor pays the factor in accordance with the terms and conditions of the contract concluded between the supplier and the debtor.[19]

The debtor is released from his obligation after he pays the money in favour of the factor in accordance with the provisions under Article 17 of the Law 'On factoring,' as well as under any other circumstances, where payment of money by debtor in favour of the factor releases him from his obligation.[20]

The debtor is entitled to lodge objections and protect itself both against the factor and the supplier. If the factor makes claims against the debtor for the payment of the client account money, earned on the basis of a contract for sale of goods and/or services, the debtor is entitled to raise with the factor all objections that he was supposed to raise against the supplier. Likewise, the debtor is entitled to require that the factor make up for the client account money transferred to the factor through debtor's funds paid to the supplier, which are earned at the moment when the debtor has received the written notice about the transfer of funds, under Articles 6 and 17 of the Law 'On factoring.'[21]

However, failure to execute, or the irregular or delayed execution of the contract for sale of goods and/or services, without impairing the debtor's rights, pursuant to Article 19 of the

[17] Article 6 of the Law 'On factoring' stipulates that:

'*1. The factor or supplier shall provide written notice to the debtor, including fax, electronic messages, and any type of communication that may be reproduced in a concrete manner. The notice shall be considered to have been given where it is collected by the receiver.*

2. The content of notice shall include statement on the existence of the contract of factoring concluded between the factor and supplier, as well as identification of the factor and the client account money, object of the contract of factoring.

3. Notice shall be provided within the time-scale, as specified in the contract of factoring.'

[18] Article 16 of the Law No 9630 of 30 October 2006 'On factoring,' as amended.

[19] Article 17 of the Law No 9630 of 30 October 2006 'On factoring,' as amended.

[20] Article 18 of the Law No 9630 of 30 October 2006 'On factoring,' as amended.

[21] Article 19 of the Law No 9630 of 30 October 2006 'On factoring,' as amended.

Law 'On factoring,' does not immediately entitle them to require that the factor returns the paid amount, even if the debtor is entitled to require that the supplier returns this amount. The debtor, which enjoys the right to require that the supplier returns the amount that has been paid to the factor for the client account money, is entitled to require that the factor returns the amount provided that the factor:

a) has not made a payment in favour of the supplier for the money under discussion; or,
b) has made a payment in favour of the supplier for the money under discussion, while being aware of the failure to execute or the irregular or delayed execution of the contract for sale of goods and/or services by the supplier.[22]

4) Securities in Relation to Contract of Factoring

The factor and the supplier may foresee specific securities for factoring transactions in the contract of factoring. The securities include the deposit, pledge, liens, surety, or other securities, in accordance with the effective legal provisions.[23] Factoring transactions, as specific types of obligations, may be ensured by all the obligation securities laid down in Articles 530 through to 607 of the Civil Code,[24] and the Law No 8537 of 18 October 1999 'On the pledge,' as amended.

5) Succession of Credits

Article 21 of the Law 'On factoring' governs the rules for the successive transfer of money to the factor or the subject in favour of which the transfer is made. In concrete terms, this article specifies that:

'1. Where the supplier pays the factor the client account money on the basis of the contract of factoring, in accordance with this law:

a) the provisions of Articles 3[25] and 20[26] of this law, in accordance with letter 'b' of this article, shall be enforced for each and every further transfer of the money under discussion onto third parties;

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[22] Article 20 of the Law No 9630 of 30 October 2006 'On factoring,' as amended.

[23] Article 15 of the Law No 9630 of 30 October 2006 'On factoring,' as amended.

[24] Penal conditions, liens, mortgage, surety, down payment, privileges for, and objection to the debtor's juridical activities.

[25] Article 3 provides for the contract of factoring, and is expounded earlier on.

[26] Article 20 of the Law 'On factoring,' stipulates that:

'*1. Failure to execute or the irregular or delayed execution of the contract for sale of goods and/or services, without impairing the debtor's rights, under Article 19 of this law, shall not immediately entitle him to require that the factor returns the paid amount, even if the debtor is entitled to require that the supplier returns this amount.*

2. The debtor, which enjoys the right to require that the supplier returns the amount paid to the factor for the client account money, shall be entitled to require that the factor returns the amount under discussion, where the factor:

a) has not made a payment in favour of the supplier for the money under discussion; or,

b) has made a payment in favour of the supplier for the money under discussion, while being aware of the failure to execute or the irregular or delayed execution of the contract for sale of goods and/or services by the supplier.'

b) the provisions of Articles 17[27] and 20 of this law shall be enforced in respect of the subjects, which successively receive the money under discussion, the same as in the case of the factor.

2. The existing or the new factor shall provide notice to the debtor on the successive transfer.'

Hence, the aforementioned situation concerns the cases where the transfer of the client account money takes place more than once in favour of the new factors. Notwithstanding, Article 22 of Law 'On factoring' expressly states that the contract of factoring may limit or prohibit sales or successive transfers of the client account money.

6) The Registry of Factoring

The transfer of the money held in the client account through the contract of factoring, as well as any other change or addition, and termination of the contract of factoring are entered in the pledge registry.[28] The pledge registry functions and is regulated by the Law No 8537 of 18 October 1999 'On the pledge,' as amended, as well as the subordinate legal acts enacted in furtherance of and pursuant to this law.

Application form for the registration of the transfer of the client account money through the contract of factoring contains:

a) data on the identification of the factor, supplier and debtor;

b) identification of any collateral regulated by the contract of factoring;

c) signature of the person applying for the registration of the contract of factoring, and the transfer of the client account money.[29]

The data outlined in the above are entered in the registry upon submission of the registration application, and take priority over third parties' claims.[30] The factor, supplier or debtor may require that a note on some lawsuit brought over the contract of factoring be entered in the register. The note contains data on the identification of the writ for petition of legal rights, and a brief description of it. Likewise, waiver of the writ for petition of legal rights, or other decisions relevant to it may also be registered.[31]

Entry in the pledge registries has effects for the third parties. It is presumed that the third parties have knowledge about the existence of transfers entered in the registry. The data entered in the registry are not used to prove ownership, unless otherwise stated, or to prove

[27] Article 17 states that, '*1. The debtor shall be obliged to pay the factor provided only that he is not aware of the priority that another subject must be paid, and provided that the written notice about the transfer of money:*

a) is provided to the debtor by the supplier or the factor, with the supplier's consent;

b) identifies, to the extent possible, the client account money transferred in favour of the factor to which the debtor must pay the funds;

c) refers to the client account money earned on the basis of a contract for sale of goods and/or services concluded prior to or at the time that the notice is given.

2. With the notice having been duly provided, the debtor pays the factor in accordance with the terms and conditions of the contract concluded between the supplier and the debtor.'

[28] Article 23 of the Law No 9630 of 30 October 2006 'On factoring,' as amended.

[29] Article 24 of the Law No 9630 of 30 October 2006 'On factoring,' as amended.

[30] Article 25 of the Law No 9630 of 30 October 2006 'On factoring,' as amended.

[31] Article 26 of the Law No 9630 of 30 October 2006 'On factoring,' as amended.

any other right in respect of the transfer of the client account money through the contract of factoring, or as a proof of the validity of a legal transaction.[32]

7) Other Issues Relevant to Factoring

The factoring activities are subject to supervision by the Bank of Albania. So, under Article 28 of the Law 'On factoring,' factoring activities, as specified by Article 2 of this law, which are carried out by the subjects provided for in Article 10, besides as prescribed by this law, are supervised and regulated by the Bank of Albania, in accordance with the provisions of the Law 'On the banks in the Republic of Albania,' and the subordinate legal acts enacted pursuant to it for that purpose.

Likewise, the Law 'On factoring' specifically governs fiscal issues surrounding factoring. For the purpose of the value added tax, factoring is considered as a financial service.[33]

Article 31 of the Law 'On factoring' also specifically regulates bankruptcy, reorganisation or liquidation of the factor and the debtor. In such a way, under this article, in the process of bankruptcy, reorganisation or liquidation, the provisions of the effective legislation are applicable to examination of the factor in court. This procedure is regulated by the Law 'On bankruptcy' of 2002.

And, where the debtor initiates a bankruptcy, reorganisation or liquidation procedure, its obligation to pay the client account money to the factor:

a) is considered by court as an uncovered obligation;
b) is considered by court as a covered obligation, provided that it is covered by one of the securities;
c) continues to be subject to the same rights and obligations, as stated in Articles 16 and 17 of this law.

FINANCIAL LEASING

1) Fundamental Concepts and Elements

The Albanian civil law has fairly recently provided for the legal regulation of the financial leasing contract. Before the nineties, effective legislation did not provide for such contract at all. It was only in 1994, after the adoption of the new Civil Code, that the financial leasing contract (*its main aspects*) was correctly regulated, thus becoming a typical contract. However, as we will see later on, the Civil Code of 1994 does not govern the financial leasing contract in a comprehensive way, while allowing at times for vagueness. To that effect, in 2005, the Parliament of the Republic of Albania passed a specific law, which expressly regulates all the crucial elements relevant to a financial leasing contract. This is the Law No 9396 of 12 May 2005 'On financial leasing,' as amended. The number of companies carrying on financial leasing activities in Albania at present, including *Tirana Leasing* sh.a, *Raiffeisen Leasing* sh.a, *LandesLease* sh.a, and *Bileasing* sh.a., has significantly increased since then

[32] Article 26 of the Law No 9630 of 30 October 2006 'On factoring,' as amended.

[33] Article 30 of the Law No 9630 of 30 October 2006 'On factoring,' as amended.

A. Meaning of financial leasing

Article 849 of the Civil Code of the Republic of Albania states that:

'*Under a financial leasing contract, one party shall be obliged to make a movable or immovable object available to the other party, for a certain period of time, with the payment being made on periodical instalments, as stated in respect of the object value, the duration of contract, and eventually, other elements, in accordance with the parties' assent.*

'The object must have been earned, or built by the lessor in compliance with the lessee's wish and description, and the latter shall be entitled to obtain ownership upon the termination of the contract, while paying a certain sum.

'The lessor shall be accountable to the lessee in accordance with the general rules governing failure to deliver or the delayed delivery of the object, and the shortcomings of the object.

'The agreement may contain a provision stating that, before requiring that his/its rights be respected by the lessor, the lessee must require that the one who makes delivery of object (supplier) respect his/its rights, or the rights transferred to the lessee.'

Article 1§11 of the Law No 9396 of 12 May 2005 'On financial leasing,' as amended, stipulates that, '*Financial leasing shall mean a juridical relationship where the lessor shall purchase from supplier an object selected by the lessee [from those available to] the supplier, and give it to the lessee to be used for a definite period of time, with the price being established in the contract, and upon the termination of the contract, the lessee may purchase the object, continue to take a lease of it for another period of time, or return it to the lessor.*' Common financial leasing has the following features:

a) the object is selected by the lessee, absolutely independently of the lessor;

b) the object is purchased by the lessor, or, as the case may be, the lessor builds it with his/its own financial means in order to give it to the lessee under a leasing agreement, in accordance with the contract concluded, or to be concluded, and about which the supplier has full knowledge;

c) the rental is in the form of payments, which are also calculated on the basis of the depreciation norm of the object, a part of it, or its core parts;

d) upon the termination of the contract, the lessee is entitled to purchase the object, while advancing a symbolic sum, as agreed upon by the parties or established at the moment of the exercise of the right to purchase, to renew the contract for another period of time, with the rental payment being lower than the initial one, or to return the object to the lessor.

The concept of direct financial leasing is also contained in point 14 of Article 1 of the Law 'On financial leasing.' Hence, direct financial leasing is that type of leasing where the lessor gives an object in his/its possession to the lessee to use it for a definite period of time at the end of which the lessee is entitled to purchase the object, while paying a certain price, to extend contract duration for holding the object under lease, or to return it to the lessor. In terms of financial leasing, the lessor himself/itself is the owner of the object or its builder, and deals directly with the lessee for the purpose of letting it under lease. Unlike financial leasing contracted with the supplier, in respect of direct financial leasing:

a) the lessor, along with the object, provides the lessee with assistance and maintenance services, as well;

b) the objects held under lease are primarily of the same type;

c) the lessee has greater choice to terminate the contract before it expires, while giving preliminary notice.[34]

B. Scope of financial leasing

Financial leasing is contemporary medium- and long-term financing earmarked for businesses and practitioners in order to acquire solid elements, namely, equipment and immovable property for professional use. It represents an alternative to bank financing. Financial leasing is ideal for small- and medium-sized businesses. At the same time, it is a highly efficient arrangement for small businesses in need to upgrade their performance and adjust to the market needs. Notwithstanding the purpose of financial leasing, which, as with any other lease agreement, is to make use of a certain movable or immovable object, unlike the traditional lease, in a financial leasing contract the ultimate outcome of the agreement concluded between the parties includes the lessee's entitlement to become the owner. An analysis of the Civil Code clearly underscores this feature of financial leasing. However, many other issues, ranging from the form of such contract, its basic conditions, expiration, or the cases involving its termination, are not clearly set out in Article 849 of this Code. As already mentioned earlier on, the provisions of the Law No 9396 of 12 May 2005 'On financial leasing,' as amended, are precisely intended to fill these loopholes.

C. The object of financial leasing

The object of the financial leasing contract may include both movable and immovable objects, provided that they are individually specified, because, where the parties have not provided for the lessee's entitlement to purchase an object, the same object will be returned. If the object includes things that are individual by count, weigh or measure, then we would be dealing not with a financial leasing contract, but with a loan contract. The object of the contract must be feasible, in consistent with legislation, determined or determinable.[35] Application of this provision of the Civil Code represents a prerequisite for a contract to be concluded and be valid (*Article 663 of the Civil Code*).

D. Parties to financial leasing

The parties to the financial leasing contract include the lessee, lessor, and supplier.

The 'Lessee' means a physical or juridical person, who may gain ownership rights after he/it has used the object for the whole duration of the financial leasing contract, and has paid all the rentals and the final purchasing price.[36]

The 'Lessor' means a juridical person who has and reserves the ownership right to the object, and entitles the lessee to hold and use the object for the whole duration of the financial leasing contract, under the conditions laid down in the contract.[37]

The 'Supplier' means the physical or juridical person who, on the basis of the supply contract, sells the object to the lessor, which the latter lets to the lessee under lease.[38]

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[34] Article 2§2/3 of the Law No f 9396 of 12 May 2005 'On financial leasing,' as amended.

[35] Article 678 of the Civil Code of the Republic of Albania.

[36] Article 1§13 of the Law No 9396 of 12 May 2005 'On financial leasing,' as amended.

[37] Article 1§12 of theLaw No 9396 of 12 May 2005 'On financial leasing,' as amended.

[38] Article 1§6 of the Law No 9396 of 12 May 2005 'On financial leasing,' as amended.

In addition to the above, Article 3 of the Law 'On financial leasing' specifies that the lessor, which is not a financial institution or bank, may not carry on activities other than financial leasing activities, and upon registration as a juridical person with the court, must have a capital not less than Lekë 20 000 000. Hence, the lessee is the party, which seeks to buy from the lessor the object that the lessor has selected from the supplier, and lets it to the lessee under financial lease. The lessee's obligations may be assumed by sureties on the basis of a surety contract concluded between the lessee and the surety. The supplier represents the party that possesses, produces or builds the object according to specifications required by the lessee, and then, sells it out to the lessor for the selling price paid by the lessor.

Subjects involved in banking or financial activities may carry on financial leasing activities, provided that entitlement to conduct financial leasing activities is expressly stated in the relevant licence or permit.[39]

E. Basic principles governing financial leasing

The basic principles underlying the financial lease relationship are specifically outlined in two articles of the Albanian Law 'On financial leasing.' These principles refer to the regulation in respect of the ownership right to the thing, object of the financial leasing contract, and in respect of the risks associated with such thing.

Article 9 of this law expressly states that the object is given to the lessee to be held and used for a certain period of time, and its ownership remains with the lessor and is transferred to the lessee, provided the lessee decides to exercise his right to purchase it, as stated in the financial leasing contract. Where the contract is terminated prior to its expiration through the lessee's fault, rental payments are not considered as purchasing instalments, and the payment of such rentals does not give rise to the lessee's ownership right to the object. On the other hand, the lessee loses the right to hold and further use the object, which is taken back by the lessor. Further on, Article 10 of the Law 'On financial leasing' prescribes the elements in respect of the carrying forward of the risks associated with the object of the financial leasing contract. This article expressly stipulates that, if not otherwise stated in the financial leasing contract, following acceptance of the object by the lessee, all the risks associated with the object, including its injury, accidental loss, theft, or untimely loss of usability, are carried forward by the lessee.

2) Commercial Nature of Financial Leasing

Article 5 of the Law 'On financial leasing' specifies that, where the lessee in the financial leasing contract is a physical person, and has not registered his commercial activities, the financial leasing contract is considered to be non-commercial in nature, and is subject to the general rules governing contracts. An *argumentum ad contrario* means that, where the lessee in the financial leasing contract is a physical person and has registered his commercial activities, or company, the financial leasing contract will be considered as commercial in nature, and aside from the general rules governing contracts, will also be subject to the specific provisions that may regulate the commercial subjects' activities.

The financial leasing activities, and all the subjects carrying on such activities, obtain licenses and are supervised by the Bank of Albania in accordance with the provisions con-

[39] Article 4 of the Law No 9396 of 12 May 2005 'On financial leasing,' as amended.

tained in this law, namely, the Law 'On the banks in the Republic of Albania,' and the subordinate legal acts enacted pursuant to it for that purpose.[40]

3) Terms in Financial Leasing

It might be said that the term of lease is closely related to two factors. *First,* to the extent of consumption (depreciation) of the object, and *second,* to the fact whether the object is movable or immovable.

Hence, movable objects to be consumed within 5 years are let under lease for at least one year, and the movable objects to be consumed for an extended period of more than 5 years may be let under lease for a period of at least 2 years.[41] Immovable objects may be let under lease for a minimal period of 3 years.[42]

Such terms are calculated from the date of the acceptance of the object to the date after the final payment is made.

Generally, the financial leasing contracts are not short-termed. As per the minimal term laid down in the law, all those lease contracts concluded for a term shorter than the minimal term, are not considered to be financial leasing. This is the legal effect brought on by the parties' failure to comply with the provisions specifying the terms of the financial leasing contract.

It is normal that the minimal term of the lease contract for objects to be used for over 5 years should be longer.

For the same grounds, and in respect of the nature of immovable property, too, I believe that a minimal term of 3 years for the lease of immovable objects is appropriate.

4) Domestic and International Financial Leasing

It is considered that financial leasing is domestic if the object is held under lease in the Republic of Albania, and both the lessor and the lessee have permanent residence in the Republic of Albania. Financial leasing will be international if both the lessor and the lessee, or either of them, do not have their headquarters or permanent residence in the Republic of Albania. In such case, financial leasing is regulated by international law on financial leasing, or as per the case, through a bilateral agreement to which the Republic of Albania is a party.[43]

5) Form and Basic Clauses of Financial Leasing

In terms of the **form,** the financial leasing contract is drawn up in writing, or before the notary public, if it contains conditions allowing out-of-court acquisition of the object, where the contract terminates before its expiration through the lessee's fault.[44] In this case, along

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[40] Article 43/1 of the Law No 9396 of 12 May 2005 'On financial leasing,' as amended.

[41] Article 6 of the Law No 9396 of 12 May 2005 'On financial leasing,' as amended.

[42] Article 7 of the Law No 9396 of 12 May 2005 'On financial leasing,' as amended.

[43] Article 8 of the Law No 9396 of 12 May 2005 'On financial leasing,' as amended.

[44] Article 11 of the Law No 9396 of 12 May 2005 'On financial leasing,' as amended.

with the financial leasing contract the parties may sign the re-acquisition document as an annex to and a constituent part of the contract. Out-of-court re-acquisition of the object is performed in compliance with the conditions laid down in the lease contract.

The juridical action, which is not duly outlined in the paper document as required by law, is invalid only where this invalidity is prescribed by law. In all the other cases, the juridical action is valid even in the absence of a paper document. However, it may not be proved by witnesses. Hence, failure to have financial leasing written in a paper document does not entail invalidity of the contract, but the impossibility for it to be proved by witnesses.

Likewise, the lease contract must contain, *inter alia*, the following;

a) the description of the object, in a way that makes it distinguishable;
b) the initial term and the lessee's entitlement to renew it for another term or several other terms; however, renewal is possible where the object may live up to the needs for which it is let under lease;
c) the lessee's entitlement to purchase the object, and the relevant price or the price-setting formula;
d) the number and sum of lease payments, or the formula for their calculation;
e) the cases where the lessee refuses the object;
f) the cases involving termination of the contract and the procedures for the lessor's acquisition of the object;
g) the parties' obligation to cover the expenses and administration work, including technical support, maintenance expenses and support services relating to the use of the object;
h) the responsibility to thirds parties;
i) the obligation to ensure the object;
j) the parties' obligations in the event that the object reveals shortcomings.[45]

Chapter 5 of the Law 'On financial leasing' outlines several basic principles underlying such contract. In concrete terms, in respect of ownership, the object is given to the lessee to hold and use it for a definite period of time, and its ownership remains with the lessor and is transferred to the lessee in compliance with the conditions of the lease contract, in the event that the lessee decides to exercise his/its purchase right. However, there are also restrictions on the lessee's right to purchase the object. Hence, if the contract is terminated prior to its expiration through the lessee's fault, rentals are not considered as purchase instalments, and their payment does not give rise to the lessee's ownership rights to the object. In such case, the latter also loses his/its right to hold the object.[46]

Article 10 of the Law 'On financial leasing' stipulates that, aside from the cases where the contract states otherwise, with the lessee's acceptance of the object, all the risks associated with the object, including damage, accidental loss, theft or untimely loss of its usability, are carried forward by the lessee. The carrying forward of risks by the lessee represents one of the main features of financial leasing.

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[45] Article 12 of the Law No 9396 of 12 May 2005 'On financial leasing,' as amended.

[46] Article 9 of the Law No 9396 of 12 May 2005 'On financial leasing,' as amended.

6) Rights and Duties of the Parties to the Financial Leasing

The rights and duties of the parties to the financial leasing contract make up what is called the content of the contract. The following section is devoted to the rights and duties of the parties to the financial leasing contract.

The rights and duties of the parties to the financial leasing contract are divided according to the subjects they are assigned to, namely, either the lessor, or the lessee, or the supplier. More detailed specifications of the rights and duties are left to the parties to do in their agreement, with the assurance, however, that the parties' specifications do not run afoul of the provisions of this law, the Civil Code and the other laws related to financial leasing.

The lessor's rights and duties.

1- The lessor has the right to receive the rental payments from the lessee in accordance with the terms laid down in the contract.

Likewise, he/it has the right to benefit the purchasing price if the object is foreseen to be sold upon the termination of the contract.

2 - The lessor is free of any responsibility in respect of the object, where the latter is accepted by the lessee, provided that it is not otherwise stated in the financial leasing contract. The only exception to this is the case where the third parties put forward claims derived from the lessor's act or failure to act.[47]

The lessor may not be held accountable to the lessee or the third parties for the death, corporeal damage, or unrelated damage to property caused by the object, either in his/its capacity as the lessor, or as the owner of the object.[48]

3 - The lessor has the right to check whether the object is properly maintained and used, and examine the lessee's financial documentation in respect of financial leasing for the whole duration of the lease.

4 - The lessor is obliged to ensure that the lessee fully and freely enjoys the object. Hence, he is accountable for the third parties' claims to the object, which oppose, impair or restrict full enjoyment of the object by the lessee, whereas the latter has no knowledge and has not accepted the object under these conditions.[49]

In this aspect, any condition stated in the financial leasing contract, which eliminates or restricts the lessor's accountability in respect of the object's legal defects, is considered as invalid.

5 - The lessor is obliged to deliver the object to the lessee where the contract does not provide that such delivery must be made by the supplier in the way described in the supply contract.[50]

In any case, the delivery must be made with respect to the term and conditions prescribed by the lease contract.

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[47] Article 14 of the Law No 9396 of 12 May 2005 'On financial leasing,' as amended.

[48] Article 14 of theLaw No 9396 of 12 May 2005 'On financial leasing,' as amended.

[49] Article 23 of the Law No 9396 of 12 May 2005 'On financial leasing,' as amended.

[50] Article 15 of the Law No 9396 of 12 May 2005 'On financial leasing,' as amended.

6 – The lessor is obliged to give written notice to the supplier that he is purchasing the object to let it to the lessee under lease, in accordance with the lease contract that the lessee has concluded with the lessor.[51]

This obligation must be met prior to or upon the signing of the supply contract.

7 – The lessor is obliged to indemnify the lessee for the losses sustained through his default on his contractual obligations. As per the case, this may be done by detracting the value of the total damage sustained, or a part of it, from the subsequent rental payments.

The lessor is not obliged to indemnify the damage sustained if the lessee has accepted the object, or full enjoyment of the object is reduced or restricted, while the lessee was fully aware of the damage at the time of the conclusion of the contract.

The lessee's rights and duties.

1- The lessee has the right to select the object, as well as the supplier, if any, without relying on the lessor's capabilities and discretion.[52]

The lessee accepts the terms and conditions for the supplying of the object to the extent to which they do not jeopardise his interests.

In the event that the lessee agrees with the content of the supply contract, on the basis of which the lessor gains full ownership of the object, subsequent changes in the conditions of the supply contract may not impair the lessee's rights, except for the cases where he/it himself/itself has agreed to such changes.

2 – The lessee is entitled to consider whether the object supplied matches or not to the description contained in the lease contract.

If the object does not match with the description contained in the lease contract, or if the supplier or the lessor refrains from delivering the object at all, delivers it late, or delivers it without observing the conditions of the contract, the lessee is entitled:

a) not to accept the object;
b) to terminate the lease contract;
c) to suspend rental payments stated in the contract until the object is delivered in compliance with the conditions of the lease contract;
d) to be indemnified for the losses that may be sustained through the lessor's default on the contractual obligations, and as per the case, even with the value of damage or part of it being detracted from future rental payments.[53]

If the object supplied is the one agreed upon by the parties in the financial leasing contract, the lessee may not refuse it. Hence, the lessee is obliged to accept the thing, object of the contract, where it complies with the conditions of the contract.

Likewise, the lessee may not refuse the object given by the lessor, where he has accepted it based on the supplier's promise that he would fix any discrepancies between the object requested and the object supplied.[54]

Where the lessee has accepted the object based on the promise and warranty given by the lessor that the latter will discharge his/its obligation, but fails to discharge it by a reason-

[51] Article 13 of the Law No 9396 of 12 May 2005 'On financial leasing,' as amended.

[52] Article 14 of the Law No 9396 of 12 May 2005 'On financial leasing,' as amended.

[53] Article 16 of the Law No 9396 of 12 May 2005 'On financial leasing,' as amended.

[54] Article 20 of the Law No 9396 of 12 May 2005 'On financial leasing,' as amended.

able time-limit, the lessee may revoke acceptance, by providing a written notice to the lessor.[55]

3 - Payment of the lease price is the most obvious obligation for the lessee.

Unless such obligation is fulfilled within the terms of the contract, the lessor is entitled to require the termination of the contract. This issue will be delved into later on, where we look at the cases involving termination of the financial leasing contract.

Usually, the rental is paid on a monthly basis. However, the cases where the parties determine otherwise are not ruled out.

Actually, the rental of immovable objects is rather paid on a yearly basis, mainly due to the fact that for this category of objects long-term contracts are overall concluded.

4 – Unless otherwise stated in the contract, the lessee is obliged to use and maintain the object at his/its own expenses.

The object must, of course, be used in compliance with its destination derived from the contracts or the parties' purpose. Otherwise, he/it is responsible for all the losses sustained, independently of whether the object has been used by him/it, has been used by a person authorised by him/it in advance, or another person on his subsequent assent.[56]

5 – As mentioned with reference to the features of financial leasing, the lessee, except as otherwise provided in the contract, takes all the risks associated with the object, including damage, accidental loss, theft, or untimely loss of its usability.

The supplier's rights and obligations.

Given that the supplier enters into contractual relationships with the lessor on the basis of a supply contract, his/its rights and obligations are precisely those derived from the latter.

Hence, the supplier is obliged to supply the commodity, object of the contract, to ensure the lessor on the quality of the object supplied, and to transfer the ownership right to the supplied object to the lessor.

One peculiarity concerning the supplier as a party to the financial leasing contract includes his/its right to receive a written notice by the lessor that the latter is purchasing the object let to the lessee under lease. Except as otherwise stated in the contract, the supplier delivers the object to the lessee and not to its purchaser (lessor).

Another peculiarity lies also in the fact that the supplier is selected and contacted by the lessee and not by the lessor in the latter's capacity as the purchaser of the object supplied. This is basically one of the specific features of the financial leasing contract.

On the basis of the supply contract, the supplier's obligations to the lessor include any warranty, either explicit or implicit, that the supplier gives to the lessor. They are also obligations to the lessee, as if the latter were also a party to that contract, however, always within the limits of the lessee's interests in the framework of the rapport between the financial leasing and the supply contract, and without infringing on the conditions of the supply contract and all the supplier's rights arising from the supply contract. Such involvement of the lessee is intended to ensure the protection of his/its interests in the supply contract, and in no case must it be construed that the lessee takes on obligations on the basis of that contract, as well. In respect of the supply contract, notwithstanding the lessee's involvement, the latter never assumes obligations on the basis of the supply contract. He/it is not entitled to terminate or

[55] Article 18 of the Law No 9396 of 12 May 2005 'On financial leasing,' as amended.

[56] Article 25 of the Law No 9396 of 12 May 2005 'On financial leasing,' as amended.

seek the termination of the supply contract, neither is he/it entitled to ask for the reduction in the selling price of the object, without the lessor's consent.

7) Termination of Financial Leasing Contract

The Law 'On financial leasing' provides for three ways to terminate the lease contract: 1) normal termination of the lease contract, 2) termination of the lease contract by the lessor, and 3) termination of the contract by the lessee.

1- Normal termination.

The lease contract is considered to be terminated in a normal way where the termination does not take place through the parties' default on their contractual obligations. The contract is considered to be terminated where:

a – the term stated in the contract has expired.

In this case, the contract has performed its function, and has yielded the effects desired by the parties. Normally, after this, the contract is considered as terminated; however, the parties may in agreement with each other decide to renew it also for another indefinite term.

b – the lessor, the supplier or the lessee has gone bankrupt

In the event that the lessee's bankruptcy is declared, the object will not be included in the bankrupt properties (to the extent of bankruptcy), neither in the creditors' general warranty, but is returned to the lessor. This is due to the fact that the lessor has held the ownership right for the whole duration of the lease contract. The object, which does not appertain to the bankrupt lessee, is obviously returned to its owner.

At this moment, the contract is considered as terminated, with its effects wearing off. However, in any case, it must be borne in mind that nothing must run afoul of the provisions of the Law 'On bankruptcy.'

In the event that the supplier goes bankrupt, the latter is unable to deliver or produce the object required by the lessee, because his/its property will be affected by the measure of bankruptcy, and he/it will be short of the means required for that. The same applies also if he/it is the owner of the object, given that the latter will also be affected by the measure of bankruptcy, and will best contribute to his creditors' rights achievement. I share the opinion that everything that has been said so far is valid only provided that a supply contract is not yet signed between the supplier and the lessor, because, if such contract is in place, the ownership of the object has been transferred to the lessor and the supplier's bankruptcy does not affect the financial leasing contract for as long as the lessee does not put forward any claims related to the supplier's obligations.

Overall, the lessor's bankruptcy results in the termination of the financial leasing contract, given that the object will contribute to the fulfilment of the lessor's obligations to the third parties. However, the law provides for the lessee's possibility to carry on the financial leasing contract with the new owner of the object.

Therefore, 'Where, in respect of the lessor, the liquidation procedures under way do not entail merging or absorption, the lessee is entitled to carry on the lease contract with the new owner of the object, or pay off the total overdue rental sum, and gain ownership of the object upon the termination of the lease' (Article 60).

c – the object has been destroyed or lost

In this case, the termination of the contract is evident, as no object of the contract exists.

The parties decide by mutual agreement to terminate the contract.

Where one of the contracting parties to a contract of mutual obligations fails to discharge its obligations, the other contracting party, as per the case, may seek the fulfillment of the obligation, or the termination of the contract, except for the indemnification of the injury.[57]

The subsequent article of the Civil Code states that the contract may not be terminated if one party's default on its obligations is of little importance to the other party's interests. Instead, the other party's interest has to be affected to an extent that makes it impossible for it to carry on the contract. Such interests may include, for example, the loss of all the lessee's benefits derived from the contract.

Except for the cases as expressly stated in the law, which will be taken up later on, in the contract the parties may specify that it must be terminated if a given obligation is not fulfilled as required by the stated conditions. In this case, the contract is terminated where the interested party declares to the other party that it will resort to the conditions allowing termination of the contract.

2 - Termination by the lessor.

Article 28 of the Law 'On financial leasing' prescribes the lessor's entitlement to terminate the lease contract prior to its expiration, in the event that:

The lessee fails to make the first rental payment by the time limit set out in the contract.

The lessee makes the first rental payment, but, after that, he/it fails to make one or several rental payments in time, the total sum of which amounts to 20 per cent of the rental value. In this case, as well as being entitled to seek the termination of the contract, the lessor is entitled to require that the lessee advance the total amount of overdue rental payments, along with the interest charged for them.

The lessee has not met any of the conditions of the contract, and default persists for 20 days after he/it has received a written notice from the lessor that he/it must comply with the conditions of the contract.

The surety presented by the lessee becomes insolvent or goes bankrupt, and the lessee is not able to find another surety acceptable to the lessor to substitute for him/it, within 30 days after he/it receives the lessor's written request to make such substitution.

The lessor, seeking to terminate the contract on the afore-mentioned grounds, is obliged to give notice to the lessee seven days prior to the initiation of the procedure for the reacquisition of the object. The reason behind this is to enable the lessee to make the rental payment, or meet some other obligations.

3 - Termination by the lessee.

The lessee is entitled to terminate the lease contract in the following cases:

before the acceptance of the object, where the latter has not been supplied in accordance with the contract;

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57 Article 698 of the Civil Code of the Republic of Albania.

after acceptance of the object, through the lessor's default on his/its obligations;

after acceptance of the object, where the lessor does not warrant full enjoyment of the object by the lessee.

In this case, the following conditions must be complied with:

– default must have caused loss of the benefits due to the lessee as per the financial leasing contract;
– the lessee must give a written notice to the lessor about the default, and the latter is not remedied within the time limit mentioned in the notice.

8) Consequences of Termination of Financial Leasing

Termination of the contract in the event of default on the obligations has a retroactive effect on the parties, except for the contracts that are executed on a constant and periodic basis for which the effects of termination do not apply to previous actions.[58]

Hence, the consequences of termination of the financial leasing contract will not influence the actions carried out previously between the lessee and the lessor. The latter, even if the contract is terminated through significant non-performance on his/its part, is not obliged to return to the lessee the previous rental payments made by him. This is basically the main element that distinguishes this contract from the sale contract withholding ownership for which it is often mistaken in the course of practice.

Article 30 of the Law 'On financial leasing' provides for the lessor's rights in the event of the termination of contract. In this case, the lessor is entitled to:

a) reacquire the object;
b) seek immediate payment of all overdue rentals;
c) be indemnified for the damage sustained; and,
d) recover all the additional expenses made through the lessee's failure to pay the dues, while detracting the amount of the market value of the reacquired object.

No provision of the law expressly provides for the consequences of the termination of contract for the lessee. However, it is evident that, in the event of the termination of the contract through the lessor's fault, the lessee, besides being obliged to hand in the object, is entitled to be indemnified for all the damage sustained through the termination of the contract prior to its expiration.

Likewise, he/it is entitled to benefit any amount that the lessor has received in excess of the lessee's dues set forth in Article 30.

In favour of the lessor, the law has also provided for the procedure of acquisition of the object through sequestration in those cases where the lessee does not hand in the object on a voluntary basis within 10 days after the date the notice is received.

This procedure is based on the fact that the financial leasing contract is an executive title, and under Article 510 of the Civil Procedure Code, mandatory execution may only take place on the basis of an executive title. Where the contract is terminated through the lessee's fault, the order of the competent court is executed by the judicial bailiff.

Article 33 of the law provides for the protection of the third parties whose rights are impaired through the sequestration of the object. In this case, these parties may require the competent court to:

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[58] Article 703 of the Civil Code of the Republic of Albania.

a) suspend the procedures, where it is proved that the lessee is not under circumstances of default on his/its obligations specified in the contract, and violation of the provisions of this law, and rule the object to be returned to the lessee;
b) request that the lessor meet one or several procedural requirements of this law;
c) lift the stipulation for each and every person to satisfy one or several procedural requirements of this law, where such stipulation is unnecessary, or no grounds exist to require it;
d) require a person to reimburse the expenses made by another person for the judicial procedures initiated without any grounds.

The destiny of the changes,, improvements and/or additions to the object.

It must be said that, in terms of this issue, the law provides for the parties to act 'free hand'. The regulation by law is valid where the parties to the contract have not specified otherwise. However, the parties' stipulation must not run afoul of what is provided for in the Civil Code on this issue.

In terms of the specific improvements the lessee may make to the object, Article 36§1 stipulates that their ownership will be held by the lessee.

Where the lessee makes improvements to the object, at his/its own expenses and with the lessor's written consent, and where the improvements may not be separated from the object without damaging it, then the lessee is entitled to receive payment equivalent to the value of such improvements, in the event that after the termination of the contract the object is returned to the lessor (*Article 36§2*).

The law does not provide for the manner of determining the value of those improvements. In this case, we may refer to how the traditional lease contract is regulated. Hence, in their evaluation account must be taken of the useful upshots of the improvements and their conversion, however, in the lowest levels of their value.

In relation to the additions, Article 37 of the law specifies that, where the movable objects, which are let under financial leasing by the lessor, are merged or affixed to immovable objects or other movable objects to which the third persons have certain titles, the latter do not affect the lessor's ownership right to the movable objects let under financial leasing.

Insurance.

Article 38 of the law has provided for the insurance of the thing, object of the contract, against any type of injury related to the risk of destruction, loss, theft, abatement of the value, or untimely loss of usability.

Often, it happens that the parties fail in their efforts to include insurance of the object in the purpose of their contract. In this case, the law has prescribed that, in default of the provisions contained in the contract, the lessee, as the user of the object, is obliged to warrant the insurance of the object.

9) Sub-Financial Leasing

The additional provisions of the Law 'On financial leasing' (Article 34) regulate sub-financial leasing, as well.

According to such contracts, the lessee is entitled to let the whole object or a part of it under sub-financial leasing, however, the lessor's written consent is mandatory for this to happen. Otherwise, the latter is entitled to terminate the lease contract, and require indemni-

fication, too. Even if the lessor gives his consent, the lessee continues to be accountable to the lessor.

In the event of failure of the lessee or sub-lessee to pay, where the object is held by the sub-lessee under sub-financial lease, the lessor is entitled to reacquire the object directly from the sub-lessee, in accordance with the same procedures applicable where the lessor reacquires the object from the lessee.

The term of the sub-financial leasing, in no case, may be longer than that of the lease contract. However, sub-financial leasing is a leeway provided for in favour of the lessor in those cases where the lessee, for different reasons, is not able to discharge his/its obligations according to the manner outlined in the contract.

10) Registry of Financial Leasing Contracts

Article 42 of the law states that the financial leasing contracts concluded for immovable objects, which contain conditions for the acquisition of ownership of such objects, or the possibility for the lessee to purchase such objects, are registered in compliance with the requirements of the Civil Code of the Republic of Albania, and of the Law 'On the registration of the immovable property.'

On the other hand, the financial leasing contracts concluded for movable objects, under this law, are entered in the pledge registry, in accordance with the Law 'On pledge.' The effects of the registration or failure to register the financial leasing contract influencing the ownership or other rights due to the lessor and the third parties, are governed by the Law 'On pledge.'[59]

11) Forced Execution in Financial Leasing

The financial leasing contract is an executive title in respect of the reacquisition of the thing, object of the financial leasing contract, and is executed by the judicial bailiff after the competent court issues the order for execution, which [the court] states its position within 5 days after submission of petition. The court, which issues the order for execution, also establishes the actions to be carried out by the bailiff for the sequestration of the object, and its returning to the lessor or the person duly authorised by him/it. In terms of this procedure, the court applies the regulations provided for in the Civil Procedure Code.

The judicial bailiff gives notice of the order to the lessee within 5 days after its issuance, and if the lessee fails to hand it in on a voluntary basis within 10 days from receipt of notice, the judicial bailiff immediately decides on its sequestration. Where the judicial bailiff notes that, with the expiration of the 10-day time limit the execution of the order becomes impossible, the judicial bailiff immediately initiates its mandatory execution, while undertaking the sequestration to the thing, object of the financial leasing contract, and delivers it to the lessor.

If he fails to undertake sequestration to the object, the judicial bailiff immediately provides a written notice to the lessor, but no later than 10 calendar days from the date when the bailiff started actions to apply the sequestration.[60]

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[59] Article 43 of the Law No 9396 of 12 May 2005 'On financial leasing,' as amended.

[60] Article 32 of the Law No 9396 of 12 May 2005 'On financial leasing,' as amended.

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MODERNE VRSTE UGOVORA

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SAVREMENI UGOVORI

FRANŠIZING

1) Osnovni koncept franšizinga

1.1. Istorija i komercijalna pozadina

Koncept franšizinga je relativno nov pojam u Hrvatskoj. Počeo je da u većoj meri figuriše u hrvatskoj ekonomiji početkom 1990-ih godina. Franšizing su po prvi put uvele inostrane franšizne kompanije (među kojima je jedna od prvih bila McDonalds) i još uvek se smatra inostranim vidom poslovanja. U narednih nekoliko godina određeni broj drugih kompanija ušlo je na tržište poput franšize Sabveja (*Subway*) iz SAD i mađarskog Fornetija (*Fornetti*), koji trenutno predstavlja jednu od najrasprostranjenijih kompanija sa preko 400 franšiznih partnera širom Hrvatske. Na osnovu procena Franšiznog udruženja Hrvatske, u Hrvatskoj trenutno postoji i radi oko 150 različitih franšiza od kojih je oko 30 domaćeg porekla koje posluju na oko 1000 lokacija i zapošljavaju preko 16000 zaposlenih.[1] Iako je franšizing još uvek nedovoljno razvijen u poređenju sa ostalim evropskom zemljama poput Francuske ili Nemačke, tendencija rasta tokom prethodnih godina se svakako primećuje.

1.2. Pravni okvir

Glavna karakteristika hrvatskog franšizinga je da trenutno ne postoji pravna regulativa koja se direktno odnosi na franšizing. Neke kratke odredbe postoje u pojedinim posebnim propisima, kao što su zakon o zaštiti konkurencije i antitrust zakon.

Najčešće, zavisno od posebnih slučajeva i namere ugovornih strana, ugovor o franšizingu obuhvata nekoliko elemenata različitih ugovora na koje se primenjuje nekoliko različitih zakona ili propisa. On u većini slučajeva obuhvata elemente kupoprodajnog ugovora, ugovora o licenci, ugovora o lizingu i prodaji, distribuciji, zajmu, radu i agencijske ugovore. Stoga, osim opštih pravila o ugovornim odnosima Hrvatskog zakona o obveznim odnosima (Narodne novine 35/05, 41/08, u daljem tekstu: Zakon o obveznim odnosima), primenjuju se i posebni zakoni (*lex specialis)* koji uređuju posebna pitanja u takvim ugovorima.

Uprkos činjenici da ne postoji jasna regulativa, ipak je moguće identifikovati osnovne elemente franšiznog ugovora. Na sadržaj i konfiguraciju franšiznog ugovora u Evropi u mnogome je uticala poslovna praksa i regulativa o zaštiti konkurencije. Isto se može reći i za Republiku Hrvatsku. Trenutno jedini zakon koji se eksplicitnije bavi franšiznim ugovorima

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* Originalan tekst je na engleskom jeziku. Prevod sa engleskog na srpski jezik izvršio je GTZ Beograd, Srbija. Autor ne preuzima nikakvu odgovornost za prevod.

[1] Poslednji dostupni podaci su za 2007. godinu.

jeste Hrvatski zakon o zaštiti konkurencije (Narodne novine br. 122/03, u daljem tekstu: Zakon o konkurenciji) i Regulativa o izuzecima dodeljenim određenim kategorijama vertikalnih sporazuma (Narodne novine 51/04, u daljem tekstu: Regulativa o ukupnom izuzeću). Oba propisa se u velikoj meri zasnivaju na zakonodavstvu EU o zaštiti konkurencije.

Na osnovu čuvenog slučaja *Pronuptia*[2], Evropska komisija usvojila je dve uredbe koje su od velikog značaja za franšizing. Prva je *Uredba Komisije (EEZ) 4087/1988 o primeni člana 85(3) Ugovora Evropske komisije na kategorije franšiznih ugovora*[3] *(*u daljem tekstu: franšizna uredba iz 1988.). To je sektorski opredeljena uredba za franšizne ugovore koji ističu 31. decembra 1999. Ova Uredba zamenjena je 1999. godine *Uredbom Komisije* (EZ) *2790/1999 o primeni člana 81(3) Ugovora na kategorije vertikalnih ugovora i usklađeno delovanje*[4] (u daljem tekstu: Uredba o ukupnom izuzeću EK iz 1999.) koja prestaje da važi 31. maja 2010. Potonja uredba predviđa manje formalnu, regulisanu i više ekonomski orjentisanu primenu kriterijuma predviđenih članom 81(3) Ugovora (bivši član 85(3)) na vertikalne ugovore uključujući i franšizne ugovore. Poduprta je i *Smernicama Komisije o vertikalnom izuzeću*[5] (u daljem tekstu: Smernice Evropske komisije) koje služe kao smernice za tumačenje Uredbe. Uredba o ukupnom izuzeću Evropske komisije iz 1999. više nema sektoralni pristup samo u odnosu na franšizing. Mnogo je šira i odnosi se na širi delokrug vertikalnih ugovora, dok se franšizing posebno tretira u smernicama Uredbe. Štaviše, iako je Franšizna Uredba iz 1988. prestala da važi, osnovni koncepti franšiznih ugovora koji su u njoj definisani ostali su nepromenjeni.

U svetlu pridruživanja Hrvatske EU, moguća (buduća) rešenja hrvatskog zakonodavstva uvijek treba razmatrati u bliskom odnosu sa zakonodavstvom EU.

1.3. Neobavezujuća regulativa

Neobavezujućom regulativom smatraju se različiti etički kodeksi Franšiznih udruženja koji definišu pravila ponašanja svojih članova koja se bave franšizingom. *Hrvatsko franšizno udruženje* (www.fip.com.hr, u daljem tekstu: Udruženje) osnovano je 2002. godine kao neprofitno, nevladino udruženje čiji je glavni cilj promovisanje i reklamiranje franšiznog poslovanja u Republici Hrvatskoj i regionu. Postoje još dve institucije koje mogu da pruže pomoć i stručne savete licima koja su zainteresovana za franšizing: Franšizni centar *Pro maturo* u Zagrebu (www.promaturo.hr) i *Franšizni centar* u Osijeku (www.fransiza.hr). Hrvatsko franšizno udruženje usvojilo su Evropski etički kodeks o franšizingu i član je Evropskog franšiznog saveza (www.eff-franchise.com).

Etički kodeks sadrži odredbe koje definišu franšizing i *know-how* (član 1.), temeljna načela (član 2.), zapošljavanje, oglašavanje i objavljivanje informacija (član 3.), odabir pojedinačnih primalaca franšize (član 4.), franšizne ugovore (član 5.), i odnos kodeksa sa glavnim franšiznim ugovorima (član 6.). Odredbe koje se odnose na predugovorno objavljivanje

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[2] *Pronuptia v Schillgalis*, C 161/84 od 26. januara 1986, ECR 353.

[3] Uredba Komisije (EEZ) 4087/1988 od 30. novembra 1988. o primeni člana 85(3) Ugovora na kategorije franšiznih ugovora, Službeni list L 359/46, 28/12/1988, str. 0046-0052.

[4] Uredba Komisije (EZ) 2790/1999 od 22. decembra 1999. o primeni člana 81(3) Ugovora na kategorije vertikalnih ugovora i usklađeno delovanje, Službeni list L 336, 29/12/1999, str. 0021-0025. U odnosu na ovu Uredbu, Komisija je takođe usvojila Uredbu 1/2003, koja značajno menja postupak primene člana 81(3) i koja doprinosi promenama u postupku primene Uredbe Komisije (EZ) 2790/1999, ali ne i sam sadržaj.

[5] Obaveštenje Komisije, Smernice o vertikalnim izuzećima, Službeni list 2000, C 291/1, str. 0001-0044.

informacija posebno su interesantne, i u velikoj meri se oslanjaju na UNIDROIT Model zakona o otkrivanju informacija iz 2002.

Član 5. Kodeksa reguliše **franšizni ugovor.** Franšizni ugovor mora biti u skladu sa nacionalnom zakonom, zakonom Evropske Unije i Etičkim kodeksom (član 5.1.). Između ostalog, etički kodeks predviđa koji su to neophodni minimalni uslovi koje franšizni ugovori treba da ispune (član 5.4.):

- Prava davaoca franšize;
- Prava dodeljena pojedinačnim primaocima franšize;
- Robe i/ili usluge koje se pružaju pojedinačnim primaocima franšize;
- Obaveze davaoca franšize;
- Obaveze pojedinačnih primalaca franšize;
- Uslove plaćanja za pojedinačne primaoce franšize;
- Trajanje ugovora koje bi trebalo da je dovoljno da bi pojedinačnim primaocima franšize dozvolilo da zavisno od date franšize amortizuju svoje investicije;
- Osnov za obnovu ugovora;
- Uslove na osnovu kojih pojedinačni primaoci franšize mogu prodati ili preneti franšizno poslovanje i moguća prava preče kupovine davaoca franšize;
- Odredbe koje se odnose na korišćenje posebnih obeležja, robnih imena, robnih marki, uslužnih marki, natpisa, logotipa ili ostalih prepoznatljivih obeležja davaoca franšize od strane primalaca franšize;
- Pravo davaoca franšize da franšizni sistem prilagodi novim ili izmenjenim metodama;
- Odredbe za prekid ugovora;
- Odredbe za primopredaju bez odlaganja opipljive i neopipljive imovine po isteku franšiznog ugovora koja pripada davaocu franšize ili vlasniku.

Iako se ovaj Kodeks odnosi samo na članove udruženja, i neispunjavanje njegovih odredaba ne može rezultirati u pravnoj nevaljanosti ugovora (već samo u otkazu članstva u Udruženju), ovaj Kodeks može biti važna i praktična smernica.

2) Pravna priroda i delokrug dodeljenih prava i odnos ugovornih strana

2.1. Definicija

U Hrvatskoj ne postoji zakonska definicija franšiznog ugovora, niti se ista može pronaći u sudskoj praksi. Međutim, franšizing je prihvaćen u hrvatskoj literaturi[6] i u pojedinim delovima Zakona o zaštiti konkurencije. *Hrvatski zakon o zaštiti konkurencije* u svom članu 11. predviđa osnovna pravila kojima franšizni ugovori mogu da podležu u pogledu ukupnih izuzeća, dok Uredba o ukupnom izuzeću sadrži opis franšiznog ugovora (ali ne reguliše njegov sadržaja).

[6] Na primer: D. Mlikotin Tomić, *Pravo međunarodne trgovine*, Školska knjiga, Zagreb, 1999; V. Gorenc, *Zakon o obveznim odnosima s komentarom*, RRiF, 1998; D. Mlikotin Tomić, *Ugovor o franšizingu*, Informator, Zagreb, 1986. (Ph.D. Thesis), D. Mlikotin Tomić, *Ugovor o franšizingu - instrument sigurnog uspjeha ili promašaja*, Računovodstvo, revizija i financije, 6/2004; B. Vukmir, *Ugovor o franšizi*, Pravo i porezi, 5/2002; N. Kukić, *Računovodstvo franšize*, Računovodstvo, revizija i financije, 6/2004, H. Horak, *Uredba o skupnom izuzeću vertikalnih sporazuma i hrvatski Zakon o zaštiti tržišnog natjecanja*, Zbornik Ekonomskog fakulteta u Zagrebu, 1/2004, etc.

Sukladno Uredbi o ukupnom izuzeću „Franšiza predstavlja vertikalni ugovor u kome jedna ugovorna strana (davalac franšize) drugoj ugovornoj strani (primaocu franšize) u zamenu za određenu direktnu ili indirektnu naknadu, daje pravo da koristi franšizu, odnosno paket industrijske ili intelektualne svojine i prava na proizvodnju i/ili marketing pojedinih proizvoda. Paket prava na industrijsku intelektualnu svojinu odnosi se na imena i robne marke ili žigove, znanja, modele, dizajn, autorska prava, industrijsko znanje ili patente, koji se koriste za i u distribuciji datih proizvoda ka krajnjim korisnicima." (član 3(6) Uredbe o ukupnom izuzeću). „Proizvod" predstavlja „robu i/ili usluge". (član 2 Uredbe o ukupnom izuzeću). Ova definicija je u mnogome u skladu sa definicijom iz Uredbe o franšizingu iz 1988. i Smernicama Evropske komisije.

2.2. Osnovni elementi – delokrug dodeljenih prava

Franšizni ugovor predstavlja kompleksan ugovor koji se sastoji od velikog broja elemenata. koji se moraju unapred ugovoriti kroz tzv. paket aranžman. Paket aranžman se u većini slučajeva sastoji od:

1. Davanja prava na korišćenje franšize, poslovnih metoda i znanja (*know-how*), koji uglavnom obuhvataju prava intelektualne svojine (poslovni paket).
2. Davanja prava na korišćenje i/ili distribuciju proizvoda, uključujući i njihovu prodaju (ugovor o distribuciji) na određenoj teritoriji krajnjim korisnicima;
3. Davanja prava na korišćenje prava industrijske intelektualne svojine koja se odnose na korišćenje imena, robne marke ili žiga, modela, dizajna, autorskih prava, industrijskog znanja ili patenata;
4. Pružanje komercijalne ili tehničke pomoći tokom trajanja ugovora;
5. Kontrola korišćenja franšize,
6. Plaćanje direktnih ili indirektnih finansijskih naknada – nadoknada davaocu franšize.

Ugovorne strane se takođe mogu dogovoriti o ostalim pitanjima kao što su ekskluzivitet, podfranšiza itd. Uredba o franšizingu iz 1988. godine jasno predviđa da elementi na koje se upućuje pod 1, 3, i 4 predstavljaju minimalne ugovorne elemente. Hrvatsko zakonodavstvo predviđa postojanje istih tih elemenata. Iako se sadržaj i delokrug dodeljenih prava može razlikovati zavisno od želja i namera ugovornih strana, u svakom slučaju, osnovni uslovi hrvatskog Zakona o obveznim odnosima koji se odnose na opštu valjanost ugovora se moraju ispuniti.

2.3. Priroda i odnos ugovornih strana

U klasičnim franšiznim ugovorima ugovorne strane su u direktnom ugovornom odnosu. Ugovorne strane su jednake i nezavisne i obe postupaju u svoje ime i za svoj račun.

Što se tiče prirode, franšizne ugovore moguće je identifikovati kao nenominovane ugovore u hrvatskom zakonu koji su razvijeni od strane i preuzeti većinom iz inostrane poslovne prakse. Nenominovani ugovori (ugovori *sui generis*) kao opšte poznati u građanskom pravu nisu posebno regulisani kao posebni ugovorni tipovi već ugovorne strane imaju slobodu da definišu sadržaj i strukturu ugovora i da ga ukroje prema svojim posebnim potrebama i namerama. Ugovorne strane su u stalnoj obavezi da poštuju obavezne odredbe zakona. U nedostatku zakona koji reguliše franšizing, ugovor predstavlja osnovni dokument u odnosu između davaoca i primaoca franšize. Na pitanja koja nisu jasno definisana ugovorom, primenjuju se *lex specialis* ili opšta pravila ugovora.

Što se tiče odnosa sa drugim ugovorima, sadržaj paket aranžmana i osnovni elementi direktno utiču na prirodu franšiznog ugovora. To omogućava da se utvrdi da li se određeni

ugovorni odnos može klasifikovati kao franšizni ili ne. Ukoliko neki od osnovnih elemenata paket aranžmana nedostaju takvi ugovori se mogu smatrati pseudo ili zabranjenim franšiznim ugovorima. Drugim rečima, zavisno od prisutnosti određenih elemenata ugovor se može klasifikovati kao ugovor komercijalnog ili trgovinskog prava. U poslovnoj praksi, jasna podela se može napraviti između distributivnih ili agencijskih ugovora.

2.4. Tipovi franšiznih ugovora

Prema hrvatskoj literaturi moguće je razlikovati nekoliko tipova franšiznih ugovora shodno njihovom predmetu: 1. Industrijska franšiza odnosi se na proizvodnju i prodaju robe u skladu sa pravima intelektualne svojine davaoca franšize; 2. Distributivna franšiza odnosi se samo na prodaju robe (koristeći ime, robnu marku ili obeležje davaoca franšize), i 3. Servisna/uslužna franšiza koja se odnosi samo na pružanje usluga takođe u skladu sa pravima intelektualne svojine davaoca franšize koristeći ime, robnu marku ili obeležje davaoca franšize.

3) Trajanje ugovora i uslovi za njegovo obnavljanje

U hrvatskom zakonu ne postoje jasne odredbe koje regulišu trajanje ugovora, ali je na osnovu prirode ugovornog odnosa i činjenice da je primaocu franšize potrebno određeno vreme da razvije i povrati uložena sredstva, očekivano da se franšizni ugovor može zaključiti na duži vremenski period. Isto je predviđeno i Etičkim kodeksom (član 5.4.) i smernicama UNIDROIT Konvencije. Na osnovu opštih ugovornih pravila hrvatskog Zakona o obveznim odnosima, ne postoje izuzeća u pogledu trajanja franšiznog ugovora. Ugovorne strane imaju slobodu da utvrde trajanje i dužinu franšiznog ugovora ukoliko se to ne kosi sa javnom politikom i obaveznim zakonskim pravilima. (član 2. Zakona o obveznim odnosima)

Ugovori zaključeni na određeni vremenski period prestaju da važe poslednjeg dana trajanja, osim ako nije drugačije predviđeno zakonom ili ako se ugovorne strane nisu dogovorile drugačije (član 211. Zakona o obveznim odnosima). Ugovorne strane se uvek mogu sporazumeti o obnovi ugovora. Ponekad, čak i prećutno nastavljanje sa korišćenjem prava i ispunjavanjem obaveza franšiznog ugovora proizvodi dejstvo koje se poistovećuje sa obnavljanjem ugovora na neodređeno vreme. Kao primer navedenog se može navesti ugovor o licenci (članovi 721. - 723. Zakona o obveznim odnosima).

Ugovorne strane se mogu sporazumeti o obnavljanju ugovora bez da pritom razmatraju ili ne razmatraju nove uslove ugovora kao što su naknada, razlika u tretmanu i ostale naknade, sprovođenje novih znanja ali i odgovornost za naknadu štete, plaćanje naknade za obnovu ugovora, itd. Dogovor o obnovi ugovora se mora postići pre isteka ugovora osim ako ugovorne strane nisu dogovorile drugačije.

U skladu sa opštim obligacionim pravilima, ugovori zaključeni na neodređeno vreme moguće je otkazati uz adekvatan otkazni rok. Obaveštenje o otkazu ugovora se drugoj ugovornoj strani mora dostaviti u trenutku koji za tu ugovornu stranu nije neodgovarajući. Ugovor prestaje da važi po isteku otkaznog roka ugovorenog između ugovornih strana ili ako je tako predviđeno zakonskim pravilima poslovne prakse (član 212. Zakona o obveznim odnosima). U franšiznim ugovorima se očekuje da se ugovor raskida na osnovu osnovanih razloga dok je u (finansijskom) interesu obe ugovorne strane da se zajednički bave franšiznim poslom. Međutim, preporučuje se da se ugovorne strane dogovore o tim pitanjima (prihvatljiv otkazni rok ili osnovani razlozi za raskid ugovora) prilikom potpisivanja ugovora.

Određena izuzeća u pogledu ugovora o franšizingu mogu proisteći iz posebnog zakonodavstva (*lex specialis*) naročito u pogledu licenciranja i transfera prava intelektualne svojine

(u daljem tekstu: prava intelektualne svojine). Na primer, ugovor o licenci je moguće zaključiti na neodređeno vreme, iako u slučaju patenata i modela, ugovore o licenci nije moguće zaključiti na period duži od perioda u kome važe prava na zaštitu pomenutih, što je na primer u slučaju patenata, period od 20 godina. Stoga, je pri obnavljanju ugovora neophodno uzeti u obzir trajanje prava intelektualne svojine (videti poglavlje 10). Bilo bi idealno da se trajanje franšiznog ugovora poklapa sa trajanjem prava intelektualne svojine, međutim ne postoje ograničenja koja onemogućavaju ugovorne strane da se dogovore drugačije.

4) Finansijska pitanja

1. Franšizna naknada

U hrvatskom zakonu ne postoji izričita zakonska odredba koja se tiče finansijskih pitanja u franšiznim ugovorima. Uredba o ukupnom izuzeću samo navodi da davalac franšize primaocu franšize omogućava „na osnovu direktne ili indirektne naknade” da koristi franšizu (član 3.6. Uredbe o ukupnom izuzeću). Isto je predviđeno i u Smernicama Evropske Unije (Smernice 199), Etičkom kodeksu (član 1.), i Uputstvu UNIDROIT-a. U poslovnoj praksi i literaturi je opšte prihvaćeno da primalac franšize treba da plati dve vrste naknade davaocu franšize:

a) **Inicijalnu franšiznu naknadu –** koja se mora ustanoviti u franšiznom ugovoru i u suštini predstavlja inicijalni iznos koji se plaća za korišćenje određenog poslovnog modela. To je obično fiksna suma koja pokriva troškove licenciranih ili prenesenih prava uključujući i pomoć i obuku pri uspostavljanju poslovanja. Iskustvo hrvatske poslovne prakse je pokazalo da hrvatski primaoci franšize oklevaju da ulože u takvim situacijama više od 50.000 EUR.

b) **Prihod od autorskog prava ili kontinuirana franšizna naknada –** plaća se tokom trajanja ugovora za kontinuirano korišćenje i eksploatisanje franšize, licenciranih prava i tekuće pomoći. Ova periodična naknada se obično obračunava kao procenat franšiznog prometa – prihoda (*turn over*) ili bruto prodaje, osim ako se ugovorne strane ne dogovore drugačije (na osnovu količine prodatih proizvoda, kao fiksna rata, kao procenat prihoda u odnosu na rashode, itd.). Ovaj iznos se obično obračunava na periodičnom nivou, kvartalno ili u periodima od tri do šest meseci u skladu sa inflacijom i ostalim fluktuacijama na tržištu. Takođe je moguće ustanoviti periodičnu naknadu naknadno tokom trajanja ugovora iz prostog razloga što je ponekad objektivno nemoguće ustanoviti sistem plaćanja u trenutku zaključivanja ugovora. U pravilu, iznos naknade utvrđuje davalac franšize. U tom slučaju preporučljivo je da primalac franšize obezbedi postojanje određenih zaštitnih klauzula protiv jednostranog utvrđivanja naknade od strane davaoca franšize i zloupotrebe diskrecionog prava. U svakom slučaju ugovorne strane dužne su da uvek postupaju u skladu sa opštim principom jednakosti obaveza u ugovornim odnosima, koji na osnovu hrvatskog Zakona o obveznim odnosima mogu biti razlog za proglašenje određenog ugovora nevaljanim i nevažećim (član 7., član 375. Zakona o obveznim odnosima).

Što se tiče utvrđivanja cene, hrvatska sudska praksa ukazuje na analogiju sa kupoprodajnim ugovorima. Ukoliko se cena ne ustanovi, ili ako ugovor ne sadrži elemente na osnovu kojih se može ustanoviti cena, takav ugovor će se smatrati kao ugovor koji ne proizvodi pravno dejstvo. Ukoliko se smatra da je cena ustanovljena jednostrano, smatra se kao da nije precizirana. U potonjem slučaju cena se utvrđuje u skladu sa zakonskim odredbama. To znači da: 1. Se cena obračunava na osnovu elemenata prisutnih u ugovoru; 2. Uobičajena cena; ili 3. Opravdana cena; i 4. Cena koju utvrdi sud (članovi 384. – 385. Zakona o obveznim odnosima).

2. Fiskalna razmatranja

Franšizni ugovori su u Republici Hrvatskoj priznati u posebnom poreskom zakonodavstvu (*lex specialis*). Poreski aspekat podleže Međunarodnim računovodstvenim standardima br. 18, koji čine deo hrvatskom računovodstvenog sistema na osnovu člana 14. hrvatskog računovodstvenog zakona, zakona o PDV-u i Pravilnika o primeni PDV-a i delimično ostalih zakona iz ove oblasti.

U skladu sa članom 18. Međunarodnih računovodstvenih standarda smatra se da „prodaja robe, pružanje usluga ili korišćenje opreme uključujući i posebna poslovna znanja predstavlja prihod...” i stoga podleže oporezivanju kao prihod. Sam obračun zavisi od različitih vrsta franšiznih ugovora i ispunjavanja obaveza franšiznog ugovora. Duplo oporezivanje se mora izbeći.

5) Uloga davaoca franšize

Prava i obaveze ugovornih strana zavise od sadržaja svakog pojedinačnog ugovora. Pošto predmet ugovora može biti različit (distribucija i prodaja robe ili usluga, licenciranje robnih marki, transfer znanja, itd.), obaveze i uloge ugovornih strana variraju zavisno od predmeta ugovora. Većina obaveza sadržanih u franšiznim ugovorima su neophodne radi zaštite prava intelektualne svojine ili zadržavanja zajedničkog identiteta i ugleda franšizne mreže.

Pre zaključivanja ugovora, davalac franšize je dužan da primaocu franšize omogući pristup adekvatnim i blagovremenim podacima o franšiznoj kompaniji i iskustvu, franšiznoj mreži i tržišnim iskustvima, relevantnim poslovnim znanjima, pravima intelektualne svojine, finansijskim uslovima i ostalim odredbama ugovora (predugovorna obaveza obaveštavanja).

U Hrvatskoj ne postoji izričita odredba koja se odnosi na predugovornu obavezu obaveštavanja davaoca primatelja franšize niti je Hrvatska usvojila UNIDROIT Model zakona o obvezi otkrivanja informacija. Međutim takva obaveza postoji kao opšta obaveza u hrvatskom Zakonu o obveznim odnosima. Ona je jasno je navedena i u Etičkom kodeksu. Neispunjavanje predugovorne obaveze pružanja adekvatnih informacija može rezultirati u predugovornoj odgovornosti za nadoknadu štete (*culpa in cotrahendo*).

Nakon zaključivanja ugovora, sledeće obaveze u franšiznom ugovoru se smatraju obaveznim:

1. Obaveza dodeljivanja prava na **poslovni metod ili znanje** (*know-how*). Davalac franšize je dužan da primaocu franšize obezbedi odgovarajuća znanja koja su neophodna za obavljanje određenog poslovanja koje je predmet franšiznog ugovora (videti poglavlje 11);
2. Obaveza dodeljivanja prava na **korišćenje i distribuciju proizvoda,** uključujući i prodaju proizvoda na određenoj teritoriji (gradu, regionu, celoj zemlji, itd.), krajnjim korisnicima (potrošačima). Franšizni ugovori uglavnom sadrže kombinaciju različitih vertikalnih izuzeća koja se tiču proizvoda koji se distribuiraju.
3. Obaveza dodeljivanja prava na korišćenje (licenciranje) **industrijskih i/ili intelektualnih svojinskih prava** koja se odnose na korišćenje imena, robne marke ili obeležja, modela, dizajna, autorskih prava, industrijskog znanja ili patenta (videti poglavlje 10).
4. Obaveza pružanja **komercijalne ili tehničke pomoći** tokom trajanja ugovora – **tekuća pomoć.** Ova obaveza se u mnogome razlikuje od ugovora do ugovora i praktičnija je po svojoj prirodi. Obaveza pružanja pomoći sastoji se od obaveze

pružanja saveta, davanja instrukcija, obuke i nadzora primaoca franšize prilikom donošenja važnih odluka koje se tiču finansijskog planiranja, marketinga i oglašavanja. To obuhvata promovisanje prodaje, obuku zaposlenih i opšti izgled poslovnih prostorija i ne iziskuje dodatne troškove.

5. **Informisanje tokom trajanja ugovora.** Davalac franšize je dužan da primaoca franšize blagovremeno informiše i ažurira informacije o dešavanjima na tržištu i tržišnim uslovima, novim proizvodima ili novim karakteristikama postojećih proizvoda, cenama i uslovima nabavke uključujući i opšte informacije o novim poslovnim konceptima i potražnji. Ne postoji izričita zakonska odredba u hrvatskom zakonodavstvu koja reguliše ovo pitanje. Međutim, hrvatski Zakon o obveznim odnosima je u skladu sa opštom doktrinom savesnosti i dužnosti saradnje. Pošto ova obaveza može činiti bitan elemenat franšiznog ugovora, njeno neispunjavanje (ako je suštinsko) može biti osnov za otkaz ugovora.
6. Obaveza **kontrole nad korišćenjem franšize** tokom celokupnog trajanja ugovora. Ovo predstavlja zaštitnu meru koja služi da očuva vrednost, zajednički identitet i ugled franšiznog poslovanja kao celine. Pošto se ova obaveza smatra bitnim elementom franšiznog ugovora, neispunjavanje (ako je suštinsko) može biti osnov za otkaz ugovora.
7. Obaveza da se zahteva i dobije **direktna ili indirektna naknada** koja je u skladu sa ugovorom.

6) Uloga primaoca franšize

Uloga primaoca franšize u pojedinačnim franšiznim ugovorima reflektira ulogu davaoca franšize. Stoga neke od glavnih obaveza primaoca franšize jesu:

1. Obaveza korišćenja poslovnih **metoda** i **znanja** (*know-how*) u skladu sa franšiznim ugovorom, na dogovorenoj teritoriji i u dogovorenu svrhu uz obavezu prihvatanja svih mogućih budućih izmena u poslovanju.
2. Obaveza **korišćenja i distribucije proizvoda,** uključujući i prodaju robe na određenoj teritoriji (gradu, regionu, celoj zemlji, itd.), krajnjim korisnicima u skladu sa franšiznim ugovorom.
3. Obaveza korišćenja **paketa industrijskih i/ili prava intelektualne svojine** u skladu sa ugovorom. U slučaju imena, robne marke, ili žiga to se naročito odnosi na obavezu korišćenja tokom poslovanja naziva i obeležja, robne marke i oznaka davaoca franšize uz informacije o franšizi. U poslovnoj praksi uobičajeno je korišćenje sledećih izraza: „franšiza od strane...”. Franšizne ugovore karakteriše jaka uniformisanost iz prostog razloga što u očima potrošača ne sme da postoji razlika između davaoca i primaoca franšize.

   Na osnovu Smernica Evropske komisije i hrvatske prakse i literature sledeća prava intelektualne svojine i povezane obaveze smatraju se neophodnim da bi se zaštitila prava intelektualne svojine davaoca franšize:
   a. Obaveza primaoca franšize da se ne bavi bilo direktno ili indirektno bilo kakvom sličnom delatnošću;
   b. Obaveza primaoca franšize da ne stiče finansijski kapital u konkurentnom preduzeću koje bi primaocu franšize omogućilo da utiče na privredno ponašanje takvog preduzeća;

c. Obaveza primaoca franziše da trećim licima ne odaje poslovna znanja dobijena od davaoca franšize ukoliko poslovna znanja nisu javni domen;
d. Obaveza primaoca franšize da davaocu franšize prenese sva iskustva dobijena tokom eksploatacije franšize i da njemu i ostalim franšizama da neograničenu dozvolu za korišćenje poslovnih znanja stečenih na osnovu tog iskustva;
e. Obaveza primaoca franšize da davaoca franšize informiše o povredi licenciranih prava intelektualne svojine, da pokrene zakonski postupak protiv prestupnika ili da davaocu franšize pruži pomoć prilikom pokretanja zakonskog postupka protiv prestupnika;
f. Obaveza primaoca franšize da ne koristi stečena poslovna znanja koja su licencirana od strane davaoca franšize u ostale svrhe osim onih koja se tiču eksploatacije franšize;
g. Obaveza primaoca franšize da ne prenesi svoja prava i obaveze iz franšiznog ugovora bez saglasnosti davaoca franšize.

4. Obaveza poštovanja obaveze pružanja tekuće i kontinuirane pomoći kao i mogućnost da se zahteva dodatna pomoć ukoliko je to potrebno u skladu sa ugovorom. Dalje, primalac franšize je u obavezi da davaoca franšize obavesti o svih pritužbama ili povredama od strane trećih lica sa lokalnog tržišta na kom posluje franšiza, uključujući sve ostale činjenice i događaje koji su vezani za poslovanje (informisanje tokom trajanja ugovora).
5. Obaveza dopuštanja davaocu franšize da vrši kontrolu i nadzor u izvršavanju poslovnih obaveza, da kontroliše izgled poslovnih prostorija, kvalitet proizvoda ili usluga koje se nude i izvršavanje ugovora uopšte tokom celokupnog trajanja ugovora. Ponekad ova obaveza obuhvata kontrolu popisanih artikala, računa i računovodstvenih knjiga primaoca franšize. Iz razloga što je primalac franšize nezavisni preduzetnik, inspekcija računovodstvenih knjiga se mora vršiti u okviru ovlašćenja koja proizilaze iz nezavisnog statusa primaoca franšize. Ova se obaveza na osnovu hrvatskog zakonodavstva može tumačiti i kao savesno ponašanje.
6. Obaveza plaćanja direktne ili indirektne finansijske naknade davaocu franšize u skladu sa ugovorom.

7) Podfranšizni ugovor

U hrvatskom zakonodavstvu ne postoji posebna pravna regulativa za trostepeni franšizni sistem. Međutim, podfranšizni ugovor se mora posmatrati u odnosu na mogućnost licenciranja i transfera paketa industrijskih ili prava intelektualne svojine u okviru trostepenog sistema. Stoga je preporučljivo da se ugovorne strane u franšiznom ugovoru dogovore oko licenciranja tih prava u slučaju kasnije sklapanja podfranšiznog ugovora. (za pitanja vezana na licenciranje i prenos prava intelektualne svojine videti rešenja hrvatskog zakonodavstva u poglavlju 10).

8) Oglašavanje i kontrola oglašavanja

U hrvatskom zakonodavstvu ne postoje izričite odredbe koje regulišu ovo pitanje. Poslovna praksa i literatura pokazuje da postoje slučajevi u kojima franšizni ugovori u velikoj meri sadrže odredbe na osnovu kojih davalac franšize preuzima obavezu kontrole oglašavanja i promotivnih aktivnosti. Uniformisanost predstavlja ključni faktor u franšiznoj mreži koji se

može ispuniti samo ako svi članovi te mreže poštuju iste smernice za poslovanje. U očima potrošača ne sme postojati razlika između davaoca i primaoca franšize. Pitanja o kojima se treba dogovoriti unapred jesu saglasnost i korišćenje promotivnih materijala, pružanje smernica za oglašavanje i prevod. U većini slučajeva odluke o tim pitanjima donosi davalac franšize osim ako nije dogovoreno drugačije. Promotivne kampanje se mogu sprovoditi na međunarodnom, nacionalnom i regionalnom nivou. Davalac franšize obično inicira kampanju na najvišem nivou i potom ostali članovi prate i na isti način sprovode ustanovljenu kampanju i oglašavanje na regionalnom nivou. Iako su prvobitno prikupljeni iz franšizne naknade, troškovi oglašavanja i održavanja ugleda same franšize uglavnom snosi davalac franšize. Što se tiče primaoca franšize, ovi troškovi su uglavnom obuhvaćeni periodičnim naknadama osim ako nije dogovoreno drugačije (naročito za oglašavanje na lokalnom nivou).

U hrvatskoj ne postoji izričita zakonska odredba koja reguliše pitanje oglašavanja već ova obaveza proističe iz opštih pravila o obligacionim odnosima. Iako je ovaj element spada u domenu autonomije ugovornih strana, one su dužne uvek pridržavati se načela savesnosti i poštenja. Ugovorne strane dužne su da vode računa o opštoj svrsi franšiznog ugovora i da čuvaju identitet i ugled davaoca franšize.

9) Snabdevanje opremom, proizvodima i uslugama

Dobavljanje opreme, proizvoda i usluga primaocu franšize može vršiti direktno davalac franšize ili dobavljač koga je u tu svrhu ovlastio davalac franšize. Položaj davaoca franšize je time monopolistički i on definiše uslove koji idu njemu u korist. Istovremeno, postavlja se pitanje da li primalac franšize ima pravo da se obrati drugim dobavljačima koje ne koristi davalac franšize ili koji nisu pomenuti u ugovoru o nabavci opreme, robe ili usluga koje su potrebne za poslovanje franšize.

U Hrvatskoj je monopolistički položaj na tržištu i pravo konkurencije regulisano Zakonom o zaštiti konkurencije. Generalno, monopol je zabranjen osim ako u posebnim slučajevima zakon nije predvideo određene izuzetke. Uredba o ukupnom izuzeću za pojedine kategorije franšiznih ugovora postavlja uvjete koji moraju biti ispunjeni da bi ugovor bio izuzet od primjene odredbe o zabranjenim ugovorima kako je to predviđeno Zakonom o zaštiti konkurencije. Ukupno izuzeće u Hrvatskoj se primenjuje na franšizne ugovore uz izuzetak industrijskih (tehnoloških) franšiznih ugovora, pod sledećim uslovima:

a) Tržišni udeo:

(1) Ukupno izuzeće primenjuje se na vertikalne ugovore pod uslovom da tržišni udeo dobavljača nije veći od trideset procenata (30%) relevantnog tržišta na kom prodaje ugovorene proizvode.

(2) U slučaju vertikalnih ugovora koji sadrže isključive (ekskluzivne) odredbe o nabavci, ukupno izuzeće predviđeno ovom Uredbom primenjuje se kada tržišni udeo dobavljača na datom tržištu na kom kupuje ugovorene proizvode nije veći od trideset procenata (30%) (član 5. – 6. Uredbe).

b) Ukupan godišnji promet:

(1) Ukupno izuzeće se primenjuje na vertikalne ugovore zaključene između udruženja preduzeća na maloprodajnom nivou i njegovih članova ako:

a. Članovi tog udruženja jesu distributeri koji prodaju ugovorene proizvode krajnjim korisnicima;
b. Niko od pojedinačnih članova tog udruženja zajedno sa povezanim preduzećima nema godišnji promet veći od 50,000.000 (pedeset miliona) HRK.

(2) Dalje, ukupno izuzeće primenjuje se na vertikalne ugovore zaključene između konkurentnih preduzeća ali samo kada ta konkurenta preduzeća zaključe nerecipročne vertikalne ugovore koji ne dodeljuju jednaka prava i obaveze ugovornim stranama i ako:

   a. Je dobavljač proizvođač i distributer proizvoda, a kupac je distributer koji ne proizvodi supstitucione proizvode; i/ili
   b. Dobavljač pruža usluge na nekoliko trgovinskih nivoa, dok kupac ne pruža usluge koje supstituišu dobavljačeve usluge na trgovinskom nivou na kom kupuje ugovorene usluge; i/ili
   c. Godišnji promet kupca nije veći od 50,000.000 (pedeset miliona) HRK. (član 7. - 8. Uredbe)

Hrvatsko zakonodavstvo time ne dozvoljava ugovore o apsolutnom vezivanju davaoca i primaoca franšize u pogledu nabavke opreme, proizvoda i usluga. Nezavisno tko je dobavljač, primalac franšize je dužan uvijek da distribuira i prodaje proizvode ili usluge u skladu sa uvijetima franšize kako su utvrđeni franšiznim ugovorom.

10) Intelektualna svojina

„Industrijska ili prava intelektualne svojine odnose se na naziv i robne marke ili oznake, znanje, modele, dizajn, industrijsko znanje ili patente, korišćenje i distribuciju ugovorenih proizvoda krajnjim korisnicima" (član 3(6) Uredbe o ukupnom izuzeću). Ova definicija je u skladu sa opisom koji je sadržan u Evropskim Smernicama o tumačenju Evropske Uredbe o ukupnom izuzeću iz 1999. Uglavnom se smatra da franšizni ugovori sadrže „licence" za prava intelektualne svojine za korišćenje ili distribuciju robe ili pružanje usluga.

Pravni osnov za licenciranje prava intelektualne svojine u Hrvatskoj jest **ugovor o licenci** koji je regulisan hrvatskim Zakonom o obveznim odnosima (članovi 699. – 725. Zakona o obveznim odnosima) ili odredbe posebnih Zakona o pravima intelektualne svojine (*lex specialis*). Ugovor o licenci primaocu licence daje pravo da koristi intelektualnu svojinu davaoca licence u određenom opsegu (ekskluzivna ili neekskluzivna licenca) na određenoj teritoriji i za odrešenu naknadu koju plaća primalac licence. Ugovor o licenci se mora zaključiti u pisanoj formi. Ugovor o licenci se može zaključiti na neodređeni period iako u slučaju patenata i modela taj ugovor ne može biti duži od perioda trajanja pravne zaštite tih prava, na osnovu posebnih propisa (*lex specialis)*. Sledeća prava intelektualne svojine podležu ugovorima o licenci: patenti, znanje, robne marke, uzorci i modeli. Davalac licence ostaje vlasnik prava i ima pravo da ista koristi u skladu sa ugovorom o licenci. Poslovno ime, oznaka, dizajn, autorska prava, industrijsko znanje i poslovne tajne ne mogu biti predmet ugovora o licenci.

Hrvatsko zakonodavstvo o pravima intelektualne svojine je u potpunosti u skladu sa tekućim zakonodavstvom Evropske zajednice.[7] Detaljnije o svakom pravu moguće je reći sledeće:

1. Robni žigovi i oznake predmet su Zakona o robnim žigovima (Narodne novine 173/2003, 76/2007, u daljem tekstu: Zakon o robnim žigovima). Robni žigovi se moraju registrovati u Zavodu za intelektualnu svojinu Republike Hrvatske (u daljem tekstu: Zavod), te samo registrovani robni žigovi ostvaruju pravnu zaštitu u periodu od 10 godina od dana podnošenja zahteva za registraciju. Ovaj period se može obnavljati opet na 10 godine, neodređeni broj puta. Bilo koja oznaka koja je slična ili ista registrovanom robnom žigu se ne sme koristiti od strane drugog preduzetnika bez saglasnosti vlasnika a vezano za proizvode ili usluge koje su iste, slične ili potpuno različite od onih koje su obuhvaćene robnim žigom.

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[7] Za pravne tekstove na hrvatskom i engleskom jeziku videti internet stranicu Državnog zavoda za intelektualnu svojinu Republike Hrvatske, www.dziv.hr

2. Trgovački naziv (ime/tvrtka) davaoca franšize ne može biti predmet ugovora o licenci. Na osnovu hrvatskog Zakona o privrednim društvima (Narodne novine 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08, 137/09) poslovni naziv davaoca franšize se ne može licencirati ili preneti na treće lice (primalac franšize) radi korišćenja i distribucije ugovorenog proizvoda ili usluge. Trgovačko ime se mora registrovati u Trgovinskom sudu i mora biti na hrvatskom jeziku osim ako se sastoji od robnog žiga koji sadrži međunarodne reči. Stoga se u većini slučajeva u praksi ime kompanije unosi i predstavlja deo robnog žiga i licencira se zajedno sa ostalim robnim žigovima i oznakama u skladu sa ugovorom o licenci i odredbama hrvatskog zakona o robnom žigu.

3. Autorska i druga povezana prava ne podležu ugovoru o licenci. Zakon o autorskim i povezanim pravima (Narodne novine 167/03, 79/07, u daljem tekstu: Zakon o autorskim pravima) sadrži odredbe koje se odnose na posebne vrste ugovora o različitim pitanjima vezanim za autorska i ostala povezana prava. Autorska prava obuhvataju moralna, ekonomska i ostala prava autora predviđena zakonom. Autor se ne može odreći svojih autorskih prava niti ih može preneti na drugo lice. On može samo dodeliti ekskluzivno ili neekskluzivno pravo korišćenja autorskih prava, obično u zamenu za određenu naknadu na osnovu zaključenog ugovora o autorskim pravima. Ovaj ugovor zaključuje se u pisanoj formi. Držalac ekskluzivnog prava na korišćenje može na osnovu svog prava da trećem licu dodeli ili prenese pravo korišćenja samo na osnovu pismene saglasnosti autora (na primer od davaoca franšize na primaoca franšize ili primaoca podfranšize). Autor ne može da odbije da saglasnost ako je to protivno savesti i pravičnom odnosu. Saglasnost nije neophodna ako se pravo korišćenja daje samo radi koristi autora. Zaštita autorskih i ostalih povezanih prava ne zahteva formalnu registraciju. Zaštita autorskih prava se uglavnom dodeljuje za života autora i tokom 70 godina nakon njegove smrti, osim ako drugačije nije predviđeno Zakonom o autorskim pravima. Na ostala povezana prava primenjuju se posebna pravila iz Zakona o autorskom pravu i drugim povezanim pravima.

4. Patenti su u Hrvatskoj regulisani i zaštićeni na osnovu Zakona o patentima (Narodne novine 173/03, 87/05, 76/06, u daljem tekstu: Zakon o patentima). Uslovi pod kojima se pruža zaštita pronalasku jesu da je taj pronalazak nov, inventivan i da može da se koristi u industriji. Patenti se moraju registrovati u Zavodu za intelektualnu svojinu. Samo vlasnik registrovanog patenta ima pravo da koristi zaštićeni pronalazak. U slučaju franšize, patent može biti predmet delimičnog ili kompletnog prenosa. Pravo korišćenja zaštićenog pronalaska se dodeljuje davaocu licence u obliku ugovora o licenci. Registrovani patenti zaštićeni su u periodu od 20 godina od dana registracije (samo konsezualni patenti su zaštićeni u periodu od 10 godina). Držalac patenta može da zabrani njegovo korišćenje ili ugrožavanje. Aktivnosti koje se preduzimaju u slučaju povrede patenta propisane su Zakonom o patentima.

5. Dizajn je regulisan i zaštićen na osnovu Zakona o industrijskom dizajnu (Narodne novine br. 173/03, 76/07, u daljem tekstu: Zakon o industrijskom dizajnu). Dizajn je zaštićen kao industrijski dizajn u meri u kojoj on predstavlja novi dizajn koji ima svoj poseban karakter i koji nije suprotan javnim interesima ili prihvaćenim moralnim principima. Tvorac dizajna ima pravo da prenese ili licencira svoja prava na industrijski dizajn, međutim on nema pravo da prenese svoja moralna prava. Ako je dizajn nastao na osnovu naloga, pravo na pokretanje procedure i sticanje prava na industrijski dizajn ima nalogodavac osim ako nije drugačije predviđeno ugovorom o nalogu. Dizajn se mora registrovati u Zavodu za intelektualnu svojinu. Samo vlasnik registrovanog dizajna ima pravo na zaštitu od povrede od strane trećih lica. Zaštita industrijskog dizajna traje 5 godina od dana podnošenja zahteva za registraciju. Može se obnoviti na novih 5 godina do ukupnog perioda od 25 godina. U slučaju franšize obično se dizajn licencira drugom licu bilo u celini ili delimično, za celu ili deo teritorije Republike Hrvatske. Licenca može biti ekskluzivna ili neekskluzivna i mora se regi-

strovati da bi proizvodila dejstvo naspram trećih lica. Ugovor o licenci se mora zaključiti u pisanoj formi. Držalac prava industrijskog dizajna i ekskluzivni primalac licence mogu zaštiti svoj patent od korišćenja i povreda od strane trećih lica. Primalac neekskluzivne licence ima pravo da pokrene postupak u slučaju povrede samo uz saglasnost držaoca prava na industrijski dizajn osim ako nije drugačije dogovoreno ugovorom o licenci. Postupak koji se pokreće u slučaju povrede propisan je Zakonom o industrijskom dizajnu.

11) Poslovna znanja i poslovne tajne

Poslovno znanje (*know-how*) je u Hrvatskoj definisano Uredbom o ukupnom izuzeću. U smislu te Uredbe poslovno znanje predstavlja „skup nepatentiranih tehničkih informacija koje su dobijene iskustvom i ispitivanjima dobavljača, koje su tajne, bitne i prepoznatljive. **Tajna** znači da je skup tih znanja u celini ili u tačnoj konfiguraciji ili po elementima nedostupan širom auditorijumu. **Bitne** znači da taj skup informacija obuhvata podatke koji su neophodni za korišćenje, prodaju ili preprodaju ugovorenih proizvoda, a naročito za prezentovanje tih proizvoda prilikom prodaje, metode kojima se utiče na potrošače, tehnički sposobno osoblje i finansijski menadžment. **Prepoznatljive** znači da se te informacije moraju prikazati na dovoljno razumljiv način kako bi bilo moguće potvrditi da li zadovoljavaju kriterijume vezane za njihovu tajnu i bitnu prirodu." (član 10.6.) Ova definicija je u skladu sa definicijom Uredbe o ukupnom izuzeću Evropske komisije iz 1999., i EU Smernicama. Iako Etički kodeks poslovno znanje definiše na nešto drugačiji način, glavne karakteristike poverljivost, bitnost i prepoznatljvost su ipak prisutne.

U franšiznim poslovima poslovno znanje se uglavnom prenosi kroz ugovor o licenci na osnovu tzv. uputstva za upotrebu koje predstavlja sastavni deo ugovora (*operating manual*). Uputstvo za upotrebu sadrži detaljna uputstva za upotrebu i poslovno ponašanje i mora biti sačinjeno u pisanoj formi. Ovaj dokument je zaštićen kao poslovna tajna i ne sme se davati na uvid trećim licima čak i nakon isteka franšiznog ugovora.

U skladu sa poslovnom praksom, poslovno znanje predstavlja širi koncept. Ono dodatno obuhvata i obavezu davaoca franšize da primaocu franšize omogući pristup ostalim znanjima i pomoći u radu kroz tekuće pružanje pomoći, instrukcije, obuku zaposlenih i savetovanje u svim fazama poslovanja (u usmenoj formi). Poslovna znanja bi trebalo pružati tokom celokupnog trajanja ugovornog odnosa, a ako dođe do bitnih promena u tim saznanjima, davalac franšize dužan je da o tome obavesti primaoca franšize.

U aktuelnom hrvatskom zakonodavstvu ne postoji jasna odredba koja se odnosi na poslovne tajne ili posledice u slučaju neadekvatnog korišćenja poslovnog znanja. U praksi poslovna znanja davaoca franšize su obično zaštićena odredbama o poverljivosti koje su sadržane u franšiznom ugovoru. Ugovorne strane uvek imaju pravo na zaštitu u skladu sa opštim zakonskim pravilima.

12) Pravni lek u slučaju neispunjavanja ugovornih obaveza

U slučaju povrede ili neispunjavanja prava intelektualne svojine, odgovarajuće posebno zakonodavstvo (*lex specialis*) u tu svrhu propisuje određeni pravni lek. To je uglavnom izričito navedeno u odgovarajućim zakonskim aktima (vidi poglavlje 11).

Po pitanju neispunjavanja ostalih obaveza, ne postoji jasna zakonska odredba koja reguliše., Opšta pravila koja važe za neispunjavanje ugovorenih obaveza iz hrvatskog Zakona o

obveznim odnosima se uvek primenjuju, osim ako se ugovorno strane nisu dogovorile drugačije (članovi 360. – 368. Zakona o obveznim odnosima). U skladu sa opštim pravilima ako jedna od ugovornih strana prekrši svoje ugovorne obaveze, druga ugovorna strana mora da od strane koja nije ispunila svoju obavezu zahteva ispunjenje tih obaveza u datom dodatnom vremenskom roku. Ako se ni u dodatnom vremenskom roku date obaveze ne ispune, oštećena ugovorna strana ima pravo da ugovor raskine. Dodatni vremenski period nije neophodan ako je jasno da data ugovorna strana neće biti u mogućnosti da ispuni svoje obaveze čak i u tom roku, ili ako je u pitanju vremenski ograničena obaveza. Ugovor se ne može otkazati u slučaju neispunjavanja neznatnog dela obaveze. U pojedinim slučajevima moguće je od suda zahtevati da ugovorna strana koja je u prekršaju ispuni svoje obaveze. U prilog ovim rešenjima, ugovorne strane uvek imaju pravo na nadoknadu učinjene štete. Opšta pravila za nadoknadu štete propisana su Zakonom o obveznim odnosima, članovima 1045. - 1110. Zbog prirode i svrhe franšiznog ugovora, preporučljivo je da ugovorne strane postignu zajednički dogovor i da odredbu o raskidu ugovora koriste samo u krajnjim slučajevima.

13) Prestanak ugovornog odnosa i njegove posledice

a) Ugovorni odnos će se najčešće završiti na jedan od sledećih načina:

1. Istek ugovora.
   - Ugovor koji ima ograničeno trajanje prestaje da važi nakon isteka ugovorenog vremenskog perioda osim ako nije drugačije dogovoreno. Obnova ugovora je diskreciono pravo davaoca franšize, osim ako mogućnosti za obnovu ili produžetak ugovora nisu posebno dogovorene.
2. Otkaz/raskid ugovora od strane jedne ugovorne strane.
   - Raskid ugovora moguć je u skladu sa dogovorenim uslovima ili na osnovu neispunjavanja ili povrede ugovornih obaveza, promene ugovornih uslova (vanredni pogoršani uslovi), stečaja, nelikvidnosti, likvidacije jedne ugovorne strane.
   - U slučaju otkaza ugovora, razlog za otkaz mora biti dovoljno ozbiljan s obzirom na ulog u poslovanje.
   - Dobrovoljan raskid ili raskid na osnovu zajedničke odluke obe ugovorne strane je takođe moguć zavisno od namere ugovornih strana.

b) Zakonske posledice

Nakon isteka ugovornog odnosa obe ugovorne strane se oslobađaju svojih ugovornih obaveza (osim odgovornosti za nadoknadu štete). Pošto je franšizni ugovor vrlo složen, sva pojedinačna prava se moraju valjano prekinuti i po potrebi vratiti. Ovo naročito važi kod prenosa industrijskih ili prava intelektualne svojine i poslovnog znanja.

Idealna situacija bi bila da se istek franšiznog ugovora podudara sa istekom prava na intelektualnu svojinu. Ukoliko to nije slučaj, sva prava intelektualne svojine se moraju vratiti davaocu franšize uz unošenje odgovarajućih promena u Registru, ukoliko je tako propisano posebnim zakonodavstvom (*lex specialis).*

U slučaju raskida ili otkaza, u skladu sa opštim obligacionim pravilima, zakonske posledice su sledeće. Osim ako nije drugačije dogovoreno, obe ugovorne strane se oslobađaju svojih ugovornih obaveza, osim obaveze nadoknade štete. Obe ugovorne strane dužne su da jedna drugoj vrate ono što su jedna od druge dobile na osnovu ugovora, računajući i plaćene naknade i ostale dobitke na osnovu ugovora. Ugovorna strana koja vrši povraćaj novčanih

obaveza dužna je takođe da izvrši i povraćaj plaćenih kamata na te novčane obaveze (član 368. Zakona o obveznim odnosima). Iz tog razloga opšti princip i nastojanje zakona je ispunjenje ugovornih obaveza.

Kao dodatak ovim rešenjima, ugovorne strane uvek zadržavaju pravo da traže nadoknadu štete. Opšta pravila za nadoknadu štete propisana su članovima 1045. – 1110. Zakona o obveznim odnosima.

Ostale posledice mogu biti: obaveza primaoca franšize da čuva poslovne tajne i poverljive informacije, da se suzdrži od rada u konkurentnom poslovanju, za primatelja franšize da ukloni sve oznake i ime franšize, primalac franšize ima pravo da otkupi opremu ili imovinu (buy out option), nakon prestanka ugovora obe ugovorne strane moraju postupati saglasno sa odredbama o stečaju, likvidaciji i drugim opštim prisilnim odredbama.

Ostale opšte odredbe

– Biće razmotreno

Preporučena literatura:

Knjige i radovi:

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– *UNIDROIT Priručnik za međunarodne glavne franšizne ugovore,* UNIDROIT Međunarodni institut za unifikaciju privatnog prava, Rim, 1998.
– *Model zakona o objavi podataka u franšizi (Model Franchise Disclosure Law)*, UNIDROIT Međunarodni institut za unifikaciju privatnog prava, Rim 2002.
– *Nacrt zajedničkih odrednica (Draft Common Frame of Reference)*, knjiga IV, deo E, Poglavlje 4: Franšizni ugovori, 2009.
– V. Korah, *Budućnost vertikalnih ugovora na osnovu EZ Zakona o zaštiti konkurencije,* ECLR, 1998.
– M. Martinek, *Moderne Vertragstypen, Band II: Franchising, Know-How, Management und Consultingverträge*, C.H. Beck, 1992.
– M. Mendelson, *Franšizni zakon (Franchising Law)*, Ričmond, 2004.

Zakonski tekstovi – izvori u Republici Hrvatskoj

– Narodne Novine – Službeni list RH internet stranica: www.narodne-novine.hr
– Za zakonodavstvo u oblasti Zakona o zaštiti konkurencije pogledajte internet stranicu hrvatske Agencije za tržišnu konkurenciju www.aztn/eng/zakonodavni_o.htm (dostupni tekstovi na hrvatskom i engleskom jeziku)
– Za zakonodavstvo u oblasti prava intelektualne svojine, videti internet stranicu Državnog zavoda za intelektualno vlasništvo Republike Hrvatske www.dziv.hr/en/
(tekstovi su dostupni na hrvatskom i engleskom jeziku)
– Za ostalo opšte zakonodavstvo i postupak usklađivanja RH sa zakonodavstvom Evropske Unije videti internet stranicu hrvatskog Ministarstva inostranih poslova i evropskih integracija www.mvpei.hr

FAKTORING*

1) Osnovni koncept i elementi

U Republici Hrvatskoj ne postoji izričita pravna regulativa koja uređuje faktoring - prodaju prava potraživanja. Reč je neimenovanom ugovoru koji je uslovljen poslovnom praksom i u velikoj meri uređen na osnovu opštih pravila koja regulišu obaveze i zakonodavstvo u oblasti finansija i bankarstva. U razvijajućim ekonomijama prodaja prava potraživanja je način finansiranja koji je prvenstveno dostupan bankama i finansijskim kućama. Izveštaji Hrvatske agencije za nadzor finansijskih usluga (www.hanfa.hr, u daljem tekstu: Agencija) pokazuju da u Hrvatskoj postoji 14 kompanija koje se bave prodajom prava potraživanja i ukupan iznos njihovih aktivnosti vezanih za prodaju prava potraživanja iznosi 2.736.001 hiljada HRK za 2009. godinu (oko 375.000.000 hiljada EUR).[8] Potonji broj kompanija koje se bave prodajom prava potraživanja odnosi se na kompanije koje obavljaju aktivnosti vezane za prodaju prava potraživanja i koje su u obavezi da svoje finansijske izveštaje dostave Agenciji. Međutim, Agencija nema ovlašćenja da ih licencira (kao što je to slučaj kod lizing kompanija) međutim ima ovlašćenja na osnovu Agencijskog zakona (Narodne novine 140/05) da samo vrši nadzor.

Prodaja prava potraživanja u Hrvatskoj se pominje u sledećim regulativama: Zakon o obveznim odnosima (Narodne novine 35/05, 41/08) u okviru dodele prava, Zakon o bankama (Narodne Novine 84/02, 141/06), gde se precizira da su banke ovlašćene da vrše aktivnosti vezane za prodaju prava potraživanja, Uputstvo o primeni Pravilnika o adekvatnosti kapitala banaka (Narodne novine 195/03, 41/2006, 130/2006, 14/2008, 31/2008, 33/2008, 18/2009) i Zakon o deviznom poslovanju (Narodne novine 96/03, 140/05, 132/06, 150/08, 92/2009, 153/2009) gde se prodaja prava potraživanja pominje kao jedan vid kreditnog finansiranja i Uputstvo o primeni Pravilnika o uslovima i postupku prenosa novca sa inostranstvom (Narodne novine 136/05, 176/04, 88/05, 18/06, 24/06, 132/07) gde se priznaje da inostrana banka može da vrši prodaju prava potraživanja u Republici Hrvatskoj. Dalje, Hrvatski nacionalni program za pridruživanje EU precizira prodaju prava potraživanja kao vid finansijskih usluga.

Republika Hrvatska nije potpisnik UNIDROIT Konvencije o međunarodnoj prodaji prava potraživanja (Otava, 1998) ali se u manjoj ili većoj meri slična rešenja mogu pronaći u hrvatskom zakonodavstvu. Gdje je potrebno, bliža veza sa UNIDROIT Konvencijom će se detaljnije razmatrati.

A. Značenje prodaje prava potraživanja.

Ugovor o prodaji prava potraživanja predstavlja ugovor zaključen između dve ugovorne strane (dobavljača i faktora) na osnovu koga dobavljač prodaje i dodeljuje potraživanja koja proizilaze iz ugovora o prodaji robe i usluga sačinjenog sa trećim licem, njegovim klijentima (dužnicima) u zamenu za nadoknadu radi finansiranja kontinuiranog poslovanja.

Glavne funkcije prodaje prava potraživanja su: finansiranje, regresivna odgovornost (*delcredere*) i pružanje ostalih usluga koje su direktno ili indirektno vezane za prodaju prava

* Originalan tekst je na engleskom jeziku. Prevod sa engleskog na srpski jezik izvršio je GTZ Beograd, Srbija. Autor ne preuzima nikakvu odgovornost za prevod.

[8] Ovaj iznos predstavlja kumulativni iznos kupljenih faktura u prodaji prava potraživanja u prvih šest meseci 2009. godine na osnovu izveštaja 14 kompanija koje se bave prodajom prava potraživanja.

potraživanja (kao što su ispitivanje kreditne istorije dužnika, oporezivanje, računovodstvo, oglašavanje usluga, itd.).

U suštini prodaja prava potraživanja predstavlja kupoprodajni ugovor potraživanja na regresivnoj osnovi, osim ako se ugovorne strane ne dogovore drugačije. **Osnovni element prodaje prava potraživanja je dodeljivanje potraživanja,** koja su **u Hrvatskoj uređena odredbama članova 80. – 90. Zakona o obveznim odnosima** (u daljem tekstu: Zakon o obveznim odnosima). Time je prodaja prava potraživanja uređena na osnovu odredaba opštih zakonskih pravila.

Ugovor o prodaji prava potraživanja predstavlja složeni ugovor. On se sastoji od sledećih **osnovnih elemenata:**

1. Predugovor koji obavezuje ugovorne strane da zaključe glavni ugovor:
   - Predugovor predstavlja ugovor zaključen između dobavljača i faktora na osnovu kog dobavljač preuzima obavezu da faktoru ponudi sva ili neka od svojih potraživanja (dugova) koji proizilaze iz ugovora zaključenih za dužnicima, dok faktor preuzima obavezu da ukoliko je zadovoljan kreditnom sposobnošću dužnika „kupi” ta potraživanja. Obično su obe ugovorne strane u kontinuiranoj i neraskidivoj vezi. Pitanje da li faktor treba da kupi sva ili samo neka od potraživanja dobavljača zavisi od dogovora ugovornih strana.
   - U skladu sa hrvatskim zakonom, predugovor će biti važeći ako su ugovorne stranke definisale ili moguće definisale uslove glavnog ugovora i predmet prodaje prava potraživanja (član 268. Zakona o obveznim odnosima)
2. Glavni ugovor zaključen između dobavljača i faktora:
   - Glavni ugovor se uglavnom zaključuje kada je moguće definisati potraživanja i/ili kada ona nastanu. Obično dobavljač faktoru šalje ponudu u vidu fakture sa jasno definisanim potraživanjem i datumom dospeća.
   - Pravni osnov potraživanja može biti bilo koji ugovor, ali u praksi su to najčešće kupoprodajni ugovori.
   - Faktor je uglavnom spreman da kupi potraživanja po regresivnom osnovu od dobavljača, pre datuma njihovog dospeća i za nižu cenu od samog potraživanja. Faktor zadržava pravo da zahteva da dobavljač nenaplaćena potraživanja (dugovanja) otkupi nazad i stoga dobavljač snosi rizik konačne isplate duga.
   - Takođe je moguće da se ugovorne strane dogovore drugačije – kupovina potraživanja na neregresivnom osnovu pri čemu faktor nema pravo da traži regresivnu kupovinu od dobavljača. U ovom slučaju faktor je taj koji je odgovoran za konačnu isplatu duga.
3. Asignacija prava od prodavca na faktora – predstavlja ključni element prodaje prava potraživanja. Na osnovu hrvatskog zakona asignacija prava uređena je na sledeći način:
   - sva (opšta asignacija) ili bilo koja (pojedinačna asignacija), postojeća ili buduća potraživanja se mogu preneti (član 80. Zakona o obveznim odnosima).
   - asignacija prava predstavlja ugovor zaključen između dobavljača i faktora i stoga saglasnost dužnika ne predstavlja uslov za validnost asignacije prava. Međutim:
   - **obaveštenje** o asignaciji potraživanja se mora uputiti dužniku kako bi takva dodela bila zakonski obavezujuća za dužnika. Ukoliko se obaveštenje ne uputi, i dužnik nije svestan dodele ili prenosa, on se samim tim oslobađa obaveze

kroz ispunjavanje obaveze prema dobavljaču (član 82. Zakona o obveznim odnosima). U svim ostalim slučajevima dužnik se oslobađa svoje obaveze samo kada ispuni sve obaveze prema faktoru.

– u slučaju višestruke dodele prava na isto potraživanje, dužnik je dužan da ispuni svoje obaveze prema primaocu prava čije obaveštenje je prvo primio, ili prema licu koja je prvo podnelo zahtev za namirenje duga (član 83. Zakona o obveznim odnosima)
– **asignacija prava nema dejstvo prema dužniku** ukoliko su se u trenutku sklapanja ugovora o prodaji robe dobavljač i dužnik dogovorili (*pactum de non cedendo*) o zabrani takve asignacije prava (apsolutna zabrana) ili ako su uslovili takvu dodelu prava prethodnom saglasnošću dužnika (relativna zabrana) (član 80.2. Zakona o obveznim odnosima). Sa lingvističke tačke tumačenja zakona i na osnovu stava pojedinih autora ugovori o dodeli prava koji su protivni zabrani valjani su što se tiče faktora (nezavisno od njegovog znanja o zabrani) međutim ne proizvode nikakvo pravno dejstvo prema dužniku. U tom slučaju dužnik se oslobađa obaveze kroz namirenje dobavljača ili u slučaju da dobavljač odbije namirenje i predmet obaveze preda sudu.
– U hrvatskoj literaturi postoje različita mišljenja o opštoj dodeli, dodeli svih potraživanja jednog dobavljača, uključujući i zabranjena i nezabranjena potraživanja, kao što je to obično slučaj kod prodaje prava potraživanja, tj. da ugovori o dodeli prava nisu validni bez saglasnosti dužnika.[9] Zakon po ovom pitanju nema stav.

4. Forma – forma asignacije i forma obaveštenja predstavljaju dve različite stvari.
   – Na osnovu hrvatskog zakona asignacija prava ne predstavlja formalni ugovor. Međutim, asignacija je povezana ili akcesorna nekom od prethodnih ugovora (obično su to kupoprodajni ugovori) i stoga se u hrvatskoj literaturi smatra da bi uvek trebalo da prati oblik glavnog ugovora (paritet).
   – Ova obaveza forme se ne odnosi na obaveštenje o dodeli prava. Pošto zakon ne uređuje formu obaveštenja, može se zaključiti da se obaveštenje može dostaviti u bilo kojoj formi, uključujući i usmenu. Isti stav u pogledu obaveštenja sreće se i u hrvatskoj literaturi i sudskoj praksi. Ovo rešenje se razlikuje od rešenja propisanih Konvencijom UNIDROIT-a gde obaveštenje mora ispuniti sve uslove propisane članom 1. Konvencije i mora biti u pisanom obliku.

B. Delokrug ugovora o prodaji prava potraživanja.

Pravila hrvatskog Zakona o obveznim odnosima primenjuju se kada se prenos prava potraživanja izvršava na osnovu ugovora o prodaji potraživanja kojeg uređuje Zakon o obveznim odnosima. Kada se radi o ugovoru o prodaji prava potraživanja koji sadrži međunarodni element primenjivo pravo utvrditi će se u skladu sa pravilima kolizionog zakona.

C. Predmet prodaje prava potraživanja.

Predmet prodaje prava potraživanja mogu biti sva ili bilo koja postojeća ili buduća potraživanja koja proizilaze iz ugovora sa dužnikom, osim sledećih potraživanja:

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[9] V. Gorenc, *Zakon o obveznim odnosima s komentarom*, RRIF, 1998, p 567.

– Potraživanja čija je asignacija zabranjena zakonom (kao što su porezi, carine i ostala javna potraživanja),
– Potraživanja koja su isključivo lične prirode (tesno povezana sa pravnim karakteristikama ili identitetom lica, kao što su potraživanja vezana za zdravstveno osiguranje, alimentaciju, itd.),
– Ili potraživanja koja su po svojoj prirodi neprenosiva (novčana naknada za povredu, itd.) (član 80.1. Zakona o obveznim odnosima).

Prenosiva su i sva postojeća ili buduća potraživanja, uključujući i potraživanja pod uvjetom, kao i deljiva potraživanja (koja se mogu namiriti u delovima). Buduća potraživanja se ne moraju precizirati u trenutku zaključivanja ugovora, ali se moraju definisati i utvrditi u trenutku prenosa. (Pred)ugovor je validan ako potraživanja nisu definisana u trenutku zaključivanja ugovora, ali se mogu definisati na osnovu elemenata iz ugovora u trenutku njihova nastanka ili asignacije (prijenosa).

U trenutku asignacije potraživanja sva ostala akcesorna prava poput hipoteke, zaloga, dažbina, garancija, prioriteta u plaćanju, kamata, itd., se daju zajedno se potraživanjima. Kamata koja je dospela u trenutku asignacije takođe postaje predmet asignacije zajedno sa potraživanjima (član 81. Zakona o obveznim odnosima)

D. Ugovorne strane u prodaji prava potraživanja.

Ne postoje zakonske odredbe koje izričito uređuju tko može biti ugovorna strana u ugovoru o prodaji prava potraživanja. Na osnovu postojeće literature i poslovne prakse može se zaključiti da su ugovorne strane u prodaji prava potraživanja:

– **Prodavac ili dobavljač prava** – bilo koje fizičko ili pravno lice sposobno da zaključi ugovore i učestvuje u pravnim transakcijama.
– **Dužnik** – bilo koje fizičko ili pravno lice sposobno da zaključi ugovore i stupi u ostale pravne transakcije.
– **Faktor** – pravno lice, banka ili finansijska institucija – kompanija koje je registrovana za obavljanje aktivnosti vezanih za prodaju prava potraživanja. U skladu sa Zakonom o agencijama, faktor je u obavezi da Agenciji podnese završne račune na odobrenje. Faktor ne podleže prethodnom odobrenju od strane Agencije. U hrvatskoj praksi dugo je postojao raskorak u mišljenju da li banke treba da imaju ovlašćenja da se na hrvatskom tržištu bave prodajom prava potraživanja. Ova neizvesnost je okončana donošenjem novog Zakona o bankama. Sada je bankama jasno dozvoljeno da vrše prodaju prava potraživanja (član 6.2.) uz prethodnu saglasnost Nacionalne banke Hrvatske.

2) Vrste ugovora o prodaji prava potraživanja

U hrvatskoj ne postoji izričita postoje izričite odredbe koje uređuju vrste ugovora o prodaji prava potraživanja u Hrvatskoj, ali na osnovu uticaja inostranog iskustva, hrvatska poslovna praksa i literatura priznaje sledeće glavne tipove ugovora o prodaji prava potraživanja:

a) S obaveštenjem ili bez obaveštenja – zavisno od toga da li je dužnik o tome obavešten ili ne.
b) Regresivni ili neregresivni – zavisno od toga da li je rizik na dobavljaču ukoliko dužnik ne izmiri svoja dugovanja ili da li je dobavljač odgovoran za otkup potraživanja nazad ukoliko dužnik ne ispuni svoje obaveze.

c) S obavezom otkupa ili bez – zavisno od toga da li postoji samo jedan ili više faktora u ugovornom odnosu.
d) Domaći i međunarodni – zavisno od toga da li ugovor o prodaji prava potraživanja sadrži određene međunarodne elemente ili ne.
e) Hrvatska pravna literatura takođe pominje i tradicionalnu prodaju prava potraživanja, konvencijalnu, prodaju prava potraživanja sa obaveštenjem o dospeću, uvoz – izvoz prodaju prava potraživanja uzetih iz UNIDROIT Studije i Izveštaja o prodaji prava potraživanja, iako ne postoje dokazi da ove vrste ugovora o prodaji prava potraživanja pod tim nazivima postoje u Hrvatskoj.[10]

U Hrvatskoj ugovori o prodaji potraživanja uglavnom se zaključuju bez formalne kategorizacije. Međutim, njihov sadržaj, zavisno od ugovornih odredaba i sporazuma ugovornih strana se može kategorisati na gore pomenuti način.

3) Prava i obaveze ugovornih strana koje učestvuju u prodaji prava potraživanja

a) Prava i obaveze između **dobavljača i faktora**:

- U slučaju predugovora za prodaju postojećih ili budućih potraživanja, obe ugovorne strane su u obavezi da kasnije zaključe glavni ugovor i prenesu dogovorena potraživanja;
- Faktor je u obavezi da dobavljaču isplati dogovorenu sumu za prenesena potraživanja (provizija je najčešće već uključena u tu sumu);
- Dobavljač je u obavezi da faktoru dostavi original fakture, računa ili drugi dokaz kojim se potvrđuje i identifikuje prodano potraživanje. U slučaju da se određeno potraživanje samo delimično prenese faktoru, dobavljač je u obavezi da faktoru obezbedi valjano overen transkript predmetne fakture, računa ili drugog dokaza o postojanju potraživanja (član 85. Zakona o obveznim odnosima);
- Potraživanje se asignira/prenosi faktoru istog kvaliteta i količine kao i dobavljaču, osim ako nije drugačije dogovoreno.
- Ako se asignacija potraživanja vrši u zamenu za određenu nadoknadu, dobavljač je odgovoran za postojanje potraživanja (faktor ima pravo na regres od dobavljača (član 86. Zakona o obveznim odnosima)). Ovo je dispozitivna odredba i ugovorne strane se mogu dogovoriti drugačije.
- Dobavljač je odgovoran faktoru za likvidnost dužnika samo ako je tako eksplicitno/izričito ugovoreno, i ako jeste, čak i tada samo do sume koju je faktor platio uključujući sve kamate i ostale troškove asignacije. Veća odgovornost dobavljača ne može se ugovoriti (član 87. Zakona o obveznim odnosima).
- Nakon asignacije, dobavljač je u obavezi da dužniku dostavi obaveštenje o asignaciji potraživanja. Neispunjavanje ove obaveze ili asignacija koje je protivna postojećoj zabrani ne utiče na validnost ugovora o asignaciji. Dobavljač je odgovoran faktoru za ispunjavanje obaveza koje proizilaze iz ugovora o asignaciji (član 82. Zakona o obveznim odnosima).
- Istovremeno, dobavljač je odgovoran dužniku u slučaju kršenja uslova glavnog kupoprodajnog ugovora, naročito po pitanju zabrane asignacije (član 82. Zakona o obveznim odnosima).

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[10] B. Vukmir, *Factoring u poslovnoj praksi i teoriji*, Pravo i porezi, 7/2006, p 4-5.

– U svakom slučaju ugovorne strane dužne su da poštuju opšta pravila savesnosti i pravičnosti (članovi 4-5. Zakona o obveznim odnosima).

b) Prava i obaveze **dužnika**:

- Glavno pravilo je da se dužnik ne može dovesti u nepovoljniju situaciju od one u kojoj se nalazio pre asignacije.
- Nakon asignacije, faktor ima sva prava dobavljača stečena na osnovu kupoprodajnog ugovora, a koja je imao dobavljač pre asignacije (član 84.1. Zakona o obveznim odnosima). Ovo takođe obuhvata i mogućnost žalbe u slučaju neispunjavanja obaveza, nevaljanog ili neblagovremenog ispunjavanja obaveza. Ukoliko je tako dogovoreno, faktor u svakom slučaju ima pravo na regres od dobavljača.
- U slučaju podnošenja žalbe protiv dužnika, dužnik može u svoju korist da upotrebi sve prigovore, uključujući i lične prigovore protiv faktora koji bi mogli proizaći iz drugih ugovornih (član 84.2. Zakona o obveznim odnosima).
- Ako je dužnik obavešten ili ima saznanja o postojanju faktora, on je u obavezi da plaćanje dugovanja izvrši faktoru. Dužnik se ne oslobađa svoje obaveze samo ako plati faktoru (član 82. Zakona o obveznim odnosima).
- Dužnik će se osloboditi obveze plaćanja dobavljaču, samo ako je namirenje dobavljača stupilo na snagu pre dospeća dospeća obaveštenja, drugog saznanja o postojanju faktora ili superiornog prava nekog trećeg lica (član 82. Zakona o obveznim odnosima).

4) Obezbeđenje u ugovoru o prodaji prava potraživanja

Na osnovu hrvatskog zakonodavstva osnovna pravila za prenos prava na obezbeđenje su:

1. Sva akcesorna i sporedna prava poput hipoteke, fiksnih i promenljivih troškova, zaloge, garancije, prioriteta u plaćanju, kamata, itd., prenose se *ex lege* (član 81. Zakona o obveznim odnosima) faktoru zajedno sa glavnim potraživanjima u trenutku asignacije.
2. Neakcesorna prava poput fiducijarnog prenosa vlasništva po pravilu nisu prenosiva i prestaju da važe asignacijom potraživanja. Međutim, u hrvatskoj literaturi ne postoji jasan stav po pitanju neakcesornih prava na obezbeđenje pogotovo kada je u pitanju zemljište.

Generalno, prava na obezbeđenje na zemljištu moraju se registrovati u zemljišnim knjigama u skladu sa odredbama Zakona o zemljišnim knjigama i Zakonom o vlasništvu i ostalim stvarnim pravima. Stoga se prenos obezbeđenja u odnosu na prodaju prava potraživanja mora uvek posmatrati u odnosu sa posebnim zakonodavstvom koje uređuje obezbeđenje.

5) Prenos potraživanja (dugovanja)

Ne postoji izričita zakonska odredba koja uređuje prenos potraživanja ili zabranjuje takav prenos. U tom slučaju se primenjuju opšta pravila za asignaciju prava.

6) Registrovanje prodaje prava potraživanja

U Republici Hrvatskoj ne postoji registar prodaje prava potraživanja.

7) Ostala pitanja vezana za prodaju prava potraživanja

– biće razmotrena

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– Narodne Novine – Službeno glasilo RH, internet stranica: www.narodne-novine.hr
Zakon o obveznim odnosima - Narodne Novine 35/06, 41/08.
– Za zakonodavstvo u oblasti finansijskih usluga videti internet stranicu Hrvatske agencije za nadzor finansijskih usluga, www.hanfa.hr
(dostupni tekstovi na hrvatskom i engleskom jeziku. Prevod bi trebalo da služi samo *u informativne svrhe*!)
– Za ostalo opšte zakonodavstvo i postupak usklađivanja sa zakonodavstvom Evropske Unije videti internet stranicu hrvatskog Ministarstva inostranih poslova i evropskih integracija www.mvpei.hr

FINANSIJSKI LIZING*

1) Osnovni koncepti i elementi

U Republici Hrvatskoj finansijski lizing je regulisan Zakonom o lizingu (Narodne Novine 135/06, u daljem tekstu: Zakon). Zakon je stupio na snagu 13. decembra 2006. i važi za sve ugovore o lizingu zaključene posle ovog datuma. Ugovori zaključeni pre ovog datuma ostaju na snazi do isteka, ali se ne mogu obnoviti. Sva registrovana pravna lica i kompanije koje se bave finansijskim lizingom mogu da nastave sa radom u skladu sa Zakonom, ali su dužne da svoje aktivnosti usklade poštujući novu regulativu. Odredbe koje se odnose na preduzetnike država članica koji se bave finansijskim lizingom stupaju na snagu danom pridruživanja Hrvatske Evropskoj Uniji. Do tada će se države članice smatrati trećim zemljama.

Zakon o lizingu reguliše: zakonske uslove i rad lizing kompanija, ugovor o lizingu, prava i obaveze ugovornih strana u finansijskom lizingu, finansijske izveštaje, nadzor rada lizing kompanija i upravljanje rizikom (član 1.). Zakon se odnosi na finansijski i na operativni lizing (član 7.).

Ovaj Zakon predstavlja novi korak u razvoju Hrvatske. Njegovo usvajanje znači da je potreba regulisanja tržišta finansijskog lizinga konačno priznata kao neophodnost. Status ugovora o lizingu je promenjen od neimenovanog u imenovani ugovor. Mnoga pitanja iz oblasti ugovora o lizingu, obaveze ugovornih strana, pitanja vezana za prenos vlasništva i uslovi lizing transakcije u odnosu na koje je ranije postojala pravna praznina sada su regulisane. Baza podataka hrvatske Agencije za nadzor finansijskih usluga (www.hanfa.hr) navodi da u Hrvatskoj trenutno postoji 27 lizing kompanija[11] i da su delatnosti finansijskog lizinga u trenutku usvajanja Zakona o lizingu predstavljale 6% ukupne delatnosti na hrvatskom finansijskom tržištu.[12]

Republika Hrvatska nije potpisnik UNIDROIT Konvencije o međunarodnom finansijskom lizingu (Otava 1998.), ali osnovni principi sadržani u Konvenciji obuhvaćeni su hrvatskim Zakonom o lizingu. Odnos sa Konvencijom UNIDROIT će biti detaljnije razmotren u poglavljima koja slede.

A. Značenje finansijskog lizinga – definicija

Član 7. Zakona o lizingu predviđa: **Lizing posao** je pravni posao u kojem 1. Davalac lizinga na osnovu kupoprodajnog ugovora o objektu lizinga zaključenog sa isporučiocem dobija pravo vlasništva nad objektom lizinga (u daljem tekstu: ugovor o nabavci) i istovremeno 2. Davalac lizinga na osnovu ugovora o lizingu sa primaocem lizinga primaocu lizinga daje pravo korišćenja (plodouživanja) objekta lizinga na određeni period u zamenu za određenu naknadu (u daljem tekstu: ugovor o lizingu) (član 7.1.) Zavisno od karakteristika, lizing može biti finansijski ili operativni (član 7.2.).

Finansijska lizing predstavlja pravnu transakciju na koju se upućuje u prethodnom stavu u kojoj primalac lizinga davaocu lizinga plaća određenu naknadu za korišćenje objekta lizinga tokom određenog vremenskog perioda pri čemu ta naknada u obzir uzima ukupnu

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[11] Podaci od 01.02.2010.godine.

[12] Videti Vlada Republike Hrvatske – objašnjenje finalnog predloga Zakona o lizingu www.sabor.hr/Download/2006/11/15/PZ_539.pdf, za ukupan bilans lizing kompanija videti www.hanfa.hr

vrednost objekta lizinga i ostalih troškova. Primalac lizinga snosi troškove amortizacije objekta lizinga i kroz mogućnost otkupa može da stekne vlasništvo nad objektom lizinga za određenu cenu koja je u trenutku otkupa niža od stvarne trenutne vrednosti objekta lizinga (član 7.3.). Primalac lizinga bira isporučioca i objekt/predmet ugovora o lizingu.

Neophodno je napraviti **razliku** sa operativnim lizingom. **Operativni lizing** predstavlja pravnu transakciju na koju se upućuje u prvom stavu ovog poglavlja u kojoj primalac lizinga plaća određenu naknadu davaocu lizinga za korišćenje predmeta lizinga tokom određenog utvrđenog perioda pri čemu ta naknada ne uzima u obzir ukupnu vrednost predmeta lizinga. Davalac lizinga snosi troškove amortizacije predmeta lizinga i primalac lizinga nema mogućnost otkupa predmeta lizinga pri čemu se lizing može prekinuti samo pod prethodno ugovorenim uslovima (član 7.4.).

B. Delokrug finansijskog lizinga

Odredbe hrvatskog Zakona o lizingu primenjuju se i na finansijski i na operativni lizing kao i na domaće i međunarodne lizing poslove dok se UNIDROIT konvencija primenjuje samo na međunarodni finansijski lizing.

Finansijski lizing se primenjuje na sve poslove finansijskog lizinga u skladu sa zakonskom definicijom. Poslove finansijskog lizinga takođe obuhvataju aktivnosti direktno ili indirektno vezane za lizing poslove kao što su agencijska prodaja i daljnja prodaja objekta lizinga stečenog na osnovu ugovora o lizingu. Lizing kompanijama nije dozvoljeno da odobrava kredite ili zajmove (član 8.).

Poslove finansijskog lizinga može vršiti samo ovlašćena i registrovana lizing kompanija (davalac lizinga) u smislu i pod uslovima predviđenim zakonom. Primalac lizinga može biti i fizičko i pravno lice (članovi 88. – 91. ZL). UNIDROIT konvencija izuzima potrošačke poslove – kada se oprema koristi u lične, porodične ili kućne svrhe primalaca lizinga.

Predmet/objekt lizing posla može biti bilo koja pokretna ili nepokretna stvar koje podleže odredbama Zakona o vlasništvu i drugim stvarnim pravima. Stoga je delokrug primene hrvatskog zakona mnogo širi od UNIDROIT Konvencije. Konvencija se primenjuje samo na opremu – fabričku opremu, kapitalnu robu i ostalu opremu i isključuje lizing nekretnina, plovila i aviona.

Kao i kod UNIDROIT Konvencije „opcija otkupa“ nije obavezan elemenat ugovora o finansijskom lizingu ali se indirektno podrazumeva kroz njegovu zakonsku definiciju. Tamo se takođe navodi da vrednost objekta lizinga, trošak amortizacije uključujući i ostale troškove i dažbine tokom trajanja ugovora snosi primalac lizinga.

Fiskalna i poreska pitanja regulisana su hrvatskim fiskalnim i poreskim zakonodavstvom. Ugovorne strane ne mogu da izostave primenu obaveznih zakonskih odredaba. Pitanja koja nisu jasno regulisana Zakonom o lizingu regulišu se u skladu sa opštim zakonskim pravilima.

C. Predmet finansijskog lizinga

Predmet lizinga može biti bilo koja pokretna ili nepokretna stvar koja je uređena odredbama Zakona o vlasništvu i drugim stvarnim pravima (Narodne Novine 91/96, 73/00, 114/01, 79/06, 141/06, 146/08, 38/09, 153/09, u daljem tekstu: objekt lizinga). Pravilnik o načinu vođenja registra objekata lizinga (Narodne Novine 24/07, 72/2007, u daljem tekstu: Pravilnik) predviđa da se sledeći podaci o objektu lizinga moraju upisati u Registar: opis „vozila, nekretnina, plovila, aviona, postrojenja i mehanizacije, kancelarijske opreme i ostale opreme, i ostalog” (član 4.) Ovaj spisak nije sadržajno ograničen i ugovorne strane ga mogu proširiti.

D. Ugovorne strane u finansijskom lizingu

Ugovorne strane u finansijskom lizingu su: davalac lizinga, primalac lizinga i isporučilac (član 4.).

a) **Davalac lizinga** je bilo koje lice koje ima pravo da obavlja delatnosti lizinga u skladu sa odredbama Zakona. Takvu delatnost može da obavlja samo:

1. Domaća lizing kompanija – kompanija koja je pri hrvatskom Trgovinskom sudu registrovana za obavljanje lizing aktivnosti na osnovu dozvole nadležnog tela kao preduslov. Dužnost nadležnog organa izvršava hrvatska Agencija za nadzor finansijskih usluga (u daljem tekstu: Agencija);
2. Lizing kompanija države članice – kompanija ustanovljena u bilo kojoj državi članici EU i registrovana za obavljanje lizing aktivnosti;
3. Hrvatska filijala lizing kompanije države članice ili treće države ovlašćene i registrovane za obavljanje lizing aktivnosti;
4. Banka registrovana na osnovu hrvatskog zakona, banka registrovana u bilo kojoj državi članici ili njenoj hrvatskoj filijali i banka registrovana u skladu sa zakonom treće države, uz izuzeće koje proizilazi iz uslova definisanih hrvatskom bankarskom regulativom (član 6.1.).

Suprotno ranijoj regulativi, sada davalac lizinga više ne može biti fizičko lice ili pravno lice koje nije registrovano ili licencirano za obavljanje lizing aktivnosti. Ovo je značajna promena u regulativi. Ako dodatno uzmemo u obzir nove striktne zakonske odredbe za lizing kompanije iz članova 7. – 29. ZL (na primer, minimalni kapital je sada ustanovljen na 1 milion HRK, što je otprilike 7.3 miliona EUR) nova regulativa jasno sužava krug potencijalnih davalac lizinga.

b) **Primalac lizinga** može biti bilo koje lice koje na osnovu ugovora o lizingu stekne pravo na korišćenje objekta lizinga u zamenu za plaćanje ugovorene naknade za lizing. Primalac lizinga može biti pravno ili fizičko lice, kompanija ili prodavac koji podleže odredbama hrvatskog Zakona o trgovačkim društvima (Narodne Novine 111/93, 34/99, 118/03, 146/08, 137/09). U slučaju da je primalac lizinga potrošač, primenjuje se hrvatsko zakonodavstvo o potrošačima.

c) **Dobavljač** nije ugovorna strana u ugovoru o lizingu ali je ugovorna strana u ugovoru o nabavci koji čini sastavni deo lizing posla u smislu značenja zakona. Dobavljač je bilo koje fizičko lice, kompanija ili prodavac koji podleže odredbama hrvatskog Zakona o trgovačkim društvima ili specijalizovanog zakonodavstva za područje trgovine. Dobavljač stupa u ugovor o nabavci sa davaocem lizinga i ima obavezu da objekt lizinga dostavi direktno primaocu lizinga na osnovu instrukcija davalaca lizinga. Na osnovu ugovora o nabavci davalac lizinga stiče pravo vlasništva nad objektom lizinga, osim ako dobavljač i davalac lizinga nisu isto lice.

E. Osnovni principi finansijskog lizinga.

Neki osnovni principi koji uređuju finansijski lizing su da:

– Elementi finansijskog lizing treba da su jasno definisani;
– Razlika sa ostalim tipovima/vrstama ugovora bi trebalo da je jasna (naročito u pogledu operativnog lizinga, ugovora o zajmu, kupoprodajnog ugovora uz zadržavanje prava vlasništva ili kupoprodajnog ugovora uz plaćanje kupovne cene u ratama);
– Finansijski lizing bi trebalo da predstavlja balans interesa svih ugovornih strana;

- Lizing posao je kompleksna posao – ona obuhvata odnos tri strane i kombinuje dva različita ugovora;
- Ugovor o nabavci i ugovor o lizingu predstavljaju dva obavezna sastavna elementa posla finansijskog lizinga;
- U pravnom poslu finansijskog lizinga, primalac lizinga precizira predmet ugovora i ponekad isporučilaca, pravo vlasništva nad objektom lizinga stiče davalac lizinga i založeni, a posed objekta lizinga stiče primalac lizinga - skladno uputama iz ugovora isporučilac dostavlja objekt lizinga direktno primaocu lizinga;
- Davalac lizinga bi trebalo da bude profesionalno lice ili preduzetnik koji obavlja lizing aktivnosti u svojstvu svoje profesije;
- Primalac lizinga može biti bilo koje lice ili pojedinac koji može imati pravo na korišćenje objekta lizinga. Primalac lizinga je odgovoran za svu štetu nastalu korišćenjem objekta lizinga;
- Dobavljač je odgovoran za sve materijalne nedostatke objekta lizinga, uključujući i neblagovremenu isporuku;
- Suprotno operativnom lizingu, finansijski lizing ima za cilj da primalac lizinga iskoristi svoje pravo da otkupi objekt lizinga nakon isteka ugovora o lizingu.

2) Komercijalna priroda finansijskog lizinga

Finansijski lizing uređuju odredbe Zakona o lizingu, a sva ostala pitanja koja nisu izričito tamo regulisana, regulišu se u skladu sa opštim zakonskim principima hrvatskog Zakona o obveznim odnosima. Zakonske odredbe lizing kompanija i likvidacija podležu odredbama Zakona o trgovačkim društvima osim ako nije drugačije predviđeno Zakonom o lizingu. Stečaj i prinudno izvršenje uređuju se Zakonom o stečaju i Zakonom o prinudnom izvršenju. Računovodstvena i poreska pitanja uređuje posebno zakonodavstvo (*lex specialis*). Poreski aspekat je predmet Međunarodnih računovodstvenih standarda, koji čine deo računovodstvenog sistema u skladu sa članom 14. hrvatskog računovodstvenog zakona, Zakona o PDV-u, i Pravilnika o primeni PDV-a i delimično ostalih zakona na tom polju. Carinski aspekat uređuje hrvatski Zakon o carini i Pravilnik o uslovima i proceni carinske osnove, kao i ostali zakoni u toj oblasti.

U definisanju međunarodnog lizinga Zakon o lizingu ne koristi nacionalnost ugovornih strana kao vezni elemenat, već glavno mesto poslovanja i prebivališta. Zakon o lizingu ne sadrži izričite odredbe o direktnoj primeni prihvaćene poslovne prakse i standardnih ugovornih uslova. Zakon samo direktno navodi primenu opštih pravila ugovornog zakona iz Zakona o obveznim odnosima.

3) Trajanje finansijskog lizinga

Ugovor o finansijskom lizingu se zaključuje na određeni vremenski period koji mora biti odrešen u trenutku zaključivanja. Ovo je obavezan element ugovora o lizingu i ako se ugovorne strane ne dogovore po ovom pitanju, ugovor će biti ništavan.

Ne postoje izričite zakonske odredbe o minimalnom ili maksimalnom trajanju ugovora o lizingu. Teoretski to znači da su ugovorne strane slobodne da se dogovore o trajanju ugo-

vora, ali one moraju da uvek imaju u vidu usklađenost trajanja ugovora i plaćanja naknade za objekt lizinga, troškova amortizacije i ostalih naknada.

4) Domaći i međunarodni finansijski lizing

Pravni posao financijskog u Hrvatskoj može biti domaći ili međunarodni zavisno od toga da li sadrži međunarodni elemente ili ne i da su ugovorne strane čije je sedište poslovanja (registracije) ili uobičajeno prebivalište u istim ili različitim državama.

Domaća lizing kompanija može da obavlja delatnost finansijskog lizinga van Republike Hrvatske direktno ili kroz filijalu u jednoj od država članica ili kroz filijalu treće države pri čemu podleže prilično kompleksnoj proceduri prethodne notifikacije (za državu članicu) i/ili odobrenja (za treću državu) koje vrši Agencija (članovi 29. – 30. ZL).

Ovlašćene lizing kompanije država članica mogu da obavljaju aktivnosti finansijskog lizinga u Republici Hrvatskoj direktno ili kroz filijalu, dok lizing kompanije trećih država koje su ovlašćene za obavljanje aktivnosti finansijskog lizinga u Republici Hrvatskoj to mogu da čine samo kroz filijale. U oba slučaja neophodna je notifikacija i/ili odobrenje Agencije. Registracija i rad filijale podleže odredbama Zakona o lizingu, Zakona o privrednim društvima i relevantnom zakonodavstvu (članovi 31. – 35.).

Primjenjivo pravo u međunarodnom finansijskom lizingu je hrvatsko pravo, u slučaju da je primalac lizinga ustanovljen ili ima prebivalište u Republici Hrvatskoj. U slučaju da je primalac lizinga ustanovljen ili ima prebivalište u nekoj od država članica, primjenjivo pravo biti će pravo te države članice. Ukoliko pravo te države članice dozvoljava izbor, ugovorne strane mogu da izaberu pravo neke druge države kao primenjivo Nezavisno od potonjih odredaba, ugovorne strane su uvek u mogućnosti da odaberu pravo države državljanstva primalaca lizinga, ukoliko zakon te države to dozvoljava (član 94. Zakona). Samo osnovane odredbe inostranog prava su primenjive. Ugovorne strane ne mogu da izuzmu primenu obaveznih odredaba hrvatskog zakona i principa *ordre public* (članovi 91. -92.) U svim ostalim slučajevima primenjivi zakon u međunarodnim ugovorima o lizingu utvrđuje se na osnovu odredaba hrvatskog Zakona o kolizionim pravilima (Narodne Novine 53/91, 88/01)

5) Oblik i osnovne odredbe finansijskog lizinga

1. Ugovor o finansijskom lizingu mora biti sačinjen u **pisanoj formi**, na jasan i razumljiv za primalaca lizinga.

2. a) Ugovor o finansijskom lizingu **mora** da sadrži sledeće **odredbe:**

   1. Poslovni naziv i sedište davalaca lizinga;
   2. Poslovni naziv i sedište, ili pun naziv i adresu primalaca lizinga;
   3. Specifikaciju lizing posla (finansijski ili operativni lizing);
   4. Detaljan opis objekta lizinga;
   5. Ukupnu vrednost objekta lizinga;
   6. Ukupan iznos za isplatu (iznos isplate);
   7. Iznos svake pojedinačne rate (pojedinačne rate);
   8. Trajanje ugovora o lizingu;
   9. Odredbe i uslove za prevremeni raskid ugovora.

Dalje, vezano za plaćanje naknada, ugovor mora jasno da navodi:

1. Udeo svake pojedinačne rate u ukupnoj vrednosti založene stvari;
2. Iznos, broj i vremensko određenje plaćanja svake pojedinačne rate – uključujući i raspored plaćanja u prilogu (otplatnu tablicu);
3. Stvarnu (tekuću) godišnju kamatnu stopu. Način izračunavanja stvarne godišnje kamatne stope, uključujući i sve elemente obračuna vrši se u skladu sa Pravilnikom Agencije.

b) Uz pomenute obavezne odredbe ugovor o lizingu **može da sadrži** i ostale odredbe poput odredaba o osiguranju objekta lizinga od rizika i vrstu osiguranja; vreme, mesto i način preuzimanja objekta lizinga u vlasništvo; prenos duga i rata u slučajevima kompleksnog objekta lizinga; troškove održavanja objekta lizinga, obučavanje osoblja primalaca lizinga, kao i ostale uslove o kojima odlučuju ugovorne strane. Ova lista nije iscrpna.

6) Prava i obaveze ugovornih strana u finansijskom lizingu

U poslu financijskog lizinga moguće je identifikovati sledeće obaveze ugovornih strana:

a) Prava i obaveze davalaca lizinga:

1. Postupajući po specifikaciji i zahtevu primalaca lizinga, davalac lizinga će pribaviti predmet lizinga od isporučilaca. Davalac lizinga će obavestiti isporučilaca da se predmet stiče radi davanja u lizing te će precizirati primalaca lizinga radi isporuke.
2. Davalac lizinga je odgovoran za postojanje prava i zahteva trećih lica koji mogu da oduzmu, umanje ili ograniče pravo slobodnog korišćenja i mirnog poseda (državine) primalaca lizinga osim ako je primalac lizinga svestan tih prava i sa njima je saglasan (odgovornost za pravne nedostatke). (Za posledice videti poglavlje tačku 7.2.d.)
3. Davalac lizinga nije odgovoran primaocu lizinga za bilo koju štetu nastalu tokom korišćenja objekta lizinga.
4. Davalac lizinga ima pravo da otkaže ugovor zbog nepoštovanja ili neispunjavanja obaveze plaćanja rata (Za posledice videti tačku 7.2.b.)
5. Davalac lizinga ima pravo da izuzme objekt lizinga u slučaju prinudnog izvršenja nad svojinom primalaca lizinga. (Za prinudno izvršenje videti tačku 11.1.a.)
6. Davalac lizinga ima pravo da izuzme založeni predmet iz stečajne mase u slučaju stečaja primalaca lizinga (Za stečaj videti poglavlje 11.2.a.)

b) Prava i obaveze primalaca lizinga:

1. Primalac lizinga preuzima vlasništvo nad objektom lizinga na način i u vreme precizirano ugovorom.
2. Primalac lizinga je odgovoran za plaćanje lizing naknade u ratama, u roku i na način određen ugovorom. Primalac lizinga nije u obavezi da plaća naknadu sve dok ne dobije predmet lizinga (Za posledice o neplaćanju videti tačku 7.2.b.)
3. Primalac lizinga ima pravo da koristi predmet lizinga u skladu sa ugovorom i karakteristikama predmeta lizinga.

4. Primalac lizinga dužan je koristiti predmet lizinga uz odgovarajuću brigu i na odgovarajući način, u protivnom je odgovoran za štetu nastalu korišćenjem objekta lizinga suprotno ugovoru o lizingu i suprotno njegovoj svrsi. Sve modifikacije objekta lizinga podležu dogovoru ugovornih strana.
5. Primalac lizinga može korišćenje objekta lizinga dodeli trećem licu pod uslovom da postoji pismena saglasnost davalaca lizinga (Za posledice dodele videti pod tačkom 8.2.c.)
6. Nakon isteka ugovora primalac lizinga ima pravo da otkupi predmet lizinga za određenu utvrđenu cenu koja je u trenutku otkupa niža od stvarne vrednosti objekta lizinga. U tom slučaju primalac lizinga ima pravo da zadrži predmet lizinga u svom vlasništvu ili ako nije otkupio predmet lizinga isti mora da vrati. Međutim, nije jasno zašto bi primalac lizinga trebalo da ima bilo kakav ekonomski interes da ne iskoristi pravo otkupa i ne stekne pravo vlasništva nad objektom lizinga nakon isteka ugovora.
7. Primalac lizinga može da iskoristi pravo i odbije dostavu objekta lizinga i da otkaže ugovor zbog neadekvatne ili neblagovremene dostave, materijalnih nedostataka ili nepoštovanje objekta lizinga sa ugovorom o lizingu (odgovornost za materijalne nedostatke) (Za posledice videti pod tačkom 8.2.a.)
8. Primalac lizinga ima pravo da otkaže ugovor ili da umanji naknadu u slučaju pravnih nedostataka ili postojanja superiornih prava ili zahteva trećeg lica koja mogu da umanje, izuzmu ili ograniče pravo slobodnog korišćenja i mirnog poseda (državine) objekta lizinga, dok u svakom slučaju primalac lizinga ima pravo na nadoknadu pretrpljene štete (Za posledice videti tačku 7.2.d.)
9. Primalac lizinga je odgovoran za gubitak, uništenje, štetu ili gubitak namene objekta lizinga. U bilo kojem slučaju on se ne oslobađa obaveza iz ugovora o lizingu.

c) Prava i obaveze isporučilaca:

1. Isporučilac je obvezan dostaviti predmet lizinga direktno primaocu lizinga na način na koji je to predviđeno ugovorom o lizingu osim ako nije ugovoreno da davalac lizinga direktno dostavi predmet lizinga primaocu lizinga.
2. Isporučilac je odgovoran za bilo koje zakašnjenje ili neispunjavanje obaveze dostave objekta lizinga uključujući i materijalne nedostatke precizirane ugovorom o lizingu na isti način na koji bi odgovoran davaocu lizinga i da je u ugovornom odnosu sa primaocem lizinga. Ova zakonska odredba znači da je isporučilac *de facto* odgovoran licu (primaocu lizinga) sa kojim nije u ugovornom odnosu za štetu nastalu neispunjenjem ugovorne obveze. U svakom slučaju, on ne može biti odgovoran istovremeno i davaocu lizinga i primaocu lizinga (Za posledice videti tačku 8.2.a.)
3. Ukoliko davalac lizinga definiše predmet lizinga, isporučilac i davalac lizinga postaju zajednički odgovorni (solidarna odgovornost) za štetu nastalu kašnjenjem isporuke, neisporučivanjem i za materijalne nedostatke objekta lizinga.

7) Prestanak važenja ugovora o finansijskom lizingu

Ugovor o finansijskom lizingu može prestati važiti na neki sledećih načina:

1. istekom ugovora o lizingu – ispunjenjem ugovornih obaveza;
2. raskidom ugovora – u skladu sa odredbama Zakona o lizingu zbog:

a. Neisporuke, neblagovremene isporuke, materijalnih nedostataka ili neadekvatnosti objekta lizinga (član 44.),
b. Neblagovremenog ili neplaćanja rata (član 45.),
c. Asignacije/prijenosa prava na korišćenje objekta lizinga trećem licu bez pismene saglasnosti davalaca lizinga (član 47.),
d. Pravnih nedostataka i/ili superiornih prava ili zahteva trećeg lica (član 41.),

3. raskidom ugovora – pod uslovima i u skladu sa odredbama o prevremenom raskidu ugovora koje su jasno ugovorene i precizirane ugovorom o lizingu;
4. raskidom ugovora – u skladu sa opštim obligacionim pravilima Zakona o obveznim odnosima.
5. raskidom ugovora – u skladu sa posebnom regulativom kao što je stečaj ili prinudno izvršenje.

8) Posledice prestanka ugovora o finansijskom lizingu

Zavisno od načina prestanka ugovora o lizingu posledice mogu biti sledeće:

1. U pravilu ugovori na određeno vreme prestaju proizvoditi pravni učinak nakon **isteka** ugovorenog perioda osim ako nije drugačije dogovoreno (član 211. Zakona o obveznim odnosima). Nakon isteka ugovora primalac lizinga zbog „opcije kupnje“ ima pravo da otkupi objekt lizinga za cenu, koja je u trenutku otkupa niža od stvarne vrednosti objekta lizinga stvari. Primalac lizinga zadržava objekt lizinga u svom posjedu ili, ukoliko se odluči da ga ne otkupi dužan je da stvar vrati.
2. **Raskid** ugovora zbog:
   a. Neisporuke, neblagovremene isporuke, materijalnih nedostataka ili neadekvatnosti objekta lizinga u odnosu na uslove ugovora o lizingu. Dobavljač je odgovoran za svako kašnjenje ili neisporučivanje objekta lizinga uključujući i materijalne nedostatke i neslaganje sa uslovima preciziranim u ugovoru o lizingu na isti način na koji bi bio davaocu lizinga i da je u ugovornom odnosu sa primaocem lizinga. Ukoliko davalac lizinga određuje predmet lizinga, isporučilac i davalac lizinga su zajednički odgovorni za nastalu štetu (solidarna odgovornost) (član 44. ZL).
   b. Neispunjavanja obaveze plaćanja rata – lizing naknade. Davalac lizinga ima pravo da raskine ugovor ako primalac lizinga ne ispunjava obavezu plaćanja lizing naknade u dva uzastopna navrata/dve uzastopne rate. Davalac lizinga ima pravo da zahteva povraćaj objekta lizinga i plaćanje dugovanja i svih preostalih naknada koje proističu iz ugovora o lizingu. Iako to nije izričito navedeno, davalac lizinga svakako ima pravo da traži nadoknadu štete nastale zbog neispunjavanja ugovornih obaveza, u skladu sa opštim pravilima. Ugovor o lizingu ostaje na snazi ako primalac lizinga isplati zakasnele rate pre prihvatanja obaveštenja o raskidu ugovora (član 45. ZL).
   c. U slučaju asignacije/prijenosa prava na korišćenje objekta lizinga trećem licu bez pismene saglasnosti davalaca lizinga, davalac lizinga ima pravo da raskine ugovor o lizingu i zahteva nadoknadu štete (član 47. ZL).

d. Davalac lizinga je odgovoran za pravne nedostatke objekta lizinga u odnosu na superiorna prava ili zahteve trećih lica koja mogu da izuzmu, umanje ili ograniče pravo na slobodno korišćenje i mirni posed (državinu) objekta lizinga od strane primalaca lizinga osim ako primalac lizinga toga nije unapred svestan i sa time saglasan.

3. Ugovorne strane imaju pravo da raskinu ugovor pre njegovog isteka na osnovu nekih drugih uslova koji su **eksplicitno unapred ugovoreni.** Ovo je obavezna klauzula ugovora o lizingu. U svim ostalim slučajevima, u skladu sa opštim zakonskim pravilima „ugovori na određeno vreme se ne mogu raskinuti pre njihovog isteka osim ako nije drugačije dogovoreno" (član 211. Zakona o obveznim odnosima).
4. U skladu sa **opštim pravilima** o obligacionim odnosima, posledice raskida ugovora su:

   Osim ako nije drugačije dogovoreno, obe ugovorne strane se oslobađaju svojih ugovornih obaveza, osim obaveze nadoknade štete. Obe ugovorne strane vraćaju jedna drugoj ono što su stekle na osnovu ugovora, uključujući i plaćene naknade i profit. Ugovorna strana koja vrši povraćaj novčanih sredstava dužna je i da izvrši povraćaj plaćenog iznosa s kamatom (član 368. Zakona o obveznim odnosima). Zbog pomenutih posledica, opšti princip i nastojanje zakona je da se ugovorne obaveze ispune. U prilog pomenutim, ugovorne strane takođe imaju i pravo da zahtevaju nadoknadu štete. Opšta pravila o nadoknadi štete predviđena su Zakonom o obveznim odnosima (članovi 1045. - 1110. Zakona o obveznim odnosima)
5. Vezano za prinudno izvršenje videti pod tačkom 11.1., za stečaj – videti pod tačkom 11.2.

9) Finansijski podlizing

Primalac lizinga može da zaključi ugovor o podlizingu sa trećim licem samo uz pismenu saglasnost davalaca lizinga. Pravo korišćenja objekta lizinga se trećem licu može preneti u celosti ili delimično. Asignacija ili prenos objekta lizinga trećem licu radi korišćenja ne oslobađa primalaca lizinga obaveza predviđene ugovorom o lizingu. Neispunjavanje obaveze prethodnog pribavljanja pismene saglasnosti davalaca lizinga davaocu lizinga daje pravo da raskine ugovor i zahteva nadoknadu štete. Odredbe ugovora o lizingu važe i za ugovore o podlizingu po analogiji.

10) Registar ugovora o finansijskom lizingu

Hrvatska agencija za nadzor financijskih usluga (HANFA) nadležna je za vođenje Registra objekata lizinga (u daljem tekstu: Registar). Zakon o lizingu i Pravilnik o načinu vođenja registra objekata lizinga predviđa da Registar sadrži sledeće informacije o ugovoru o lizingu:

1. Poslovni naziv i sedište davalaca lizinga;
2. Poslovni naziv i sedište, ili pun naziv i adresu primalaca lizinga;
3. Specifikaciju lizing poslova (da li je u pitanju finansijski ili operativni lizing);

4. Detaljan opis objekta lizinga;
5. Ukupnu vrednost objekta lizinga;
6. Iznos pojedinačnih rata;
7. Datum zaključivanja ugovora o lizingu;
8. Datum isporuke objekta lizinga primaocu lizinga;
9. Trajanje ugovora o lizingu;
10. Istek ugovora o lizingu;
11. Izmene i dopune ugovora;
12. Status objekta lizinga (aktivan status – stvar je u lizingu; neaktivan status, stvar nije u lizingu);
13. Informacije o isporučiocu;
14. Datum ugovora o lizingu;
15. Interni broj objekta lizinga.

Davalac lizinga je u obavezi da podnese Zahtjev za upis u Registar u roku od osam dana od dana zaključivanja, izmene ili raskida ugovora. Neispunjavanje navedene obaveze ne utiče na pravnu valjanost ugovora o lizingu već dovodi samo do prekršajne odgovornosti davatelja lizinga.

Pravilnik i Tehničke instrukcije za unošenje podataka u Registar predviđa postupak unosa podataka i sadržaj Registra. Zahtev za upis u Registar podnosi ovlašćeno lice osoba davatelja lizinga uz pomoć valjano popunjenog elektronskog zahteva koji se može pronaći na internet stranici Agencije. Podaci iz zahteva se automatski unose u Registar nakon potvrde ovlašćenog lica koje je ovlastio davalac lizinga za unos podataka. Potom se izdaje elektronska potvrda koja je validna bez pečata i potpisa. Odštampana potvrda služi samo kao dokaz da je izvršen upis u Registar.

Pravno dejstvo i funkcija Registra:

1. Unos podataka u Registar ima dejstvo deklaratorne izjave (član 52.4. ZL). Drugim rečima, Registar samo stavlja na uvid činjenicu da je ugovor o lizingu zaključen, izmenjen ili raskinut, koja se to stvar daje u lizing i na koji vremenski period (trajanje ugovora). Upis nema konstitutivni karakter.
2. Registar ima (samo) **javnu** funkciju. Ova funkcija je u tesnoj vezi sa deklarativnom funkcijom. To znači da Registar služi kao dokaz da su određeni podaci tu upisani. Upis u Registar ne utiče na stvaranje ili prestanak prava trećih lica ili na bilo koje moguće pravne procedure kao što su stečaj ili prinudno izvršenje.
3. Registar je samo **delimično javan.** Javnosti su dostupni samo podaci o opis objekta lizinga i trajanje ugovora. Sve ostale informacije dostupne su samo ugovornim stranama i Agenciji (član 52.5. ZL)
4. Registar objekata lizinga **nije javni registar.** Agencija ne odgovara za tačnost i validnost javno dostupnih podataka unetih u Registar niti ne izdaje overene izvode iz Registra (član 16. Pravilnika).
5. Registar **ne utiče na validnost** ugovora o lizingu. Propust podnošenja zahteva za upis može rezultirati samo s prekršajnom odgovornosti.

11) Prinudno izvršenje u finansijskom lizingu

1. Prinudno izvršenje

U Hrvatskoj niti u Zakonu o lizingu niti u Zakonu o prinudnom izvršenju ne postoje izričite odredbe o prinudnom izvršenju u finansijskom lizingu (Narodne novine 57/95, 29/99, 173/03, 194/03, 151/04, 88/05, 121/05, 67/08, u daljem tekstu; Zakon o izvršenju). Prinudno izvršenje vezano za objekt lizinga uređuje se stoga u skladu sa opštim odredbama Zakona o izvršenju. Činjenica da **davalac lizinga zadržava pravo vlasništva nad objektom lizinga do isteka ugovora o lizingu** predstavlja ključni faktor u prinudnom izvršenju.

Ovdje je neophodno da napravimo razliku između dve moguće situacije:

a. Ukoliko se prinudno izvršenje sprovodi **nad imovinom primalaca lizinga,** pravo vlasništva davalaca lizinga nad objektom lizinga validna su protiv izvršnog poverioca primalaca lizinga koji su stekli pravo na izvršenje. Drugim rečima, on ima pravo da objekt lizinga izuzme iz prinudnog izvršenja koje se sprovodi nad imovinom primalaca lizinga.

b. Ukoliko se prinudno izvršenje sprovodi **nad imovinom davalaca lizinga,** primalac lizinga nema pravo da objekt lizinga izuzme iz postupka izvršenja. Ako je predmet izvršenja u posedu (državini) primalaca lizinga, on ima pravo da odbije predaju objekta lizinga izvršnom poveriocu. U tom slučaju sud može samo naložiti davaocu lizinga kao izvršnom dužniku da prenese zahtev za predaju objekta lizinga na izvršnog poverioca. (član 131. Zakona o izvršenju).

2. Stečaj

Stečajni postupak u Hrvatskoj podleže Zakonu o stečaju (Narodne novine 44/96, 29/99, 129/00, 123/03, 82/06). Ovde je neophodno da napravimo razliku između dve moguće situacije:

a. Stečaj primalaca lizinga – Stvarna prava (pravo vlasništva) davalaca lizinga nad objektom lizinga validna su protiv poverilaca primalaca lizinga u stečaju i skupštine poverilaca. „Poverilac primalaca lizinga" u stečaju mogu biti stečajni upravnik, administrator ili drugo lice imenovano da sprovede stečajni postupak nad imovinom primalaca lizinga u ime poverenika. U međunarodnim ugovorima o lizingu primenjuje se zakon one države u kojoj se objekt lizinga nalazi ili je registrovan (brod, avion, pokretnost, itd.).

b. Stečaj davalaca lizinga – predstavlja složeniju situaciju. Tokom trajanja ugovora o lizingu davalac lizinga zadržava pravo vlasništva nad objektom lizinga. U trenutku otvaranja stečajnog postupka nad davaocem lizinga, objekt lizinga postaje deo stečajne mase davalaca lizinga kojom od tada dalje upravlja stečajni upravnik i kojim tada stiče pravo da ugovor o lizingu otkaže ili da nastavi s njegovim izvršenjem. Pošto poslovna praksa i Zakon o stečaju jasno pokazuju opštu nameru da se postojeći ugovorni odnosi nastave i da se ugovorne obveze ispune, stečajni upravnik će u većini slučajeva doneti odluku o nastavku ispunjenja ugovora o lizingu. Međutim, u slučaju da stečajni upravnik odluči da predmet lizinga proda i raskine ugovor, primalac lizinga ima pravo da traži povraćaj isplaćene naknade i nadoknadu štete jednako kao i ostali poverioci stečajne mase.

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- Narodne novine – internet stranica: www.narodne-novine.hr
  Zakon o leasingu - Narodne novine 135/06,
  Zakon o obveznim odnosima - Narodne novine 35/06, 41/08.
- Za zakonodavstvo u oblasti finansijskih usluga videti internet stranicu Hrvatske agencije za nadzor finansijskih usluga, www.hanfa.hr
  (dostupni tekstovi na hrvatskom i engleskom jeziku uključujući i prevod Zakona o lizingu. Autor napominje da prevod Zakona o lizingu *nije identičan originalnom tekstu* i da određeni delovi teksta nedostaju, stoga bi prevod trebalo da služi samo kao *orijentaciono štivo*!)
- Za ostalo opšte zakonodavstvo i postupak usklađivanja sa zakonodavstvom Evropske Unije videti internet stranicu hrvatskog Ministarstva inostranih poslova i evropskih integracija www.mvpei.hr

Državni izveštaj – Republika Makedonija
Prof. Dr. *Goran Koevski**

SAVREMENI UGOVORI
(franšiza, faktoring, lizing)

Franšiza i faktoring spadaju u kategoriju neimenovanih ugovora autonomnog privrednog prava. Ugovori o lizingu, koji su ranije bili neimenovani, su pretvoreni u imenovane ugovore, regulisanjem u Zakonu o lizingu iz 2002. godine.

Međutim, pošto su to ugovori iz savremene komercijalne prakse, kada ih inkorporišemo u državni pravni system uvek moramo prizvati u pomoć osnovne principe obligacionog prava I razmotriti moguću analognu primenu odredaba imenovanih ugovora, iznad svega onih koji imaju svoju pravnu osnovu u ugovorima o naručivanju ili u takozvanim ugovorima o kontinuiranim komercijalnim uslugama, kao što je, npr. ugovor o komercijalnom predstavništvu.

Pravna praksa, kao neformalni izvor prava, takođe ima veliku ulogu u pravnom profilisanju ovih ugovora.

I. UGOVORI O FRANŠIZI

1. Nastanak i značaj franšize i ugovora o franšizi

Franšiza je:

- originalni, složeniji sistem za distribuciju i prodaju robe i usluga; i
- relativno novi metod savremene distribucije i prodaje robe i usluga, koji se pojavljuje na svim nivoima tržišta.

1.1. Pozadina poslovnog koncepta franšize

Poslovni koncept franšize može se pratiti mnogo stoleća unazad, iznad svega u Kini i Japanu, i najistaknutije u licenciranju Mai Toi restorana i Norenkai radnji.[1]

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* Originalni tekst je na lokalnom jeziku.

[1] Vidi: Schulz Albrecht, “Selective Distribution, Franchising and EU Competition Law” u Međunarodnoj studijskoj grupi, “Agency and Distribution Agreement” (Seminarki materijali) 1997.

Savremena franšiza se pojavila u američkoj poslovnoj praksi u 19. stoleću a koncept je postao poznat u Evropi takođe u 19. stoleću.[2]

Najčuveniji primer franšize u istoriji je Coca-Cola Co., koja ima sistem flaširanja svuda po svetu, po kojem kompanija šalje svojim primaocima prava gotovu koncentrisanu formulu, koju oni samo razblažuju u vodi i flaširaju. Kasnije je franšizovanje postalo popularno u automobilskoj industriji (1898.), gde su odgovornosti podeljene: proizvođači, odgovorni za konstrukciju i proizvodnju s jedne strane i prodavci, odgovorni za (pret)prodaju i uslugu nakon prodaje s druge; nakon čega se proširila u hotelijerstvo.[3]

Dokaz da franšiza postaje sve ukorenjenija u međunarodnoj poslovnoj praksi dolazi iz činjenice da se ove godine obeležava 50. godišnjica osnivanja Međunarodne franšizne asocijacije (IFA, 1960) u Vašingtonu.[4]

1.2. Pravni propisi o franšizi i ugovor o franšizi

Ugovor o franšizi je neimenovani ugovor autonomnog privrednog prava, čiji pravni sadržaj je definisan, najpre kroz precedentno pravo u S.A.D. i Evropi i kroz definicije i tumačenja koje pružaju profesionalne franšizne asocijacije.

Na međunarodnom planu čine se napori da se unifikuju propisi o franšizi u UNIDROIT (Međunarodni institut za unifikaciju privatnog prava), koji je 2002. godine objavio Model zakona o otkrivanju franšize koji je još uvek relativno nepoznat u poslovnoj praksi u Republici Makedoniji.

Prvi propisi u oblasti franšizovanja su usvojeni u S.A.D.,[5] najpre iz razloga da se zaštite mali preduzimači od nepoštenih davalaca prava koji su želeli da jednostrano ponište ili su odbijali da obnove ugovore o franšizi bez opravdanog razloga.[6]

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[2] 1840. godine nekoliko proizvođača piva u Nemačkoj je dalo franšizu jednom broju gostionica da služe njihovo pivo i ekskluzivno pravo da ga prodaju. 1851. godine, kompanija za proizvodnju šivaćih mašina Singer je počela da izdaje franšize za prodaju svojih mašina. 1880. godine veći evropski gradovi su počeli da izdaju ekskluzivne franšize tramvajskim kompanijama i kompanijama za snabdevanje vodom, odnošenje smeća, snabdevanje gasom i, kasnije, snabdevanje strujom.

[3] Istorijski gledano, razvoj franšize u S.A.D. je imao sledeći tok: 1886: Coca-Cola, 1930 – Harlin Sanders, benzinske pumpe; 1952 – KFC; 1955 – McDonalds; 1964 - 7-Eleven; 1974 – Subway; 1980 - Mail Boxes; 1995 – Curves; 2001 - Geeks On Call.

[4] Ovo je neprofitna trgovinska asocijacija koja predstavlja interese više od 1300 franšiznih sistema, više od 10.000 primalaca prava i više od 500 kompanija koje isporučuju robu i usluge u industriji. Etički kodeks IFA teži da stvori okvir za primenu najbolje prakse od strane svojih članova. Za više o IFA, posetite: http://www.franchise.org/aboutifa.aspx

[5] Vidi: Automobile Dealers Day in Court Act (1956), Presale Registration Process Act (1970), Proposed Rule Involving Disclosure Requirements and Prohibitions Concerning Franchising (1979) The Federal Trade Commission Act, Uniform Franchise and Business Opportunities Act (1987), Petroleum Marketing Practices Act.

[6] Za više informacija o franšizama i ugovorima o franšizi, vidi: Milkotin-Tomić Deša Dr. Sc., Pravo međunarodne trgovine, Školska kjiga, Zagreb, 1999, str. 234-235, Zlatko d-r Stefanović, Privredno ugovorno pravo, drugo izdanje, Pravni fakultet Univerziteta Union u Beogradu, Javno preduzeće „Službeni glasnik", Beograd 2007, str. 272-274 i Goran Dr. Koevski, Pojam i pravna priroda ugovora o distribuciji u uporednom pravu, Dissertation, Univerzitet u Novom Sadu, Pravni Fakultet, maj 2000., str. 34-35, 298-327.

U okviru Evropske Unije ugovori o franšizi su regulisani iznad svega sa tačke gledišta konkurencije,[7] naime, regulisanje je uglavnom u vezi sa vertikalnim ugovorima.[8] Međutim, i pored njihove primarne veze sa zakonom o konkurenciji, ovi zakonodavni akti sadrže relevantne definicije i smernice o ugovorima o franšizi, njihovom predmetu, najvažnijim elementima, drugom relevantnom sadržaju itd.

Vredi pomenuti propis o zakonu koji se primenjuje na ugovoren obave od 2008[9], čiji član 4 paragraf 1 stavka e), koji propisuje da, u odsustvu utvrđenog važećeg zakona, primenjivaće se zakon države gde primalac prava ima svoje boravište.

U Republici Makedoniji, ugovori o franšizi su regulisani u Zakonu o zaštiti konkurencije.[10] Član 5, paragraf 1, alineja 14 pruža definiciju ugovora o franšizi, po kojoj će „ugovor o franšizi" označavati ugovor po kome korisnik franšize preuzima obavezu da stalno, u svoje ime i za svoj račun, prodaje robu i/ili usluge, proizvedene ili razvijene od strane davaoca franšize, i konsekventno, koristi ekskluzivna prava da koristi know-how, robne marke i usluge koje su prenete od davaoca franšize za izvesnu nadoknadu.

Na osnovu člana 8 paragraf 2 Zakona o zaštiti konkurencije, Vlada Republike Makedonije je usvojila Propis o zajedničkom izuzeću vertikalnih ugovora o ekskluzivnim pravima distribucije, selektivnim pravima distribucije, ekskluzivnim pravima kupovine i franšize.[11] Ovaj propis reguliše uslove za zajedničko izuzeće vertikalnih ugovora, uključujući ugovor o franšizi, karakteristične vertikalne ugovore, odredbe koje ti ugovori moraju sadržavati, ograničenja ili uslove koje ti ugovori ne smeju sadržavati i druge uslove koji moraju biti zadovoljeni u cilju zajedničkog isključenja. Shodno članu 3 paragraf 2 slovo e) Propisa, franšiza će označavati vertikalni ugovor, u kojem jedan preduzetnik, davalac prava, u razmenu za direktnu ili indirektnu novčanu nadoknadu, daje korisniku prava pravo da koristi franšizu tj. paket prava intelektualne svojine, u marketinga određene robe i/ili usluga i maloprodaje robe ili pružanja usluga krajnjim potrošačima/korisnicima.

1.3. Koncept franšize

Sa etimološke tačke gledišta, reč „franšiza" potiče iz francuskog jezika i označava „koncesiju" ili „privilegiju". Međutim, ovo je relativno neprecizan termin tako da nema pravnih konsekvenci ako se distributivna mreža nazove „franšiznom mrežom". Tip ugovora za svaki odgovarajući slučaj zavisi primarno od specifičnog sadržaja ugovora tj. konkretnih prava i obaveza ugovornih strana.

1.4. Definicija franšize i ugovora o franšizi

Ugovor o franšizi je (1) dvostrano obavezujući ugovor između (2) davaoca franšize (Franschisegeber na nemačkom jeziku ili franchisor u zemljama u kojima se govori engleski

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[7] Razlog zbog čega je Evropska komisija počela da detaljno revidira vertikalne ugovore, uključujući ugovore o franšizi, bio je slučaj 161/84 Pronuptia de Paris GMBH v Pronuptia de Paris Irmgard Schillgalis [1966] ECR 353, [1986] 1 CMLR 414.

[8] Vidi: Propis Komisije (EEC) br. 4087/88 od 30. novembra 1988. o primeni člana 85(3) Sporazuma na kategorije ugovora o franšizi (OJ EEC L 359/46 od 28. decembra 1988.) zamenjen Propisom Komisije (EC) br. 2790/1999 od 22. decembra 1999. o primeni člana 81(3) Sporazuma na kategorije vertikalnih ugovora i zajedničkih praksi (Tekst sa EEA relevantnošću) (OJ EC L 336/21 od 29. decembra 1999. Za više, vidi: http://www.unidroit.org/english/guides/2007franchising/country/eu.htm#NR104

[9] Vidi: Propis (EC) br. 593/2008 Evropskog parlamenta i od Saveta od 17. juna 2008., o zakonu koji se primenjuje na ugovorne obaveze (Rim I).

[10] Vidi: Službeni list Republike Makedonije, br. 4/2005, 70/2006 i 22/2007.

[11] Vidi: Službeni list Republike Makedonije, br. 91/2005.

jezik) i (3) jednog ili više individualnih korisnika franšize (Franschisenehmer na nemačkom jeziku ili franchisee u zemljama u kojima se govori engleski jezik), koji, kao (4) distribucioni sistem za robu i usluge, se (5) koristi od pravno i finansijski nezavisnih preduzeća (poslovnih preduzeća) (6) koja su udružila svoj know-how i kapital u vertikalnoj formi saradnje.

Elementi definicije ugovora o franšizi:

- Davalac franšize daje korisniku franšize pravo da prodaje određenu (1) robu (odeću, obuću, brzu hranu, igračke itd.) ili da pruža određene usluge (2) (usluge konsaltinga u vezi sa računarskim softverom, hotelske usluge, rent-a-car usluge itd.);
- Davalac franšize daje licencu korisniku franšize da koristi komercijalnu formulu (poslovne i tehničke metode i model upravljanja preduzećem) kao i standardizovani, uniformni i potpuni sistem za prodaju robe i/ili usluga;
- Sistem za marketing robe i usluga je standardizovan preko odgovarajućeg operativnog programa za razdvajanje odgovornosti između partnera;
- Korisnici franšize u potpunosti prihvataju i kontinuirano repliciraju i koriste komercijalnu politiku i prepoznatljivi imidž čiji je vlasnik davalac franšize;
- Korisnicima franšize se nudi kontinuirana komercijalna i tehnička podrška u vođenju aktivnosti koje su predmet franšize; i
- Korisnici franšize generišu sigurni i kontinuirani profit a zauzvrat pružaju vlastite finansijske i druge investicije i plaćaju davaocu franšize utvrđenu novčanu nadoknadu.

1.5. Elementi ugovora o franšizi

- Potpuna pravna nezavisnost ugovornih strana;
- Transfer odn. pružanje licence za pravo korišćenja svetski poznatog i uniformnog poslovnog metoda i imidža;
- Saradnja između ugovornih strana na kontinuiranoj i dugoročnoj osnovi;
- Kontinuirana podrška koju obezbeđuje davalac franšize; i
- Intuitu personae karakter ugovora odn. izuzetno blizak profesionalni odnos poverenja između davaoca franšize i korisnika franšize tako da će razvijanje podfranšizne mreže biti podložno potpunoj kontroli i odobrenju davaoca franšize.

2. Pravna priroda ugovora o franšizi

Ugovor o franšizi sadrži elemente mnogih imenovanih i neimenovanih privredno-pravnih ugovora:

- Ugovor o kupoprodaji,
- Ugovor o komercijalnom predstavništvu,
- Ugovor o distribuciji,
- Ugovor o licenciranju u vezi prava intelektualne svojine,
- Ugovor o know-how, u vezi razmeni tehničkih, operativnih i drugih praktičnih i relativno poverljivih informacija,
- Ugovor o snabdevanju,
- Ugovor o zajedničkom ulaganju itd.

Međutim, ovaj tip ugovora je specifična kombinacija i sastav svih ovih elemenata pri čemu oni gube svoju autonomiju i odvojenost. To znači da ugovor o franšizi nije mixti iuris ugovor već novi sui generis neimenovani ugovor autonomnog privrednog prava.

3. Predmet ugovora o franšizi

Predmet ugovora o franšizi je poslovni metod, imidž i formula, to jest uniformnost i standardizacija prodaje robe ili pružanja usluga dok se sama roba i/ili usluge mogu posmatrati kao sekundarni predmet ugovora.

4. Tipovi franšize i ugovora o franšizi

4.1. Prema načinu na koji je franšizna mreža zasnovana mogući su sledeći tipovi franšize:

- Direktna franšiza; i
- Zaključivanje glavnog ugovora o franšizi.

4.2. U zavisnosti od predmeta franšize, ističu se tri osnovna tipa franšize mada je prilično teško povući jasnu liniju razdvajanja između njih u praksi.

- Industrijska ili proizvodna franšiza;
- Uslužna franšiza; i
- Distributivna franšiza.

4.3. Konačno, prema ekskluzivnosti, ugovori o franšizi se mogu podeliti na ekskluzivne i ne-ekskluzivne.

Danas termin "franšizovanje" je počeo da označava uglavnom model franšizovanja distribucije, takođe poznat kao franšizovanje poslovnog formata.

5. Prednosti i nedostaci ugovora o franšizi

5.1. Prednosti ugovora o franšizi se mogu sumirati na sledeći način:

- Franšizovanje kombinuje prednosti koherentne distributivne mreže s jedne strane i toga što postoje nezavisni i zainteresovani maloprodavci s druge strane;
- Franšizovanje pruža brži, jeftiniji i manje rizičan prodor na strana tržišta;
- Manje razvijena distributivna infrastruktura je prednost za davaoca franšize tako što može osnovati jaču i centralizovaniju kontrolu nad nezavisnim korisnicima franšize;
- Davalac franšize dobija kompenzaciju u formi franšize i autorskih prava i povećava prihod od intelektualne svojine;
- Korisnici franšize više vole da obavljaju svoje sitno poslovanje pod kišobranom globalno zasnovanog i renomiranog imena i/ili imidža;
- Politički i administrativni problemi koji utiču na efikasan ulazak stranog kapitala u zemlju domaćina su prevaziđeni; itd.

5.2. Nedostaci ugovora o franšizi:

Ugovori o franšizi, ipak, imaju određene nedostatke, naime:

- Nakon uspešne obuke glavnog korisnika franšize on može da odluči da raskine ugovor i nastavi da radi kao nezavisan entitet i tako efektivno postane konkurent na tržištu na koje je davalac franšize ciljao da uđe;

- Veoma je teško odabrati pravna lica za zaključivanje glavnog ugovora o franšizi a kontrolisati mrežu podfranšiza, koju razvije glavni korisnik franšize je još teže;
- Ako je korisnik franšize obučen za menadžment na dovoljno visokom nivou troškovi za kontrolu i nadzor nad korisnikom franšize će porasti;
- Relativno visoki troškovi za započinjanje i razvijanje novog poslovanja na strani korisnika franšize;
- Ugovori o franšizi se koriste kao alatka za ekonomsku kolonizaciju sveta od strane velikih multinacionalnih kompanija iz razvijenih zemalja itd.

6. Forma ugovora o franšizi

Uporedno pravo ne poznaje posebna pravila u vezi sa formom ugovora o franšizi; u poslovnoj praksi, međutim, on se zaključuje u pisanoj formi i ad probationem.

7. Prava i obaveze strana u ugovoru o franšizi

7.1 Obaveze davaoca franšize

- Davalac franšize će otkriti što je moguće više informacija u odgovarajućoj dokumentaciji, preko koje se poslovni koncept franšize materijalizuje– takozvani *corpus mechanicum* (operativni priručnici, program obuke, materijali za marketing franšize, brošure, prijave, obaveštenja javnosti, operativni priručnici davaoca franšize, prijava za registraciju korisnika franšize itd.);
- Davalac franšize će preneti na korisnika franšize komercijalnu formulu kao potpuni i uniformni sistem;
- Davalac franšize će ponuditi korisniku franšize kontinuiranu podršku.
  - Podrška za instaliranje i održavanje formule;
  - Podrška u prenosu i primeni know-how;
  - Obaveza za redovnu isporuku robe ako je davalac franšize proizvođač robe ili vrši pred-odabir robe koja će biti distribuisana.

7.2 Prava davaoca franšize

- Pravo da kontroliše i nadzire rad sistema;
- Pravo zaštite paketa prava intelektualne svojine;
- Pravo na klauzulu zabrane konkurencije za jedan period vremena nakon okončanja ugovora o franšizi;
- Pravo na kompenzaciju za pruženu poslovnu formulu i uključenje kao integralnog dela pojedinačne distributivno franšizne mreže.

7.3 Obaveze korisnika franšize

- Obaveza da promoviše poslovni metod davaoca franšize;
- Plaćanje odgovarajuće nadoknade davaocu franšize, i za početno uključenje u mrežu (ulazna nadoknada) kao i nadoknade u vezi sa korišćenjem prava intelektualne svojine (autorskih prava);
- Obaveza da ne bude konkurencija davaocu franšize za jedan period vremena nakon okončanja ugovora;
- Podlicenciranje poslovne formule biće u potpunosti zabranjeno ili će biti dozvoljeno samo po prethodnom odobrenju davaoca franšize;

- Redovni izveštaji davaocu franšize;
- Obaveza zaštite trgovinskih tajni;
- Obaveza učestvovanja u reklamnim troškovima;
- Obaveza kontinuiranog prikazivanja činjenice da je nezavisan entitet;
- Obaveza članstva u lokalnoj franšiznoj asocijaciji ako takva postoji itd.

7.4 Prava korisnika franšize

- Pravo na neometanu upotrebu prenesenog paketa prava koji se sadrži u poslovnoj franšiznoj formuli;
- Pravo na nemešanje od strane davaoca franšize u vezi sa načinom korišćenja prenesenog paketa prava koji se sadrži u franšizi, osim u vezi sa pravom davaoca franšize da kontroliše i vrši nadzor nad radom sistema i mrežom franšize;
- Pravo korisnika franšize da zahteva odgovarajuću nadoknadu tokom trajanja klauzule zabrane konkurencije nakon redovnog okončanja ugovora.

8. Trajanje ugovora o franšizi

- Ugovor može biti zaključen na ograničen ili neograničen period vremena; međutim, trendovi u praksi pokazuju da se ovi ugovori obično zaključuju na određeni period vremena;
- Po zaključenju ugovora biće određen početni period vremena tokom kojeg davalac franšize može raskinuti ugovor o franšizi. Taj početni period je vreme u kojem bi investicije korisnika franšize trebalo generisati odgovarajući povraćaj.

9. Nadoknada za štetu u ugovorima o franšizi

- Nadoknada za štetu ili izgubljene profite usled neosnovanog preuranjenog raskida ugovora;
- Nadoknada za štetu usled kratkog roka za raskid datog od davaoca franšize korisniku franšize;
- Nadoknada štete ako korisnik franšize koristi prava koja se sadrže u paketu franšize nakon okončanja ugovora i tako stvara iluziju da je još uvek član franšizne distributivne mreže; i
- Nadoknada štete usled neovlašćene upotrebe i/ili prenosa prava intelektualne i industrijske svojine od strane korisnika franšize konkurentima davaoca franšize.

U vezi sa pitanjem da li korisnik franšize ima pravo na nadoknadu štete za izgubljene klijente i/ili goodwill, kao i na nadoknadu za investicije u razvoj franšize, uporedna pravna praksa je različita, sa izuzetkom Nemačke, gde postoji tendencija ka široj analognoj primeni propisa u vezi sa zaštitom privrednih predstavnika.

10. Obaveze ugovornih strana nakon okončanja ugovora o franšizi (klauzule nakon roka ugovora)

- Obaveza korisnika franšize da vrati celokupnu imovinu i svu aktivu (dokumentaciju u vezi sa pravima koja se sadrže u paketu franšize) davaocu franšize;
- Obaveza korisnika franšize da prestane da koristi i da ukloni iz svojih poslovnih prostorija robni naziv, robnu marku, pečat ili logo davaoca franšize i da prestane da stvara utisak da je i dalje deo lanca franšize davaoca franšize;

– Obaveza korisnika franšize da čuva kao poslovnu tajnu sve informacije i know-how, koje je pribavio na osnovu ugovora o franšizi u periodu vremena u kojem su prava u ugovoru o franšizi zaštićena zakonom;
– Dalje, korisnik franšize će poštovati sve obaveze koji potiču iz klauzule o zabrani konkurencije nakon okončanja ugovora; itd.

Davalac franšize, sa svoje strane, će otkupiti svu robu koja je ostala na poziciji korisnika franšize nakon okončanja ugovora (klauzula o otkupu) po ceni koja je prethodno utvrđena u ugovoru ili prema proceni nezavisnog stručnjaka ili će dozvoliti korisniku franšize da i dalje prodaje tu robu ali bez prava da upućuje na trgovinsku oznaku ili logo davaoca franšize u svojim poslovnim prostorijama.

11. Pravna praksa u Republici Makedoniji u vezi sa ugovorima o franšizi

Za razliku od drugih zemalja u tranziciji gde je franšizovanje poslovni model koji postaje sve prisutniji, [12] franšize u Makedoniji su pre izuzetak nego pravilo. U ovom momentu, sledeći brendovi su prisutni u zemlji kao predmet franšizne mreže: Mango, McDonalds, Diners, Forneti i jedini makedonski davalac franšize Alkaloid, koji je uspeo da proda svoj brend Kafetin u Rusiji.[13]

Ne postoji razvijena pravna praksa u Republici Makedoniji u vezi sa ugovorima o franšizi.

II. UGOVOR O FAKTORINGU

1. Uvod

Generalno govoreći, faktoring je finansijska (ne ekskluzivno bankarska) usluga koja poboljšava protok gotovine klijentovog poslovanja.

Kao tip komercijalne, finansijske usluge, faktoring se primenjuje odn. realizuje preko ugovora o faktoringu.

2. Definicija

Ugovor o faktoringu se definiše kao (1) dugoročni ugovorni odnos između jedne strane – prodavca (klijenta) i druge strane – faktorske institucije (faktora), pri čemu a) klijent prenosi na faktora, sa popustom, svoja kratkoročna ugovorna novčana potraživanja pre njihovog datuma dospelosti, koja potiču iz ugovora o prodaji robe ili pružanja usluga među tim – klijent i njegov kupac (dužnik), osim u vezi one robe i usluga koji su kupljeni za ličnu, porodičnu ili domaću upotrebu; b) faktor, za određenu nadoknadu, prihvata da naplati ta potraživanja ako ga zadovoljava platežna sposobnost klijentovih dužnika, obaveštavanjem dužnika o ovom prenosu, bez obzira da li klijent ili faktor snose rizik za naplatu navedenih potraživanja.

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[12] Od tranzicionih zemalja koje su sada članice Evropske Unije prednosti franšizovanja kao poslovnog modela prvo je prihvatila Mađarska, gde u ovom momentu ima 400 lanaca franšize, zatim Poljska, Slovenija i Hrvatska, svaka sa 120 franšiza dok Republika Češka ima 55 kompanija koje rade na osnovu franšize. Vidi: Kapital, izdanje 438, od 10.04. 2008. http://www.kapital.com.mk/DesktopDefault.aspx?tabindex=0&tabid=0&EditionID=618&ArticleID=14518

[13] Vidi: Kapital, izdanje 438, ibid.

3. *Poreklo*[14]

Faktoring se pojavio u S.A.D. kao komisioni rad gospode (faktora) koji su delovali u svoje ime a za račun svojih klijenata. Usluge američkih faktora (i na domaćem tržištu i u inostranstvu, prvenstveno u Evropi – Nemačkoj i Švajcarskoj) su najviše koristili evropski izvoznici tokom šezdesetih godina zato što su američki faktori garantovali da će kupci u S.A.D. platiti za uvezenu robu.

Danas postoje globalni lanci institucija faktoringa kao što je The Factor Chains International, osnovan 1968 i koji radi u više od 30 zemalja na svetu.

Prelomni momenat u razvoju faktoringa je bio ulazak moćnih globalnih banaka u poslovanje (Citibank, Chase Manhattan Bank, Bank of New York)

4. *Ugovorne strane*

4.1. Klijent

Klijent je lice, najčešće pravno lice koje radi na osnovi profita (kompanija), koje prenosi faktoru svoja nedospela ugovorna kratkoročna novčana potraživanja uz popust.

4.2. Faktor

Faktor je lice koje kupuje dug drugog lica (novčano potraživanje) sa ciljem stvaranja profita iz naplate navedenog duga.

Faktori su obično banke ili specijalizovane institucije faktoringa; međutim, čak i kada banke preuzmu ulogu faktora, faktoring *se smatra za alternativu za* a ne kao poseban tip bankarskog zajma.

Faktor je ugovorna strana koja obavlja karakteristično delovanje u skladu sa ovim ugovorom.

Faktor preuzima obavezu da izvrši barem dve navedene funkcije za klijenta (član 1 Konvencije):

1. Obezbedi finansijska sredstva za klijenta putem avansnog plaćanja;
2. Vodi evidenciju (knjige) u vezi sa naplativim računima;
3. Naplati naplative račune;
4. Preduzme odgovarajuću meru u slučaju kašnjenja plaćanja od strane klijentovih dužnika.

Po opštem pravilu, faktor nema pravo regresa prema klijentu u vezi sa nemogućnošću naplate potraživanja (ovo se smatra jednim od suštinskih elemenata ugovora o faktoringu); međutim u praksi postoje slučajevi ugovora o regresnom faktoringu.

4.3. Klijentov dužnik

Ovo je treća strana koja je obavezna da plati novčana potraživanja faktoru na osnovu osnovne pravne transakcije tj. ugovora o prodaji robe ili pružanju usluga sa klijentom.

5. *Koja je pravna priroda ugovora o faktoringu?*

Ugovor o faktoringu obuhvata elemente sledećih tipova ugovora:

– cesija,
– komisija,

[14] Vidi: Kapor dr Vladimir i Slavko dr Carić, Ugovori robnog prometa, X izdanje, Centar za privredni konsalting, Novi Sad, 2000, str. 481-485.

- garancija,
- predstavljanje,
- ugovor o usluzi,
- predugovor, kao osnova za zaključivanje glavnih ugovora ili okvirnih ugovora, koji, sa svoje strane, su osnova za buduće pojedinačne ugovore za transfer kratkoročnih nedospelih novčanih potraživanja,
- prodaja potraživanja od dužnika,
- ugovor o lombardnom zajmu.

Faktoring, kao zasebna poslovna aktivnost je bliska zajmovima ali se razlikuje od zajmova prema sledećim kriterijumima:

- Faktoring stavlja naglasak na strukturu klijentove aktive (kvalitet naplativih računa, deo klijentove aktive, koja je predmet transfera), dok bankarski zajam se fokusira na kolateralu (datu kao obezbeđenje, mada se potraživanje može staviti kao kolaterala, prema Zakonu o ugovornoj zalozi), i iznos zajma zavisi od kolaterale;
- Tako, iznos zajma, datog od ugovora od zajmu, zavisi od kolaterale, dok u slučaju faktoringa samo novčano potraživanje je kolaterala;
- Kratkoročna potraživanja nisu od interesa kada se razmatra bankarski zajam za klijenta dok su kod faktoringa od suštinskog značaja za zaključivanje ugovora o faktoringu;
- Tradicionalni zajam ne nudi dodatne usluge van glavne pravne transakcije dok ugovori o faktoringu zaista obezbeđuju te usluge; itd.

Može se zaključiti da je faktoring specifična kombinacija i spoj svih ovih elemenata pri čemu oni gube svoju autonomiju i zasebnost, tako da to nije *mixti iuris* ugovor već novi *sui generis* neimenovani ugovor autonomnog privrednog prava, prisutan prvenstveno u oblasti bankarskog prava mada transakciju mogu obaviti nefinansijske institucije. To je jednostavno neimenovani ugovor autonomnog privrednog prava ili drugim rečima, ugovor koji nije regulisan bilo kojim zakonom već koji se spontano pojavio u poslovnoj praksi.

6. Na koji način naplativa potraživanja mogu biti prenesena (pravni instrumenti za primenu faktoringa)?

- Putem cesije u skladu sa građanskim pravom;
- Putem dokumentarnog akreditiva ako je taj način predviđen finansijskom klauzulom kupoprodajnog ugovora;
- Prema pravilima za indosament menica.

Način prenosa naplativih potraživanja zavisi od pravnog odn. finansijskog instrumenta u kojem je kratkoročno novčano potraživanje inkorporisano ili je planirano da bude inkorporisano.

7. Koje ugovorno potraživanje može biti cedirano?

Mada novčana potraživanja iz bilo kog ugovora mogu biti cedirana u praksi su najčešća ona iz ugovora o prodaji robe ili pružanju usluga, više nego ona potraživanja koja potiču iz prodaje robe za lične, porodične ili domaće potrebe.

Velika Britanija prednjači u Evropi sa faktoring transakcijama, sa iznosom od 161 milijardi EUR na kraju 20. stoleća.

Stoga, može se zaključiti da faktoring najviše odgovara velikim preduzećima sa velikim brojem kupaca koji redovno koriste njihove usluge.

Na suprotnoj strani spektra, faktoring, kao alternativni izvor finansiranja, je najređi u građevinarstvu i prodaji medicinske opreme (usled svog dugog roka i nesigurne prirode ti ugovori nisu uobičajeni između učesnika u trgovinskim operacijama.

Ugovor o faktoringu se obično odnosi na ukupna ugovorna novčana potraživanja klijenta, pre nego na pojedinačna naplativa potraživanja ("globalna cesija").

Stoga se faktoring smatra stalnim ugovornim odnosom jer uključuje u sebe naplativa potraživanja sa različitim datumima dospelosti i odnosi se na različite dužnike, zasnovane na osnovnoj pravnoj transakciji – prodaji robe ili pružanju usluga.

8. Koji tip naplativih potraživanja bi trebalo da bude predmet ugovora?

Prenesena novčana potraživanja su obično kratkoročna (30 – 120 dana), i prvenstveno ali ne isključivo u domaćoj trgovini.

Ovim se želi reći da mora da postoji vremenski razmak između momenta isporuke robe ili pružanja usluge i plaćanja.

Usled kratkoročne prirode naplativih potraživanja, ona su retko kad osigurana.

9. Forma ugovora

Pošto je ugovor o faktoringu ugovor autonomnog privrednog prava nema posebnih pravila u vezi sa formom; međutim, uobičajeno je da se zaključuje u pismenoj, ad probationem formi, u svrhu dokazivanja prava i obaveza strana u ugovoru.

Poznato pravilo u privrednom pravu je da kratkoročni ugovorni odnosi mogu biti neformalni dok dugoročni odnosi zahtevaju strožu formu usled opasnosti da dogovorene odredbe mogu biti zaboravljene.

Faktoring je, usled svoje forme, po našem mišljenju, okvirni sporazum – globalna cesija prema određenom dužniku, koji se primenjuje preko neutvrđenog broja budućih ugovora, kako dug postane dospeo; otuda potreba za strožom ad probationem formom.

10. Kako primena ugovora o faktoringu izgleda u praksi?

Pre zaključenja ugovora o faktoringu ima nekoliko radnji koje moraju biti unapred sprovedene.

Faktor zahteva otprilike dve sedmice da pregleda ugovorna novčana potraživanja koja će biti prenesena, tj. kupljena. Ovaj period se smatra dovoljnim za proveru solventnosti i finansijske sposobnosti klijenta (pravne i finansijske doličnosti).

Pored proveravanja klijentove solventnosti, faktor proverava solventnost klijentovih dužnika i njihovu sposobnost da ispune svoje ugovorne obaveze za blagovremenu isplatu.

Stoga, uvek bi trebalo podrazumevati da je glavni izvor plaćanja faktoru od klijenta je klijentov dužnik i njegova solventnost a ne sam klijent.

Neki faktori imaju unapred utvrđeni minimalni iznos novčanih potraživanja klijenta protiv trećih strana, neophodan za zaključivanje ugovora o faktoringu. Druge faktoring kompanije utvrđuju maksimalni iznos za koji ugovor o faktoringu sa jednim licem može biti zaključen za određeni period vremena (sa ciljem diversifikovanja rizika u vezi sa jednim klijentom).

Stoga, klijentovi dužnici ili dužnici su glavni fokus faktora. Faktoring je zasnovan na kvalitetu naplativog potraživanja, sa tačke gledišta njegove naplativosti a ne kvaliteta samog klijenta.

U slučaju regresnog faktoringa, faktor će najčešće zahtevati transfer svih klijentovih naplativih potraživanja iz svih ugovora kao garanciju za klijentovu obavezu prema njemu.

Faktoring se, stoga, smatra za odgovarajući izvor alternativnog finansiranja za nova preduzeća koja su toliko nova da nisu izgradila pouzdanost u vezi sa svojim finansijskim položajem.

Dok se ne preduzmu prethodne radnje faktor ne donosi odluku o zaključivanju ugovora o faktoringu odn. prihvatanju klijentove ponude.

Korak 1. Klijent isporučuje robu ili usluge i podnosi originalnu fakturu svom poslovnom partneru (dužniku na osnovu osnovne pravne transakcije). Originalna faktura zadrži nalog za plaćanje iznosa navedenog u fakturi fakturu (otkriveni faktoring). Tako, u slučaju otkrivenog faktoringa, dužnik je odmah obavešten o postojanju faktora, bez obzira da li je ugovor o faktoringu regresni ili neregresni ugovor. Klijent podnosi primerak originalne fakture faktoru.

Korak 2. Po prijemu fakture i drugih otpremnih dokumenata faktor preuzima dospeli račun u skladu sa ugovorom o faktoringu.

Faktor obrađuje fakturu, obično u roku od 24 - 48 časova. Faktor odmah obezbeđuje kreditnu liniju za svog klijenta, obično u iznosu od 70 – 90% od iznosa fakture, od čega klijent može odmah da povuče izvestan iznos. Ovaj procenat vrednosti fakture je poznat kao „avans2 i predstavlja prvi od ukupno dva plaćanja od faktora.

Preostalih 10 – 30% se stavlja na zasebni rezervni račun kojim klijent ne može da raspolaže i služe kao obezbeđenje za faktora u slučaju odgovornosti klijenta u vezi sa postojanjem cediranog novčanog potraživanja.

Korak 3. Poslovni partner – klijentov dužnik plaća vrednost fakture faktoru na dan kada efekat za naplatu postane dospeo. U slučaju kašnjenja plaćanja faktor inicira odgovarajući sudski postupak za naplatu duga i ostaje strana u ovom postupku do njegovog dovršetka. U slučaju regresnog faktoringa faktor ima pravo regresa prema klijentu za svako potraživanje čija naplata nije uspela, dok u neregresnom faktoringu faktor snosi rizik nenaplate potraživanja osim ako postoji obezbeđenje potraživanja koje je osigurao faktor.

Korak 4. Na dan potpune isplate faktor kreditira klijentov račun sa razlikom (umanjenom za avans i faktorovu nadoknadu).

11. Faktorova nadoknada (Provizija)

Faktorova provizija, takođe nazvana „diskontna stopa“ je iznos koji faktor naplaćuje za svoje usluge i korišćenje sopstvenih sredstava.

Postoje dve varijabile ili indikatora za izračunavanje nadoknade:

1) bruto iznos fakture i
2) krajnji rok za plaćanje fakture.

Postoje, međutim, faktori koji naplaćuju unapred utvrđeni iznos bruto iznosa fakture i, naravno, u zavisnosti od iznosa potraživanja.

12. Funkcije faktoringa

Faktoring generalno ima tri osnovne funkcije:

12.1. Finansiranje, odn. obezbeđivanje gotovine kroz avansno plaćanje.

Faktor stavlja na raspolaganje klijentu izvestan iznos novca i veoma je važno da postoji utvrđeni vremenski period, poznat unapred, između datuma plaćanja od strane faktora odn. datuma na koji faktor stavlja utvrđeni iznos na raspolaganje klijentu, i datuma na koji će faktor imati mogućnost odn. pravo na naplatu od klijentovog dužnika.

Klijent nema dug prema faktoru i stoga nije obavezan da podnese dokaz o solventnosti.

12.2. Obezbeđenje naplate del credere (garancija za odgovornost trećeg lica)

Faktor preuzima na sebe rizik naplate tj. rizik nesolventnosti klijentovog dužnika. Koji nivo rizika *in concreto* faktor preuzima zavisi od određenog ugovora o faktoringu jer preuzimanje *del credere* obaveze ne znači neophodno da je faktor prihvatio da preuzme na sebe sve moguće rizike u vezi sa naplatom potraživanja. Postoje, međutim, naročito u američkoj praksi, ugovori o faktoringu u kojima faktor preuzima na sebe *del credere* obavezu, ne samo za finansijski rizik već takođe i za političke rizike u vezi sa naplatom potraživanja, rizike u vezi sa isporukom robe itd.

Pošto klijent isporuči robu faktor ne sme ni pod kakvim okolnostima raskinuti pretpostavljenu *del credere* obavezu. Klijent ima pravo na isplatu punog iznosa cediranog novčanog potraživanja, osim faktorove provizije, bez obzira na (ne)solventnost njegovog (faktorovog) dužnika.

12.3. Upravljanje potraživanjima

Ovo je funkcija i usluga koja se ne sadrži u prethodne dve funkcije. U okviru ove funkcije faktor će:

- podnositi tužbe ili putem drugih sredstava obezbeđivati isplatu prenetih potraživanja;
- nuditi usluge konsaltinga svojim klijentima;
- štititi svoje klijente od loših (nenaplativih ili teško naplativih) dugova;
- čuvati račune;
- obračunavati proviziju i porez; itd.

13. Tipovi ugovora o faktoringu

Ugovori o faktoringu se mogu razlikovati prema različitim kriterijumima:

13.1. Prema obimu preuzetog rizika u vezi naplate:

a) Pravi faktoring (old line factoring, echtes factoring): faktor preuzima celokupno naplativo potraživanje, zajedno sa svim rizicima u vezi naplate potraživanja (*del credere* faktoring), što je najčešća forma faktoringa u međunarodnim operacijama;
b) Kvazi faktoring – kada faktor ne preuzima *del credere* rizik u vezi naplate efekta za naplatu. Ovo znači da „nepravi“ faktoring gubi jednu od svojih glavnih funkcija – *del credere* funkciju.
c) Faktoring naplativ po dospelosti efekta za naplatu. Ovo je tip faktoringa kojem nedostaje njegova finansijska funkcija. Faktor kupuje klijentove kratkoročne efekte za naplatu na dan njihove dospelosti. Nema avansa kao što je slučaj kod pravih ugovora o faktoringu;
d) Regresni i neregresni faktoring. U slučaju regresnog faktoringa, faktor zadržava pravo regresa prema svom klijentu ako ne uspe u naplati duga od klijentovog dužnika; ovaj tip faktoringa se ne smatra pravim faktoringom.[15]

[15] Ako se faktoring primenjuje putem cesije onda bi pitanje da li je regresni ili neregresni faktoring trebalo posmatrati kroz prizmu člana 432 Zakona o obligacijama u vezi sa posebnim slučajevima prenosa efekata za naplatu (cesije). To je transfer umesto izvršenja ili za svrhu naplate. Kada dužnik umesto plaćanja efektive za naplatu prenese na poverioca svoj efekat za naplatu ili jedan njegov deo, sa zaključenjem ugovora o transfer, dužnikov efekat za naplatu će se smatrati poravnatim u iznosu prenesenog efekta za naplatu. Međutim, ako dužnik prenese svoj efekat za naplatu na poverioca isključivo u svrhu naplate onda će se smatrati da je efekat za naplatu namiren ili smanjen samo pošto poverilac naplati preneseni efekat za naplatu.

13.2. Teritorijalni kriterijum

a) Prema ovom kriterijumu ugovori o faktoringu se mogu podeliti na one za domaći i za međunarodni faktoring. U slučaju međunarodnog faktoringa postoji veći broj strana u ugovoru: prodavac – klijent, njegov domaći faktor, inostrani kupac (klijentov poslovni partner) i odgovarajući faktor u kupčevoj zemlji. Međunarodni faktoring povećava broj usluga koji pruža faktor: spoljnotrgovinske operacije, devizne operacije, usluge u vezi sa oporezivanjem i carinama itd. Klijentu se nudi podrška u vezi sa problemima oko razlika u zakonodavstvu, carinama, jeziku itd. Ova karakteristika faktoringa je odvela do potrebe da se unifikuje i uskladi ova predmetna materija.

13.3. Otkriveni naspram neotkrivenog faktoringa, u zavisnosti od toga da li klijent obaveštava kupca o transferu svojih efekata za naplatu na faktora.

14. Advantages of the Faktoring Agreement

- Povećanje likvidnosti (protoka gotovine slobodne novčane aktive) malih i srednjih preduzeća a naročito preduzeća koja raspolažu relativno ograničenom slobodnom novčanom aktivom;
- Odgovarajući metod za stimulisanje i finansiranje izvozno orjentisanih malih i srednjih preduzeća, naročito kada troškovi za faktoring su niži nego troškovi za bankarski zajam do datuma dospelosti efektive za naplatu;
- Odgovarajuća za mala i srednja preduzeća koja nemaju razvijenu kreditnu sposobnost ili solventnost potrebnu za traženje bankarskog zajma;
- Klijent raščišćava svoje knjigovodstvo, briše nenaplaćene dospele račune i povećava svoju solventnost prema drugim entitetima.

15. Propisi u vezi sa ugovorima o faktoringu u međunarodnom i domaćem zakonodavstvu

15.1. Međunarodni izvori

U međunarodne izvore propisa u vezi faktoringa spadaju:

- UNIDROIT (Međunarodni institut za unifikaciju privatnog prava), Konvencija o međunarodnom faktoringu, potpisana 1988. godine u Otavi, koju Republika Makedonija nije potpisala i ratifikovala;
- Pravila Međunarodne Asocijacije Faktoringa;
- Pravila Factor Chains International;
- Konvencija iz 2004. Ujedinjen Nacija o ustupanju potraživanja u međunarodnoj trgovini, nacrt koji je pripremila Komisija Ujedinjenih Nacija za međunarodno trgovinsko pravo (UNCITRAL) i Evropska banka za obnovu i razvoj (EBRD). Međutim, ova konvencija još uvek nije stupila na snagu.

15.2. Domaći izvori

Može se zaključiti da propisi u vezi faktoringa i ugovora o faktoringu u Republici Makedoniji nisu jasno definisani, što ne dozvoljava zainteresovanim entitetima (prodavcima, kup-

cima i finansijskim institucijama) da u potpunosti iskoriste prednosti ovih, relativno novih poslovnih transakcija. Možda bi se mogli ponuditi neki poreski ustupci za ove transakcije da bi one postale privlačnije za zainteresovane entitete.

Ne postoji poseban zakon o faktoringu u Republici Makedoniji što ne znači da apsolutno ne postoji pravni okvir za ovaj tip ugovornog odnosa– faktoring.

U februaru 2007. godine pripremljena je jedna studija o faktoringu u Republici Makedoniji koja je pokušala da pruži odgovore na neka od pitanja i dilema u vezi sa razvojem faktoringa u Republici Makedoniji.

Faktoring, kao finansijsku uslugu, u ovom momentu nudi nekoliko kompanija u Republici Makedoniji: a) *Prvi Faktor*, Faktoring Company doo Skopje, zajednička kompanija NLB d.d. i SID Bank d.d., koja nudi nekoliko tipova faktoringa: domaći, izvozni faktoring itd.; [16] b) EOS Matrix doo Skopje, koja je deo vodeće grupe u menadžmentu duga u Jugoistočnoj Evropi i nudi usluge u oblasti menadžmenta potraživanja i naplate duga, i u B2B i u B2C odnosima[17]; i c) FINEA Faktoring, Faktoring Company doo iz Maribora u Republici Sloveniji, koja postepeno postaje vodeća kompanija u faktoringu na tržištima bivše Jugoslavije.

Faktoring se pominje u sledećim zakonima u Republici Makedoniji:

– Zakon o bankama; [18]
– Zakon o sprečavanju pranja novca i drugih prihoda od kriminala i finansiranja terorizma; [19]
– Zakon o deviznom poslovanju; [20]
– Zakon o osnivanju Makedonske banke za podsticanje razvoja; [21]
– Zakon o preduzećima; [22]
– Zakon o ugovornoj zalozi; [23] i
– Zakon o obligacijama Republike Makedonije.[24]

16. Pravna praksa u Republici Makedoniji u vezi ugovora o faktoringu

Ne postoji razvijena pravna praksa u Republici Makedoniji u vezi sa ugovorima o faktoringu.

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[16] Vidi: www.prvifaktor.si/mk/mkd/

[17] Vidi: www.eos-matrix.com.mk/en

[18] Vidi: Službeni list Republike Makedonije, br. 67/2007 i 90/2009.

[19] Vidi: Službeni list Republike Makedonije, br. 4/2008.

[20] Vidi: Službeni list Republike Makedonije, br. 34/2001, 49/2001, 103/2001, 51/2003 i 81/2008

[21] Vidi: Službeni list Republike Makedonije, br. 24/98, 6/2000 i 109/2005.

[22] Vidi: Službeni list Republike Makedonije, br. 28/2004, 84/2005, 25/2007 i 87/2008.

[23] Vidi: Službeni list Republike Makedonije, br. 05/2003, 4/2005 i 87/2007.

[24] Vidi: Službeni list Republike Makedonije, br. 18/2001, 78/2001, 04/2002, 59/2002, 05/2003, 84/2008 81/2009 i 161/2009.

III. LIZING I UGOVOR O LIZINGU

U svom širem smislu termin *lizing* se odnosi na noviji tip privredne aktivnosti, koji koriste privredni entiteti (obično mala i srednja preduzeća) u obraćanju specijalizovanoj instituciji lizinga da bi uzeli u zakup investicionu opremu na određene vreme i za nadoknade.

U svom užem smislu -*sui generis* – termin se odnosi na jedan tip ugovora, prema kome

– jedna od strana u ugovoru - zakupodavac, (1) daje predmet naznačen u ugovoru na upotrebu drugoj strani i (2) preduzima sve neophodne radnje da obezbedi da predmet naznačen u ugovoru se pravilno koristi od druge strane u ugovoru
– zakupoprimac je obavezan da plati zakupodavcu definisane nadoknade tj. rate zakupa.

Otuda lizing označava jedan način finansiranja; ugovor o zakupu je instrument realizovanja aranžmana između zakupodavca i zakupoprimca.

Među savremenim ugovorima u Makedoniji jedino ugovor o zakupu je regulisan posebnim zakonom, naime Zakonom o lizingu.[25] Član 2 Zakona o lizingu definiše lizing kao: „Ugovor o lizingu je ugovor u pisanoj ili elektronskoj formi, sačinjen između zakupodavca i zakupoprimca, koji obavezuje zakupodavca da preda predmet u zakup pod uslovima navedenim u ugovoru na određenim period vremena.“

Ono što je zaista važno je da se definiše vlasništvo nad predmetom zakupa – tj. da se definiše zakupodavac kao vlasnik predmeta. Vlasništvo je opasan luksuz; međutim, ekonomsko vlasništvo (korišćenje i upravljanje) se smatra mnogo važnijim od pravnog vlasništva.

Ovaj ugovor obuhvata uređeni transfer prava korišćenja najnovije tehničke i tehnološke investicione opreme; ovo pravo takođe može da uključi u sebe i/ili “know-how”.

2. Razlozi za pojavu lizinga

Razlozi za pojavu lizinga su povezani sa potrebom za razvijanje novih, alternativnih finansijskih metoda; potrebom da se pronađe novi način finansiranja male ekonomije i manjkom poverenja koje bankarske institucije pokazuju prema malim, srednjim i novim preduzećima na tržištu; zatim, nedostatkom valjane državne politike da pomogne i podrži razvoj male ekonomije i mnogim drugim razlozima.

Istorijski gledano, lizing je potekao iz američke poslovne prakse. 1877. godine, kompanija Bell Telephone iz S.A.D. je prva iznajmila svoje telefone umesto da ih proda.

Lizing je treći po važnosti finansijski izvor na svetu; prva dva su zajmovi i obveznice. Najviše se koristi za nabavku sredstava transporta, hardvera i softvera, građevinske mašinerije i tome slično.[26]

3. Pravni propisi o lizingu u Republici Makedoniji

Na međunarodnom nivou važnoj je obratiti pažnju na UNIDROIT Konvenciju on međunarodnom finansijskom lizingu (1988, Ottawa), koja je stupila na snagu 1. maja 1995. godi-

[25] Vidi: Službeni list Republike Makedonije, br. 4/2002, 49/2003, 13/2006 i 88/2008

[26] Prema podacima iz Međunarodne finansijske korporacije (IFC), u 1994. godini 1/8 ukupnih privatnih investicija u svetu je sprovedeno preko sistema lizinga; u zemljama članicama Organizacije za Evropsku saradnju i razvoj (OECD, finansiranje preko lizinga je zauzelo 1/3 ukupnog iznosa investicija i na kraju, u S.A.D., investicije u lizingu su procenjene na 350 milijardi dolara. Vidi: *Kapital*, 18. april 2002., str. 18

ne. Iz samog njenog naslova očigledno je da se konvencija specifično bavi finansijskim lizingom. Ova konvencija nije ratifikovana u Republici Makedoniji bez obzira na činjenicu da je znatan broj odredbi konvencije unesen u makedonski Zakon o lizingu.

Kao što smo već pomenuli, u Makedoniji je usvojen poseban Zakon o lizingu. Da bi jedna trgovinska kompanija mogla da obavlja aktivnosti lizinga ona mora da pribavi dozvolu od Ministarstva finansija. Ovu dozvolu bi trebalo da traže trgovinske kompanije voljne da obavljaju finansijski lizing. Dodela ove dozvole je regulisana jednim podzakonskim aktom – Pravilnikom o metodima i uslovima za davanje dozvole za obavljanje finansijskog lizinga, izdatog od strane Ministra finansija.[27] Lizing se takođe pominje u Zakonu o bankama[28]; Zakon o obligacijama je još jedan veoma relevantan[29]. Preciznije rečeno, član 1-a Zakona o lizingu jasno specifikuje da ugovori o lizingu su podložni odredbama Zakona o obligacijama ako drugačije nije navedeno u Zakonu o lizingu kao *lex specialis*.

Prva finansijska institucija u Makedoniji koja je usvojila sistem lizinga bila je štedionica „Možnosti“. Danas je tržište finansijskog lizinga još uvek mali segment finansijskog sistema Republike Makedonije; ipak, ono daje zadovoljavajuće rezultate i pokazuje tendenciju stalnog razvoja. Zaključno sa izveštajem od 1.10.2009, tržište u Makedoniji ima 11 (jedanaest) aktivnih lizing kompanija[30].

Iskustvo aktivnih lizing kompanija u Makedoniji je do sada pokazalo da najveći interes leži u lizingu automobila. Međutim, sa podizanjem svesti o lizingu kao finansijskoj službi, sve je veće zanimanje za lizing opreme i nekretnina. Lizing najviše koriste pravna lica mada takođe postaje popularan kod fizičkih lica.

Glavni razlozi za spori razvoj lizinga nekretnina u Makedoniji su: a) duplo oporezivanje u slučaju opcije transfera vlasništva na zakupca, i b) pojedinačno plaćanje ukupnog iznosa poreza na dodatu vrednost (PDV) od strane lizing kompanije, koja zauzvrat kupi iznos od klijenata umesto da se lizing kompaniji daje mogućnost odloženog plaćanja PDV.

Bez obzira na opadanje poslova lizinga u Makedoniji, globalna finansijska kriza je uzela svoj danak i prošle godine došlo je do povećanja u prometu ovog poslovanja. To se dogodilo uglavnom zato što su banke usvojile strože uslove za odobravanje kredita koji su uzrokovali da se njihovi klijenti okrenu ka lizing kompanijama.

Teška komercijalna vozila se sve više koriste kao predmeti zakupa kao i snabdevanje osnovnih sredstava. Ovo povećanje je naročito primetno u vezi sa osnovnim stadima (stoke, svinja, ovaca) pošto se oni smatraju za osnovna sredstva i u skladu sa politikom makedonske vlade za promociju stočarstva kao strateške razvojne grane.

Sudska praksa u Republici Makedoniji u vezi sa ugovorima o zakupu je prilično siromašna. Do sada je bio samo jedan slučaju u Osnovnom sudu Skoplja 2, u Skoplju[31]; okrivljeni je tvrdio da je zakup koji je on plaćao za određene poslovne prostorije u stvari trebalo da bude tretiran kao ugovor o zakupu sa klauzulom opcije otkupa (opcijom kupovine) po okončanju roka. Sud je našao da ugovor o zakupu pre svega nije postojao tako da nije bilo mogućnosti da se otplata zakupnine pobrka sa plaćanjem rate lizinga. Zanimljivo je da je u obrazlo-

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[27] Vidi: br. 11- 14902/1- 4. maj 2006.

[28] Vidi: “Službeni list Republike Makedonije” br. 67/2007 i 90/2009.

[29] Vidi: “Službeni list Republike Makedonije” br. 18/2001, 78/2001, 04/2002, 59/2002, 05/2003, 84/2008 81/2009 i 161/2009.

[30] Ove informacije su nađene na Web strani Ministarstva finansija: http://www.finance.gov.mk/files/u11/registar_lizing_drustva_web_0.pdf

[31] Vidi: XIII ПС No. 1863/07 od 3.07.2008.

ženju presude sud uputio na Zakon o obligacijama u vezi sa prodajom sa pravom zadržavanja naslova[32], što samo po sebi dokazuje da sudska praksa nema jasan stav tj. da li istek ugovora o zakupu mora da obuhvata transfer prava vlasništva zakupljene imovine.

4. Strane u ugovoru

I domaće i strane i trgovinske kompanije mogu da funkcionišu kao zakupodavci samo ako su one (u skladu sa Zakonom o trgovinskim kompanijama) osnovale filijalu u Republici Makedoniji i ako su (u skladu sa Zakonom o lizingu) pribavile dozvolu od Ministarstva finansija da obavljaju finansijski lizing.

Zakupac može da bude bilo koje domaće ili strano fizičko lice sa poslovnom sposobnošću ili pravno lice registrovano u odgovarajućem registru, koje prihvata da koristi zakupljenu imovinu.

5. Prava i odgovornosti strana u ugovoru

U vezi sa pravima i odgovornostima strana u ugovoru trebalo bi napraviti razliku između prava i odgovornosti definisanih zakonom i prava i odgovornosti koje su definisale strane u ugovoru. Prava i odgovornosti se definišu zakonom u isključivu svrhu zaštite slabije strane u ugovoru sve dok se aktivnost ovog tipa u potpunosti ne razvije.

5.1. Zakupac:

– ima pravo da koristi zakupljenu imovinu za ekonomsku upotrebu;
– ima faktički posed imovine ali nije pravni vlasnik;
– bi trebalo da plaća zakupodavcu ugovorenu ratu lizinga.

5.2. Zakupodavac:

– je pravni vlasnik zakupljenog predmeta;
– dozvoljava zakupcu da koristi, ima u posedu i izvlači ekonomsku korist iz zakupljenog predmeta;
– ima pravo da primi ratu lizinga.

6. Predmet lizinga

Predmet lizinga je bilo koji pokretni i nepokretni predmet koji zakupac ima pravo da koristi osim predmeta čija je upotreba kao predmeta zakupa ograničena zakonom.

Mogući predmeti finansijskog lizinga su: industrijska oprema, teška oprema, sredstva transporta, automobilska oprema, telekomunikaciona oprema, kancelarijski nameštaj, oprema za fitnes, građevinska oprema, oprema za suvo čišćenje, štamparska oprema, restoranska oprema, računarska oprema i softver, poljoprivredna oprema itd.

Tip opreme koja će biti data u lizing zavisi od ponude zakupodavca i potrebe zakupca, definisane u ugovoru o zakupu.

Praksa lizinga u Makedoniji je dovela do nekih dilema koje su morale biti rešavane zakonskim izmenama. Otud, sa izmenama Zakona o lizingu iz februara 2006. godine, u vezi sa režimom predmeta zakupa, jasno je predviđeno da:

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[32] Vidi: član 528 Zakona o obligacijama

– Zakupodavac ima isključivo pravo kao pravni vlasnik nad predmetom zakupa u slučaju stečaja zakupca;[33]
– U slučaju stečaja zakupodavca stečajni upravnik može: (1) da smatra ugovor o zakupu kao momentalno dospeo prebacivanjem vlasničkih prava na zakupca; (2) da prebaci ugovore o zakupu pod određenim uslovima na različitog zakupodavca – transfer se sprovodi na osnovu javnog poziva sa sporazumom između stečajnog upravnika i novog zakupodavca; (3) da obnovi ugovor o zakupu.
– Odgovor na pitanje da li zakupodavac može da ponudi predmet zakupa kao garanciju je pozitivan, samo ako postoji pismeno odobrenje zakupca; odobrenje bi trebalo podneti Založnom registru;
– Predmet je registrovan u poreske svrhe u skladu sa poreskim propisima. Porez bi trebalo da plati pravni vlasnik a ne ekonomski vlasnik. Otuda bi zakupodavac trebalo da bude poreski obveznik jer je zakupodavac obavezan da registruje predmet u posebnom registru pod Centralnim registrom (član 12), mada bi osiguranje korišćenja za predmet zakupa trebalo da plati zakupac (član 13); korisnik je takođe obavezan da pokrije troškove za održavanje predmeta zakupa (član 9); ove obaveze prema isporučiocu se ispunjavaju ako drugačije nije navedeno u ugovoru (naime, ovo su dispozitivna pravna pravila).
– Sa računovodstvene tačke gledišta, u doba revolucije lizinga u S.A.D., tokom sedamdesetih godina prošlog stoleća, lizing se nije pojavljivao knjigovodstvenim bilansima. U bilansu stanja odn. bilansu uspeha, lizing se nije pojavljivao ni kao aktiva ni kao pasiva; bio je prisutan samo u formi fusnote u finansijskom izveštaju. Danas stvari izgledaju drugačije. Prema DAD (FABS) knjigovodstvenim standardima, lizing bi trebalo da bude prisutan kao obaveza na desnoj strani a kao aktiva na levoj strani finansijskog izveštaja. U slučaju registrovanja lizinga, trgovinske kompanije za ekonomski i poreski konsalting u Makedoniji specifikuju da u pripremi završnog obračuna i finansijskog izveštaja lizing bi trebalo tretirati kao rentu.

7. Pravna priroda ugovora o lizingu

Lizing obuhvata elemente i institute iz različitih drugih ugovora:
– Kreditni ugovor;[34]
– Ugovor o iznajmljivanju;
– Ugovor o zajmu,[35]
– Ugovor o kupoprodaji,[36]

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[33] U vezi ovog isključivog prava zakupodavca postoji jedna relativno nebulozna i apsurdna odluka stečajnog upravnika tokom stečajnog postupka trgovinske kompanije Swedmilk da porekne lizing tj. vlasništvo opreme u fabrici koju je pribavila by Hypo Alpe-Adria-Leasing. Vidi: http://www.a1.com.mk/vesti/default.aspx?VestID=117124

[34] Kreditna komponenta jer ili zakupodavac obezbeđuje finansije ili je treća strana angažovana da finansira kupovinu predmeta zakupa i pokrivena je kroz naplatu uvećanih rata lizinga.

[35] Etimološki, reč potiče iz engleske reči *to lease*, što znači *iznajmiti* ili *rentirati*. U pravnoj terminologiji ne možemo smatrati *lease* i *rent* kao podjednake jer renta nikada ne implicira mogućnost prenosa vlasništva dok je kod ugovora o lizingu takva mogućnost prisutna mada to nije glavni razlog. Reč *creditbail* se koristi u francuskoj terminologiji.

[36] Lizing se ne može uporediti sa kupoprodajnim ugovorom jer prodaja pretpostavlja prenos vlasništva u njegovom potpunom pravnom kapacitetu, koji znači pravo držanja, korišćenja i raspolaganja dok je poenta ugovora o lizingu samo da prenese pravo korišćenja izvesne opreme za dati period vremena.

– Kupoprodajni ugovor sa odloženim plaćanjem ili zadržavanjem naslova u ugovorima o kupoprodaji (*pactum reservati domini*), itd.
  Jedna od glavnih ekonomskih i pravnih odlika lizinga je mogućnost da se predvide jedna od tri alternative nakon isteka ugovora:
  (1)Da se vrati predmet zakupa zakupodavcu
  (2)Da se nastavi sa upotrebom predmeta zakupa pod povoljnijim uslovima, ugovorenim nakon isteka, ili
  (3)Da predmet zakupa postane vlasništvo zakupca.

Međutim, zakupac ne pribavlja vlasništvo predmeta zakupa automatski tj. plaćanjem ukupnog iznosa kao što je definisano u ugovoru o zakupu (član 10).

8. Forma ugovora o lizingu

Prema makedonskom pozitivnom pravu ugovor o zakupu je strogo formalni ugovor *ad validitatem*, koji, pored obavezne sadržine, mora da bude overen od notara.

9. Prenos prava i odgovornosti poteklih iz ugovora o lizingu

Zakupodavac može slobodno da prenese prava i koristi iz ugovora o lizingu samo ako:
– Pravo zakupca da koristi predmet zakupa nije potpuno ograničeno i zakupac ima mogućnost da potpuno ispuni svoje obaveze, osim:
  1. ako je drugačije navedeno u ugovoru
  2. je to protiv zakona Republike Makedonije

Prenos prava zakupodavca ne oslobađa zakupca od njegovih obaveza navedenih u ugovoru o lizingu.

Zakupac može da prenese svoja korisnička prava ili obaveze predmetna zakupa samo ako je pribavio pismenu saglasnost od zakupodavca.

10. Raskid ugovora o lizingu (član 11):

Prema makedonskom Zakonu o lizingu, ugovor može biti raskinut ako:
– bilo koja od ugovornih strana ne ispuni svoje obaveze definisane u ugovoru; potrebno je dati pismeno obaveštenje sa rokom od pet dana pre raskida.

Zakupac ima pravo da raskine ugovor ako (a) predmet zakupa nije isporučen na vreme, ili (b) neki materijalni ili pravni nedostatak nije uklonjen na vreme (evikcija).

Zakupodavac ima pravo da raskine ugovor ako: (a) postoje nedostaci u vršenju plaćanja; (b) zakupac je dao predmet zakupa trećoj strani bez pribavljanja pismene saglasnosti od zakupodavca ili suprotno odredbama ugovora; (c) zakupodavac zapazi šansu da predmet zakupa bude iznesen iz zemlje a ugovor navodi da su takve radnje zabranjene; (d) predmet zakupa se tretira sa nehatom i nemoralno.

11. Prednosti lizinga

– Može biti korišćen od svakog ekonomskog subjekta, bez obzira na njegovu veličinu i aktivnost;
– Potpomaže razvoj male privrede;
– Nudi lakše i fleksibilnije finansiranje potreba investiranja. Naime, postoji pojednostavljeni postupak za nabavku sredstava preko lizing aranžmana. Lizing kompanije ne zahtevaju toliko dokumenata kao banke; za lizing kompanije najvažnija stvar je

sposobnost generisanja protoka gotovine. Ključna prednost lizinga je brzo odobravanje gotovine; novac je mnogo vredniji kada je urgentno potreban.

- Ne obavezuje se veliki iznos gotovine da bi se platilo za novu opremu. Suštinska odlika ovog aranžmana je mali iznos gotovinskog učešća na početku roka zakupa. Na primer: 10% od opreme kupljene preko lizinga. Takvi aranžmani daju priliku da se koristi najnovija tehnologija;
- Zaštita od rizika zastarelosti zakupljene opreme;
- Zakupnina se plaća od stvarnog prihoda koji se dobija od korišćenja predmeta zakupa;
- Zakupac ne smanjuje svoju kreditnu sposobnost zato što ne koristi sopstvene izvore finansiranja niti ima bilo kakve kreditne dugove tj. njegov bilans stanja nije promenjen;
- Fleksibilnost ugovora o lizingu – ugovorne strane imaju veću slobodu kada pregovaraju ugovor, sa šansom da se dogovore o alternativnim mogućnostima u vezi sa dinamikom plaćanja lizinga (odloženo plaćanje, sezonsko plaćanje, fluktacija stope lizinga u vezi sa tržišnim uslovima za proizvode zakupca);
- Zakupodavcu nisu potrebne nikakve posebne garancije jer sama zakupljena oprema služi kao garancija i tretman isključivog stečajnog poverioca u slučaju stečaja zakupca;
- Za razliku od banaka (gde je veoma teško efektuirati hipotekarne operacije i druga obezbeđenja po njihovom zahtevu), ugovori o lizingu obično ne angažuju sudove u slučaju propusta da se ispune najvažnije ugovorne obaveze;
- Zakupodavac ima isključivo pravo nad predmetom zakupa u slučaju stečaja zakupca;
- Mogućnost da se zakupcu da ne samo oprema već i odgovarajuće znanje i iskustvo (know-how);
- Zakupodavci (lizing kompanije) daju mogućnost da se prate cene investicione opreme i pribave jeftina neophodna sredstva rada;
- Na makroekonomskom planu, finansijski sektor se razvija kroz ekspanziju opsega raspoloživih instrumenata koji se nude za finansiranje trgovinskih subjekata; i drugo.

12. Nedostaci lizinga

- Kao finansijski instrument, skuplji je u poređenju sa bankarskim kreditima;
- Nejednakost između strana u ugovoru; jača strana u ugovoru nameće svoju volju;
- Nefleksibilnost ugovora o lizingu nakon njegovog zaključenja u vezi sa krajem roka, iznosa zakupnine, perioda plaćanja, mogućnosti ranijeg raskida ugovora;
- Ima negativan uticaj u odnosu na mogućnost da korisnik obnovi i osavremeni osnovna sredstva (tehničku i tehnološku opremu), jer veoma često nakon isteka ugovora o lizingu korisnik kupuje opremu ili pravi drugi ugovor o lizingu (lizing iz druge ruke).

13. Tipovi lizing aranžmana odn. ugovora o lizingu

U praksi lizing se može klasifikovati na osnovu različitih kriterijuma:[37]

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[37] Vidi: Kapor, Dr Vladimir and Slavko, Dr Carić, Ugovori robnog prometa*,* X Izdanje, Centar za privredni konsalting, Novi Sad, 2000, str. 265-272.

13.1. Prema svojstvima predmeta zakupa:

a) Lizing trajne potrošačke robe (rent-a-car automobila, trajnih predmeta domaćinstva);
b) Investicioni lizing ili lizing opreme (oprema, mašine itd.)
c) Lizing nekretnina i lizing pokretne imovine; i
d) Lizing iz druge ruke (lizing polovnih predmeta), u suprotnosti sa lizingom iz prve ruke (kada su predmeti zakupa nova roba)

13.2. Prema dužini ugovora o lizingu:

a) Kratkoročni ili operativni lizing kada su predmeti zakupa proizvodi višestruke upotrebe. U principu, ovaj tip ugovora o lizingu može biti raskinut u bilo kom momentu. Takođe je poznat kao servisni lizing jer davalac lizinga (obično proizvođač predmeta) ima odgovornost da održava (pruža servis za) predmet. Trajanje ugovora zavisi od dužine roka trajanja proizvoda. Prednosti operativnog lizinga su minimalne inicijalne investicije; i
b) Dugoročni ili finansijski lizing, kada su predmeti zakupa roba od vrednosti sa dugom upotrebom. U ovom slučaju zakupodavac je obavezan da isporuči opremu definisanu u ugovoru od treće strane (isporučioca ili proizvođača). Ovaj tip lizinga predviđa osnovni utvrđeni rok, koji je istog trajanja kao rok trajanja predmeta ili opreme. Stoga ovaj tip lizinga pretpostavlja potpunu amortizaciju. Sa ovim aranžmanom postoji minimalno početno plaćanje, postoje mogućnosti za Greenfield investicije, fleksibilnost ugovora (što znači da plaćanje rata može biti prilagođeno potrebama korisnika) i postoji mogućnost prenosa vlasništva po okončanju roka ugovora. Kao što smo već naveli, makedonski pravni propisi zahtevaju da finansijski, dugoročni lizing bude registrovan u posebnom registru lizinga koji funkcioniše u okviru Centralnog registra.

U teoriji se još uvek raspravlja kako napraviti jasnu razliku između kratkoročnog i dugoročnog lizinga. Član 2, paragraf (3) Zakona o lizingu definiše operativni lizing kao svaki lizing koji nije finansijski lizing.

13.3. Prema položaju zakupodavca:

a) Slučaj lizinga gde (a) proizvođač predmeta zakupa i (b) zakupodavac su odvojena lica ili lizing preko lizing kompanije;
b) Koncernski lizing gde lizing kompanija povezuje (kroz koncern) sa proizvođačima, prodavcima i finansijskim institucijama (uglavnom bankama) u jedinstvenom procesu usluga lizinga.
c) Proizvođački lizing gde je proizvođač predmeta zakupa istovremeno zakupodavac;
d) Sale-and-lease-back lizing. Ovaj tip lizinga angažuje tri strane. Proizvođač prodaje proizvod subjektu koji će kasnije postati zakupac. U odnosu sa proizvođačem subjekt ima samo ulogu kupca. Kasnije subjekt ulazi u odnos lizinga sa lizing kompanijom za gore pomenuti predmet; subjekt prenosi vlasništvo predmeta na lizing kompaniju ali nastavlja da stiče koristi od ekonomske upotrebe predmeta navedene u aranžmanu lizinga.
e) Proizvođačko-finansijski lizing, koji je veoma sličan proizvodnom lizingu. Međutim, u ovom slučaju zakupac nema direktni kontakt sa proizvođačem predmeta zakupa već sa bankom koja obezbeđuje kredit za primaoca zakupa u vezi sa odgovornostima iz ugovora o lizingu; i mnoge druge.

U praksi su najvažniji tipovi lizinga investicioni lizing i finansijski lizing.

13.4. Finansijski lizing

Finansijski lizing angažuje tri strane:

1) Zakupodavca, koji je najčešće davalac finansija; može da uzme formu specijalizovane lizing kompanije ili banke ili osiguravajućeg društva,
2) Zakupca i
3) Proizvođača predmeta zakupa.

U stvari se zaključuju dva ugovora:

(1) ugovor o zakupu između zakupodavca i zakupca, i
(2) kupoprodajnog ugovora između (a) zakupodavca (davaoca finansija) i (b) proizvođača/isporučioca predmeta zakupa.

S tim u vezi možemo da napravimo podpodelu ugovora o lizingu u vezi sa ugovornim stranama:

(1) direktni lizing u kom slučaju zakupodavac je proizvođač predmeta zakupa;
(2) indirektni lizing, u kom slučaju zakupodavac nije proizvođač/isporučilac predmeta zakupa. Rezultat ove finansijske operacije je zaključivanje dva ugovora: kupoprodajnog ugovora između zakupodavca i isporučioca predmeta zakupa i ugovora o zakupu između zakupodavca i zakupca.

Odlike finansijskog lizinga:

– Ovaj tip lizinga je srednjoročni ili (većinom) dugoročni lizing, u zavisnosti od ekonomske i tehničke upotrebne vrednosti predmeta zakupa (prema Zakonu o lizingu pokretni predmeti imaju upotrebnu vrednost od najmanje jedne godine a nepokretna imovina ima upotrebnu vrednost od najmanje dve godine);
– Ugovor o lizingu obično ne obuhvata usluge;
– Predmet zakupa ostaje vlasništvo lizing kompanije u svakom momentu i ugovor privremeno pokriva period amortizacije predmeta zakupa;
– Zakupcu se u potpunosti plaća za njegove kapitalne troškove i to je potpuno neopozivo;
– Jedino zakupac snosi investicioni rizik;
– U većini slučajeva, nakon okončanja roka ugovora vlasništvo predmeta zakupa se prenosi na zakupca.

Republika Srbija:
Prof. Dr. *Jelena Perović**

MODERNI UGOVORI

Opšti pogled

Zakon o obligacionim odnosima Republike Srbije, kao matična kodifikacija za ugovorne odnose, reguliše one ugovore koji su tipični odnosno uobičajeni u pravnom prometu, kao i one čiji značaj zahteva zakonsku regulativu. Najveći broj ugovora spada u kategoriju zakonski regulisanih - imenovanih ugovora. Tako na primer, Zakonom su regulisani ugovor o prodaji, razmeni, zakupu, zajmu, posredovanju, trgovinskom zastupanju, komisionu, itd. Pravila Zakona o obligacionim odnosima uglavnom su dispozitivne prirode, što znači da Zakon u najvećem broju slučajeva prepušta ugovornim stranama slobodu da samostalno, saglasnošću svojih volja, urede svoj ugovorni odnos, a njegova pravila primenjuju se tek ako strane drukčije nisu ugovorile. Pored ovih, dispozitivnih pravila, Zakon sadrži i određeni broj odredaba imperativnog karaktera, kojima se obezbeđuju opšti okviri pravne sigurnosti u pravnom prometu. Za određeni broj ugovora koji su na opšti način regulisani Zakonom o obligacionim odnosima, postoje i posebni zakoni koji ih detaljno regulišu (osiguranje, prevoz, zaloga, i sl.). S druge strane, određeni ugovori, zbog svoje specifične prirode, nisu obuhvaćeni Zakonom o obligacionim odnosima, već su regulisani drugim, posebnim zakonima. Tako na primer, ugovor o osnivanju preduzeća regulisan je Zakonom o privrednim društvima, ugovor o koncesijama Zakonom o koncesijama, ugovor o finansijakom lizingu Zakonom o finansijskom lizingu.

Pored imenovanih ugovora, u srpskom pravnom sistemu zaključuje se i čitav niz ugovora koji nisu zakonski regulisani - neimenovani ugovori. Postojanje neimenovanih ugovora posledica je činjenice da su život i poslovna praksa uvek bogatiji od zakona, tako da zakon teško može obuhvatiti sve ugovorne odnose koji se javljaju u pravnom prometu. Na prvom mestu, to su ugovori „pravljeni po meri“ ugovornih strana, koji nisu tipični u pravnom prometu i koji izražavaju specifične potrebe ugovornika. Njihovu sadržinu u celini određuju same ugovorne strane, bilo kombinovanjem elemenata dva ili više imenovanih ugovora, bilo određenjem potpuno nove, „originalne“ sadržine. Nadalje, to su ugovori koji jesu relativno česti u poslovnom prometu ali predstavljaju tvorevinu savremene prakse - tzv. moderni ugovori, te nisu mogli biti obuhvaćeni zakonom, s obzirom da nisu bili učestali ili nisu uopšte bili poznati u vreme donošenja zakona. Tako na primer, u srpskom pravnom sistemu, ugovori o franšinzingu, faktoringu i forfetingu predstavljaju neimenovane ugovore, a to je bio i ugovor o finansijskom lizingu sve do donošenja Zakona o finansijskom lizingu 2002. godine. U ovu

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* Originalni tekst je na lokalnom jeziku.

kategoriju neimenovanih ugovora spada i veliki broj drugih, tzv. mešovitih ugovora, koji sadrže elemente više različitih ugovora, a koji su nastali kao rezultat potreba savremenog poslovnog prometa. Neimenovani ugovori, s obzirom na princip autonomije volje, *mogu se punovažno zaključivati*, s tim što ne smeju biti u suprotnosti sa javnim poretkom, imperativnim propisima i dobrim običajima. Ukoliko ispunjavaju uslove punovažnosti, ovi ugovori uživaju sudsku zaštitu bez obzira na to što nisu zakonski regulisani.

Za razliku od imenovanih ugovora koji su zakonski regulisani, kod neimenovanih ugovora nema dispozitivnih pravila zakona koja zamenjuju ili dopunjuju volju ugovornih strana, pa ih je potrebno urediti detaljno i u tekst ugovora uneti sve ono što ugovornici smatraju značajnim za svoj ugovorni odnos. Odredbe ovih ugovora moraju se formulisati sa posebnom pažnjom, tako da volja ugovornih strana bude izražena tačno, precizno i nedvosmisleno. Kako neimenovani ugovori nisu zakonski regulisani, ugovorne strane u pogledu njihove sadržine nisu vezane imperativnim propisima koje zakon u izvesnim slučajevima predviđa za imenovane ugovore. Ipak, neimenovani ugovori, da bi bili punovažni, moraju se uvek kretati u granicama javnog poretka, opštih imperativnih propisa i dobrih običaja. U slučaju spora, na neimenovane ugovore sud, po pravilu, primenjuje opšta pravila i principe obligacionog prava, kao i zakonska pravila relevantna za druge, slične ugovore (analogija).[1]

Predmet ove Studije predstavlja analiza ugovora o franšiznigu, ugovora o faktoringu i ugovora o finansijskom lizingu u srpskom pravnom sistemu.[2]

FRANŠIZING

1) Osnovna koncepcija

Ugovor o franšizingu, kao relativno nov trgovinski ugovor proistekao iz *lex mercatoria*, u pravnom sistemu Srbije nije zakonom regulisan, te ulazi u kategoriju neimenovanih ugovora.[3] Slična je situacija i u ostalim nacionalnim pravnim sistemima[4] s obzirom da ovaj posao, nastao u SAD, doživljava značajniji razvoj tek sredinom prošlog veka i u Evropu ga uvode, pre svega, američke kompanije (Mc Donalds, Coca Cola, i sl.).[5] Pored toga, franšizing posao, zbog svoje mešovite pravne prirode, podrazumeva različite oblasti prava kao što su: ugovorno pravo, zastupanje i distribucija robe, finansijske investicije, intelektualna svojina, pravo konkurencije, pravo trgovačkih društava, fiskalno pravo, pravo zaštite potrošača

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[1] O neimenovanim ugovorima, v. S.Perović, *Obligaciono pravo*, Beograd, 1990, str.192-194; J.Perović, *Međunarodno privredno pravo,* Beograd, 2009, str.209-211.

[2] O potrebi i predlozima regulisanja novih privrednih ugovora Srpskim građanskim zakonikom, v. *Rad na izradi Građanskog zakonika Republike Srbije, Izveštaj Komisije sa otvorenim pitanjima,* Beograd, 2007, str.277-308.

[3] O pitanju zakonske regulative ugovora o franšizingu u srpskom pravnom sistemu, v. P.Šulejić, *Franšizing, lizing, faktoring – otvorena pitanja kod regulisanja ovih ugovora u Građanskom zakoniku Srbije,* pravo i privreda, br.5-8/2008, str.500. i dalje.

[4] Spisak zemalja koje su zakonom regulisale franšizing, v. u *Rad na izradi Građanskog zakonika...,* nav. delo, str.291.

[5] O franšizingu u domaćoj literaturi, v. na primer, M.Draškić, *Ugovor o franšizingu,* Beograd, 1983; M.Draškić, *Međunarodno privredno ugovorno pravo,* Beograd, 1990, str.358-365; M.Vasiljević, *Trgovinsko pravo,* Beograd, 2006, str.267-273; R.Vukadinović, *Međunarodno poslovno pravo*, Kragujevac, 2009, str.263-277; M.Parivodić, *Pravo međunarodnog franšizinga,* Beograd, 2003.

i odgovornost za štetu od proizvoda, pravo osiguranja, radno pravo, transfer tehnologije, pravo stranih ulganja, i dr, što predstavlja posebnu teškoću u pokušaju njegovog zakonskog regulisanja.[6]

Prema svojim pravnim osobinama, ugovor o franšizingu predstavlja neimenovan, dvostrano obavezan i teretan ugovor, ugovor sa trajnim izvršenjem prestacija i ugovor koji se zaključuje *intuitu personae.* U praksi, ovaj ugovor najčešće se zaključuje u pismenoj formi i može postati formalan ako ugovorne strane predvide formu kao uslov njegove punovažnosti. Prema tehnici zaključenja, ugovor o franšizingu se, po pravilu, zaključuje kao ugovor po pristupu.

U pravnom sistemu Srbije, na ugovor o franšizingu primenjuju se opšti uslovi poslovanja, opšti principi obligacionog prava, kao i pravila srpskog Zakona o obligacionim odnosima, predviđena za druge, srodne ugovore (ugovor o licenci, ugovor o prodaji, ugovor o zakupu, ugovor o trgovinskom zastupanju, i sl.).[7]

Prilikom izrade Građanskog zakonika Srbije koja je u toku, postavilo se pitanje da li je potrebno ugovor o franšizingu regulisati zakonom. U tom smislu, istaknuti su, između ostalog, i stavovi prema kojima je poželjno da ovaj ugovor bude uređen nacionalnim propisima, s obzirom da davalac franšizinga u master sporazumu, putem ugovorne klauzule o izboru merodavnog prava, najčešće nameće sopstveno pravo, što može dovesti u podređen položaj kako lokalnog davaoca, tako i korisnika franšizinga. Pored toga, ocenjeno je da pozivanje na druge slične ugovore prilikom rešavanja spora nastalog iz ugovora o franšizingu, nije poželjno rešenje s obzirom da se u tom slučaju moraju kombinovati elementi više različitih ugovora (licenca, prodaja, zastupanje, i sl.). Polazeći od toga, redaktori Građanskog zakonika pozvali su na diskusiju o ovom otvorenom pitanju i predstavili mogući Nacrt odredaba o ugovoru o franšizingu (u daljem tekstu: Nacrt).[8]

2) Pojam, sadržina i forma ugovora o franšizingu

U srpskoj pravnoj doktrini nema jedinstvene definicije ugovora o franšizingu.[9] Prema Nacrtu, ugovor o franšizingu je ugovor u kome jedna strana – davalac franšizinga, ustupa isključiva prava prodaje robe ili vršenja usluga drugoj strani – primaocu franšizinga, ovlašćujući ga da istupa pod njegovim zaštićenim imenom (firmom), da koristi njegove licence (trgovačke i robne žigove) i druge znakove razlikovanja, da koristi njegove tehničke i komercijalne metode poslovanja, znanja i iskustva (know-how), marketing, uz pružanje stručnih usluga i pomoći u obučavanju i poslovanju korisnika, a uz konstantno pravo davanja instruk-

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[6] UNIDROIT, Annex 3 au Guide sur les Accords Internationaux de Franchise Principale, www. unidroit. org.

[7] Osnovnim međunarodnim izvorima prava za ovaj ugovor smatraju se opšti uslovi poslovanja, formularni ugovori, pravni vodiči i model ugovori. Na nivou Evropske unije, Komisija je u okviru propisa o konkurenciji, usvojila Uredbu 4087/88 koja se odnosi na blok izuzetke za kategorije sporazuma o franšizingu od 30. novembra 1988. godine. Značajnu ulogu u regulisanju posla franšizinga imaju i Evropski kodeks o etici u franšizingu usvojen od strane Evropske asocijacije franšizanata 23.09.1972. godine, uslovi poslovanja međunarodne franšizing asocijacije (IFA) i ICC Model ugovora o franšizingu. U okviru UNIDROIT izrađeni su Pravni vodič za međunarodne master franšizing sporazume 1988. godine, revidiran 2007, kao i Model zakon o otkrivanju podataka u franšizing poslovanju iz 2002. godine. Pravila o franšizingu sadržana su i u Nacrtu Zajedničkog okvira (*Draft Common Frame of Reference*).

[8] *Rad na izradi Građanskog zakonika...,* nav. delo, str.292. i dalje.

[9] V. na primer, M.Draškić, nav. delo, str,358; R.Vukadinović, nav. delo, str.266; M.Vasiljević, nav. delo, str.268.

cija i nadzora nad poslovanjem korisnika, a druga ugovorna strana – primalac franšizinga, plaća za ustupljena prava i izvršene usluge odgovarajuću naknadu davaocu franšizinga (čl.1.).[10]

Kako ugovor o franšizingu u srpskom pravnom sistemu nije zakonski regulisan, njegovu sadržinu određuju ugovorne strane, na osnovu principa autonomije volje.

Nacrt predviđa da ugovor o franšizingu mora da sadrži: označenje ugovornih strana; privrednu delatnost u kojoj se posao obavlja; isključiva prava koja se ugovorom prenose; iznos, rokove i način plaćanja naknade; prava i obaveze ugovornih strana, uključujući prava i obaveze posle prestanka važnosti ugovora; odgovornost ugovornih strana za neizvršenje ili neuredno izvršenje ugovora; način rešavanja sporova, teritoriju na kojoj se koriste isključiva prava; trajanje ugovora i uslovi pod kojima ugovorne odredbe mogu biti izmenjene, proširene ili njihovo dejstvo okončano; ostale uslove koje ugovorne strane zahtevaju (čl.2.).[11]

Pored obavezne sadržine ugovora o franšizingu, Nacrt putem dipozitivne odredbe, predviđa da se ovim ugovorom može predvideti: obaveza davaoca da ne prenosi na druga lica isključiva prava koja su predmet ugovora o franšizingu radi njihovog vršenja na teritoriji primaoca, kao da se uzdržava od vršenja sopstvenih takvih aktivnosti na istoj teritoriji; obaveza primaoca da ne konkuriše davaocu u korišćenju prenetih prava van teritorije na kojoj se prostire dejstvo ugovora o franšizingu; obaveza primaoca da odbije prijem analognih prava onima koja je dobio ugovorom o franšizingu, od strane konkurenata (potencijalnih konkurenata) davaoca franšizinga; obaveza primaoca da se pridržava normi za formiranje cena datih od strane davaoca, pod uslovom da između njih ne postoji dogovorno ponašanje u pogledu stvarne primene tih cena; obaveza primaoca da u saglasnosti sa davaocem odredi mesto (prostorije, lokale) u kojima se ostvaruju isključiva prava predviđena ugovorom o franšizingu, kao i njihov unutrašnji i spoljni izgled; obaveza primaoca da prodaje robu ili vrši usluge koje su predmet franšizinga samo u određenim ugovorenim prostorijama, opremljenim na način predviđen ugovorom.

Ipak, ova ograničenja mogu biti proglašena bez dejstva na zahtev antimonopolskog organa ili drugog zainteresovanog lica, ako zbog ponašanja na tržištu i ekonomskog položaja ugovornih strana protivureče antimonopolskom zakonodavstvu.

S druge strane, Nacrt imperativnom odredbom predviđa da se smatraju ništavim ugovorna ograničenja prema kojima: davalac franšizinga ima pravo određivanja cene prodaje robe od strane primaoca ili cenu rada (usluga) koje iskazuje primalac, ili ustanovljava gornju ili donju granicu tih cena; primalac ima pravo da prodaje robu ili vrši usluge isključivo u određenoj kategoriji kupaca, ili isključivo kupcima na određenoj teriotriji.[12]

Odredbe ugovora o franšizingu formulišu se u zavisnosti od vrste ugovora o franšizingu koji se u konkretnom slučaju zaključuje. U teoriji i praksi uporednog prava postoje razli-

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[10] Upor. sa definicijom ugovora o franšizingu u Drafr Common Frame of Reference, prema kojoj: „*This Chapter applies to contracts under which one party, the franchisor, grants the other party, the franchisee, in exchange for remuneration, the right to conduct a business (franchise business) within the franchisor's network for the purposes of supplying certain products on the franchisee's behalf and in the franchisee's name, and under which the franchisee has the right and the obligation to use the franchisor's tradename or trade mark or other intellectual property rights, know-how and business method.*" (čl.4:101)

[11] Gotovo identično rešenje predviđeno je UNIDROIT Model zakonom o otkrivanju podataka u franšizing poslovanju.

[12] Čl.9. Nacrta.

čite klasifikacije ovog posla.[13] Tako na primer, u američkoj praksi razlikuju se tri vrste franšizing posla: jedinstveni ili direktni, višestruki ili složeni i master franšizing sporazum. Posebnu vrstu prestavlja franšizing o zajedničkom poduhvatu – *joint venture franchising.* U pravu Evropske unije čini se distinkcija između: industrijski ili proizvodni franšizing, distributivni ili robni, kao i uslužni franšizing.[14]

S obzirom da nije zakonski regulisan, ugovor o franšizingu može postati formalan ugovor samo onda kad je to rezultat volje ugovornih strana. Drugim rečima, ugovorne strane mogu predvideti zaključenje ovog ugovora u određenoj formi, bilo tako da ta forma predstavlja uslov njegove punovažnosti (forma *ad solemnitatem*), bilo tako da ona predstavlja dokazno sredstvo postojanja i sadržine ugovora ali ne i uslov njegove punovažnosti. Ipak, ugovori o franšizingu najčešće se zaključuju u pismenoj formi[15], pre svega zbog potrebe dokazivanja njihove sadržine. Pored toga, kako je reč o trajnom i složenom ugovornom odnosu za koji ne postoje dopunske zakonske odredbe, prava i obaveze iz tog odnosa treba da budu precizno i detaljno ugovorom predviđena, radi izbegavanja spornih situacija koje predstavljaju osnov za različita tumačenja i po pravilu dovode do spora. Najzad, značajan razlog zaključenja ugovora o franšizingu u pismenoj formi ogleda se i u činjenici da oni najčešće sadrže arbitražnu klauzulu za čiju se punovažnost u najvećem broju nacionalnih zakona i međunarodnih konvencija zahteva ispunjenje pismene forme. Nacrt predviđa obaveznu pismenu formu ugovora o franšizingu (čl.3.).

Najčešće, davaoci franšizinga zaključuju sa svim svojim partnerima iz jednog sistema franšizinga standardne ugovore, koji su unapred pripremljeni u vidu formulara i koji po tehnici zaključenja predstavljaju ugovore po pristupu.[16] Prema tome, ugovor o franšizingu po pravilu se zaključuje kao formularni, tipski ugovor, sastavljen od strane jedne ugovorne strane. To znači da druga strana pristupa unapred definisanim elementima i uslovima ugovora, što za posledicu ima primenu opšteg pravila Zakona o obligacionim odnosima, prema kome u takvom slučaju nejasne ugovorne odredbe tumače u korist strane koja je ugovoru pristupila (pravilo *contra preferentem*).[17] S druge strane, ugovori ove vrste najčešće upućuju na opšte uslove. U tom pogledu, Zakon o obligacionim odnosima predviđa opšte pravilo prema kome opšti uslovi obavezuju ugovornu stranu ako su joj bili poznati u času zaključenja ugovora.[18] Reč je o oborivoj pretpostavci i strana koja tvrdi da joj opšti uslovi nisu bili poznati, mora to i dokazati. U kontekstu opštih uslova kod ugovora o franšizingu, potrebno je obratiti posebnu pažnju na mogućnost suda da poništi pojedine odredbe opštih uslova koje su ‘’ protivne samom cilju ugovora ili dobrim poslovnim običajima ...” ili da odbije primenu onih odredbi koje ‘’lišavaju drugu stranu prava da ističe prigovore, ili na osnovu kojih ona gubi prava iz ugovora ili gubi rokove, ili koje su inače nepravične ili preterano stroge prema njoj’’[19] . U slučaju poništenja pojedine odredbe ugovora, neće doći do poništenja celog ugovora, ako on može opstati bez poništene odredbe, i ako ona nije bila ni uslov ugovora ni odlučujući motiv zbog koga je ugovor zaključen. Ipak, čak i u slučaju kad je poništena odredba bila uslov ili odlučujući motiv zaključenja ugovora, ugovor će ostati

13 V. M.Vasiljević, nav. delo, str.269. i dalje.

14 Više, R.Vukadinović, nav. delo, str.263. i dalje.

15 Više, M.Draškić, nav. delo, str.359.

16 Više, M.Draškić, nav. delo, str.359. i dalje.

17 Čl..100.

18 Čl.142. st..3.

19 Zakon o obligacionim odnosima, čl.143.

na snazi ukoliko je do poništenja te odredbe došlo upravo radi oslobađanja ugovora od te odredbe i njegovog daljeg važenja bez nje.[20]

3) Trajanje i obnavljanje ugovora o franšizingu

Ugovor o franšizingu se, kao ugovor sa trajnim izvršenjem prestacija, zaključuje na duži vremenski period, sa određenim ili neodređenim vremenom trajanja.

Prema Nacrtu, trajanje ugovora o franšizingu određuju ugovorne strane zavisno od potreba distribucije robe ili usluga koji su predmet ugovora. Ako trajanje ugovora nije određeno, ile prelazi rok od deset godina, svaka strana ima pravo da raskine ugovor sa otkaznim rokom od šest meseci, ako ugovorom nije predviđen duži otkazni rok. Ako po isteku ugovorenog roka nije predviđeno produženje ugovora, a ugovorne strane nastave da ispunjavaju ugovorne obaveze, ugovor se prećutno produžava svaki put za period od dve godine. Prestankom ugovora istekom ugovorenog roka nastaje obaveza primaoca da sva ustupljena sredstva vrati davaocu franšizinga, kao i obaveza da prestane da u pravnom prometu u svojoj firmi koristi reči, elemente, žigove i sve znakove razlikovanja koje je po osnovu ugovora o franšizingu dobio od davaoca franšizinga (čl.11.).

U pogledu obnavljanja ugovora o franšizingu, Nacrt predviđa da primalac franšizinga, pošto je ispunio svoje ugovorne obaveze, po isteku roka trajanja ugovora, ima pravo da zaključi ugovor na novi rok i pod istim uslovima. Davalac franšizinga može odbiti da zaključi ugovor o franšizingu na novi rok pod uslovom da u roku od tri godine od dana isteka roka datog ugovora on neće zaključivati sa drugim licima analogne ugovore o franšizingu čije će se dejstvo protezati na teritoriju na kojoj je dejstvovao istekli ugovor. U slučaju da do isteka trogodišnjeg perioda davalac odluči da prenese na drugoga prava koja su bila predmet isteklog ugovora, on je u obavezi da predloži primaocu da zaključi novi ugovor ili mu naknadi pretrpljeni gubitak. Uslovi pod kojima se zaključuje novi ugovor ne mogu biti nepovoljniji za primaoca od uslova iz isteklog ugovora (čl.12.).

4) Finansijska pitanja

Osnovna obaveza primaoca franšizinga ogleda se u plaćanju naknade za ustupljena prava i usluge. Ugovorne strane, na osnovu principa autonomije volje, određuju vrstu i načain naknade. U praksi se najčešće ugovara početna naknada i naknada koja zavisi od obima prometa. U ugovorima o franšizingu usluga, kao i ugovora između trgovaca na veliko i trgovaca na malo, kad je reč o franšizingu robe, po pravilu se utvrđuje da je primalac franšizinga dužan da plati naknadu koja zavisi od obima prometa (*royalty fee*). Pored toga, predviđa se i plaćanje jedne početne ili pristupne svote (*initial fee*), kao i najmanji iznos koji primalac franšizinga mora da plati u slučaju obračunavanja naknade prema prometu. Naknada može biti uključuena u prodajnu cenu proizvoda koje davlac prodaje primaocu franšizinga.[21] U pogledu obaveze primaoca franšizinga na plaćanja naknade Nacrt predviđa da je primalac dužan da plaća naknadu za ustupljena prava, čija se visina utvrđuje, u principu, prema procentu od ostvarene dobiti ili prometa (čl.8.).

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[20] Pravila o delimičnoj ništavosti, čl.105. Zakona o obligacionim odnosima.

[21] M.Draškić, nav. delo, str.362.

5) Obaveze davaoca franšizinga

Osnovna obaveza davaoca franšizinga iz ugovora o franšizingu jeste da primaocu franšizinga ustupi isključivo pravo prodaje proizvoda ili grupe proizvoda ili obavljanje usluga i da ustupi pravo upotrebe robnog ili uslužnog žiga i drugih prava intelektualne svojine u skladu sa ugovorenim uslovima. Ova obaveza podrazumeva da davalac franšizinga ustupljeno pravo ne daje drugim licima na ugovorenom području, da ne otvara poslovne jedinice za prodaju robe ili usluga na ugovorenom području, da ne isporučuje robu ili usluge koje su predmet franšizinga drugim trgovcima na ugovorenom području. U druge oblike prava intelektualne svojine koje davalac franšizinga može dati primaocu ulazi pravo upotrebe drugih znakova razlikovanja robe i usluga, kao što su simboli, spoljna oprema robe, znakovi geografskog porekla, industrijsko oblikovanje, dizajn objekta, poslovnog prostora i unutrašnje uređenje i oprema. Prava intelektualne svojine moraju biti slobodna od zahteva ili pretenzija trećih lica. Davalac franšizinga je obavezan i da ustupi određena znanja i iskustva, koja se, pre svega, odnose na know-how. Druga grupa obaveza odnosi se na usluge čije davanje ima za cilj da primaocu franšize omogući da lakše počne i da efikasnije vodi poslove predviđene ugovorom o franšizingu (pomoć u izboru materijala i načina opremanja radnji u cilju ostvarenja uniformnosti franšizing sistema, pomoć u nalaženju odgovarajućih radnji, obuka kadrova, pomoć u upravljanju preduzećem, dostavljanje poslovnih informacija i inovacija i komercijalna i tehnička pomoć, i sl.). Najzad, davalac franšizinga mora garantovati primaocu da će ga snabdevati redovno i u dovoljnim količinama. S druge strane, davalac franšizinga ima pravo kontrole nad poslovanjem primaoca i pravo da bude obaveštavan o svim pitanjima koja se tiču kvaliteta i napretka franšizing posla. Davalac franšizinga ima pravo i da od primaoca zahteva da prodaje samo njegovu robu, pri čemu može uticati na cene ali nema pravo i da ih direktno ili indirektno fiksira jer bi to bilou suprotnosti sa čl.81(1) Ugovora o osnivanju Evropske zajednice.[22]

U tom smislu, u Nacrtu su posebnom odredbom predviđene osnovne obaveze davaoca franšizinga. Prema Nacrtu, davalac franšizinga je dužan da primaocu, u cilju isključive prodaje robe ili vršenja usluga, omogući korišćenje svojih isključivih prava: pravo upotrebe firme, pravo korišćenja robnog ili uslužnog žiga, modela i drugih znakova razlikovanja, metoda marketinga i svih ostalih znanja i iskustava u promociji i prodaji roba i usluga. Davalac franšizinga je dužan da u svrhu realizacije navedenog posla obezbedi stalno informisanje primaoca o svim činjenicama koje omogućavaju uspešno poslovanje, da sprovodi obuku i usvršavanje osoblja primaoca u preuzimanju i vođenju posla, da pruži pomoć primaocu u slučaju spora oko registracije i licenciranja žiga. Davalac franšizinga je dužan da vrši nadzor u funkciji zaštite žiga, kao i kontrolu načina njegove upotrebe i da zaštiti preneta prava na primaoca u slučaju zahteva trećih lica (čl.6.). Davalac franšizinga odgovara za postojanje i sadžinu prenetih prava, kao i za informacije date primaocu u cilju obavljanja programa prenetih prava. U slučaju povrede ove obaveze, primalac lizinga ima pravo da raskine ugovor ili da umanji nakandu koju duguje davaocu, u srazmeri koju utvrdi nezavisan ekpert (čl.7.). Najzad, davalac franšizinga odgovara subsidijerno po zahtevima trećih lica prema primaocu u slučaju nesaobraznosti svojstava robe ili usluga koje na osnovu ugovora o franšizingu primlac prodaje trećim licima. Po zahtevima od strane trećih lica prema primaocu franšizinga, a u vezi robe koju je proizveo davalac franšizinga, davalac odgovara solidarno sa primaocem (čl.10.).

Na sličan način, Nacrt Zajedničkog okvira predviđa obaveze davaoca frnšizinga vezane za: prenos prava intelektualne svojine (imperativna odredba), ustupanje know-how (imperativna odredba), pomoć primaocu franšize u vidu trening-kurseva, rukovođenja i davanja

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[22] R.Vukadinović, nav. delo, str.271.

saveta i sl, snabdevanje primaoca proizvodima (imperativna odredba), obaveštavanje primaoca tokom ispunjenja ugovora, obaveštenje primaoca o smanjenoj mogućnosti snabdevanja (imperativna odredba), kao i reputaciju mreže i reklamiranje (čl.4:201–4:207).

6) Obaveze primaoca franšizinga

Obaveze primaoca franšizinga mogu se grupisati u one koje se odnose na plaćanje naknade i one koje se odnose na način korišćenja franšize.

Osnovna obaveza primoaca franšizinga sastoji se u plaćanju naknade za ustupljena prava davaocu franšizinga i analizirana je u tački 4 dela ove Studije posvećenog franšizingu.

U obaveze primaoca lizinga vezane način korišćenja franšize, po pravilu, ulaze sledeće obaveze:

1) da će prodavati isključivo ugovorenu robu davaoca franšizinga u ugovorenoj poslovnoj jedinici (prostoru);
2) da neće obavljati sličnu preivrednu delatnost izvan ugovorenog područja za vreme trajanja ugovora ili nakon prestanka ugovora u određenom roku;
3) da će uložiti nabolje napore pri prodaji robe ili obavljanju usluga koje su predmet franšizinga;
4) da će održavati objekat, poslovni prostor, opremu i sredstva u skladu sa ugovorom i standardima;
5) da će prodavati robu koju je izradio samo franšizer ili treće lice koje je on odredio, a kad to zbog prirode nije praktično, da primeni objektivne standarde kvaliteta;
6) da se ni direktno ni indirektno ne angažuje na sličnim poslovima na teritoriji koja je konkurentna članovima franšizing mreže;
7) da krajnjim potrošačima, drugim davaocima franšizinga i preprodavcima preko drugih kanala distribucije prodaje samo robu koju mu je isporučio davalac franšizinga ili uz njegovu saglasnost;
8) da čuva kao poslovnu tajnu sve informacije koje mu davalac franšizinga prenese;
9) da štiti know-how ili da zadrži zajednički identitet i reputaciju franšizing mreže, da prodaje samo robu koja zadovoljava standarde kvaliteta koje je odredio davalac franšizinga,
10) da sva ustupljena prava koristi samo u ugovorenoj poslovnoj jedinici, prema propisanim standardima i na ugovoren način;
11) da koristi know-how samo u svrhe eksploatacije franšize;
12) da informiše davaoca o povredama prava industrijske ili intelektualne svojine, da preduzme akcije protiv prekršilaca ili da u tome pomogne davaocu;
13) da obaveštava davaoca o svim stečenim iskustvima u korišćenju franšize.

Pored navedenih, primalac franšizinga može preuzeti i druge obaveze predviđene ugovorom.[23]

U pogledu obaveza primaoca franšizinga, Nacrt na prvom mestu predviđa obavezu plaćanja naknade za ustupljena prava, čija se visina utvrđuje, u principu, prema procentu od ostvarene dobiti ili prometa. Nadalje, predviđa se da ugovorom o franšizingu mogu biti utvrđene i druge obaveze primaoca, kao što je na primer nabavka robe od strane davaoca ili lica koje on odredi, primena u poslovanju svih uputstava i standarda poslovanja i tehnoloških

[23] R.Vukadinović, nav. delo, str.271. i dalje.

postupaka u proizvodnji odnosno pružanju usluga, obaveza određenog investiranja, spoljnog jednoobraznog uređenja sedišta, i drugo (čl.8.). Pored toga, primalac franšizinga je u obavezi da ne otkriva trećim licima poverljive informacije i poslovne tajne davaoca franšizinga do kojih je došao za vreme trajanja ugovora. Ova obaveza postoji i posle prestanka ugovora o franšizingu (čl.17.).

Nacrtom Zajedničkog okvira takođe je predviđena obaveza primaoca franšizinga na plaćanje naknade, kao i obaveze vezane za obaveštavanje davaoca franšizinga tokom ispunjenja ugovora, poslovni metod i instrukcije i kontrolu od strane davaoca franšizinga (čl.4:301-4:304).

7) Pod-franšizing

U pogledu pod-franšizinga, Nacrt predviđa rešenje prema kome ugovorom o franšizingu može biti predviđeno pravo primaoca franšizinga da isključiva prava, ili deo tih prava, koja su na njega preneta ugovorom o franšizingu, prenese na drugo lice uz saglasnost davaoca franšizinga. Ugovorom može biti predviđena obaveza primaoca da izvši prenos tih prava na određeno lice i na određeno vreme. Ugovor o pod-franšizingu ne može biti zaključen na rok koji je duži od roka na koji je zaključen ugovor o franšizingu. Ništavost ugovora o franšizingu povlači i ništavost ugovora o pod-frašizingu. Primalac franšizinga snosi subsidijernu dgovornost za štetu pričinjenu davaocu franšizinga radnjama korisnika pod-franšizinga, ako ugovorom nije drukčije predviđeno. Na ugovor o pod-franšizingu primenjuju se pravila Nacrta za ugovor o franšizingu, ako iz prirode pod-franšizinga ne proizilazi nešto drugo (čl.5.).

8) Reklamiranje i kontrola reklamiranja

U pogledu obaveze reklamiranja iz ugovora o franšizingu, u srpskom pravnom sistemu nema posebnih propisa, uključujući i Nacrt koji ne sadrži posebnu odredbu o tome. Ipak, ugovori o franšizingu koji se u praksi zaključuju redovno sadrže klauzulu kojom se ovo pitanje reguliše. Ovom klauzulom najčešće se predviđa da je davalac franšizinga obavezan da uloži nabolje napore u pravcu promocije i očuvanja ugleda franšizing mreže. On je, između ostalog, obavezan da dizajnira i uskladi odgovarajuće reklamne kampanje u cilju promocije franšizing mreže. Aktivnosti vezane za promociju i očuvanje ugleda franšizing mreže obavljaju se o trošku davaoca franšizinga.[24]

9) Snabdevanje opremom, proizvodima i uslugama

Obaveza snabdevanja opremom, proizvodima i uslugama nije predviđena posebnim propisima u srpskom pravnom sistemu, te se ona ugovorom predviđa na osnovu principa autonomije volje. U tom smislu, široko je prihvaćeno pravilo prema kome, u slučaju kad je primalac franšizinga obavezan da pribavlja proizvode of davaoca franšizinga ili od dobavljača koga je davalac odredio, davalac franšizinga obavezan je da obezbedi snabdevanje primaoca naručenim proizvodima u razumnom roku. Ovo pravilo primenjuje se i u slučaju kad primalac franšizinga nije na osnovu ugovora obavezan da pribavlja proizvode od davaoca ili snabdevača koga on odredi ali je faktički upućen na takvo snabdevanje.[25] U principu, dava-

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[24] V. Nacrt Zajedničkog okvira čl.4:207.

[25] V. Nacrt Zajedničkog okvira čl.4:204.

lac franšizinga je, kao dobavljač, obavezan da primaoca snabdeva u dovoljnim količinama i redovno, a povreda ove obaveze podleže opštim pravilima obligacionog prava. U pogledu ove obaveze davaoca franšizinga, u Nacrtu je predviđeno da davalac franšizinga odgovara subsidijerno po zahtevima trećih lica prema primaocu u slučaju nesaobraznosti robe ili usluga koje na osnovu ugovora o franšizingu primlac prodaje trećim licima. Po zahtevima od strane trećih lica prema primaocu franšizinga, a u vezi robe koju je proizveo davalac franšizinga, davalac odgovara solidarno sa primaocem (čl.10.). Ukoliko je ugovorom o franšizingu predviđena nabavka robe, uz ugovor se, po pravilu, prilažu opšti uslovi isporuke i plaćanja robe koji predstavljaju sastavni deo ugovora i u kojima su posebno predviđene odredbe o obazbeđenju plaćanja i posledicama docnje.

10) Prava intelektualne svojine

Jedna od osnovnih obaveza davaoca franšizinga jeste da primaocu ustupi pravo upotrebe robnog ili uslužnog žiga i drugih prava intelektualne svojine u skladu sa ugovorenim uslovima. U druge oblike prava intelektualne svojine koje davalac franšizinga može dati primaocu ulazi pravo upotrebe drugih znakova razlikovanja robe i usluga, kao što su simboli, spoljna oprema robe, znakovi geografskog porekla, industrijsko oblikovanje, dizajn objekta, poslovnog prostora i unutrašnje uređenje i oprema. Davalalc franšizinga mora ustupiti primaocu pravo upotrebe prava intelektualne svojine u meri koja je neophodna za obavljanje franšizing posla od strane primaoca franšizinga. U tom smislu, davalac mora nastojati da obezbedi neometanu i kontinuiranu upotrebu tih prava od strane primaoca, što znači da prava intelektualne svojine moraju biti slobodna od zahteva ili pretenzija trećih lica. U okviru opšte odredbe o odgovornosti davaoca franšizinga, Nacrt predviđa da je davalac odgovoran za postojanje i sadržinu prava prenetih primaocu franšizinga, kao i za informacije date primaocu u cilju obavljanja programa prenetih prava, a u slučaju povrede ove obaveze, primlac franšizinga ima pravo da raskine ugovor ili da umanji naknadu koju duguje davaocu, u visini utvrđenoj od strane nezavisnog eksperta (čl.7.).

11) Know-how i poslovna tajna

Davalac franšizinga je obavezan da primaocu franšizinga ustupi određena znanja i iskustva (know-how), neophodna za obavljanje franšizing posla od strane primaoca franšizinga.[26] Ta obaveza ne uključuje samo know-how u tehničkoj oblasti (tajni metodi proizvodnje, upotreba recepata, formula, specifikacija, postupaka i metoda proizvodnje), već i tzv. Komercijalni know-how, u koji ulaze znanja o metodima pridobijanja potrošača, o organizaciji plasmana i prometa, kao i znanja o osnovima finansiranja i kalkulacije, u čije okvire spadaju i metodi obrazovanja trgovačkih saradnika.[27]

Obaveza primaoca franšizinga da čuva informacije i podatke o davaocu franšizinga i njegovom poslovanju kao poverljive, tj. kao poslovnu tajnu, redovno se predviđa u ugovrima o franšizingu (*confidentiality clause*). Ipak, potrebno je naglasiti da u srpskom pravnom sistemu ova obaveza postoji i onda kad nije izričito ugovorena, s obzirom da proističe iz opštih načela Zakona o obligacionim odnosima, a pre svega načela savesnosti i poštenja. Obaveza čuvanja poslovne tajne posebno je predviđena i Nacrtom, prema kome je primalac franšizinga u obavezi da ne otkriva trećim licima poverljive informacije i poslovne tajne davaoca

[26] V. Nacrt Zajedničkog okvira čl.4:202.

[27] M.Draškić, nav. delo, str.360.

franšizinga do kojih je došao za vreme trajanja ugovora. Ova obaveza postoji i posle prestanka ugovora o franšizingu (čl.17.).

12) Pravna sredstva u slučaju neispunjenja ugovorne obaveze

Do povrede ugovora dolazi u slučaju neispunjenja ugovorne obaveze, kao i u slučaju kad je obaveza ispunjena ali ne onako kako je to ugovorom bilo previđeno. Srpski Zakon o obligacionim odnosima ne poznaje koncept "bitne povrede ugovora" predviđen Bečkom konvencijom (CISG)[28], kao ni "bitno neizvršenje" usvojeno u UNIDROIT Principima i Principima evropskog ugovornog prava. Umesto toga, Zakon, poput većine evropskih građanskih zakonika, predviđa pravilo o neispunjenju ugovorne obaveze kao opšti osnov povrede ugovora. Prema opštem pravilu Zakona o obligacionim odnosima o raskidu ugovora zbog neispunjenja, kad jedna ugovorna strana ne ispuni svoju obavezu, druga strana može, ako drukčije nije predviđeno, zahtevati ispunjenje obaveza ili, pod uslovima predviđenim Zakonom, raskinuti ugovor prostom izjavom, ako raskid ne nastupa po samom zakonu, a u svakom slučaju ima pravo na naknadu štete (čl.124.). U okvirima ovog opšteg pravila, pravne posledice povrede ugovora o franšizingu kao ugovora koji nije zakonski regulisan, zavisiće, pre svega, od onoga što su strane ugovorom predvidele u skladu sa principom autonomije volje. U slučaju da to ugovorom nije predviđeno, srpski sudovi, ukoliko se na ugovor primenjuje srpsko pravo, primeniće opšte principe i pravila Zakona o obligacionim odnosima, kao i pravila tog Zakona relevantna za druge, slične ugovore.

Srpsko pravo, kao i najveći broj nacionalnih pravnih sistema i uniformnih pravila ugovornog prava, prihvata princip vansudskog raskida ugovora zbog neispunjenja. U tom smislu, opšte pravilo je da se ugovor raskida prostom izjavom o raskidu, koju je poveriolac obavezan učiniti dužniku bez odlaganja.[29] Izjava o raskidu, u principu, ne mora ispunjavati bilo kakave zahteve forme i može biti učinjena kako u pismenoj formi tako i usmenim putem, pri čemu je kod ugovora o franšizingu, kao trajnog i složenog ugovornog odnosa, radi pravne sigurnosti preporučljivo da bude učinjena u pismenoj formi. Ono što je u okviru ovog pitanja bitno jeste da je namera o raskidu izražena na siguran način i da je druga strana o toj nameri obaveštena. Trenutak u kome izjava o raskidu počinje da proizvodi pravna dejastva, Zakon o obligacionim odnosima, u skladu sa usvojenom teorijom prijema[30], vezuje za trenutak u kome je dužnik primio saopštenje o raskidu ugovora.

Zakon o obligacionim odnosima dozvoljava raskid ugovora po samom zakonu (*ipso facto, de plain droit*) samo onda kad ispunjenje u roku predstavlja bitan element ugovora (fiksni ugovor).[31] Ukoliko ispunjenje u roku nije bitan element ugovora, poverilac mora ostaviti dužniku naknadni primeren rok za ispunjenje obaveze,[32] osim ako iz dužnikovog držanja ne proizilazi da on svoju obavezu neće ispuniti ni u naknadnom roku.[33]

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[28] UN Convention on Contracts for the International Sale of Goods. Komparativnu analizu uniformnih pravila o raskidu ugovora s jedne i relevantnih pravila srpskog Code on Obligation, see, J.Perović, *Fundamental Breach of Contract, Intenrational Sale of Goods*, Beograd, 2004.

[29] Izraz "bez odlaganja" tumači se tako da, poverilac koji namerava da raskine ugovor, mora o tome obavestitti dužnika u najkraćem mogućem roku, a u skladu sa okolnostima slučaja i onim što je uobičajeno u konkretnom domenu trgovačke struke. Više, J.Perović, *Fundamental Breach of contract….,* nav. delo, str.322-323.

[30] V. čl.31. Zakona.

[31] Čl.125.

[32] Čl.126.

[33] Čl.127.

Bez obzira da li zahteva ispunjenje obaveze ili raskida ugovor o franšizingu, poverilac ima pravo na naknadu štete, u smislu opštih pravila Zakona o obligacionim odnosima o ugovornoj odgovornosti.

13) Prestanak ugovornog odnosa i pravne posledice prestanka

Prestanak ugovora o franšizingu podleže opštim pravilima Zakona o obligacionim odnosima o prestanku ugovora. Pored opštih osnova prestanka ugovora, specifičnosti ugovora o franšizingu nalažu i postojanje određenih posebnih pravila o prestanku ovog ugovora. U tom smislu, Nacrt predviđa pravila o prestanku ugovora o franšizingu usled isteka ugovorenog roka, usled prestanka isključivih prava davaoca franšizinga i usled prinudne likvidacije ili stečaja.

U pogledu prestanka ugovora usled isteka ugovorenog trajanja, Nacrt predviđa da trajanje ugovora o franšizingu određuju ugovorne strane zavisno od potreba distribucije robe ili usluga koji su predmet ugovora. Ako trajanje ugovora nije određeno, ile prelazi rok od deset godina, svaka strana ima pravo da raskine ugovor sa otkaznim rokom od šest meseci, ako ugovorom nije predviđen duži otkazni rok. Ako po isteku ugovorenog roka nije predviđeno produženje ugovora, a ugovorne strane nastave da ispunjavaju ugovorne obaveze, ugovor se prećutno produžava svaki put za period od dve godine. Prestankom ugovora istekom ugovorenog roka nastaje obaveza primaoca da sva ustupljena sredstva vrati davaocu franšizinga, kao i obaveza da prestane da u pravnom prometu u svojoj firmi koristi reči, elemente, žigove i sve znakove razlikovanja koje je po osnovu ugovora o franšizingu dobio od davaoca franšizinga (čl.11.).

Kad je reč o prestanku isključivih prava davaoca, Nacrt predviđa da u slučaju prestanka prava na firmu i druga trgovinska obeležja, bez zamene novim, ugovor o franšizingu prestaje da proizvodi dejstva. Ako dođe do promene firme ili drugih trgovačkih obeležja davaoca, ugovor o franšizingu dejstvuje u odnosu na izmenjenju firmu ili druga obeležja, ukoliko primalac ne zahteva raskid ugovora i naknadu gubitaka. U slučaju produženja ugovora, primalac može zahtevati stazmerno umanjenje naknade koja pripada davaocu (čl.13.).

Najzad, prema Nacrtu, ugovor o franšizingu prestaje da proizvodi dejstva u slučaju prinudne likvidacije ili bankrotstva davaoca ili primaoca franšizinga (čl.14.).

Posebno pravilo Nacrta odnosi se na slučaj promene nosioca isključivih prava. Prema njemu, prelaz na drugo lice bilo kog isključivog prava koje je preneto ugovorom o franšizingu na primaoca ne dovodi do izmena ili prestanka ugovora o franšizingu. U slučaju smrti davaoca franšizinga, njegova prava i obaveze iz ugovora o franšizingu prelaze na naslednike pod uslovom da se oni prihvate nasledstva u roku od šest meseci, a u protivnom, ugovor o franšizingu prestaje da proizvodi dejstva.

O pravnim posledicama prestanka ugovora o franšizingu u srpskom pravnom sistemu nema posebnih propisa, pa se na ovo pitanje primenjuju opšta pravila Zakona o obligacionim odnosima.

14) Ostale uobičajene klauzule

Biće predmet diskusije.

FAKTORING

1) Osnovna koncepcija

A) Pojam faktoringa

Ugovor o faktoringu, kao moderan ugovor poslovnog prometa proistekao iz *lex mercatoria*, u srpskom pravnom sistemu nije regulisan zakonom. Prilikom izrade Građanskog zakonika Srbije koja je u toku, postavilo se pitanje da li je potrebno ugovor o franšizingu regulisati zakonom, a redaktori Građanskog zakonika predstavili su mogući Nacrt odredaba o ugovoru o faktoringu (u daljem tekstu: Nacrt).[34]

U izvore prava za ovaj ugovor ulaze opšti uslovi poslovanja faktoring kompanija, tipski i formularni ugovori, trgovački običaji, kao i opšta pravila ugovornog prava. Na međunarodnom planu, faktoring je regulisan UNIDROIT Konvencijom o međunarodnom faktoringu iz 1988. godine.

Prema svojim pravnim osobinama, ugovor o faktorinu predstavlja neimenovan, dvostrano obavezan i teretan ugovor, ugovor sa trajnim izvršenjem prestacija i ugovor koji se zaključuje *intuitu personae.* U praksi, ovaj ugovor najčešće se zaključuje u pismenoj formi i može postati formalan ako ugovorne strane predvide formu kao uslov njegove punovažnosti. Prema tehnici zaključenja, ugovor o franšizingu se, po pravilu, zaključuje kao ugovor po pristupu. Ugovor o faktoringu je mešovite pravne prirode (elementi ugovora o cesiji, ugovora o kreditu, ugovora o garanciji, ugovora o delu, i sl.). [35]

U Nacrtu se ističe da teškoće definisanja ugovora o faktoringu nastaju zbog različitih vrsta ovog posla, a naročito zbog toga što faktor može preuzeti obavezu da naplati od dužnika preneto potraživanje bilo u slučaju kad ga otkupljuje – tzv. pravi faktoring, bilo u slučaju kad samo preuzima obavezu da klijentu garantuje naplatu – tzv. nepravi faktoring.[36] Iz tih razloga, u Nacrtu su alternativno predložene tri moguće definicije ugovora o faktoringu. Alternativa 2 Nacrta koja prihvata rešenje UNIDROIT Konvencije o međunarodnom faktoringu sadrži sledeće određenje: "Ugovorom o faktoringu jedna strana, koja je isporučilac robe ili vršilac usluga (klijent) obavezuje se da ustupi drugoj strani (faktoru) potraživanja već nastala ili buduća prema trećem licu iz ugovora o prodaji robe ili vršenja usluga, ili iz izvršenog rada, a faktor se obavezuje da uz naknadu i naplatu troškova izvrši najmanje dve od sledećih obaveza: 1. da avansno finansira klijenta (isplata potraživanja pre doseplosti, uključujući zajam i avansne isplate u vezi tih potraživanja); 2. da naplati preneta potraživanja; 3. da garantuje klijentu naplatu tih potraživanja (preuzima rizik naplate potraživanja u slučaju nelikvidnosti dužnika); 4. da vodi evidenciju o potraživanjima klijenta." (čl.1, alternativa 2. Nacrta).

B) Sardžina i forma ugovora o faktoringu

Prema Nacrtu, ugovor o faktoringu, po pretnjom ništavosti, sadrži: imena i sedišta faktora i klijenta; potraživanja koja se prenose, podatke o momentu dospelosti potraživanja, načinu, vremenu i mestu plaćanja; iznos i način obračuna naknade koju faktor naplaćuje za svoje usluge. Pored obaveznih elemenata, nacrt *exempli causa* navodi da ugovor o faktorinu

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[34] *Rad na izradi Građanskog zakonika...,* nav. delo, str.303-307.

[35] Više o ugovoru o faktoringu u srpskoj pravnoj literaturi, M.Vasiljević, *Trgovinsko pravo*, Beograd, 2006, str.290-293; R.Vukadinović, *Međunarodno poslovno pravo*, Karagujevac, 2009, str.414-427.

[36] *Rad na izradi Građanskog zakonika...,* nav. delo, str.303.

može sadržati i elemente o: dužniku iz osnovnog posla, instrumentima obezbeđenja, merodavnom pravu, načinu rešavanja sporova iz ugovora i druge slemente o kojima ugovorne strane postignu saglasnost (čl.2.). Nacrt zahteva pismenu formu kao uslov punovažnosti ugovora o faktoringu (čl.3.).

C) Predmet ugovora o faktoringu

U smislu opštih pravila obligacionog prava o punovažnosti ugovora, predmet ugovora o faktoringu mora biti moguć, dopušten, određen ili odrediv. Predmet ugovora o faktoringu je otkup nedospelih potraživanja. Predmet ugovora, po pravilu, mogu biti ne samo postojeća i periodična potraživanja, već i buduća i sva potraživanja koje faktorov klijent ima ili bude imao prema trećim licima. Reč je uglavnom o kratkoročnim potraživanjima koja dospevaju između 90 i 120 dana. Prema osnovu u kome su sadžana, potraživanja mogu poticati iz ugovornih odnosa faktorovog klijenta, a ne iz prenosivih hartija od vrednosti.[37]

Prema Nacrtu, klijent faktoru ustupa jedno ili više postojećih ili budućih potraživanja, određenih ili odredivih, u celini ili delimično, pojedinačnih ili zbirno određenih. Ugovor je punovažan ako je potraživanje određeno ili ako sadrži podatke na osnovu kojih se potraživanje, najkasnije u trenutku dospelosti, može odrediti. Buduće potraživanje mora biti određeno najkasnije u momentu njegovog nastanka, u kom slučaju nije potreban nov akt o prenosu potraživanja. Predmet potraživanja može biti i uslovljeno potraživanje, a kada se uslov ostvari nije potrebno novo ugovaranje. Prenosom potraživanja na faktora prelaze i sporedna prava (pravo prvenstvene naplate, založna prava, prava na kamatu, ugovornu kaznu, i dr.) na način i u obimu predviđenom ugovorom o franšizingu (čl.4.). Postojeća potraživanja se ustupaju faktoru momentom zaključenja ugovora o faktoringu, osima ako tim ugovorom nije drukčije predviđeno. Buduća potraživanja koja su predmet ugovora o faktoringu ustupaju se faktoru u momentu njihovog nastanka, ako drukčije nije ugovoreno. Klauzula u ugovoru između klijenta i dužnika kojom se zabranjuje ustupanje potraživanja nema dejstvo u odnosima između klijenta i faktora. Ustupanje faktoru novčanog potraživanja je punovažno i kada između klijenta i njegovog dužnika postoji sporazum o ograničenju ili zabrani ustupanja potraživanja. Navedeno pravilo ne oslobađa klijenta od odgovornosti za povredu ugovornih obaveza prema dužniku (čl.5.).

D) Ugovorne strane

U izvoznom faktoring poslu učestvuju tri strane: izvoznik ili prodavac robe ili usluga, faktoring organizacija ili faktor i kupac ili uvoznik ili primalac, odnosno korisnik usluga. Ugovor o faktoringu zaključuje faktor sa izvoznikom koji se označava kao klijent. U praksi se kao faktor najčešće pojavljuju bankarske i slične finansijske institucije. U principu, faktor može biti svako lice koje ima interes da obavlja ovaj posao ali se pretpostavlja da raspolaže značajnim finansijskim sredstvima. Klijenti su lica koja imaju valjana nedospela potraživanja po bilo kom osnovu prema inostranim licima ali kad je reč o izvoznom ili eksportnom faktoringu, onda su to prodavci ili izvoznici robe ili usluga. Pored navedenih lica, u faktoring poslu učestvuje i dužnik iz osnovnog posla koji isto svojstvo ima i prema faktoru. Iako nije ugovorna strana, prema rešenju koje preovlađuje u praksi i koje je prihvaćeno u UNIDROIT Konvenciji, dužnik mora biti obavešten o prenosu potraživanja.[38]

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[37] R.Vukadinović, nav. delo, str.417.

[38] R.Vukadinović, nav. delo, str.416-417.

2) *Vrste ugovora o franšizingu*

U doktrini uporednog prava, ugovor o faktoringu klasifikuje se prema različitim kriterijumima.[39] Na ovom mestu izložene su najčešće klasifikacije faktoring posla. Prema teritorijalnom kriterijumu, razlikuje se domaći i međunarodni faktoring. U međunarodnom faktoring[40], po pravilu, učestvuju četiri subjekta: prodavac (klijent), njegov domaći faktor, kupac u inostranstvu (dužnik) i korespondentni faktor u zemlji kupca. Prema kriterijumu predmeta obaveze i funkcije faktoringa, razlikuje se pravi faktoring i nepravi (kvazi) faktoring. Pravi faktoring (*Old Line Factoring; Conventional Notification Factoring*) je takav ugovor kod koga faktor otkupljuje potraživanje klijenta uz diskont o dospelosti ili otkupljuje potraživanje pre dospelosti vršeći time kreditiranje i druge faktoring usluge. Kod ovog faktoringa izostaje garantna funkcija faktora jer je potraživanje definitivno otkupljeno, a s druge strane na osnovu posebne odredbe u ugovoru ustupilac potraživanja (klijent) može garantovati faktoru naplativost potraživanja od dužnika. Nepravi faktoring je, faktoring kod kog faktor preuzima potraživanje samo radi naplate za ustupioca i po pravilu garantuje za naplativost potraživanja.[41] Prema vrsti osnovnog posla iz koga potiču potraživanja koja su predmet otkupa, razlikuje se faktoring u izvoznim poslovima ili izvozni faktoring (opšti faktoring poslovi) i faktoring u ostalim poslovima (posebni faktoring poslovi). Prema otvorenosti faktoring posla u odnosu na obaveštenost dužnika iz osnovnog posla o prenosu potraživanja, rezlikuje se otvoreni i skriveni faktoring.[42]

3) *Prava i obaveze ugovornih strana*

Osnovna obaveza klijenta iz ugovora o faktoringu je da na faktora prenese potraživanje. Ovaj prenos vrši se putem ugovora o cesiji. Sa prenosom glavnog potraživanja na faktora prelaze i sporedna prava (pravo prvenstvene naplate, založna prava, prava na kamatu, ugovornu kaznu, i dr.). Za punovažnost prenosa potraživanja na faktora nije potrebna saglasnost dužnika ali je potrebno da on o tome bude obavešten. U tom pogledu, Nacrt predviđa da obaveštenje dužnika mora biti učinjeno u pismenoj formi i da mora sadržati: podatke i isprave na osnovu kojih se sa izvesnošću mogu utvrditi potraživanja koja su ustupljena; podaci o faktoru ili sukcesivnom faktoru; uputstvo i podaci o bankarskom računu na koji dužnik treba da plati dug. Smatra se da je ovo obaveštenje dato i u slučaju kad je upućeno telegramom, telefaksom, elektronskom poštom ili drugim uobičajenim sredstvom komunikacije, koja omogućuju dokaz o sadržini obaveštenja i nesumnjivo utvrđenje identiteta pošiljaoca, kao i dokaz o prijemu obaveštenja od strane dužnika. Dužnik nije u obavezi da plati ustupljeno potraživanje faktoru, odnosno sukcesivnom faktoru, ako nije obavešten na navedeni način, ali njegova obaveza prema klijentu ostaje. Ispunjenje izvršeno klijentu pre obaveštenja o ustupanju punovažno je i oslobađa dužnika obaveze, ali je u tom slučaju klijent dužan da bez odlaganja naplaćene sume koje se odnose na ustupljena potraživanja prenese na faktora (čl.9.). Dužnik ima pravo na sve prigovore prema faktoru koje bi mogao istaći i klijentu do časa kada je saznao za ustupanje. Dužnik može istaći faktoru prigovor prebijanja njegovog potraživanja samo pod uslovom da je dužnikovo potraživanje dospelo najkasnije u momentu dobijanja obaveštenja o ustupanju potraživanja faktoru (čl.10.). Klijent odgovara faktoru za postojanje

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[39] Više, M.Vasiljević, op. cit, R.Vukadinović, op. cit.

[40] V. određenje međunarodnog karaktera ovog posla u UNIDROIT Konvenciji o međunarodnom faktoringu.

[41] Podele preuzete iz M.Vasiljević, nav. delo, str.292.

[42] Više, R.Vukadinović, nav. delo, str.415 i dalje.

potraživanja koje je predmet ustupanja u času kada je izvršeno ustupanje i odgovara za naplativost ustupljenog potraživanja, ako drukčije nije ugovoreno. Klijent odgovara za naplativost dospelih potraživanja u momentu njihovog ustupanja, a za nedospela potraživanja u častu dospelosti (čl.8.).

Obaveze faktora razlikuju se u zavisnosti od vrste konkretnog faktoring posla. Najopštije rečeno, obaveze faktora odnose se na naplatu potraživanja, kreditiranje, garancije naplate i vršenje ostalih usluga.[43]

U pogledu prava faktora, Nacrt sadrži odredbe o pravu faktora na naplatu od dužnika, o riziku naplate potraživanja od dužnika, kao i o sukcesivnom faktoringu.

Prema Nacrtu, ako je ugovorom o faktoringu ugovoren prenos potraživanja radi napalate (otkup potraživanja agenta prema dužniku), faktor ima pravo na sve sume koje dobija od dužnika na ime ispunjenja prenetog potraživanja, a klijent ne odgovara faktoru ako su te sume manje od cene po kojoj je potraživanje ustupljeno faktoru. S druge strane, ako je ugovorom o faktoringu potraživanje preneto na faktora samo na naplatu (u cilju obezbeđenja naplate), a ugovorom o ustupanju potraživanja nije predviđeno drukčije, faktor je dužan da klijentu preda obračun naplate i preda mu sumu koja prelazi visinu duga klijenta prema faktoru na osnovu ugovora o faktoringu. Ako novčana sredstva naplaćena od dužnika budu manja od potraživanja koja faktor ima prema klijentu po osnovu ustupanja potraživanja, klijent ostaje u obavezi prema faktoru za ostatak duga (čl.6.).

Ako je ugovorom o faktoringu ugovoren prenos potraživanja radi naplate, rizik naplate ustupljenog potraživanja faktor preuzima na sebe. U slučaju ovakve naplate potraživanja, klijent će izuzetno snositi rizik naplate i posle ustupanja potraživanja: 1) ako je klijent u času zaključenja ugovora sa dužnikom znao ili morao znati da dužnik nije sposoban za plaćanje; ili 2) ako klijent nije dostavio faktoru sve podatke i isprave koje je posedovao ili imao saznanja o njima niti je o tome obavestio faktora, a koji su od značaja za utvrđivanje postojanja i visine, kao i naplatu potraživanja, najkasnije u vreme njihovog ustupanja. Ako je ugovorom o faktoringu ugovoren prenos potraživanja samo za naplatu (u cilju obezbeđenja naplate), teret rizika naplate može biti ugovoren i na drukčiji način (čl.7.).

Fakor može ustupljeno potraživanje dalje ustupiti narednom faktoru (sukcesivni faktoring) samo ako je to ugovorom o faktoringu dopušteno. Sukcesivni faktor je pravni sledenik iz ugovora zaključenog između klijenta i faktora, odnosno između dva faktora, i on preuzima prava i obaveze iz ugovora prethodnog faktora. Na sukcesivni faktoring primenjuje se gore navedena obaveza obaveštavanja dužnika (čl.12.).

4) Sredstva obezbeđenja iz ugovora o faktoringu

Na sredstva obezbeđenja iz ugovora o fakotringu primenjuju se opšta pravila obligacionog i založnog prava, u zavisnosti od vrste i prirode obezbeđenja. Kad je reč o založnom pravu, u srpskom pravnom sistemu, ručna zaloga regulisana je Zakonom o obligacionim odnosima (čl.966-988.), registrovana zaloga na pokretnim stvarima Zakonom o založnom pravu na pokretnim stvarima upisanim u registar,[44]a hipoteka Zakonom o hipoteci.[45]Prema opštem pravilu Zakona o obligacionim odnosima o ustupanju potraživanja ugovorom (cesija), sa potraživanjem prelaze na prijemnika sporedna prava, kao što su pravo prvenstvene naplate, hipoteka, zaloga, prava iz ugovora sa jemcem, prava na kamatu, ugovornu kaznu i

[43] M.Vasiljević, nav. delo, str.291.

[44] „Službeni glasnik Republike Srbije”, 30. maj 2003, br.57.

[45] „Službeni glasnik Republike Srbije” 115/2005.

sl. Ipak, ustupilac može predati založenu stvar prijemniku samo ako zalogodavac pristane na to, inače ona ostaje kod ustupioca da je čuva za račun prijemnika (čl.437.st.1. i 2.). U pogledu posebnih pravila o ugovoru o faktoringu, Nacrt predviđa da prelazom potraživanja na faktora prelaze i sporedna prava (pravo prvenstvene naplate, založna prava, prava na kamatu, ugovornu kaznu, i dr.) na način i obimu predviđenom ugovorom o faktoringu (čl.4. st.5.).

5) Sukcesija kredita kod ugovora o faktoringu

U srpskom pravnom sistemu nema propisa o ovom pitanju.

6) Registar faktoringa

U srpskom pravnom sistemu nema propisa o ovom pitanju.

7) Ostala pitanja

Biće predmet diksusije.

FINANSIJSKI LIZING

1) Zakonsko regulisanje

Posao finansijskog lizinga u pravnom sistemu Srbije regulisan je Zakonom o finansijskom lizingu iz 2003. godine.[46] Regulišući jednu, relativno novu sferu privredno-pravnih odnosa, ovaj Zakon nastoji da u te odnose ugradi visok stepen pravne sigurnosti, a da time ne ograniči mogućnost njihovog daljeg razvoja, već naprotiv, da taj razvoj ohrabri i stimuliše. Iz tih razloga, Zakon svojim normama određuje opšte okvire ovog posla, dopuštajući ugovornim stranama da, unutar njih, svoje odnose regulišu saglasnošću svojih volja. Tim putem, princip autonomije volje kao izraz vekovne evolucije ugovornog prava i imperativ poštovanja ugovora oličen u načelu *pacta sunt servanda*, u ovom Zakonu našli su svoj puni izraz i primenu.[47]

Polazeći od činjenice da se finansijski lizing u poslednje dve decenije razvio u značajan i često primenjivan posao poslovnog prometa, stalo se na stanovište da potrebe pravne sigurnosti zahtevaju njegovo regulisanje zakonskim putem. Postojanje zakonskih pravila u ovoj materiji, u interesu je potencijalnih subjekata posla finansijskog lizinga, koji bi trebalo da unapred, pre stupanja u ovaj posao, budu upoznati kako sa normama koje moraju biti primenjene (imperativna pravila), tako i sa normama koje će se primeniti u slučaju kad određena pitanja njihovog odnosa nisu regulisana saglasnošću njihovih volja (dispozitivna pravila). U tom smislu, regulisanjem ovog posla zakonskim putem, u odnose koji proističu iz finansij-

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[46] „Službeni Glasnik Republike Srbije" 27. maj 2003. br.55.

[47] O Zakonu o finansijskom lizingu Republike Srbije, v. J.Perović, *Komentar Zakona o finansijskom lizingu,* Beograd, 2003; J.Perović, *Financial Leasing in Serbia: an Overview of Recent Legislation,* Uniform Law Review, UNIDROIT, 2005-3, Rome, str.503-516; J.Perović, *Finansijski lizing kao faktor podsticanja investicija*, Oživljavanje privrede i završetak tranzicije, Kopaonik biznis forum 2004, Beograd, 2004, str.140-152.

skog lizinga ugrađuje se neophodan stepen pravne sigurnosti, izražen kroz ostvarenje dva osnovna zahteva - u stvaranju uslova za efikasno i neometano odvijanje poslova finansijskog lizinga, kao i u pravnoj zaštiti ekonomski slabije ugovorne strane.

U pogledu odgovora na pitanje treba li posao finansijskog lizinga predvideti Zakonom o obligacionim odnosima ili je pak, ovaj posao potrebno regulisati u okviru posebnog zakona, prihvaćni su argumenti u prilog posebnog zakona. U tim okvirima, potrebno je imati u vidu da ugovor o finansijskom lizingu predstavlja samo deo celovitog posla finansijskog lizinga, budući da ovaj posao obuhvata i značajne aspekte izvan okvira obligacionog prava – statusno-privredni (status davaoca i primaoca lizinga), procesno-pravni (postupak sticanja državine na predmetu lizinga), carinski, poreski i računovodstveni, kao i aspekt potrebe postojanja registra finansijskog lizinga radi sigurnosti pravnog prometa. Svi pomenuti aspekti finansijskog lizinga ne bi mogli biti obuhvaćeni Zakonom o obligacionim odnosima čije se norme odnose na oblast obligacija. Još manje bi ta pitanja mogla biti predmet nekog drugog zakona opšteg karaktera.

Sve te okolnosti ukazale su na potrebu donošenja posebnog zakona koji bi na jedinstven način obuhvatio najveći broj pitanja relevantnih za posao finansijskog lizinga. Sa stanovišta pravne sigurnosti, kao i sa praktičnog stanovišta, po pravilu je prihvatljivija regulativa jednog instituta u okviru istog pravnog akta, od njegovog uređenja u pojedinim segmentima, putem mnoštva različitih zakona i podzakonskih akata, čime se otvara mogućnost njihove međusobne neusklađenosti. Zahtevu za jedinstvenim uređenjem finansijskog lizinga nije suprotstavljana potreba da se pitanja carinskog, poreskog i računovodstvenog aspekta, zbog specifičnosti materije na koju se odnose, regulišu odgovarajućim propisima javno-pravnog karaktera, ukoliko su oni usklađeni sa osnovnim rešenjima zakona koji, kao matični izvor, uređuje posao finansijskog lizinga.

Osnovni izvor prava korišćen u ovom Zakonu pri određenju definicije posla finansijskog lizinga, njegovih osnovnih karakteristika, kao i prava i obaveza subjekata ovog posla, bila je UNIDROIT Konvencija o međunarodnom finansijskom lizingu.[48] Komparativnom analizom ovog Zakona s jedne i Konvencije s druge strane, može se zaključiti da je Zakon, posebno u pogledu osnovnih pitanja, preuzeo veliki broj rešenja Konvencije, integrišući tako međunarodno prihvaćene standarde u nacionalno zakonodavstvo, a u skladu sa celokupnim nacionalnim pravnim sistemom, pravnom tradicijom i fundamentalnim pravnim principima.

Pored UNIDROIT Konvencije, značajan izvor prava pri izradi ovog Zakona predstavljala su rešenja srpskog Zakona o obligacionim odnosima koja se odnose na pravne poslove srodne finansijskom lizingu. Tako, Zakon o obligacionim odnosima reguliše ugovor o zakupu (čl.567-599.), ugovor o prodaji sa zadržavanjem prava svojine - *pactum reservati dominii* (čl.540-541), prodaju sa obročnim otplatama cene (čl.542-551.), ugovor o zajmu (čl.557-566.), kao i ugovor o kreditu (čl.1065-1071).[49]

Najzad, pri izradi ovog Zakona, uzimana su u obzir i pravila nacionalnih zakona drugih zemalja koji uređuju materiju lizinga, kao i stavovi doktrine i sudske prakse u uporednom pravu.

Svi ovi različiti izvori prava usklađeni su putem manjih ili većih modifikacija uskladiti, tako da u njihovom međusobnom odnosu, kao i u odnosu prema osnovnim principima srpskog pravnog sistema, čine jednu harmoničnu celinu.

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[48] *Unidroit Convention on International Financial Leasing.* Konvencija je usvojena u Otavi, 28. maja 1988., a na snagu je stupila 1. maja 1995. godine.

[49] O pomenutim ugovorima, detaljno, *Komentar Zakona o obligacionim odnosima*, gl. red. Prof. dr Slobodan Perović, Savremena administracija, Beograd, 1995; S. Perović, *Obligaciono pravo*, Beograd, 1990.

2) *Osnovna koncepcija i elementi*

A) Pojam finansijskog lizinga

Posao finansijskog lizinga, u smislu ovog srpskog Zakona o finansijskom lizingu, je posao u kome davalac lizinga:

1) sa isporučiocem predmeta lizinga određenim od strane primaoca lizinga zaključuje ugovor na osnovu koga stiče pravo svojine na predmetu lizinga, prema specifikaciji primaoca lizinga i pod uslovima koje, ukoliko se odnose na interese primaoca lizinga, odobrava primalac lizinga (ugovor o isporuci);
2) sa primaocem lizinga zaključuje ugovor o finansijskom lizingu kojim se obavezuje da na primaoca lizinga prenese ovlašćenje držanja i korišćenja predmeta lizinga na ugovoreno vreme, a primalac lizinga se obavezuje da mu za to plaća ugovorenu naknadu u ugovorenim ratama (ugovor o lizingu).

Zakonom o finansijskom lizingu data je definicija posla finansijskog lizinga, čime je ovaj posao u srpskom pravnom sistemu dobio svoje precizno pravno određenje. U suštini, reč je o dva ugovora – ugovoru o isporuci i ugovoru o finansijskom lizingu koji svojom uzajamnom povezanošću čine celinu posla finansijskog lizinga. Ovako određen pojam posla finansijskog lizinga predstavlja široku pravnu formulu koja obuhvata različite oblike ovog posla koji često podrazumevaju i različite pravne režime ali kojima ipak dominiraju određene zajedničke karakteristike koje otvaraju mogućnost formulisanja jedne ovakve definicije. Reč je o najopštijim karakteristikama koje su se u praksi izdvojile od brojnih različitosti i manje tipičnih oblika, tako da se sa sigurnošću moće zaključiti da predstavljaju determinante koje određuju posebnost i prirodu posla finansijskog lizinga.

Te karakteristike ogledaju se, pre svega, u trodimenzionalnom odnosu koji finansijski lizing podrazumeva, a koji se ogleda u postojanju tri subjekta posla: davaoca lizinga, primoca lizinga i isporučioca, kao i u pravilu da se naknada koju primalac lizinga plaća davaocu lizinga za korišćenje predmeta lizinga (lizing naknada) utvrđuje prvenstvenim uzimanjem u obzir amortizacije celine ili najbitnijeg dela vrednosti predmeta lizinga. Ove dve osobenosti u svojoj simbiozi predstavljaju osnovna obeležja koja finansijski lizing podrazumeva, istovremeno čineći ključne tačke razgraničenja posla finansijskog lizinga od drugih srodnih pravnih poslova.

U okviru trodimenzionalnog odnosa subjekata finansijskog lizinga, davalac lizinga zaključuje dva ugovora – ugovor o isporuci i ugovor o finansijskom lizingu.

Ugovor o isporuci je ugovor koji davalac lizinga zaključuje sa isporučiocem (proizvođačem) koga je izabrao primalac lizinga, prema specifikaciji izrađenoj od strane primaoca lizinga i pod uslovima koje, ukoliko se odnose na interese primaoca lizinga, odobrava primalac lizinga, a na osnovu koga davalac lizinga stiče pravo svojine na predmetu lizinga. Iako je ovde u suštini reč o prodaji, ovaj ugovor u Zakonu je označen kao ugovor o *isporuci* polazeći pre svega od toga da se između davaoca lizinga i isporučioca, umesto prodaje, može uspostaviti i neki drugi ugovorni odnos koji podrazumeva potpuno pravno raspolaganje predmetom lizinga i u kome davalac lizinga, pod uslovima predviđenim ovim Zakonom, stiče pravo svojine na predmetu lizinga (na primer ugovor o razmeni). Pored toga, termin ugovor o *isporuci* doprinosi jasnijem razgraničenju uzajamnih odnosa subjekata finansijskog lizinga, imajući u vidu njihovu složenost i međusobnu uslovljenost.

Ipak, nezavisno od naziva, ono što predstavlja specifičnost ovog ugovora u odnosu na ″klasičan″ dvostrani ugovorni odnos jeste činjenica da on podrazumeva određeno učešće trećeg lica – primaoca lizinga, koji nije ugovorna strana ugovora o isporuci. Ono se ogleda u

tome što primalac lizinga, po pravilu, određuje isporučioca sa kojim će davalac lizinga zaključiti ugovor, sačinjava specifikaciju prema kojoj davalac lizinga pribavlja predmet lizinga od isporučioca i najzad, odobrava one uslove ugovora o isporuci koji se odnose na njegove interese u svojstvu primaoca lizinga.

Ovo učešće primoca lizinga u ugovornom odnosu koji nastaje između davaoca lizinga i isporučioca, logična je posledica specifične prirode posla finansijskog lizinga, u kome se davalac lizinga, po pravilu, javlja samo kao finansijer posla. Kao takav, on *de facto* ne ulazi u pitanja izbora proizvođača, vrste, količine i kvaliteta opreme koja je predmet finansijskog lizinga, kao ni njene isporuke osim ako ugovorom nije predviđeno da on vrši isporuku predmeta lizinga. Iz tih razloga, primalac lizinga, po pravilu, odobrava one klauzule ugovora o isporuci koje se odnose na vrstu, količinu i kvalitet opreme koja je predmet lizinga, način, vreme i mesto isporuke predmeta lizinga (ako ugovorom nije predviđeno da iporuku vrši davalac lizinga), kao i druge klauzule čija je sadržina vezana za ugovor o finansijskom lizingu koji on zaključuje sa davaocem lizinga. S druge strane međutim, primalac lizinga ne može ulaziti u one klauzule ugovora o isporuci koje imaju "čisto" *inter partes* dejstvo i odnose se isključivo na uzajamna prava i obaveze ugovornih strana ovog ugovora (na primer, uslovi pod kojima davalac lizinga stiče pravo svojine na predmetu lizinga). Upravo ovo učešće primaoca lizinga u ugovornom odnosu koji nastaje između davaoca lizinga i isporučioca, kao odstupanje od klasičnog pravila o *inter partes* dejstvu ugovora, predstavlja jednu od osnovnih specifičnosti posla finansijskog lizinga koja sobom nosi čitav niz značajnih pravnih posledica.

Ugovor o finansijskom lizingu je ugovor koji davalac lizinga zaključuje sa primaocem lizinga i kojim se obavezuje da na primaoca lizinga prenese ovlašćenje držanja i korišćenja predmeta lizinga na ugovoreno vreme, a primalac lizinga se obavezuje da mu za to plaća ugovorenu naknadu u ugovorenim ratama.

Ukoliko bi se ovaj ugovor posmatrao izolovano od celine posla finansijskog lizinga, *prima facie* bi se moglo zaključiti da je reč o klasičnom ugovoru o zakupu ili, u zavisnosti od sadržine konkretnog ugovora, o nekom njegovom modifikovanom obliku (na primer zakup sa pravom otkupa). I upravo u toj okolnosti ogledaju se fundamentalne karkateristike posla finansijskog lizinga koje ga odvajaju od drugih, srodnih pravnih poslova. Naime, ono što jedan ugovor o zakupu nedvosmisleno odvaja od ugovora o finansijskom lizingu jeste činjenica da ugovor o finansijskom lizingu uvek predstavlja *deo* posla finansijskog lizinga u celini, i to deo čiji su nastanak, dejstva i prestanak neraskidivo povezani sa odnosima koji proističu iz ugovora o isporuci, kao ugovora koji predstavlja drugi sastavni deo posla finansijskog lizinga. Drugim rečima, ugovor o finansijskom lizingu ne može nastati i egzistirati nezavisno od ugovora o isporuci, s obzirom da finansijski lizing *per definitionem* podrazumeva simbiozu ova dva ugovora, čija međusobna uslovljenost predstavlja osnovnu determinantu ovog posla.

Specifična priroda posla finansijskog lizinga čini da ugovor o finansijskom lizingu, na isti način kao i ugovor o isporuci, rađa izvesne pravne posledice koje predstavljaju odstupanja od pravila o *inter partes* dejstvu ugovora, protežući svoje dejstvo i na treće lice – isporučioca, koje nije strana u ovom ugovornom odnosu. Najznačajnije od njih ogledaju se u tome što za materijalne nedostatke predmeta lizinga, primaocu lizinga ne odgovara davalac lizinga, već isporučilac, ukoliko drukčije nije ugovoreno (čl.16.), kao i u pravilu prema kome primalac lizinga, iako nije u ugovornom odnosu sa isporučiocem, može, u slučaju neisporuke, docnje u isporuci ili isporuke sa materijalnim nedostatkom, prema njemu upotrebiti ona pravna sredstva koja bi, prema Zakonu o obligacionim odnosima, imao da je bio strana ugovora

o isporuci, izuzev raskida ili poništaja ugovora i zahteva za sniženje cene (v. čl.38. i sa tim u vezi čl.24.).

U pogledu obaveza ugovornih strana ugovora o finansijskom lizingu koja imaju čisto *inter partes* dejstvo, čini se da sam pojam ugovora o finansijskom lizingu ukazuje na osnovnu obavezu davaoca lizinga da prenese ovlašćenje držanja i korišćenja određene pokretne nepotrošne stvari na primoca lizinga, kako bi ovaj mogao da je upotrebljava za ugovoreno vreme i uz ugovorenu naknadu koje se isplaćuje u ugovorenim ratama. Razume se, da bi ovo ovlašćenje mogao preneti na primaoca lizinga, davalac lizinga mora prethodno pribaviti predmet lizinga (steći pravo svojine na njemu) prema specifikaciji primaoca lizinga od isporučioca koga, po pravilu, određuje primalac lizinga (čl.14.). Već sama ova okolnost ukazuje da se prava i obaveze ugovornih strana ugovora o finansijskom lizingu uvek moraju posmatrati kroz prizmu ovog posla u celini. Pored pomenute obaveze prenosa ovlašćenja, davalac lizinga obavezan je da pruži zaštitu primoacu lizinga od pravnih nedostataka predmeta lizinga, tj. da mu omogući neometanu državinu predmeta lizinga (v. čl.18, 19, 20. i 21.). Prema tome, iz ugovora o finansijskom lizingu za davaoca lizinga neminovno proističu dve obaveze u odnosu na primaoca lizinga: obaveza prenosa ovlašćenja držanja i korišćenja predmeta lizinga i obaveza zaštite u slučaju pravnih nedostataka.

S druge strane, primalac lizinga, za korist koju ugovorom o finansijskom lizingu dobija, dužan je da davaocu lizinga pruži odgovarajuću naknadu, koja se u ovom poslu *per definitionem* isplaćuje u ratama i to je njegova osnovna ugovorna obaveza (čl.27.). Pored toga, on je dužan da predmet lizinga preuzme na način, u vreme i na mestu predviđenom ugovorom, nezavisno od toga da li isporuku vrši isporučilac ili pak, davalac lizinga (čl.23.). Kako ugovor o finansijskom lizingu primaoca lizinga ovlašćuje da predmet lizinga koristi za određeno vreme, pretpostavlja se i njegova obaveza da taj predmet koristi onako kako je to ugovorom bilo predviđeno ili kako proizilazi iz namene same stvari, da se prema njemu ophodi sa pažnjom dobrog privrednika, odnosno dobrog domaćina (čl.25.), kao i da ga održava u ispravnom stanju i vrši potrebne popravke na njemu (čl.26.). Pošto prestane ugovor o finansijskom lizingu, primalac lizinga je dužan da davaocu lizinga vrati predmet lizinga, s obzirom da se ovim ugovorom ne prenosi pravo svojine, već samo ovlašćenje držanja i korišćenja i to za određeno vreme. Ipak, reč je o dispozitivoj normi s obzirom da je Zakon ugovornim stranama ostavio slobodu da predvide pravo primaoca lizinga da, po prestanku ugovora, otkupi predmet lizinga ili produži ugovor o finansijskom lizingu – tzv. pravo opcije (v. čl.33 i čl.42.). Najzad, u najvećem broju slučajeva, obaveza osiguranja predmeta lizinga je na strani primaoca lizinga, iako se ugovorom može drukčije predvideti (čl.34.). Razume se da ugovorne strane ugovora o finansijskom lizingu mogu preuzeti i druge obaveze koje su izraz saglasnosti njihovih volja. Ovaj Zakon predvideo je samo pomenute obaveze s obzirom da su one opšte i svojstvene svakom ugovoru o finansijskom lizingu.

B) Oblast primene

Zakonom o finansijskom lizingu uređuju se posao finansijskog lizinga, ugovor o finansijskom lizingu, prava i obaveze subjekata u poslu finansijskog lizinga i registar finansijskog lizinga. Na subjekte i pravne odnose iz posla finansijskog lizinga nastalog u skladu sa ovim zakonom, odredbe drugih zakona primenjuju se u slučajevima koje ovaj zakon ne uređuje (čl.1.Zakona). Oblast primene Zakona u celini je određena formulacijom da se na subjekte i pravne odnose iz posla finansijskog lizinga nastalog u skladu sa ovim Zakonom, odredbe drugih zakona primenjuju u slučajevima koje ovaj Zakon ne uređuje. Tim putem, utvrđeno je da se Zakon primenjuje kao *lex specialis*, što znači da:

a) u slučaju kad ovaj Zakon i neki drugi zakon opšteg karaktera sadrže različita pravila o određenom pitanju koje ulazi u materiju finansijskog lizinga, primenjuje se ovaj Zakon. Ovo pravilo posebno je značajno kad su u pitanju Zakon o izvršnom postupku, Zakon o privrednim društvima i Zakon o stečaju.

b) odredbe drugih zakona primenjuju se na subjekte i odnose koji ovim Zakonom nisu uređeni, što je posebno značajno kad je reč o supsidijarnoj primeni Zakona o obligacionim odnosima, čije se odredbe primenjuju na sva pitanja obligacionopravnog aspekta finansijskog lizinga koja nisu regulisana Zakonom o finansijskom lizingu. Drugim rečima, Zakon o finansijskom lizingu uređuje samo ona pitanja koja su specifična za institut finansijskog lizinga, dok su druga, opšta pitanja koja spadaju u oblast obligacionog prava prepuštena odgovarajućim načelima i pravilima opšteg dela Zakona o obligacionim odnosima, kao i normama onih imenovanih ugovora koji su po svom sadržaju najbliži konkretnom ugovornom odnosu (nastanak i punovažnost ugovora, opšta pravila o pravima i obavezama ugovornih strana iz ugovora o prodaji kao što su predaja stvari, materijalni i pravni nedostaci, opšta pravila o raskidu ugovora, opšta pravila o prouzrokovanju štete i odgovornosti za štetu, itd.). U istom smislu, kad je reč o privredno-statusnom aspektu finansijskog lizinga, na subjekte finansijskog lizinga koji ulaze u oblast primene Zakona o privrednim društvima, primenjuju se pravila Zakona o privrednim društvima, osim u delu koji Zakon o finansijskom lizingu posebno reguliše. Najzad, zbog specifičnosti materije na koju se odnose, poreski, carinski i računovodstveni aspekt finansijskog lizinga ostali su izvan okvira regulative ovog Zakona. Za poreski, carinski i računovodstveni tretman koji su od posebnog praktičnog značaja za obavljanje posla finansijskog lizinga, relevantni su drugi odgovarajući zakoni.

C) Predmet finansijskog lizinga

Predmet finansijskog lizinga, prema srpskom Zakonu o finansijskom lizingu , može biti samo pokretna nepotrošna stvar (čl.4.).

D) Subjekti u poslu finansijskog lizinga

Subjekti u poslu finansijskog lizinga su davalac lizinga, primalac lizinga i isporučilac predmeta lizinga.

Davalac lizinga je lice koje, uz zadržavanje prava svojine na predmetu lizinga, prenosi na primaoca lizinga ovlašćenje držanja i korišćenja na predmetu lizinga, na ugovoreno vreme i uz ugovorenu naknadu. Prema prvobitnom tekstu Zakona, davalac lizinga je privredno društvo koje obavlja poslove finansijskog lizinga u skladu sa propisima države u kojoj je osnovano i čiji je minimalni uplaćeni novčani deo osnovnog kapitala 100.000 eura (čl.10.). Nakon izmena Zakona o finansijskom lizingu iz 2005. godine, davalac lizinga je privredno društvo osnovano u skladu sa zakonom kojim se uređuje položaj privrednih društava, čiji novčani deo osnovnog kapitala ne može biti manji od 100.000 eura u dinarskoj protivvrednosti po srednjem kursu NBS na dan uplate i koje je dobilo dozvolu NBS za obavljanje poslova finansijskog lizinga u skladu sa Zakonom o finansijskom lizingu. Davalac lizinga može da obavlja samo delatnost finansijskog lizinga i dužan je da u svom poslovanju obezbedi da njegov osnovni capital uvek bude u iznosu koji nije manji od navedenog iznosa od 100.000 eura (čl.10. Zakona nakon izmena iz 2005. godine).

Primalac lizinga, u smislu Zakona, je pravno ili fizičko lice na koga davalac lizinga prenosi ovlašćenje držanja i korišćenja predmeta lizinga, na ugovoreno vreme i uz ugovorenu naknadu (čl.11.). U pogledu statusa primaoca lizinga, Zakon predviđa da to mogu biti pravna i fizička lica koja ugovor o finansijskom lizingu zaključuju u skladu sa odredbama ovog

Zakona. U tim okvirima bitne su dve činjenice: a) za razliku od davaoca lizinga, primalac lizinga, u smislu ovog Zakona, može biti svako pravno lice, nezavisno od toga da li obavlja delatnost radi sticanja dobiti ili ne; b) primalac lizinga, u smislu ovog Zakona, može biti i fizičko lice, nezavisno od toga da li obavlja registrovanu delatnost radi sticanja dobiti ili ne.

Isporučilac predmeta lizinga, u smislu Zakona, je pravno ili fizičko lice koje na davaoca lizinga prenosi pravo svojine na predmetu lizinga, radi njegove predaje primaocu lizinga na držanje i korišćenje, na ugovoreno vreme i uz ugovorenu naknadu (čl.12.).

E) Osnovna načela finansijskog lizinga

Načelo autonomije volje kao izraz vekovne evolucije ugovornog prava i imperativ poštovanja ugovora oličen u načelu *pacta sunt servanda* u srpskom Zakonu o finansijskom lizingu našli su svoj puni izraz i primenu. U okviru posla finansijskog lizinga, poseban značaj imaju načela Zakona o obligacionim odnosima, a posebno načelo ravnopravnosti ugovornih strana, načelo savesnosti i poštenja, načelo zabrane stvaranja i iskorišćavanja monoploskog položaja, načelo ekvivalentnosti uzajamnih davanja i načelo primene dobrih poslovnih običaja.

3) Trgovinski karakter finansijskog lizinga

Ugovor o finansijskom lizingu koji se zaključuje u skladu sa srpskim Zakonom o finansijskom lizingu smatra se trgovinskim ugovorom u smislu Zakona o obligacionim odnosima, osim u slučaju kad je primalac lizinga fizičko lice koje ne obavlja registrovanu delatnost radi sticanja dobiti (čl.8. Zakona).

Jedna od najvećih dilema koja se postavila prilikom izrade ovog Zakona, odnosila se na pitanje treba li primenu Zakona ograničiti na poslove u kojima se predmet finansijskog lizinga koristi u profesionalne svrhe, tako da primalac lizinga može biti samo privredni subjekt odnosno lice koje obavlja registrovanu delatnost radi sticanja dobiti ili pak, tu primenu treba proširiti i na fizička lica koja ne obavljaju privrednu delatnost radi sticanja dobiti.

Kao najznačajniji argument u prilog prve teze, isticalo se da se osnovni cilj ovog Zakona ogleda u podsticaju privrednih aktivnosti, te da nema razloga da fizička lica koja ne obavljaju privrednu delatnost koriste povoljan režim koji ovaj Zakon predviđa za posao finansijskog lizinga. Pored toga, isticalo se da su pravila ovog Zakona prilagođena privrednim poslovima čiji su nosioci privredni subjekti kao profesionalci koji, s obzirom da se bave takvim poslovima u vidu zanimanja, poznaju njihov značaj i posledice. Nasuprot tome, fizička lica koja se ovakvim poslovima profesionalno ne bave, pa ih samim tim i nedovoljno poznaju, mogu biti izložena riziku zlouptrebe od strane davaoca lizinga kao ekonomski jače strane, posebno u uslovima nepostojanja zakonskih propisa koji regulišu zaštitu potrošača.

Ipak, na osnovu iscrpne analize rešenja domaćeg i uporedno-pravnog zakonodavstva i stavova doktrine s jedne strane, kao i na osnovu široke diskusije sa predstavnicima domaće i međunarodne poslovne prakse s druge strane, autori Zakona priklonili su se drugoj tezi, koja dozvoljava da primalac lizinga bude fizičko lice koje ne obavlja privrednu delatnost u vidu zanimanja. Ovakvo rešenje argumentovano je, pre svega, potrebama domaćeg pravnog prometa.

Na prvom mestu, iako se neposredni cilj ovog Zakona ogleda u podsticaju privrednih aktivnosti i razvoju privrede uopšte, njegova opšta svrha ne iscrpljuje se u domenu poslova isključivo privrednopravne prirode. On pred sobom ima misiju izgrađivanja pravne sigurnosti, fer poslovne prakse i dobrih običaja u odnosima koji nastaju u oblasti finansijskog lizinga, bez obzira na različite statuse subjekata tih odnosa. Konačno praktično ishodište ovog

Zakona ogleda se u porastu životnog standarda stanovništva uopšte, što podrazumeva potrebu da njegova primena obuhvati što širi krug pravnih subjekata. Iz tih razloga, zakonodavac je nastojao da pronađe gipko rešenje koje treba da obezbedi pravnu sigurnost u ovoj vrsti ugovornih odnosa ali da istovremeno ne zatvori put celini pozitivnih efekata koje ovaj Zakon sobom nosi, već, naprotiv, da te efekte podstiče.

Isključenjem fizičkih lica koja se ne bave privrednom delatnošću iz oblasti primene ovog Zakona, bio bi postignut suprotan efekat: ova kategorija lica za koju je finansijski lizing, zbog svih prednosti koje sobom nosi, ekonomski povoljan posao, bila bi, u slučaju ulaska u ovu vrstu ugovornog odnosa, lišena pravne sigurnosti koju obezbeđuje upravo zakonsko regulisanje ovog instituta. To znači da bi ugovori o finansijskom lizingu u kojima se u svojstvu primaoca lizinga javlja fizičko lice koje ne obavlja privrednu delatnost bili prepušteni proizvoljnosti prakse, čime se upravo stvara osnov za moguće zloupotrebe od strane davaoca lizinga kao ekonomski jače strane.

U okviru pokrenutog pitanja, autori Zakona rukovodili su se, pre svega, principima Zakona o obligacionim odnosima, koji usvaja princip jedinstvenog regulisanja obligacionih odnosa, prema kome njegova pravila podjednako važe za sve odnose koji nastaju u oblasti prometa robe i usluga, i obuhvataju kako odnose između pravnih lica, tako i odnose između fizičkih lica, kao i međusobne odnose svih ovih lica. Izuzetno od ovog principa, Zakon u određenim slučajevima predviđa posebna pravila za ugovore u privredi (trgovinski ugovori), s obzirom da sama priroda ovih ugovora nalaže specifičnu regulativu određenih pitanja.

U kontekstu Zakona o finansijskom lizingu, ovaj dualitet ostvaruje dvostruku funkciju.

Kako je finansijski lizing prvenstveno privredni posao koji će u najvećem broju slučajeva zaključivati privredni subjekti, od posebnog je značaja što Zakon o obligacionim odnosima poznaje posebna pravila koja su prilagođena prirodi i potrebama ugovora u privredi. Ova pravila Zakona o obligacionim odnosima primenjivaće se na ugovore o finansijskom lizingu u slučajevima koje Zakon o finansijskom lizingu ne reguliše, ukoliko su ugovorne strane privredni subjekti.

Nasuprot tome, kad je primalac lizinga fizičko lice koje ne obavlja registrovanu delatnost radi sticanja dobiti, na slučajeve koji nisu regulisani Zakonom o finansijskom lizingu, primenjivaće se odgovarajuće opšte odredbe Zakona o obligacionim odnosima koje se ne odnose na ugovore u privredi, odnosno zakona koji se bavi zaštitom potrošača.

4) Trajanje ugovora o finansijskom lizingu

Po svojoj pravnoj prirodi, ugovor o finansijskom lizingu ulazi u kategoriju ugovora sa trajnim izvršenjem obaveza (zakup, ortakluk, koncesija, osiguranje, i sl.). Činjenica da izvršenje ovih ugovora uvek podrazumeva određeno trajanje u vremenu, kao i činjenica da posao finansijskog lizinga pretpostavlja da je rok amortizacije predmeta lizinga duži od roka na koji se ugovor o lizingu zaključuje (tzv. zlatno pravilo lizinga), povukla je za sobom i specifična pravila o minimalnom roku na koji se ugovor o finansijkom lizingu zaključuje. Prema Zakonu o finansijskom lizingu, minimalni rok na koji se ugovor o lizingu zaključuje ne može biti kraći od dve godine od dana zaključenja ugovora (čl.3.).

5) Unutrašnji i međunarodni finansijski lizing

Ukoliko je posao finansijkog lizinga zaključen kao unutrašnji posao, na njega se primenjuju Zakon o finansijskom lizingu, Zakon o obligacionim odnosima i drugi relevantni zakoni Republike Srbije. S druge strane, ako je reč o finansijskom lizingu međunarodnog karak-

tera, potrebno je ukazati pažnju na izmenu člana 10. Zakona o finansijskom lizingu od 2005. godine, prema kojoj je davalac lizinga, u smislu tog Zakona, privredno društvo osnovano u skladu sa zakonom o privrednim društvima, koje je dobilo dozvolu Narodne banke Srbije za obavljanje poslova finansijskog lizinga. Drugim rečima, davaocem lizinga smatra se samo srpsko privredno društvo, iz čega proizilazi da se ovaj Zakon ne primenjuje u slučaju međunarodnog finansijskog lizinga, tj. u onim lizing poslovima u kojima je davalac lizinga inostrana kompanija. Ipak, u smislu opštih pravila, na ugovorne odnose iz međunarodnog finansijskog lizinga primenjivaće se srpski Zakon o finansijskom lizingu i srpski Zakon o obligacionim odnosima ukoliko je, autonomijom volje ugovornih strana, srpsko pravo predviđeno kao merodavno pravo. U odsustvu *electio iuris* klauzule, ovi zakoni će se primeniti ukoliko odgovarajuća pravila međunarodnog privatnog prava dovedu do srpskog materijalnog prava.

6) Sadržina i forma ugovora o finansijskom lizingu

Prema srpskom Zakonu o finansijskom lizingu, ugovor o finansijskom lizingu obavezno sadrži: precizno određenje predmeta lizinga, iznos naknade koju plaća primalac lizinga, iznos pojedinih rata naknade, njihov broj i vreme plaćanja, kao i rok na koji je ugovor zaključen. Pored navedenih, ugovor o finansijskom lizingu može da sadrži i sledeće elemente: mesto, vreme i način isporuke predmeta lizinga, svojina na predmetu lizinga, strana koja je obavezna da osigura predmet lizinga i rizici od kojih treba da bude osiguran, način prestanka ugovora, opcija kupovine ili produženja ugovora, troškovi transporta predmeta lizinga, njegova montaža, demontaža i tekuće održavanje, zamena delova, servis i tehničko-tehnološko unapređenje, obučavanje osoblja primaoca lizinga za korišćenje predmeta lizinga i druge elemente o kojima ugovorne strane postignu saglasnost. Ugovor o lizingu mora biti zaključen u pismenoj formi (čl.6.).

Iz navedene odredbe proističu tri bitna elementa ugovora o finansijskom lizingu: predmet finansijskog lizinga, lizing naknada (ukupan iznos i iznos pojedinih rata, njihov broj i vreme plaćanja) i vreme trajanja ugovora. Razume se, princip autonomije volje omogućava da kod ovog ugovora, kao i kod drugih, i svaki drugi element može dobiti snagu bitnog elementa, kad je to rezultat saglasnosti volja ugovornih strana.

Pored pomenutih bitnih elemenata, Zakon *exempli causa* navodi i elemente koje ugovor o finansijskom lizingu može sadržati, a koji spadaju u red uobičajenih klauzula u ugovorima ove vrste. *Ratio* ove odredbe ogleda se u intenciji zakonodavca da, polazeći od toga da je ugovor o finansijskom lizingu relativno nepoznat u domaćoj poslovnoj praksi, pravne subjekte (pre svega domaće) uputi na one klauzule koje se najčešće javljaju u ovom ugovoru i koje čine njegovu uobičajenu ali ne i obaveznu sadržinu.

Ugovor o finansijskom lizingu, da bi bio punovažan, mora biti zaključen u pismenoj formi. Zahtevom za ispunjenjem pismene forme sadržanom u ovoj odredbi Zakona, ugovor o finansijskom lizingu u srpskom pravnom sistemu svrstan je u red formalnih ugovora. Reč je o ugovorima kod kojih ispunjenje određene forme predstavlja bitan, konstitutivan sastojak ugovora, te je, u slučaju nepoštovanja takve forme, ugovor pogođen sankcijom apsolutne ništavosti (bitna forma, forma *ad solemnitatem*). Predviđanjem pismene forme kao uslova punovažnosti ugovora o finansijskom lizingu, zakonodavac je nastojao da zaštiti, pre svega, interese samih ugovornih strana. Naime, ugovor o finansijskom lizingu koji se, po pravilu, odnosi na predmete veće vrednosti, relativno je nov i nedovoljno poznat u domaćem poslovnom prometu zbog čega u Srbiji u pogledu ovog ugovora nema ni ustaljenih standarda ni izgrađene sudske prakse. Iz tih razloga, potrebe pravne sigurnosti ugovornih strana nalažu da se njegovom zaključenju pristupi sa posebnom pažnjom. Putem pismene forme pouzdano se

utvđuju postojanje i sadržina ugovora o finansijskom lizingu, što je značajno kako sa aspekta interesa samih subjekata posla finansijskog lizinga, tako i sa stanovišta pravne sigurnosti uopšte.

7) Prava i obaveze subjekata finansijskog lizinga

Davalac lizinga

Prema Zakonu o finansijskom lizingu, davalac lizinga je dužan da prema specifikaciji primaoca lizinga pribavi predmet lizinga od isporučioca koga je odredio primalac lizinga – *obaveza pribavljanja predmeta lizinga* (čl.14.). U slučaju stečaja primaoca lizinga, davalac lizinga ima pravo na izdvajanje predmeta lizinga (izlučno pravo) iz stečajne mase primaoca lizinga, u skladu sa zakonom kojim se uređuje stečajni postupak. Primalac lizinga i sud nadležan za sprovođenje stečajnog postupka, dužni su da bez odlaganja obaveste davaoca lizinga o pokretanju stečajnog postupka – *zaštita u slučaju stečaja primaoca lizinga* (čl.15.). Za materijalne nedostatke predmeta lizinga, primaocu lizinga odgovara isporučilac, ako drukčije nije predviđeno – *isključenje odgovornosti za materijalne nedostatke* (čl.16.).[50] Davalac lizinga ne odgovara primaocu lizinga za štetu prouzrokovanu predmetom lizinga, osim ako je primalac lizinga pretrpeo štetu usled toga što se oslonio na stručnost davaoca lizinga ili ako je davalac lizinga imao učešća u izboru isporučioca ili specifikaciji predmeta lizinga, ako drukčije nije ugovoreno – *isključenje odgovornosti za štetu prouzrokovanu predmetom lizinga* (čl.17.). Davalac lizinga odgovara ako na predmetu lizinga postoji pravo trećeg lica koje isključuje, umanjuje ili ograničava neometanu državinu primaoca lizinga, a o čijem postojanju primalac lizinga nije obavešten, niti je pristao da uzme predmet lizinga opterećen tim pravom – *odgovornost za pravne nedostatke* (čl.18.). Ako treće lice polaže pravo iz člana 18. na predmet lizinga, primalac lizinga je dužan da obavesti davaoca lizinga o tome i da ga pozove da u razumnom roku oslobodi predmet lizinga od prava ili pretenzije trećeg lica. Primalac lizinga koji je, ne obaveštavajući davaoca lizinga, pokrenuo i izgubio spor sa trećim licem u navedenom slučaju, može se pozvati na odgovornost davaoca lizinga za pravne nedostatke, osim ako davalac lizinga dokaže da je on raspolagao sredstvima da se odbije zahtev trećeg lica. Primalac lizinga ima pravo da se pozove na odgovornost davaoca lizinga za pravne nedostatke predmeta lizinga i kad je bez obaveštavanja davaoca lizinga i bez spora priznao osnovano pravo trećeg lica. Ako je u navedenom slučaju primalac lizinga isplatio trećem licu određeni iznos da bi odustao od svog prava, davalac lizinga se može osloboditi svoje odgovornosti ako naknadi primaocu lizinga isplaćeni iznos, kao i naknadu za pretrpljenu štetu – *obaveštavanje davaoca lizinga* (čl.19.). Ako davalac lizinga ne postupi po zahtevu primaoca lizinga iz prethodne odredbe, u slučaju oduzimanja predmeta lizinga od primaoca lizinga, ugovor o lizingu se raskida ako drukčije nije predviđeno ugovorom. Ako davalac lizinga ne postupi po zahtevu primaoca lizinga iz prethodne odredbe, u slučaju umanjenja ili ograničenja neometane državine primaoca lizinga, primalac lizinga može da raskine ugovor ako se zbog toga svrha ugovora ne može ostvariti, ili da zahteva srazmerno sniženje lizing naknade. U oba slučaja, primalac lizinga ima pravo na naknadu pretrpljene štete. Ako je primalac lizinga u trenutku zaključenja ugovora o lizingu znao za mogućnost da predmet lizinga bude oduzet ili da njegova neometana državina bude smanjena ili ograničena, nema pravo na naknadu štete, ako do toga dođe – *sankcije pravnih nedostataka* (čl.20.). Odgovornost davaoca lizin-

[50] V. J.Perović, *Odgovornost za nedostatke na predmetu finansijskog lizinga,* Pravo i privreda, br.5-8/2006, Beograd, 2006, str.445-458.

ga za pravne nedostatke predmeta lizinga ne može se ugovorom ograničiti ili isključiti – *ugovorno ograničenje ili isključenje odgovornosti davaoca lizinga* (čl.21.). Davalac lizinga može preneti pravo svojine na predmetu lizinga na treće lice.U slučaju prenosa prava svojine na predmetu lizinga, treće lice stupa na mesto davaoca lizinga, te prava i obaveze iz ugovora o lizingu nastaju između njega i primaoca lizinga. U tom slučaju, treće lice ne može zahtevati od primaoca lizinga predaju predmeta lizinga pre proteka roka na koji je ugovor o lizingu zaključen. Prenos prava svojine na predmetu lizinga na treće lice može se ugovorom isključiti ili drukčije predvideti – *prenos prava svojine na predmetu lizinga* (čl.22.).

Primalac lizinga

Primalac lizinga dužan je da preuzme predmet lizinga na način, u vreme in a mestu predviđenom ugovorom – *preuzimanje predmeta lizinga* (čl.23.). Ako isporučilac primaocu lizinga ne isporuči predmet lizinga, ako ga isporuči sa docnjom, ili ako predmet lizinga ima materijalni nedostatak, primalac lizinga može, u skladu sa zakonom kojim se uređuju obligacioni odnosi, odbiti prijem isporuke ili raskinuti ugovor o lizingu i ima pravo na naknadu štete. U ovom slučaju, davalac lizinga može održati ugovor ako bez odlaganja sam isporuči predmet lizinga primaocu lizinga, pod uslovima predviđenim ugovorom o lizingu. Do ispunjenja obaveze isporuke koja je u svemu u skladu sa ugovorom o lizingu, primalac lizinga ima pravo da obustavi isplatu naknade koju bi, na osnovu ugovora o lizingu, bio dužan da plaća davaocu lizinga. Ako raskine ugovor, primalac lizinga ima pravo na povraćaj naknade koju je platio u skladu sa ugovorom o lizingu, umanjenu za iznos koji predstavlja naknadu za korist koju je primalac lizinga imao od predmeta lizinga (razuman iznos) – *raskid ugovora zbog neisporuke* (čl.24.). Primalac lizinga dužan je da koristi predmet lizinga sa pažnjom dobrog privrednika, odnosno dobrog domaćina. Primalac lizinga dužan je da koristi predmet lizinga u skladu sa ugovorom ili namenom predmeta lizinga. Primalac lizinga odgovara za štetu prouzrokovanu korišćenjem predmeta lizinga protivno ugovoru ili nameni predmeta lizinga, bez obzira da li je predmet lizinga koristio on, lice koje radi po njegovom nalogu ili drugo lice kome je on omogućio da koristi predmet lizinga – *korišćenje predmeta lizinga* (čl.25.). Primalac lizinga je dužan da održava predmet lizinga u ispravnom stanju i vrši potrebne popravke na predmetu lizinga. Primalac lizinga odgovara za štetu prouzrokovanu neodržavanjem predmeta lizinga u ispravnom stanju *održavanje predmeta lizinga* (čl.26.). Primalac lizinga dužan je da davaocu lizinga plaća lizing naknadu u iznosima, rokovima i na način koji su predviđeni ugovorom o lizingu – *plaćanje lizing naknade* (čl.27.). Rizik za slučajnu propas ili oštećenje predmeta lizinga snosi primalac lizinga. Rizik prelazi na primaoca lizinga u trenutku preuzimanja predmeta lizinga, ako drukčije nije predviđeno ugovorom – *rizik za slučajnu propast ili oštećenje predmeta lizinga* (čl.32.). Primalac lizinga je dužan da, po prestanku ugovora, neoštećen predmet lizinga zajedno sa pripacima vrati davaocu lizinga ili licu koje je davalac lizinga odredio, osim ako ugovorom nije predviđeno pravo primaoca lizinga da otkupi predmet lizinga ili da produži ugovor o lizingu. Primalac lizinga ne odgovara za istrošenost predmeta lizinga koja nastane njegovom redovnom upotrebom ili za promene na njemu koje su izvršene u sporazumu sa davaocem lizinga – *vraćanje predmeta lizinga* (čl.33.). Primlac lizinga dužan je da osigura predmet lizinga od rizika koji su predviđeni ugovorom, ako drukčije nije ugovoreno – *obaveza osiguranja* (čl.34.). Primalac lizinga može predmet lizinga, u celini ili pojedinim delovima, dati na korišćenje trećem licu uz pismenu saglasnost davaoca lizinga. Davalac lizinga može da raskine ugovor i da zahteva naknadu štete ako je primalac lizinga, bez njegove pismene saglasnosti, predao predmet lizinga na korišćenje trećem licu. Poseban postupak za sticanje državine na predmetu lizinga

predviđen ovim Zakonom može se primeniti i u ovom slučaju raskida ugovora. Predaja predmeta lizinga na korišćenje trećem licu ne oslobađa primaoca lizinga obaveza koje iz ugovora o lizingu ima prema davaocu lizinga. Predaja predmeta lizinga na korišćenje trećem licu može se ugovorom isključiti ili drukčije predvideti – *predaja predmeta lizinga drugom na korišćenje* (čl.35.).

Isporučilac

Isporučilac je dužan da predmet lizinga isporuči primaocu lizinga u ispravnom stanju, zajedno sa pripacima, na način, u vreme i na mestu koji su predviđeni ugovorom o isporuci, osim ako je ugovorom o lizingu predviđeno da predmet lizinga isporuči davalac lizinga – *isporuka predmeta lizinga* (čl.36.). Ako se primalac lizinga saglasio sa sadržinom ugovora zaključenog između davaoca lizinga i isporučioca, na osnovu kojeg je davalac lizinga stekao pravo svojine na predmetu lizinga, naknadne izmene tog ugovora neće proizvoditi dejstvo prema primaocu lizinga, osim ako on na njih ne pristine – *izmene ugovora* (čl.37.). Ako isporučilac predmet lizinga ne isporuči primaocu lizinga, ako ga isporuči sa docnjom, ili ako predmet lizinga ima materijalni nedostatak, primalac lizinga ima prema isporučiocu prava koja bi, prema zakonu kojim se uređuju obligacioni odnosi, imao da je bio strana u ugovoru sa isporučiocem. Izuzetno, primalac lizinga nema pravo da, bez saglasnosti davaoca lizinga, raskine ili poništi ugovor zaključen između davaoca lizinga i isporučioca, niti pravo da zahteva sniženje cene. Isporučilac ne može biti odgovoran i davaocu lizinga i primaocu lizinga za istu štetu – *odgovornost isporučioca prema primaocu lizinga* (čl.38.). Ako je davalac lizinga izvršio izbor isporučioca, solidarno sa njim odgovara primaocu lizinga ako predmet lizinga nije isporučen primaocu lizinga, ako je isporučen sa docnjom, ili ako predmet lizinga ima materijalni nedostatak – *solidarna odgovornost davaoca lizinga i isporučioca* (čl.39.).

8) Raskid ugovora o finansijskom lizingu

Opšta pravila o raskidu ugovora zbog neispunjenja obaveze predviđena srpskim Zakonom o obligacionim odnosima (čl.124-132.), primenjuju se i na raskid ugovora o finansijskom lizingu. Pored opštih pravila Zakona o obligacionim odnosima, Zakon o finansijskom lizingu predviđa i posebna pravila o: (i) raskidu ugovora o finansijskom lizingu od strane primaoca lizinga zbog neisporuke predmeta lizinga, docnje u isporuci ili materijalnih nedostataka na predmetu lizinga; (ii) pravila o raskidu ugovora o finansijskom lizingu od strane davaoca lizinga zbog neplaćanja lizing naknade; (iii) pravila o raskidu ugovora o finansijskom lizingu od strane davaoca lizinga u slučaju neovlašćene predaje predmeta lizinga od strane primaoca lizinga trećem licu.

Pravila o raskidu ugovora o finansijskom lizingu od strane primaoca lizinga predviđena su u članu 24. Zakona o finansijskom lizingu, prema kome:

„Ako isporučilac primaocu lizinga ne isporuči predmet lizinga, ako ga isporuči sa docnjom, ili ako predmet lizinga ima materijalni nedostatak, primalac lizinga može, u skladu sa zakonom kojim se uređuju obligacioni odnosi, odbiti prijem isporuke ili raskinuti ugovor o lizingu i ima pravo na naknadu štete.

U slučaju iz stava 1. ovog člana, davalac lizinga može održati ugovor ako bez odlaganja sam isporuči predmet lizinga primaocu lizinga, pod uslovima predviđenim ugovorom o lizingu.

Do ispunjenja obaveze isporuke koja je u svemu u skladu sa ugovorom o lizingu, primalac lizinga ima pravo da obustavi isplatu naknade koju bi, na osnovu ugovora o lizingu, bio dužan da plaća davaocu lizinga.

Ako raskine ugovor, primalac lizinga ima pravo na povraćaj naknade koju je platio u skladu sa ugovorom o lizingu, umanjenu za iznos koji predstavlja naknadu za korist koju je primalac lizinga imao od predmeta lizinga (razuman iznos)."

Isporuka predmeta lizinga predstavlja jednu od osnovnih obaveza u poslu finansijskog lizinga. Ona se sastoji iz: 1. isporuke predmeta lizinga u vreme, na način i na mestu koji su predviđeni ugovorom; 2. isporuke predmeta lizinga čija svojstva u svemu odgovaraju ugovorenim. U tom smislu, osnov neispunjenja obaveze isporuke, po pravilu, može biti ostvaren neizvršenjem isporuke, docnjom u isporuci i isporukom predmeta lizinga koji ima materijalni nedostatak. U poslu finansijskog lizinga, obavezu isporuke izvršava isporučilac, ukoliko drukčije nije ugovoreno.

U slučaju neispunjenja obaveze isporuke, primalac lizinga može: 1. odbiti prijem isporuke i zahtevati ispunjenje u skladu sa ugovorom; 2. raskinuti ugovor o finansijskom lizingu. U oba slučaja primalac lizinga ima pravo na naknadu pretrpljene štete. Ova pravna sredstva primaoca lizinga podležu opštim pravilima Zakona o obligacionim odnosima.

Primalac lizinga može se opredeliti za raskid ugovora kao najoštriju sankciju nepoštovanja ugovorne obaveze u tri slučaja: kad isporuka nije izvršena, kad je isporuka izvršena sa docnjom i kad predmet lizinga ima materijalni nadostatak koji predstavlja osnov za raskid ugovora.

Odgovor na pitanje da li neizvršenje isporuke u roku daje pravo na raskid ugovora ili ne, ogleda se u značaju koji je isporuka u roku imala za primaoca lizinga. I upravo u oceni tog značaja ogleda se delikatnost pitanja prava na raskid ugovora zbog docnje u isporuci; osim u slučajevima u kojima je taj značaj izričito ugovorom predviđen odnosno kad on očigledno proizilazi iz prirode posla ili okolnosti slučaja, davalac lizinga će, po pravilu, moći da se usprotivi raskidu, ističući da izvršenje isporuke u roku nije bitan sastojak ugovora. Iz tih razloga, primalac lizinga koji ne namerava da ostavi naknadni rok za ispunjenje, mora sa posebnom pažnjom ceniti ispunjenost uslova za automatski raskid predviđen članom 125. Zakona o obligacionim odnosima, jer bi u suprotnom, u slučaju spora, raskid mogao biti osporen, a sam primalac lizinga obavezan na naknadu štete.

U kontekstu prava primaoca lizinga na raskid ugovora zbog materijalnog nedostatka, suštinsko pitanje odnosi se na uslove koji treba da budu ispunjeni da bi konkretan nadostatak predstavljao osnov za raskid ugovora, a to su značaj nedostatka, njegova priroda i momenat postojanja.[51] Kako priroda nedostatka, tj. vidljivi i skriveni nedostaci, kao i potreba njegovog postojanja u momentu prelaza rizika predstavljaju opšta pravila obligacionog prava, na ovom mestu pažnja će biti usmerena na *značaj* koji materijalni nedostatak treba da poseduje da bi predstavljao osnov za raskid ugovora o finansijskom lizingu.

Prema pravilima Zakona o obligacionim odnosima koja se odnose na ugovor o prodaji, osnovni kriterijum koji treba uzeti u obzir prilikom utvrđenja da li kupac ima pravo da raskine ugovor usled postojanja materijalnog nedostatka ogleda se u ozbiljnosti odnosno težini nedostatka u pitanju. U načelu, prodavac odgovara za sve nedostatke stvari koji umanjuju njenu vrednost ili korisnost s obzirom na cilj koji je ugovorom određen ili koji proizilazi iz okolnosti ili namere ugovornih strana. Ipak, pravo na raskid ne daje svaki nedostatak, već samo onaj usled koga kupac ne može ostvariti očekivanu korist ali tako da se time u suštini osujećuje cilj ugovora. Iako Zakon o obligacionim odnosima u kontekstu prava kupca na raskid ugovora ne predviđa izričito zahtev za ozbiljnošću nedostatka, taj zahtev proizilazi iz pravila o raskidu ugovora usled delimičnih nedostataka (čl.492.). Pod delimičnim nedostaci-

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[51] V. J.Perović, *Odgovornost za nedostatke na predmetu finansijskog lizinga,* Pravo i privreda, br.5-8/2006, Beograd, 2006, str.445-458.

ma Zakon podrazumeva slučaj kad je predat samo deo stvari i slučaj kad je predata manja količina od ugovorene. U svakom od ovih slučajeva kupac može raskinuti ugovor samo u pogledu dela koji ima nedostatke odnosno samo u pogledu dela ili količine koji nedostaju (čl.492.st.1.). On može raskinuti ceo ugovor samo ako ugovorena količina ili predata stvar čini celinu ili ako inače ima opravdan interes da primi ugovorenu stvar ili količinu u celini (čl.492.st.2.).

Pomenuta pravila o raskidu ugovora o prodaji zbog materijalnih nedostataka, posmatrana u svetlu ugovora u o finansijskom lizingu daju mesta zaključku da se kao osnovni kriterijum za ocenu dozvoljenosti raskida ugovora po ovom osnovu, uzima *svrha* radi koje je ugovor zaključen. To znači da je potrebno da je reč o takvom nedostatku usled koga primalac lizinga ne može ostvariti korist koju je od ugovora osnovano očekivao i to u takvoj meri da se za njega ne može ostvariti svrha ugovora. U skladu sa tim je i pravilo Zakona o obligacionim odnosima prema kome se neznatan materijalni nedostatak ne uzima u obzir (čl.478. st.3.), kao i opšte pravilo o tome da se ugovor ne može raskinuti zbog neispunjenja neznatnog dela obaveze (čl.131.).

Prema Zakonu o obligacionim odnosima, ugovorne strane mogu, saglasnošću svojih volja, ograničiti ili sasvim isključiti odgovornost prodavca za materijalne nedostatke stvari. Ipak, ovakva odredba ugovora biće ništava ako je nedostatak bio poznat prodavcu, a on o njemu nije obavestio kupca, kao i kad je prodavac nametnuo tu odredbu koristeći svoj poseban monopolski položaj. Kupac koji se odrekao prava da raskine ugovor zbog nedostatka stvari zadržava ostala prava zbog tih nedostataka (čl.486.). Ova pravila shodno se primenjuju na ugovor o finansijskom lizingu (v. čl.16.).

Zakon o finansijskom lizingu, sledeći princip *favor contractus* kao jedan od najzančajnijih principa ovog Zakona, u stavu 2. odredbe člana 24. predviđa da, ukoliko se primalac lizinga opredeli za raskid ugovora zbog zadocnele ili nesaobrazne isporuke, davalac lizinga može održati ugovor na snazi ako bez odlaganja sam isporuči predmet lizinga primaocu lizinga, pod uslovima predviđenim ugovorom o lizingu.

Kako obaveza isplate lizing naknade od strane primaoca lizinga predstavlja ekvivalent njegovom ovlašćenju držanja i korišćenja predmeta lizinga, u stavu 3. odredbe člana 24. predviđeno je da primalac lizinga ima pravo da obustavi isplatu lizing naknade do ispunjenja obaveze isporuke koja je u svemu u skladu sa ugovorom o finansijskom lizingu.

Pravila o raskidu ugovora o finansijskom lizingu od strane davaoca lizinga zbog neplaćanja lizing naknade predviđena su u članu 28. Zakona o finansijskom lizingu, prema kome:

„Davalac lizinga može da raskine ugovor ako primalac lizinga zadocni sa isplatom prve rate.

Ako posle isplate prve rate primalac lizinga zadocni sa isplatom jedne ili više uzastopnih rata čiji ukupan iznos dostiže četvrtinu ukupne naknade, davalac lizinga može da raskine ugovor ili da zahteva od primaoca lizinga isplatu ostatka naknade zajedno sa kamatom.

Izuzetno od odredaba st. 1. i 2. ovog člana, ako primalac lizinga ne isplati jednu ratu, davalac lizinga može da raskine ugovor u pogledu svih budućih obaveza isplate, ako je iz datih okolnosti očigledno da ni one neće biti ispunjene.

Davalac lizinga koji želi da raskine ugovor iz razloga iz st. 1. do 3. ovog člana, dužan je da ostavi primaocu lizinga primeren naknadni rok za ispunjenje obaveze.

Ako primalac lizinga ne ispuni obavezu u roku iz stava 4. ovog člana, ugovor o lizingu se raskida po samom zakonu.

U slučajevima iz st. 1. do 3. ovog člana, primalac lizinga može održati ugovor ako da odgovarajuće obezbeđenje.

Raskid ugovora zbog neplaćanja lizing naknade može se ugovorom drukčije urediti, u granicama prinudnih propisa, javnog poretka i dobrih običaja."

Isplata lizing naknade koja se vrši u pojedinim ratama predstavlja osnovnu obavezu primaoca lizinga iz ugovora o finansijskom lizingu. Izvršenje ove obaveze potčinjeno je određenim pravilima, prema kojima je primalac lizinga dužan da davaocu lizinga plaća lizing naknadu u iznosima, rokovima i na način koji su predviđeni ugovorom o finansijskom lizingu (v. čl.6. st. 1, čl.7. i čl.27.).

Prema ovom Zakonu, pravne posledice docnje odnosno neisplate rate su različite, u zavisnosti od načina i značaja konkretnog neispunjenja ove obaveze od strane primaoca lizinga.

Tako, ako primalac lizinga nije isplatio prvu dospelu ratu odnosno ako je zadocnio sa njenom isplatom, davalac lizinga može raskinuti ugovor. Isplatom prve rate, primalac lizinga pokazuje svoju ozbiljnu nameru da ugovor izvrši. Nasuprot otme, činjenica da on već prilikom dospelosti *prve* rate ne izvršava svoju obavezu, ukazuje na njegovu opštu nespremnost da ispunjava svoje ugovorne obaveze. U tom kontekstu, primalac lizinga može postupati na različite načine: može se ponašati kao da ugovor nije ni nastao, tj. ne preduzimati ništa u cilju ispunjenja obaveze isplate; može izjaviti da odbija isplatu; može, što je češći slučaj, isticati različite prigovore – da ugovor nije ni zaključen, da nije punovažan, da rata nije dospela za naplatu, da se trenutno nalazi u teškoj finansijskoj situaciji i sl. U takvom slučaju, ukoliko primalac lizinga ne ispuni svoju obavezu ni u naknadnom roku koji mu je davalac lizinga ostavio, davalac lizinga može raskinuti ugovor na osnovu člana 28. st.1. ovog Zakona, a u skladu sa opštim pravilima Zakona o obligacionim odnosima o raskidu ugovora zbog neispunjenja obaveze (čl.124. i dalje).

Ukoliko je primalac lizinga isplatio prvu dospelu ratu, davalac lizinga može da raskine ugovor u slučaju da je primalac lizinga zadocnio sa isplatom jedne ili više uzastopnih rata koje predstavljaju najmanje četvrtinu ukupne lizing naknade. Pri tome, umesto da raskine ugovor, davalac lizinga može zahtevati od primaoca lizinga isplatu celog ostatka lizing naknade zajedno sa kamatom. U ovom pravilu uzima se u obzir vrednost obaveze koju je primalac lizinga kroz otplatu pojedinih rata već ispunio, kao i o njegovoj spremnosti da nastavi sa ispunjenjem svojih obaveza. U suštini, ovde je reč o opštem pravilu Zakona o obligacionim odnosima, prema kome se ugovor ne može raskinuti zbog neispunjenja neznatnog dela obaveze (čl.131.). To znači da u principu nema osnova za raskid ugovora zbog neipunjenja ukoliko se delimičnim neizvršenjem obaveze u suštini ne osujećuje svrha ugovora i ukoliko dužnik pokazuje spremnost da u celini ispuni svoju obavezu koju je već delimično ispunio. Preneto na teren finansijskog lizinga, čini se da je pomenuti zahtev za ozbiljnošću neispunjenja ostvaren u slučaju kad je primalac lizinga u docnji sa isplatom onog broja uzastopnih rata čiji ukupan iznos dostiže četvrtinu ukupne lizing naknade. U takvom slučaju, davalac lizinga može raskinuti ugovor na osnovu člana 28. st. 2. ovog Zakona, a u skladu sa opštim pravilima Zakona o obligacionim odnosima o raskidu ugovora zbog neispunjenja obaveze (čl.124 i dalje).

Pored raskida ugovora zbog docnje u isplati prve rate, odnosno zbog docnje u isplati jedne ili više uzastopnih rata koje predstavljaju najmanje četvrtinu ukupne lizing naknade, davalac lizinga može raskinuti ugovor i onda kad primalac lizinga ne isplati samo jednu ratu, ukoliko iz konkretnih okolnosti slučaja proizilazi da ni buduće obaveze isplate neće biti ispunjene. U ovom slučaju, za razliku od prethodnih, primalac lizinga nije isplatio *samo* jednu ratu (koja nije početna), što znači da je reč o delimičnom ispunjenju obaveze.

Prema opštim pravilima obligacionog prava, ugovor se ne može raskinuti zbog neispunjenja neznatnog dela obaveze. To znači da delimično ispunjenje obaveze može biti razlog za raskid ugovora samo onda kad se usled takvog ispunjenja ne može ostvariti svrha ugovora,

odnosno kad se njime drugoj strani prouzrokuje takva šteta koja je suštinski lišava onoga što je opravdano očekivala od ugovora. Ipak, u izvesnim slučajevima, od ovog pravila dozvoljena su odstupanja u okviru kojih je raskid moguć i onda kad neispunjenje konkretne obaveze, samo za sebe, ne predstavlja osnov za raskid ugovora, ali koje, posmatrano sa stanovišta ugovora kao celine, stvara osnov za zaključak da ni buduće ugovorne obaveze neće biti ispunjene. U tom smislu, Zakon o obligacionim odnosima predviđa pravilo prema kome: „kad u ugovoru sa uzastopnim obavezama jedna strana ne ispuni jednu obavezu, druga strana može, u razumnom roku, raskinuti ugovor u pogledu svih budućih obaveza, ako je iz datih okolnosti očigledno da ni one neće biti ispunjene" (čl.129.st.1.). Ovo pravilo Zakona o obligacionim odnosima izvor je odredbe člana 28. stav 3. Zakona o finansijskom lizingu.

Putem ovog pravila, davaocu lizinga koji je u svemu postupio u skladu sa ugovorom, pruža se mogućnost da blagovremno reaguje i zaštiti se protiv budućeg neispunjenja ugovora. Pored toga, *ratio* ovog pravila ogleda se i u umanjenju štete prouzruokovane neizvršenjem, što, razume se, ne utiče na pravo davaoca lizinga na naknadu štete.

U tom smislu, ako primalac lizinga nije isplatio jednu dospelu ratu, a iz konkretnih okolnosti očigledno proizilazi da neće isplatiti ni buduće rate, davalac lizinga ne mora da čeka dospeće novih rata za naplatu u smislu stava 2. ove odredbe, već može raskinuti ugovor čim takve okolnosti postanu izvesne, a po bezuspešnom proteku naknadnog roka za ispunjenje. Ono što predstavlja osnov za raskid ugovora u ovom slučaju nije docnja u isplati jedne rate same za sebe, već konkretne okolnosti slučaja na osnovu kojih se sa sigurnošću može zaključiti da ni buduće rate lizing naknade neće biti isplaćene, tj. da ugovor u celini neće biti izvršen.

Kao uslov za raskid ugovora, ovaj Zakon zahteva da je reč o takvim okolnostima na osnovu kojih se osnovano može pretpostaviti da ugovorna obaveza koja je od suštinskog značaja za davaoca lizinga neće biti izvršena, pri čemu je pitanje krivice primaoca lizinga irelevantno za ocenu prava na raskid. Koje su to okolnosti, faktičko je pitanje koje sud ceni od slučaja do slučaja. One mogu biti kako objektivne prirode - uništenje preduzeća usled slučaja više sile, embargo, rat, uvođenje devizne kontrole, stečaj, tako i subjektivne prirode - nepreduzimanje nijedne radnje u pravcu izvršenja isplate, isticanje neosnovanih prigovora i sl.

Iz formulacije Zakona - „ako je iz datih okolnosti *očigledno* da ni buduće obaveze isplate neće biti ispunjene", nedvosmisleno proizilazi zahtev za primenom *objektivnog* kriterijuma pri formiranju pretpostavke o budućem neispunjenju ugovora. To znači da uverenje samog davaoca lizinga nije dovoljno, već se zahteva standard razumnog lica, tj. ocena od strane objektivnog i nepristrasnog posmatrača da dužnik izvesno neće izvršiti ugovor, odnosno da prema opštem mišljenju postoji očigledan rizik od neispunjenja budućih ugovornih obaveza.

U tom smislu, ukoliko su ispunjeni svi pomenuti uslovi, davalac lizinga može raskinuti ugovor na osnovu člana 28. st. 3. ovog Zakona, a u skladu sa opštim pravilom Zakona o obligacionim odnosima o raskidu ugovora sa uzastopnim obavezama (čl.129.).

Najzad, u slučaju pogrešne procene okolnosti, kada nema mesta raskidu ugovora, izjava o raskidu biće neosnovana i davalac lizinga gubi pravo da se na nju poziva. Pored toga, može se uzeti da je neosnovanom izjavom o raskidu, sam davalac lzinga odbio da izvrši svoje ugovorne obaveze i time stvorio osnov koji primaocu lizinga daje pravo na raskid ugovora.

Ukoliko su ispunjeni uslovi za raskid ugovora usled docnje u isplati prve rate (st.1.), usled docnje u isplati jedne ili više uzastopnih rata koje predstavljaju najmanje četvrtinu ukupne lizing naknade (st.2.) ili pak, usled toga što primalac nije isplatio jednu ratu, a iz konkretnih okolnosti je očigledno da ni buduće obaveze isplate neće biti ispunjene (st.3.), davalac lizinga može raskinuti ugovor ukoliko je primaocu lizinga ostavio naknadni primeren rok za

ispunjenje obaveze (st.4.). U slučaju da primalac lizinga ne ispuni svoju obavezu isplate ni u naknadnom primerenom roku, ugovor o finansijskom lizingu se raskida po samom zakonu (*ipso iure*). To znači da će se ugovor smatrati raskinutim automatski, samim istekom naknadnog roka za ispunjenje, te da davalac lizinga nije obavezan da naknadno obaveštava primaoca lizinga o raskidu (st.5.).

Zakon, u okviru ovog pitanja predviđa mogućnost održanja ugovora na snazi ukoliko primalac lizinga da odgovarajuće obezbeđenje (st.6.). Pri tome, uzimaju se u obzir sredstva obezbeđenja kao što su zaloga, jemstvo i sl., razume se, uz pretpostavku da je konkretno sredstvo obezbeđenja primereno za otklanjanje postojećeg rizika neispunjenja. Iako je reč o pitanju koje se najčešće reguliše saglasnim voljama ugovornih strana, Zakon ovu mogućnost izričito predviđa u pravilima o raskidu ugovora zbog neplaćanja lizing naknade, čime zaštićuje i primaoca lizinga, pružajući mu mogućnost da ugovor održi na snazi. Tim putem, dosledno poštujući princip *favor contractus,* Zakon teži održanju ugovora i ostvarenju njegove kauze, a istovremeno štiti obe ugovorne strane, s obzirom da, ukoliko dužnik pruži odgovarajuće sredstvo obezbeđenja (stvarno ili lično), interesi davaoca lizinga, po pravilu, ne mogu biti dovedeni u pitanje sa stanovišta neispunjenja konkretne obaveze.

Najzad, treba imati u vidu da su pravila ovog Zakona o raskidu ugovora zbog neplaćanja lizing naknade *dispozitivnog* karaktera, što znači da ugovorne strane, saglasnošću svojih volja, ovo pitanje mogu i drukčije urediti. Ugovorne strane mogu, pre svega, ugovorom predvideti drukčije uslove za raskid ugovora po ovom osnovu, pri čemu ti uslovi moraju uvek biti u granicama javnog poretka, prinudnih propisa i dobrih običaja. U pogledu same realizacije raskida, treba imati u vidu opšte pravilo Zakona o obligacionim odnosima prema kome se ugovor raskida po samom zakonu onda kad ispunjenje obaveze u određenom roku predstavlja bitan element ugovora, pa dužnik ne ispuni obavezu u tom roku, kao i kad iz prirode posla proizilazi da je izvršenje o roku bitan element ugovora (čl.125.). To znači da se ugovor o finansijskom lizingu može raskinuti automatski, po samom zakonu, bez obaveze ostavljanja naknadnog roka i obaveštavanja primaoca lizinga o raskidu u dva slučaja - onda kada su ugovorne strane predvidele da će se ugovor raskinuti ukoliko ne bude izvršen u predviđenom roku (*clausula irritatioria*), kao i onda kada iz svih okolnosti slučaja i iz prirode posla proizilazi da je izvršenje o roku bitan element ugovora.

Pravila o raskidu ugovora od strane davaoca lizinga u slučaju kad primalac lizinga neovlašćeno preda predmet lizinga trećem licu izložena su u delu ove Studije u kome su izložena pravila o predaji predmeta lizinga drugom na korišćenje.

9) Dejstva raskida

Primalac lizinga koji raskine ugovor o finansijskom lizingu zbog neisporuke, docnje u isporuci ili materijalnih nedostataka na predmetu lizinga, ima pravo na povraćaj naknade koju je platio u skladu sa ugovorom o finansijskom lizingu, umanjenu za iznos koji predstavlja naknadu za korist koju je imao od predmeta lizinga (čl.24.st.4. Zakona o finansijskom lizingu). Ukoliko je primalac lizinga imao izvesne koristi od predmeta lizinga pre raskida ugovora, ova naknada biće umanjena za iznos koji predstavlja naknadu za takvu korist - razuman iznos (v. čl. 132. st. 4. Zakona o obligacionim odnosima). Razume se, u skladu sa opštim pravilima obligacionog prava o dejstvima raskida ugovora, primalac lizinga ima i pravo na naknadu štete. Visina te nakande utvrđuje se prema kriterijumu pozitivnog ugovornog interesa, što znači da ova naknada treba primaoca lizinga da dovede u položaj u kome bi se nalazio da je primalac lizinga ispunio svoju obavezu u skladu sa ugovorom.

Davalac lizinga koji raskine ugovor zbog neplaćanja lizing naknade ima pravo na povraćaj predmeta lizinga, kao i pravo na naknadu pretrpljene štete (čl.29. Zakona o finansijskom lizingu). U ovoj odredbi reč je o opštem pravilu obligacionog prava o pravnim posledicama raskida dvostranog ugovora zbog neispunjenja obaveze, koje se sastoje u povraćaju u pređašnje stanje i naknadi štete.

U kontekstu ugovora o finansijskom lizingu, to znači da, ukoliko se ugovor raskine iz razloga predviđenih voljom ugovornih strana ili ovim Zakonom, kauza ugovora prestaje da postoji i svaka ugovorna strana se oslobađa svojih obaveza izuzev obaveze na naknadu štete. Međutim, ako su obe strane delimično izvršile svoje obaveze ili ako je davalac lizinga izvršio svoju obavezu, a primalac lizinga nije, raskid deluje retroaktivno, što znači da dolazi do restitucije onoga što je na osnovu ugovora dato. Tako, ako su obe strane delimično izvršile svoje obaveze, dolazi do uzajamnog vraćanja – primalac lizinga mora vratiti predmet lizinga odnosno onaj njegov deo koji je po osnovu ugovora primio do momenta raskida ugovora, dok davalac lizinga vraća iznos koji je do tog momenta primio na ime isplate lizing naknade. S druge strane, ukoliko je davalac lizinga potpuno ili delimično izvršio ugovor, a primalac lizinga nije, obaveza vraćanja postoji samo na strani primaoca lizinga (v. čl.132. st.1, 2. i 3. Zakona o obligacionim odnosima). Pored restitucije, svaka strana duguje drugoj naknadu za koristi koje je u međuvremenu imala od onoga što je dužna vratiti, odnosno naknaditi, a strana koja vraća novac (davalac lizinga) dužna je da plati zateznu kamatu od dana kad je isplatu primila (v. čl.132. st.4. i 5. Zakona o obligacionim odnosima). U slučaju raskida ugovora, davalac lizinga, pored restitucije ima i pravo na naknadu štete.

U slučaju raskida ugovora zbog neplaćanja lizing naknade, davalac lizinga, pored prava na povraćaj predmeta lizinga, ima i pravo na naknadu pretrpljene štete (čl.31. Zakona o finansijskom lizingu). Pri utvrđenju visine naknade štete, Zakon usvaja kriterijum pozitivnog ugovornog interesa, što znači da ova naknada treba davaoca lizinga da dovede u materijalni položaj u kome bi on bio da je ugovor uredno izvršen. Zakon dopušta ugovornim stranama da saglasnošću svojih volja predvide način na koji će se izračunavati visina naknade, s tim što ta visina ne može ni u kom slučaju premašiti onaj iznos do koga bi se došlo primenom kriterijuma pozitivnog ugovornog interesa. Reč je o pravilu imperativnog karaktera, što je od posebnog značaja za zaštitu primaoca lizinga kao ekonomski slabije ugovorne strane.

10) Predaja predmeta lizinga drugom na korišćenje

Prema Zakonu o finansijskom lizingu, primalac lizinga može predmet lizinga, u celini ili pojedinim delovima, dati na korišćenje trećem licu uz pismenu saglasnost davaoca lizinga. Davalac lizinga može da raskine ugovor i da zahteva naknadu štete ako je primalac lizinga, bez njegove pismene saglasnosti, predao predmet lizinga na korišćenje trećem licu. Poseban postupak za sticanje državine na predmetu lizinga predviđen ovim Zakonom može se primeniti i u ovom slučaju raskida ugovora. Predaja predmeta lizinga na korišćenje trećem licu ne oslobađa primaoca lizinga obaveza koje iz ugovora o lizingu ima prema davaocu lizinga. Predaja predmeta lizinga na korišćenje trećem licu može se ugovorom isključiti ili drukčije predvideti (čl.35.).

Primalac lizinga ima pravo da predmet lizinga drži i koristi u toku ugovorenog vremena i to je njegovo osnovno pravo iz ugovora o finansijskom lizingu. U tim okvirima, on je ovlašćen da predmet lizinga koristi neposredno, tako što će ga sam upotrebljavati i pribirati plodove. Međutim, u pogledu njegovog ovlašćenja da predmet lizinga preda na korišćenje trećem licu, potrebno je razlikovati dve situacije.

Prva je predviđena u st. 1. čl. 35. i odnosi se na slučaj kad primalac lizinga, zadržavajući svoj ugovorni status iz ugovora o finansijskom lizingu, predmet lizinga, u celini ili pojedinim delovima, predaje na korišćenje trećem licu. On to može učiniti po različitim osnovima – zakup, posluga, i sl.. U takvom slučaju, između njega i trećeg lica nastaje poseban ugovorni odnos čija se prava i obaveze odnose samo na ugovorne strane i koja su, u principu, nezavisna od odnosa između davaoca lizinga i primaoca lizinga iz ugovora o finansijskom lizingu. To znači da u ovom slučaju, po pravilu, postoje tri vrste ugovornih odnosa: 1. odnos između davoaca lizinga i isporučioca po osnovu ugovora o isporuci; 2. odnos između davaoca lizinga i primaoca lizinga po osnovu ugovora o finansijskom lizingu; 3. odnos između primaoca lizinga i trećeg lica po osnovu ugovora putem koga je primalac lizinga predao predmet lizinga na korišćenje trećem licu.

Ono što je u ovoj konstrukciji bitno, jeste činjenica da primalac lizinga ostaje ugovorna strana iz ugovora o finansijskom lizingu, što znači da on direktno odgovara davaocu lizinga za sve obaveze iz ugovora o finansijskom lizingu. Ugovor koji je primalac lizinga zaključio sa trećim licem ostaje izvan okvira posla finansijskog lizinga i nema, u principu, pravnog uticaja na prava i obaveze ugovornih strana iz ugovora o finansijskom lizingu. Davalac lizinga može se u tom svojstvu, po pravilu, obratiti samo primaocu lizinga za ispunjenje obaveze iz ugovora o finansijskom lizingu, a primalac lizinga je dužan da tu obavezu ispuni. U takvom slučaju, ugovor zaključen između primaoca lizinga i trećeg lica, za davaoca lizinga predstavlja *res inter alios acta* (stvar dogovorena između drugih) i bez uticaja je na njegove interese sve dotle dok primalac lizinga uredno ispunjava svoje obaveze iz ugovora o finansijskom lizingu. Razume se, time se ne dira u prava davaoca lizinga kao vlasnika stvari, kao ni u mogućnost da se saglasnim voljma ugovornih strana predvidi pravo neposrednog obraćanja davaoca lizinga trećem licu radi naplate svojih potraživanja prema primaocu lizinga nastalih iz ugovora o finansijskom lizingu.

Ipak, u određenim slučajevima, davalac lizinga će imati suštinski interes da ne dozvoli predaju predmeta lizinga na korišćenje trećem licu. To će, po pravilu, biti slučaj u kome je davalac lizinga zaključio ugovor imajući prvenstveno u vidu lična svojstva primaoca lizinga i polazeći od toga da će predmet lizinga koristiti lično primalac lizinga – ugovor *intuitu personae*. Taj interes međutim, može postojati i izvan okvira ugovora *intuitu personae* onda kad davalac lizinga oceni da konkretno treće lice ne ispunjava uslove za korišćenje predmeta lizinga tj. kada usled takvog korišćenja postoji opasnost znatne štete za davaoca lizinga (treće lice nije kvalifikovano za korišćenje određenog predmeta lizinga – ne poseduje potrebno stručno znanje, ne poseduje odgovarajući prostor, neophodnu prateću opremu, dovoljan broj ljudi i sl.; treće lice je u poslovnim krugovima opštepoznato kao nesavesno i neuredno u ispunjavanju svojih ugovornih obaveza - „na lošem je glasu"; treće lice je insolventno ili ne poseduje odgovarajuću platežnu sposobnost). Iz tih razloga, Zakon je predvideo da je za predaju predmeta lizinga na korišćenje trećem licu, potrebna saglasnost davaoca lizinga. Ova saglasnost, radi izbegavanja spornih situacija, mora biti data u pismenoj formi.

Imajući u vidu značaj pomenute obaveze, zakonodavac je predvideo raskid ugovora kao sankciju njenog nepoštovanja. Drugim rečima, ukoliko primalac lizinga preda predmet lizinga na korišćenje trećem licu bez pismene saglasnosti davaoca lizinga o tome, davalac lizinga može raskinuti ugovor i zahtevati naknadu štete koju je usled toga pretrpeo.

Kako u slučaju raskida ugovora po ovom osnovu, zbog sprečavanja nastupanja veće štete, postoji urgentna potreba oduzimanja predmeta lizinga od trećeg lica u čijoj se on državini nalazi, poseban postupak za sticanje državine na predmetu lizinga predviđen ovim Zakonom može se primeniti i na ovaj slučaj.

Druga situacija koje pokreće pitanje prava primaoca lizinga na predaju predmeta lizinga na korišćenje trećem licu predviđena je u st. 4. čl. 35. Ona se odnosi na slučaj kad primalac lizinga na treće lice prenosi sva prava i obaveze iz ugovora o finansijskom lizingu, čime treće lice postaje ugovorna strana u tom ugovoru (ustupanje ugovora). U ovom slučaju dakle, nije reč o običnoj predaji predmeta lizinga na korišćenje trećem licu putem zakupa ili posluge, već o ustupanju ugovora koje dovodi do promene u ličnosti primaoca lizinga tj. putem koga treće lice postaje primalac lizinga u ugovoru o finansijskom lizingu (v. čl. 145.Zakona o obligacionim odnosima). To znači da u ovom slučaju, za razliku od prethodnog, i dalje postoje dve vrste ugovornih odnosa: 1. odnos između davoaca lizinga i isporučioca po osnovu ugovora o isporuci; 2. odnos između davaoca lizinga i primaoca lizinga po osnovu ugovora o finansijskom lizingu, s tim što je, usled ustupanja ugovora na strani primaoca lizinga, došlo do promene u ličnosti primaoca lizinga; umesto lica sa kojim je davalac lizinga zaključio ugovor, primalac lizinga postaje treće lice.

Ovakvu situaciju Zakon isključuje, predviđajući da predaja predmeta lizinga na korišćenje trećem licu ne oslobađa primaoca lizinga obaveza koje iz ugovora o finansijskom lizingu ima prema davaocu lizinga. Ovo isključenje predviđeno je iz dva razloga. Prvi izvire iz opšteg pravila Zakona o obligacionim odnosima o ustupanju ugovora, prema kome se u dvostranim ugovorima, za ustupanje ugovora trećem licu zahteva saglasnost druge ugovorne strane (čl.145.st.1.). Drugi razlog polazi od pretpostavke da se ugovor o finansijskom lizingu zaključuje s obzirom na lična svojstva ugovornika - *intuitu personae,* čija je osnovna karakteristika strogo lično izvršenje obaveza, što znači da se kod ovih ugovora izvršenje obaveze ne može preneti na drugo lice. Naime, kada je reč o ugovoru o finansijskom lizingu, lična svojstva primaoca lizinga su, po pravilu, od posebnog značaja za davaoca lizinga, te se promena u ličnosti primaoca lizinga može značajno odraziti na osvarenje njegovih prava.

U ovom slučaju, davalac lizinga dolazi u situaciju koja se značajno razlikuje u odnosu na onu koja je predviđena u stavu 1. ove odredbe. U prethodnoj situaciji, i pored toga što predmet lizinga *de facto* koristi treće lice, druga ugovorna strana ostaje ista, što znači da za sve obaveze iz ugovora o finansijskom lizingu davaocu lizinga odgovara primalac lizinga. Druga sitaucija je međutim, značajno teža za davaoca lizinga s obzirom da se odnosi na *promenu* u ličnosti ugovornika i podrazumeva da treće lice stupa u pravni položaj primaoca lizinga koji će davoacu lizinga odgovarati za obaveze iz ugovora o finansijskom lizingu. Iz tih razloga, odredbom st.4. čl.35. isključuje se mogućnost stavljanja davaoca lizinga u takav položaj, predviđanjem da predaja predmeta lizinga na korišćenje trećem licu ne oslobađa primaoca lizinga obaveza koje iz ugovora o finansijskom lizingu ima prema davaocu lizinga. Pri tome se razume da će, u skladu sa opštim pravilima obligacionog prava, promena na strani ličnosti primaoca lizinga biti moguća ukoliko davalac lizinga na to pristane.

Najzad, potrebno je konstatovati da su pravila ovog Zakona koja se odnose na predaju predmeta lizinga na korišćenje trećem licu *dispozitivnog* karaktera, što znači da se ovo pitanje saglasnim voljama ugovornih strana može drukčije urediti.

11) Postupak prinudnog izvršenja

Jedno od najznačajnijih i najčešće postavljanih pitanja tokom izrade ovog Zakona, odnosilo se na mogućnost davaoca lizinga da, u slučaju raskida ugovora zbog neispunjenja obaveza primaoca lizinga, predmet lizinga povrati na efikasan i pravno siguran. Reč je o pitanju od velikog praktičnog značaja, budući da efikasan postupak za povraćaj predmeta lizinga predstavlja *conditio sine qua non* pri opredeljenju lizing kompanija za ulazak u poslove finansijskog lizinga u jednoj zemlji.

U tom pogledu, intencija zakonodavca bila je da postupak povraćaja predmeta lizinga pojednostavi i skrati, istovremeno ga zadržavajući u okvirima *sudskog postupka*, što je neophodan uslov za obezbeđenje pravne sigurnosti. U tom cilju, zakonodavac se opredelio za poseban postupak za sticanje državine na predmetu lizinga, koji se primenjuje kao *lex specialis* u odnosu na opšta pravila drugih relevantnih zakona.

Prema pravilima odredbe čl.30. ovog Zakona, ugovorne strane mogu, pred nadležnim sudom, u vanparničnom postupku, zapisnički utvrditi da su se sporazumele da, u slučaju neplaćanja lizing naknade od strane primaoca lizinga o dospelosti i u skladu sa ugovorom, davalac lizinga ima pravo de predmet lizinga preuzme u državinu. Potpisani zapisnik o sporazumu ugovornih strana ima snagu sudskog poravnanja koje predstavlja izvršnu ispravu, u smislu odgovarajućih odredaba Zakona o izvršnom postupku. Tim putem, davaocu lizinga pružena je mogućnost da se, bez pokretanja parničnog postupka, obrati izvršnom sudu i na osnovu pomenutog sporazuma koji predstavlja izvršnu ispravu, zahteva povraćaj predmeta lizinga. U tom kontekstu, potrebno je napomenuti da bi, u slučaju uvođenja javnih beležnika u pravni sistem Srbije, ovo pitanje bilo značajno pojednostavljeno, s obzirom da bi overa kod javnog beležnika mogla predstavljati osnov za direktno obraćanje izvršnom sudu.

Ukoliko primalac lizinga ne ispuni obavezu plaćanja lizing naknade u skladu sa ugovorom i ne preda dobrovoljno predmet lizinga, davalac lizinga može, na osnovu potpisanog zapisnika o sporazumu ugovornih strana, podneti izvršnom sudu zahtev za donošenje rešenja o oduzimanju predmeta lizinga od primaoca lizinga ili lica u čijoj se državini on nalazi i predaji tog predmeta davaocu lizinga u državinu.

Sud je dužan da o zahtevu davaoca lizinga odluči u roku od *tri* dana od dana podnošenja zahteva, a zatim, ako usvoji zahtev, da u narednom roku od *tri* dana od dana donošenja rešenja sprovede postupak oduzimanja predmeta. Kratki rokovi za donošenje rešenja o izvršenju nisu ni pre donošenja ovog Zakona bili izuzetak i najveći broj sudija ih je poštovao; ono što je u tom pogledu predstavljalo problem, bilo je sprovođenje izvršenja. Drugim rečima, i kad bi sud doneo rešenje o izvršenju, na njegovu realizaciju se često čekalo mesecima, pa i godinama. Iz tih razloga, bilo je neophodno ovim Zakonom predvideti tako kratke rokove, ne samo za donošenje rešenja i već i za njegovo sprovođenje.

Primalac lizinga može u roku od *tri* dana od dana prijema rešenja izjaviti prigovor da je izvršio obavezu isplate, čime se obezbeđuje njegova zaštita od eventualnih zloupotreba od strane davaoca lizinga. Uz prigovor se moraju podneti pismeni dokazi. Tako izjavljeni prigovor nema suspenzivno dejstvo tj. ne odlaže izvršenje rešenja o oduzimanju predmeta lizinga.

Dalji postupak po prigovoru se odvija u skladu sa opštim pravilima Zakona o izvršnom postupku. Posebna pravila odredbe čl.30. primenjuju se, kao što je rečeno, samo u slučajevima predviđenim ovim Zakonom i nemaju opšti karakter.

12) Registar finansijskog lizinga

Zakon o finansijskom lizingu predviđa i pravila relevantna za registar finansijskog lizinga (čl.43-51.). Upis podataka iz ugovora o finansijskom lizingu u ovaj registar *nema konstitutivni karakter*, što znači da se ugovor o finansijskom lizing punovažno zaključuje i egzistira bez obzira na upis. Registar finansijskog lizinga ovim Zakonom je predviđen radi zaštite pravne sigurnosti poslovnog prometa. Zakon sadrži samo opšta pravila o registru finansijskog lizinga, dok su njegovo funkcionisanje i način rada biti bliže uređeni odgovarajućim podzakonskim aktom.

Zakon predviđa da je registar finansijskog lizinga javni registar koji se formira radi upisa podataka o zaključenim ugovorima o finansijskom lizingu. Registar predstavlja jedinstve-

nu elektronsku bazu podataka koja treba da obezbedi brz i jednostavan pristup bazi, a korisnicima pruži relevantne i pouzdane podatke. Funkcionisanje registra u celini je prilagođeno elektronskoj formi, čija je osnova centralna baza podataka u kojoj se čuvaju svi podaci uneti u registar.

Zakon utvrđuje načelo dotupnosti (publiciteta) podataka o ugovorima o finansijskom lizingu, upisanim u registar finansijskog lizinga. Prema njemu, podaci upisani u registar, dostupni su svakom licu, nezavisno od prebivališta, boravišta ili sedišta lica koje se obraća registru ili mesta na kome se nalazi predmet lizinga. Efikasna dostupnost obezbeđena je zahvaljujući centralnoj elektronskoj bazi podataka. Pored načela dostupnosti, Zakonom je utvđeno i načelo javnosti registra finansijskog lizinga. Prema njemu, svako ima pravo da izvrši uvid u registar finansijskog lizinga i svaki njegov podatak i da zahteva izdavanje overenih izvoda, predviđenih zakonom. Mogućnost uvida u registar i dobijanja odgovarajućeg izvoda iz njega nije uslovljena postojanjem pravnog interesa lica koje zahteva uvid odnosno dobijanje izvoda. Najzad, Zakon proklamuje i načelo pouzdanja u registar finansijskog lizinga, prema kome se smatra da su treća lica upoznata sa postojanjem ugovora o finansijskom lizingu na osnovu njegovog upisa u registar. U tom smislu, lice koje se pouzda u ove podatke smatra se savesnim i ne može snositi štetne posledice u slučaju da registar nepotpuno ili netačno izražava stanje koje uistinu postoji. Naprotiv, lice koje se poziva na okolnost da mu podaci o finansijskom lizingu upisani u registar nisu bili poznati, smatra se nesavesnim i snosi sve pravne posledice koje iz toga proističu. Za razliku od upisa u zemljišne knjige, upis podataka iz ugovora o finansijskom lizingu u registar finansijskog lizinga ne može biti dokaz o postojanju svojinskih prava, punovažnosti ugovora o finansijskom lizingu ili bilo kog drugog pravnog posla. Upis u ovaj registar vrši se samo radi obaveštavanja trećih lica o tome da je određena stvar predmet finansijskog lizinga.

U registar finansijskog lizinga upisuje se ugovor o finansijskom lizingu, njegove izmene i dopune, kao i prestanak ugovora, što znači svi podaci relevantni za obaveštenje trećih lica o tome da je određena stvar predmet finansijskog lizinga.

Zakonodavac se opredelio za davaoca lizinga kao stranu koja je dužna da izvrši obavezu upisa, imajući u vidu da je to, pre svega, u njegovom interesu. Ipak, odredba je dispozitivnog karaktera, pa se ugovorom može predvideti da obavezu upisa vrši primalac lizinga. Obaveza upisa mora se izvršiti u roku od sedam dana od dana zaključenja ugovora o finansijskom lizingu, njegovih izmena i dopuna odnosno prestanka ugovora, što je rok u kome je razumno očekivati da su ostvareni uslovi za upis. Davlac lizinga i primalac lizinga solidarno odgovaraju za štetu koju treće savesno lice pretrpi štetu usled neispunjenja obaveze upisa, što znači da svaki od njih odgovara trećem licu za ceo iznos štete i treće lice može zahtevati njenu naknadu od bilo koga od njih.

Zahtev za upis ugovora o lizingu u registar sadrži naročito: podatke o identitetu davaoca lizinga i primaoca lizinga, precizno određenje predmeta lizinga; rok na koji je ugovor o lizingu zaključen, potpis podnosioca zahteva za upis ugovora o lizingu u registar. Ovi podaci upisuju se u registar u trenutku podnošenja zahteva za upis. Davalac lizinga, primalac lizinga i ispručilac mogu zahtevati da se u registar upiše zabeleška o postojanju spora koji se odnosi na predmet lizinga.

Izvjestilac za Bosnu i Hercegovinu :
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MODERNI UGOVORI

FRANŠIZING

1) Osnovna koncepcija

Ugovor o franšizingu u pravu BiH predstavlja potpunu novinu, odnosno ugovor i pravni posao koji ne bilježi zakonodavnu reguliranost.

Ovaj ugovor spada u ugovore koji su tvorevina novijeg vremena, te se tako u pravu BiH ubraja u grupu neimenovanih ugovora, što znači da ga pravo BiH ne predviđa i eksplicitno ne uređuje, iako se pominje u nekim propisima, osobito propisima koje donosi Konkurencijsko vijeće BiH.[1]

Mogućnost njegovog zaključivanja na tlu BiH izvodi se iz načela opće slobode ugovaranja bez obzira na nepostojanje odredbi o ovom ugovoru u pozitivnom pravu BiH.

Isto tako, franšizing posao, zbog svoje pravne prirode, zahvata različite oblasti prava kao što su ugovorno pravo, zastupanje i distribucija robe, finansijske investicije, intelektualna svojina, pravo konkurencije i sl.,što uz druge poteškoće predstavlja posebnu teškoću za tlo BiH u njegovom zakonodavnom reguliranju.[2]

U pravnom sistemu BiH i to u oba bosanskohercegovačka entiteta, na ugovor o franšizingu primenjuju se opći principi obligacionog prava, prvenstveno oni principi koji su propisani Zakonom o obligacionim odnosima, predviđeni za druge, srodne ugovore (ugovor o licenci, ugovor o prodaji, ugovor o zakupu, ugovor o trgovinskom zastupanju, i sl.

Iz dosadašnje prakse može se primjetiti da su najznačajnije karakteristike ugovora o franšizingu koji se zaključuju u BiH poslovanje sa pravom korišćenja tuđeg trgovačkog imena, znaka ili spoljnjeg izgleda [3]

Početak zakonodavnog reguliranja ugovor o franšizingu na tlu BiH nalazimo u nacrtu Zakona o obligacijama iz 2003. godine, koji još uvijek nije upućen u parlamentarnu proceduru i usvajanje na nivou BiH.

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* Originalni tekst je na lokalnom jeziku.

[1] Odluka o grupnom izuzeću sporazuma između privrednih subjekata koji djeluju na različitim nivoima proizvodnje odnosno distribucije (vertikalni sporazumi) - *"Službeni glasnik BiH" broj 18/06* Odluka o grupnom izuzeću sporazuma o distribuciji i servisiranju motornih vozila - *"Službeni glasnik BiH" broj 16/06*

[2] UNIDROIT, Annex 3 au Guide sur les Accords Internationaux de Franchise Principale, www. unidroit. org.

[3] Primjeri su ugovori koje za područje BiH zaključuju ekskluzivni distributeri i trgovci automobila marke VW, Seat, Škoda, Porsche i sl. .

Pomenuti nacrt sadrži posebne odredbe o franšizingu i to u članovima od 934. do 941. u kojima je dat pojam ovog ugovora, opće obaveze davaoca franšize, odgovornost davaoca franšize, kao i opće obaveze primaoca franšize i obaveze međusobnog informisanja, te obavezna pismena forma za zaključenje ovog ugovora, njegov prestanak i odredbe o konkurenciji.

2) Pojam, sadržina i forma ugovora o franšizingu

U bosanskohercegovačkoj pravnoj praksi i teoriji ne postoji jedinstveno stajalište ili definicija ugovora o franšizingu. Tako se shodno odredbama nacrta Zakona o obligacijama ugovorom o franšizingu obavezuje jedan poduzetnik (davalac franšizinga) da će drugom poduzetniku (primaocu franšizinga) trajnije obezbjeđivati sveukupnost činidbi za obavljanje njegove djelatnosti, a primalac franšizinga se obavezuje da mu za to plati određenu naknadu. Predmet ugovora o franšizingu mogu biti franšizing usluga, franšizing proizvodnje i franšizing trgovine. Predmetom činidbe ugovora o franšizingu su naročito trgovačke robe, trgovačke marke, oznake roba, forma posla, metode plasmana, iskustveno znanje i pravo da se određenim uslugama i robama trguje.

Nacrtom Zakona o obligacijama i to Članom 935. nacrta propisane su opće obaveze davaoca franšizinga

Davalac franšizinga je obavezan primaocu franšizinga predati tehničke i poslovne dokumente i druge neophodne informacije koje su primaocu franšizinga neophodne za vršenje ugovorom datih prava, kao i upoznati primaoca franšizinga i njegove uposlene sa pitanjima koja su povezana sa ostvarivanjem ovih prava.

Davalac franšizinga je obavezan primaocu franšizinga predati ugovorom utvrđene licence i obezbijediti sačinjavanje isprava o tome na zakonom propisan način.

Davalac franšizinga je dužan štititi program sveukupnih činidbi od zahvata trećih i kontinuirano ga dalje razvijati. On mora stalno pružati tehničku i savjetodavnu podršku primaocu franšizinga, koja obuhvata i obrazovanje i usavršavanje primaoca franšizinga i njegovih uposlenih.

Davalac franšizinga odgovara za postojanje prava i znanja u vezi sa programom franšizing činidbi prema općim propisima.

Ako davalac franšizinga skrivljeno povrijedi ostale ugovorne obaveze, onda primalac franšizinga ima pravo umanjiti naknadu.

S druge strane, primalac franšizinga je obavezan primjenjivati program franšizing-činidbi aktivno i sa pažnjom dobrog poduzetnika, kao i dobavljati robe i usluge putem davaoca franšizinga ili lica koja on označi, ako je to ugovorom predviđeno ili je u neposrednom odnosu sa svrhom ugovora.

Ugovorne strane su međusobno obavezne na upoznavanje o poslovnoj situaciji u vezi sa franšizingom kao i na sveukupno međusobno informisanje prema principima savjesnosti i poštenja. Oni su obavezni na čuvanje povjerljivih informacija i kad ne dođe do zaključenja ugovora.

Ugovor o franšizingu mora biti zaključen u pismenoj formi.

Ugovor mora sadržavati i potpuni opis programa franšizing-činidbi.

3) Trajanje i obnavljanje ugovora o franšizingu

Ugovor o franšizingu se zaključuje na duži vremenski period, sa određenim ili neodređenim vremenom trajanja.

Prema Nacrtu Zakona o obligacijama ugovorni odnos prestaje istekom vremena ili otkazom.

Ako nije drugačije ugovoreno, za otkaz ugovora o franšizingu važe rokovi za redovni otkaz ugovora o zakupu. Osim toga postoji mogućnost vanrednog otkaza iz važnih razloga.

I nakon prestanka ugovornog odnosa strane su međusobno obavezne na lojalnost u konkurenciji. U tom okviru se primaocu franšizinga može nametnuti mjesno ograničena zabrana konkurencije, koja ne smije prekoračiti trajanje od jedne godine.

Ako zabrana konkurencije bivšeg primaoca franšizinga neprimjereno ograničava u vršenju njegove djelatnosti, onda mu davalac franšizinga mora bez obzira na razlog okončanja ugovora obezbijediti primjerenu naknadu.

4) Finansijska pitanja

Samim Nacrtom Zakona o obligacijama nisu definirana niti uređena neka od finansijskih pitanja koja su značajna za ugovor o franšizingu. Ipak, ističemo da obaveza primaoca franšizinga koja se ogleda u plaćanju naknade za ustupljena prava i usluge u praksi najčešće obuhvata ugovaranje početne naknade i naknade koja zavisi od obima prometa. Naknada, ovisno o volji ugovornih strana može biti uključena u prodajnu cijenu proizvoda koje davalac prodaje primaocu franšizinga.

5) Pod-franšizing

U pogledu pod-franšizinga, Nacrt ne predviđa nikakva rješenja, iako na načelu slobode ugovaranja ne postoji smetnja da se ugovorom o franšizingu predvidi pravo primaoca franšizinga da isključiva ili dio svojih prava prenese na treća lica, a koja prava su na njega prenesena od strane davaoca franšizinga.

Smatramo da je ovo pitanje također potrebno zakonodavno riješiti i eventualno precizirati ovu mogućnost, kao i odrediti druge pojedinosti za pod-franšizing (rok na koji se zaključuje, posljedice zaključenja i sl).

6) Reklamiranje i kontrola reklamiranja

U pogledu obaveze reklamiranja iz ugovora o franšizingu, u pravnom sistemu BiH nema posebnih propisa. Ipak, jednim dijelom ovo pitanje indirektno uređuje i sam Nacrt Zakona o obligacijama i to na mjestu u kojem kao obavezu davaoca franšizinga predviđa da je davalac franšizinga dužan štititi program sveukupnih činidbi od zahvata trećih i kontinuirano ga dalje razvijati. On mora stalno pružati tehničku i savjetodavnu podršku primaocu franšizinga, koja obuhvata i obrazovanje i usavršavanje primaoca franšizinga i njegovih uposlenih.

7) Prava intelektualne svojine

Jedna od osnovnih obaveza davaoca franšizinga jeste da primaocu ustupi pravo upotrebe robnog ili uslužnog žiga i drugih prava intelektualne svojine u skladu sa ugovorenim uslovima. U tom pravcu su i rješenja, istina vrlo skromno određena i u Nacrtu Zakona o obligacijama prema kojim davalac franšizinga je obavezan primaocu franšizinga predati ugovorom utvrđene licence i obezbijediti sačinjavanje isprava o tome na zakonom propisan način.

8) Know-how i poslovna tajna

Davalac franšizinga je obavezan da primaocu franšizinga ustupi određena znanja i iskustva (know-how), neophodna za obavljanje franšizing posla od strane primaoca franšizinga. Obaveza primaoca franšizinga da čuva informacije i podatke o davaocu franšizinga i njegovom poslovanju kao poverljive, tj. kao poslovnu tajnu, redovno se predviđa u ugovorima o franšizingu (*confidentiality clause*). Ipak, potrebno je naglasiti da u pravnom sistemu BiH, pa ni u samom Nacrtu Zakona o obligacijama ova obaveza nije eksplicitno definirana, iako se na nju treba upozoriti, jer bi postojala i postoji bez obzira na ovu konstataciju. Obaveza čuvanja poslovne tajne posebno je predviđena i Nacrtom Zakona o obligacijama, prema kome ugovorne strane su međusobno obavezne na upoznavanje o poslovnoj situaciji u vezi sa franšizingom kao i na sveukupno međusobno informisanje prema principima savjesnosti i poštenja. Oni su obavezni na čuvanje povjerljivih informacija i kad ne dođe do zaključenja ugovora.

9) Pravna sredstva u slučaju neispunjenja ugovorne obaveze

Prema općem pravilu Zakona o obligacionim odnosima o raskidu ugovora zbog neispunjenja, kad jedna ugovorna strana ne ispuni svoju obavezu, druga strana može, ako drukčije nije predviđeno, zahtijevati ispunjenje obaveza ili, pod uslovima predviđenim Zakonom, raskinuti ugovor prostom izjavom, ako raskid ne nastupa po samom zakonu, a u svakom slučaju ima pravo na naknadu štete. S tim u vezi, pravne posljedice neispunjenja ugovornih obaveza iz ugovora o franšizingu kao ugovora koji nije zakonski regulisan, zavise od onoga što su strane ugovorom predvidjele u skladu sa načelom autonomije volje. U slučaju da to ugovorom nije predviđeno, u slučaju spora primjenili bi se opći principi i pravila Zakona o obligacionim odnosima, kao i pravila tog Zakona relevantna za druge, slične ugovore.

Pored navedenog, bosanskohercegovačko pravo prihvata princip raskida ugovora zbog neispunjenja bez sudskog posredovanja. U tom smislu, opće pravilo je da se ugovor raskida prostom izjavom o raskidu, koju je poverilac obavezan učiniti dužniku bez odlaganja.[4] Trenutak u kome izjava o raskidu počinje da proizvodi pravna dejstva, Zakon o obligacionim odnosima, u skladu sa usvojenom teorijom prijema[5], vezuje za trenutak u kome je dužnik primio obavijest o raskidu ugovora.

10) Prestanak ugovornog odnosa i pravne posledice prestanka

Prestanak ugovora o franšizingu podliježe općim pravilima Zakona o obligacionim odnosima o prestanku ugovora.

O pravnim posledicama prestanka ugovora o franšizingu u pravnom sistemu BiH nema posebnih propisa, pa se na ovo pitanje primenjuju opća pravila Zakona o obligacionim odnosima.

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[4] Izraz ''bez odlaganja'' tumači se tako da, poverilac koji namerava da raskine ugovor, mora o tome obavestitti dužnika u najkraćem mogućem roku, a u skladu sa okolnostima slučaja i onim što je uobičajeno u konkretnom domenu trgovačke struke. Više, J.Perović, *Fundamental Breach of contract….,* nav. delo, str.322-323.

[5] V. čl.31. Zakona.

FAKTORING

Faktoring je sve veći izvor vanjskog finansiranja za korporacije i mala i srednja preduzeća i omogućava veoma rizičnim dobavljačima da prenesu svoj kreditni rizik na visoko kvalitetne kupce. Faktoring je naročito koristan u zemljama sa slabim sudskim izvršenjem i evidencijom koja nije kompletna o podržavanju prioriteta potraživanja jer se potraživanja prodaju, prije nego da se pokrivaju kolateralom, a potraživanja koja su predmet faktoringa nisu dio imovine bankrotiranih malih i srednjih preduzeća. Statistika pokazuje da je faktoring uobičajeniji u zemljama s većim ekonomskim razvojem i rastom i razvijenim biroima s kreditnim informacijama.

U BiH, faktoring je u začetku, ali ima potencijal da donese značajne beneficije u BiH poslovnu zajednicu i doprinese boljem poslovnom okruženju. To može biti jedan od najfleksibilnijih finansijskih instrumenata koji podržava trgovinu i pogonska snaga za dalji rast ekonomije BiH. Faktoring s regresom je tehnologija koja može ublažiti problem nedostatka transparentnosti u poslovnom okruženju sa slabim informacionim infrastrukturama ali samo u slučaju kada su predmet faktoringa potraživanja od veoma kvalitetnih kupaca. Faktoring omogućava bržu cirkulaciju sredstava i osigurava likvidnost i solventnost realne ekonomije. Uvođenje faktoringa kao široko raspostranjene finansijske usluge u BiH bi obezbijedilo brži promet sredstava.

Kako se uvode usluge faktoringa, očekuje se da će veličina tržišta faktoringa biti oko 0,4% BDP-a. Prema podacima Centralne banke BiH (CBBiH), 2007. BDP u BiH je bio 21,641 milion KM. To sugeriše da bi BiH mogla očekivati tržište faktoringa od oko 86 miliona (0,4% BDP-a) čak i kratkoročno (1-2 godine). U srednjeročnom periodu (3-5 godina), tržište faktoringa se očekuje da će dostići oko 432 miliona KM (npr. 2% BDP-a), na osnovu projiciranog rasta BDP-a.

Kada bi banke u BiH mogle da obezbijede adekvatno kreditiranje privatnog sektora, uključujući kratkoročne kreditne linije, potreba za faktoringom bi vjerovatno bila mala. Što se tiče uvođenja faktoringa kao novog finansijskog proizvoda u BiH, u vrijeme sadašnje svjetske finansijske krize, finansijske institucije mogu da čekaju stabilnije vrijeme, prije nego što ponude usluge faktoringa poslovnoj zajednici. A u drugom slučaju, mogu početi da nude faktoring kao novi proizvod pokazujući svojim klijentima da rade u njihovom najboljem interesu tako što im pomažu da osiguraju likvidnost i solventnost u sadašnjem teškom vremenu.

Navedeni podaci govore u prilog što hitnijeg zakonodavnog reguliranja faktoringa koji je u BiH izostao, odnosno predstavlja još uvijek ugovor iz reda neimenovanih ugovora i zaključuje se na načelima općih pravila obligacionog prava.

FINANSIJSKI LIZING

1. Zakonodavni okvir lizinga (Osnovni koncept i elementi)

Bosna i Hercegovina je do donošenja entitetskih zakona o lizingu spadala u krug zemalja koje nisu imale cjeloviti i sistemski regulisan pravni posao lizinga (operativni ili finansijski lizing) već su postojali propisi koji su se posredno odnosili na lizing.

U takvom zakonodavnom okruženju ugovor o lizingu se zaključivao kao neimenovani ugovor, čiji sadržaj, polazeći od principa slobode ugovaranja određuju same ugovorne strane.

Od trenutka donošenja zakona o lizingu u oba bosanskohercegovačka entiteta (Zakon o leasingu F BiH objavljen je u Službenim novinama Federacije BiH broj : 85/08 i stupio je na snagu 03.01.2009. godine, Zakon o lizingu Republike Srpske objavljen je u Službenom listu Republike Srpske broj : 70/07) BiH se svrstala u krug zemalja koje imaju poseban zakon o lizingu.

Prije donošenja posebnih zakona u BiH je postojalo djelimično regulisanje lizing posla.

Djelimično regulisanje je izvršeno Zakonom o vanjskotrgovinskom poslovanju („Službene novine Federacija BiH", broj 2/95) po kojem preduzeće može privremeno izvoziti, odnosno uvoziti, te uzimati u zakup opremu radi korišćenja u proizvodnji i radi pružanja usluga. Ugovor o zakupu, obavezno sadrži rok trajanja zakupa. Ugovorom o zakupu se može predvidjeti da po isteku trajanja ugovorenog roka zakupac postane vlasnik privremeno izvezene, odnosno uvezene opreme. Lizing je bio ugrađen i u Međunarodne računovodstvene standarde i u Računovodstvene standarde Federacije BiH. U računovodstvenim standardima je naglašena razlika između operativnog i finansijskog lizinga sa različitim načinima računovodstvenog iskazivanja.

Osim toga, Zakon o standardnoj klasifikaciji djelatnosti je predvidio i djelatnost finansijskog lizinga. Primjena ugovora o lizingu predviđena je i Pravilnikom o postupku zaključivanja ugovora o upravljanju preduzećem i davanjem u lizing imovine preduzeća u postupku privatizacije.[6] Ugovor o lizingu se, u skladu sa ovim pravilnikom, zaključuje sa primateljem lizinga koji se bira putem javnog oglasa ili direktnom ponudom potencijalnih primatelja lizinga ovlaštenoj agenciji za privatizaciju.

Okvirni zakon o zalozima[7] je također jedan od zakona koji imaju uticaja i na lizing i uređuje registraciju i pravo prvenstva i davaoca lizinga.

S obzirom na široku primjenu i značaj ugovora o lizingu u međunarodnom prometu bitno je ukazati na izvršeno regulisanje ovog instituta putem uniformnih pravila međunarodnog poslovnog prava. Međunarodni pravni okvir za primjenu finansijskog lizinga obezbjeđen je UNIDROIT Konvencijom o međunarodnom finansijskom lizingu (UNIDROIT Convention on International Financial Leasing). Konvencija je usvojena u Otavi, 28. maja 1988. godine. Međutim, Konvencija samo djelimično reguliše lizing iz razloga što reguliše samo jednu vrstu lizinga i to finansijski lizing, a BiH nije potpisnica ove Konvencije, niti je istoj pristupila nakon disolucije SFRJ.

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[6] „Službene novine F BiH„ broj 5/98, 66/03 i 15/04

[7] „ Službeni glasnik BiH" broj 28/04

Konvencija o međunarodnom finansijskom lizingu je korištena i kao osnovni izvor prava pri izradi i donošenju bosanskohercegovačkih entitetskih zakona o lizingu, iako je njen utjecaj u samim zakonima nedovoljan.

1.1. Značenje finansijskog lizinga u entitetskim zakonima

U bosanskohercegovačkom dvoentitetskom pozitivnom pravu finansijski lizing je definisan kao jedan od pojavnih oblika ugovora o lizingu, pored operativnog lizinga i određen je članom 5. stav 2. i 3. Zakona o leasingu F BiH, odnosno članom 6. Zakona o lizingu RS.

Federalni Zakon tako finansijski lizing određuje kao pravni posao u kojem korisnik leasinga u razdoblju posjedovanja i korištenja predmeta leasinga plaća ugovorenu leasing naknadu s opcijom kupnje i stjecanja prava vlasništva nad predmetom leasinga i snosi troškove amortizacije predmeta leasinga. Istim članom ovog Zakona prethodno se definira lizing kao pravni posao u kojem davatelj leasinga prenosi pravo posjedovanja i korištenja predmeta leasinga na korisnika leasinga na određeni vremenski rok, a zauzvrat korisnik leasinga se obvezuje da mu za to plaća ugovorenu leasing naknadu.

Zakon o lizingu RS u članu 6. daje nešto drugačiji, ali suštinski gotovo identičnu definiciju finansijskog lizinga definirajući ga kao pravni posao u kome davalac lizinga :

a) sa isporučiocem predmeta lizinga kojeg je odredio primalac lizinga zaključuje ugovor o isporuci na osnovu kojeg stiče pravo svojine nad predmetom lizinga, prema specifikaciji primaoca lizinga i pod uslovima koje, ukoliko se odnose na interese primaoca lizinga,odobrava primalac lizinga
b) sa primaocem lizinga zaključuje ugovor o finansijskom lizingu kojim se obavezuje da na primaoca lizinga prenese ovlaštenje držanja i korištenja predmeta lizinga na ugovoreno vrijeme, a primalac lizinga se obavezuje da mu za to plaća ugovorenu naknadu
c) lizing naknadu određuje na osnovu amortizacije cjeline ili najbitnijeg dijela vrijednosti predmeta lizinga

Ovdje je važno naglasiti da se pravna priroda, kao ni jasnije pojmovno određenje ugovora o lizingu (finansijskom ili operativnom) ne daju kroz zakonski tekst, iako je to jedno od pitanja koje će se zasigurno postaviti i u teoriji i praksi s ciljem da se u prvom redu izvrši razdvajanje ovog pravnog posla od srodnih mu pravnih poslova kao što su ugovor o zakupu ili ugovor o kupoprodaji sa obročnim otplatama koji su poznati dosadašnjoj teoriji i zakonodavnoj praksi u BiH, ali i zbog činjenice da entitetski zakoni upućuju na primjenu Zakona o obligacionim odnosima u stvarima koja nisu uređena tim zakonima.(Zakon o obligacionim odnosima- Službeni list SFRJ br : 29/78 i 39/85, Sl.list R BiH br : 2/92 , 13/94).

1.2. Područje primjene finansijskog lizinga

Federalnim Zakonom o leasingu određeno je u članu 6. „Obavljanje poslova leasinga „ koje je rezervirano samo za leasing društva koja se osnivaju i posluju u skladu sa tim Zakonom na teritoriji Federacije BiH (u daljem tekstu : F BiH), te za podružnice leasing društva koje ima sjedište u Republici Srpskoj (u daljem tekstu : RS) i Brčko Distriktu BiH (u daljem tekstu : BD) ili iznimno za banku sa sjedištem u FBiH, odnosno organizacijski dio banke sa sjedištem u RS ili BD uz uvjete i na način određen propisima koji uređuju poslovanje banaka na području FBiH.

Na društva definirana ovim članom koja obavljaju poslove finansijskog leasinga primjenjuju se odredbe ovoga zakona koje uređuju:

a) ugovor o leasingu,
b) prava i obaveze,
c) registraciju leasinga,
d) prekršaje banaka

Slične odredbe o obavljanju poslova lizinga sadržane su u članovima 10 i 11. Zakona o lizingu RS.

1.3. Predmet ugovora o finansijskom lizingu

Kada je riječ o predmetu ugovora o finansijskom lizingu entitetskim zakonima nije data eksplicitna definicija niti određenje predmeta lizinga, ali se ekstenzivnim tumačenjem odredaba zakona može zaključiti da predmetom lizinga mogu biti sve pokretne i nepokretne stvari koje nisu izvan prometa ili nisu ograničene u prometu.

Zakonom o leasingu F BiH propisano je da predmet lizinga određuje primalac lizinga (član 35.) kao i dobavljača predmeta lizinga, a slično određenje predviđeno je i članom 25. Zakona o lizingu RS, iako je ovim Zakonom za davaoca lizinga propisana dodatna obaveza da pribavi predmet lizinga kojeg mu u specifikaciji odredi primalac lizinga i o tome ga obavijesti do zaključenja ugovora o isporuci predmeta lizinga.

Zakoni se na taj način ne bave preciznim definiranjem, niti određenjem predmeta lizinga, ali se u praksi kao predmet finansijskog lizinga najčešće javljaju pokretne stvari (motorna vozila, oprema i sl), dok su vrlo rijetki slučajevi lizinga nekretnina, iako ne postoje nikakva zakonska ograničenja, niti smetnje da predmetom ugovora budu i nepokretnosti.

1.4. Subjekti pravnog posla finansijskog lizinga

Zakonodavno određenje subjekata, odnosno učesnika u pravnom poslu finansijskog lizinga je dato na tragu određenja subjekata u Međunarodnoj konvenciji o finansijskom lizingu i većini nacionalnih zakonodavstava u Evropi, te su kao subjekti u oba zakona u BiH određeni davalac lizinga, primalac lizinga i dobavljač predmeta lizinga.

Zakon o leasingu F BiH određuje tako da je davalac lizinga pravna osoba sa sjedištem na teritoriji F BiH registrirana za obavljanje poslova leasinga. Korisnik leasinga je svaka osoba koje na temelju ugovora o leasingu stječe pravo posjedovanja i korištenja predmeta leasinga. Dobavljač predmeta leasinga je svaka osoba koja na temelju ugovora ili na drugi zakonom propisan način na davatelja leasinga prenosi pravo vlasništva nad predmetom leasinga, osim ako dobavljač predmeta leasinga i davatelj leasinga nisu iste osobe. Davatelj leasinga i dobavljač predmeta leasinga može biti ista osoba.

Zakon o lizingu RS za razliku od Zakona o leasingu F BiH ne smatra ugovorom o finansijskom lizingu ugovor u kome je ista osoba davalac i isporučilac (dobavljač) predmeta lizinga, već ga određuje kao ugovor o operativnom lizingu (član 7. Zakona o lizingu RS).

Na opisanim razlikama među entitetskim zakonima izvodi se zaključak da s promjenom jednog od subjekata ugovora o finansijskom lizingu može doći i do promjene vrste lizing posla tako da posao finansijskog lizinga u RS može imati tretman pravnog posla operativnog lizinga, što nije slučaj sa Zakonom u F BiH.

Bliži smo postavci da promjena ili sjedinjenje u jednoj osobi davaoca i isporučioca predmeta lizinga ne bi trebali mijenjati vrstu pravnog posla lizinga, osobito ako je zaključenje ugovora o finansijskom lizingu prvenstvena namjera ugovornih strana.

2. Pojam lizinga – Pravna i ekonomsko-finansijska priroda

Pravna priroda ugovora o lizingu u teoriji je sporna. Teškoćama u određenju pravne prirode lizinga je doprinjela i činjenica da se koriste različite forme ugovora o lizingu i da se u poslovnoj praksi razvilo više vrsta lizinga. Mišljenja variraju od toga da se radi o zakupu, modifikovanom ugovoru o zakupu, ugovoru o kupovini i zakupu, pa do mišljenja da se radi o novom sui generis ugovoru. Tome doprinosi i činjenica da se u nekim zakonodavstvima klasifikuje kao „lizing zakup", a u teoriji kao „specijalni zakup".[8]

Po nekim autorima „leasing se nalazi na granici između zakupa i kredita, i kao takav predstavlja originalan tip ugovora, čiji principi međutim, treba da budu određeni od strane doktrine i sudske prakse, u odsustvu zakonodavne intervencije". [9]

„Bliskost" lizinga sa zakupom posebno je izražena kod operativnog ili direktnog lizinga na koji se većinom i primjenjuju odredbe ugovora o zakupu.

Sporna priroda ugovora o lizingu dovela je i do različitog definisanja ovog ugovora tako da u pravnoj i ekonomskoj literaturi postoji dosta različitih definicija.

Sa posebnim aspektom na ekonomsko-finansijski momenat, definisanje lizinga, kao cjelokupne konstrukcije je, definisanje kao posebnog metoda finansiranja raznovrsnih, kako pokretnih, tako i nepokretnih investicionih dobara koja se na temelju ugovora daju u lizing primaocu lizinga, uz određenu naknadu i za određeni ugovorni period. Naknada se određuje na takav način da se ta dobra mogu sa tim jednim uzimaocem lizinga amortizovati u periodu dužem od trajanja ugovora o lizingu. Obzirom da u lizing konstrukciji postoji trodimenzionalan odnos između isporučioca-davaoca lizinga-primaoca lizinga, ugovor o lizingu predstavlja samo jedan dio cjelovite lizing konstrukcije.

Određenje lizinga na način predviđen u Konvenciji je slično izvršeno i u Zakonu o finansijskom lizingu RS i F BiH, iako je definiranje na način iz člana 6. Zakona RS bliže određenju iz Konvencije.

Ugovor o lizingu, kao dio cjelokupnog lizing posla, sa posebnim aspektom na prava i obaveze ugovarača, može se definisati kao ugovor kojim se davalac lizinga obavezuje da će primaocu lizinga dati na privremeno korištenje određenu stvar i da će obaviti određene radnje u vezi sa tom upotrebom, a korisnik se obavezuje da plati naknadu u ugovorenim ratama i da po isteku ugovorenog roka vrati stvar davaocu lizinga, ili produži korištenje ili je otkupi.

Ekonomski ratio ugovora o lizingu je da se omogući pribavljanje opreme ili drugih stvari licima koja ne raspolažu dovoljnim sredstvima, za određeno vrijeme, uz obavezu plaćanja naknade i prema takvom određenju ugovora proizilaze i njegovi bitni elementi.

Essentialia negotii su elementi o kojima ugovarači moraju postići saglasnost da bi ugovor proizvodio pravno dejstva odnosno to je minimum neophodan za njegovo postojanje.

3. Rokovi u ugovoru o finansijskom lizingu

Ugovor o finansijskom lizingu je **dvostrano obavezan ugovor**. I davalac i primalac lizinga moraju izvršiti određene ugovorne obaveze. Davalac lizinga je obavezan predati predmet lizinga, ukoliko je to ugovoreno i odgovara i za održavanje predmeta lizinga, odgovara

[8] Vasiljević Mirko, Poslovno pravo, Beograd 2001, strana 759

[9] Radomir Đurović- Međunarodno privredno pravo sa obrascima ugovora- Beograd 2000.

za pravne nedostatke na predmetu lizinga. Primalac lizinga je dužan plaćati lizing naknadu, koristiti predmet lizinga u skladu sa ugovorom itd.

Ugovor o finansijskom lizigu spada u **formalne ugovore** i potrebno je da je zaključen u pismenoj formi. Putem pismene forme ugovora može se pouzdano utvrditi postojanje i sadržaj ugovora, što ima veliki značaj, prije svega, sa aspekta zaštite interesa samih ugovarača.

Radna verzija nacrta ZOO-a u BiH iz 2003. godine koja još uvijek nije upućena u parlamentarnu proceduru , kao i entitetski zakoni o lizingu predviđaju pismenu formu ugovora o lizingu.

Ugovor o finansijskom lizingu je **teretan ugovor** i za činidbu jedne ugovorne strane daje se protivčinidba druge ugovorne strane. Tako je davalac lizinga dužan predati predmet lizinga primaocu lizinga koji ima obavezu da izvrši protivčinidbu plaćanja lizing naknade.

Ugovor o finansijskom lizingu je **trajan ugovor** i zaključuje se za određeno vrijeme koje ugovarači određuju ugovorom. Entitetskim zakonima trajanje ugovora o finansijskom lizingu je različito regulisano tako što se određuje donja granica trajanja ugovora i to vrijeme ne kraće od dvije godine od dana zaključenja ugovora (član 9. Zakona RS), odnosno vrijeme ne kraće od 6 mjeseci (član 36. Zakona F BiH).

4. Domaći i međunarodni finansijski lizing

Lizing društva u BiH shodno entitetskim zakonima mogu obavljati poslove finansijskog lizinga samo ukoliko su osnovani i posluju u skladu sa entitetskim zakonima.

Zakonima u oba entiteta su propisani način osnivanja, rada i poslovanja lizing društava koja podliježu prethodnom pribavljanju odobrenja za rad (dozvola) izdatog od strane nadležnih entitetskih Agencija za bankarstvo s tim da lizing društva mogu osnivati podružnice na teritoriji drugog entiteta u skladu sa izdatim odobrenjima Agencije.

Važno je istaći da Zakon F BiH ne predviđa eksplicitnu mogućnost osnivanja i rada podružnice lizing društva izvan teritorija F BiH (osim za teritorij RS i BD), dok je članom 20 Zakona RS predviđena mogućnost poslovanja lizing društva iz RS na teritoriji izvan RS uz obavezu takvih društava da o tome u roku od 8 dana od osnivanja poslovne jedinice izvan teritorija RS obavijeste Agenciju uz dostavu podataka o licu ovlaštenom za zastupanje poslovne jedinice, nazivu i adresi poslovne jedinice i planu poslovanja poslovne jedinice za prve tri godine.

Imajući u vidu ovakva zakonodavna rješenja otvoreno je pitanje za poslovanje lizing društava sa područja F BiH izvan teritorija F BiH.

Međutim, izvan statusnog, otvoreno je i pitanje primjene međunarodnog ili domaćeg prava na lizing odnos u kojem ugovarači dolaze sa različitih državnih teritorija.

Naime, entitetski zakoni ne sadrže odredbe kojima se uređuje pitanje primjene domaćeg ili međunarodnog prava za ugovore o finansijskom lizingu kada su ugovarači sa područja različitih jurisdikcija, odnosno kada su njihova sjedišta na teritorijama dvije ili više različitih zemalja.

Ova činjenica ostavlja vrlo široko polje pitanja primjene domaćeg ili međunarodnog prava na ugovor o finansijskom lizingu sa elementom inostranosti, te evidentnu potrebu za dodatnim normiranjem i određenjem primjene domaćeg ili međunarodnom prava u takvom odnosima.

Polazeći od zakonodavnih rješenja u entitetskim zakonima izvodi se zaključak da ugovor o finansijskom lizingu sa elementom inostranosti uopće nije reguliran, da za određenje

primjenjivog prava na tako zaključeni ugovor ne postoje direktne niti indirektne odredbe i da se ugovarači kod ugovora o finansijskom lizingu sa elementom inostranosti u pravnoj nesigurnosti.

Ovom pitanju će se u BiH morati posvetiti posebna pažnja zbog činjenice da BiH kao i ostale zemlje regiona teži priključenju EU i da je mogućnost zaključenja ovakvih ugovora sve veća.

Važno je istaći da je u BiH na snazi Zakon o rješavanju sukoba zakona sa propisima drugih zemalja u određenim odnosima koji je preuzet iz bivše SFRJ (Zakon je iz 1983. godine), te da do punog normiranja i određenja mjerodavnog prava za ugovore o finansijskom lizingu sa elementom inostranosti treba imati u vidu odredbe pomenutog zakona i to osobito člana 19. prema kojem je mjerodavno pravo za ugovore ono pravo koje izaberu sami ugovarači, ako drugačije nije određeno tim zakonom ili međunarodnim ugovorom.

Međutim, situacija se komplicira kada sami ugovarači ne ugovore mjerodavno pravo, niti za njihove odnosi postoji međunarodni ugovor kojim bi se na ugovor o finansijskom lizingu imalo primjeniti određeno pravo mjerodavno za taj ugovor koje je propisano međunarodnim ugovorom.

Do potpunog normiranja i određenja mjerodavnog prava smatramo da može poslužiti odredba člana 20. Zakona bivše SFRJ koji je u primjeni u BiH kojim je predviđeno da je za ugovore o prodaji pokretnih stvari mjerodavno pravo mjesta gdje se u vrijeme primitka ponude nalazilo prebivalište odnosno sjedište prodavca. Ipak, vidljivo je da ova odredba nije riješila niz drugih otvorenih pitanja kod ugovora o finansijskom lizingu, a tiču se finansijskog lizinga nekretnina, kao i druga pitanja u vezi sa pravnom prirodom ugovora o lizingu, koji kako smo već istakli sadrži elemente ne samo ugovora o prodaji pokretnih stvari, već i nekretnina, zatim elemente ugovora o zakupu i sl.

Za takve situacije bit će potrebno cjelovito i opsežno reguliranje kako bi se prevazišla evidentna pravna nesigurnost za ugovarače koji dolaze sa različitih državnih teritorija.

5. Forma i osnovne odredbe ugovora o finansijskom lizingu

Entitetskim zakonima na unificirani način je određena pismena forma ugovora o finansijskom lizingu i odredbe koje takav ugovor mora sadržavati.

Tako je članom Član 36. Zakona F BiH propisan oblik i sadržaj ugovora o lizingu, prema kojem takav ugovor mora biti zaključen u pisanoj formi i sadržavati sljedeće elemente :

a) podatke o subjektima ugovora o leasingu,
b) određenje da li se radi o finansijskom ili operativnom leasingu,
c) detaljno određenje predmeta leasinga,
d) vrijednost predmeta leasinga,
e) vrijeme trajanja leasinga koje ne može biti kraće od šest mjeseci,
f) ukupan iznos leasing naknade,
g) iznos, broj i dospjelost pojedine leasing naknade,
h) mogućnost za otkup ili produženje ugovora o leasingu,
i) pravo davanja predmeta leasinga drugom na korištenje,
j) slučajeve koji će se tretirati kao neizvršenje obaveza od korisnika laesinga,
k) stopu zatezne kamate koja se plaća u slučaju neizvršenja obaveza.

Pored ovih elemenata ugovor o leasingu može sadržavati i druge odredbe kojima se uređuju vrijeme, mjesto i način isporuke predmeta leasinga, rizici od kojih se predmet leasinga mora osigurati i način osiguranja, troškove transporta predmeta leasinga, troškove montaže, demontaže i tekuće održavanje predmeta leasinga, mogućnost obuke osoblja korisnika leasinga za korištenje predmeta leasinga, kao i druge odredbe.

Pored toga, u članu 37 istog Zakona propisane su i posebne odredbe za ugovor o finansijskom lizingu u kojem je određeno da ugovor o finansijskom lizingu iz člana 36. mora sadržavati i sljedeće odredbe :

a) iznos učešća u ukupnoj vrijednosti predmeta leasinga,

b) efektivnu kamatnu stopu koja se koristi za obračun leasing naknade.

Na sličan način odredbe o formi i sadržaju ugovora o lizingu propisane su i u Zakonu RS (član 9.).

6. Prava i obaveze ugovornih strana u ugovoru o finansijskom lizingu

Entitetskim zakonima određena su prava i obaveze ugovornih strana u ugovoru o lizingu.

U Zakonu F BiH pojedinačna prava i obaveze davaoca i korisnika lizinga određena su u članovima 40-50.

Tako su obaveze davaoca leasinga da prema zahtjevu korisnika leasinga pribavi predmet leasinga od dobavljača predmeta leasinga koji je odredio korisnik leasinga.

Pored toga, davalac leasinga dužan je obavijestiti dobavljača predmeta leasinga da predmet leasinga pribavlja radi izvršenja ugovora o leasingu te navesti lice koje je korisnik leasinga, osim ukoliko su davalac leasinga i dobavljač predmeta leasinga ista lica. Pomenutu obavijest davalac leasinga dužan je dostaviti dobavljaču predmeta leasinga najkasnije do preuzimanja predmeta leasinga.

Davalac lizinga je također , u slučaju da je ugovorena promjenjiva leasing naknada dužan u pisanom obliku obavijestiti korisnika leasinga o promjeni te naknade prije nego što se ona počne primjenjivati.

Kada je riječ o odgovornosti za pravne i materijalne nedostatke na stvari koja je predmet ugovora, važno je istaći da je dobavljač predmeta leasinga odgovaran davaocu leasinga za pravne i materijalne nedostatke predmeta leasinga prema općim pravilima odgovornosti za materijalne i pravne nedostatke.

Zaključenjem ugovora o leasingu davalac leasinga ustupa korisniku leasinga zahtjeve koje ima prema dobavljaču predmeta leasinga na osnovu odgovornosti za pravne i materijalne nedostatke, osim ako ugovorom o leasingu nije drugačije ugovoreno.(član 42. Zakona F BiH).

Ukoliko predmet leasinga ima neki materijalni ili pravni nedostatak, a korisnik leasinga je propustio prema dobavljaču predmeta leasinga vršiti ustupljena prava, on nema nikakva prava na osnovu materijalnih ili pravnih nedostataka prema davaocu leasinga, a posebno ne pravo na raskid ugovora ili smanjenje leasing naknade.

Davalac leasinga nije odgovoran korisniku leasinga ili trećem licu za štetu nastalu korištenjem predmeta leasinga, osim ako ugovorom o leasingu nije drugačije određeno (član 43. Zakona F BiH).Međutim, pomenuta odredba ne primjenjuje se ako je do štete došlo uslijed neispravnosti ili greške predmeta leasinga, a davalac leasinga ima pravo regresa prema dobav-

ljaču predmeta leasinga. On ovo pravo može ustupiti korisniku leasinga i smatra se da je to učinio danom zaključenja ugovora o leasingu ukoliko tim ugovorom nije drugačije određeno.

U finansijskom leasingu, shodno članu 44. Zakona F BiH rizik od slučajnog gubitka ili štete na predmetu leasinga snosi korisnik leasinga od trenutka preuzimanja predmeta leasinga u posjed, ukoliko ugovorom o leasingu nije drugačije određeno.

Važno je spomenuti i odredbu člana 46. Zakona F BiH i to u dijelu koji se odnosi na isporuku predmeta lizinga od strane dobavljača. Naime, ako dobavljač predmeta leasinga ne isporuči predmet leasinga u ugovorenom roku zbog razloga za koje snosi odgovornost, a rok nije bitni dio ugovora, korisnik leasinga mu mora ostaviti primjeren naknadni rok za ispunjenje i o tome obavijestiti davaoca leasniga. Ako dobavljač leasinga ni u naknadno određenom roku ne ispuni svoju obavezu, ugovor između davaoca i korisnika leasinga se raskida po samom zakonu. Korisnik leasinga ima pravo od davaoca leasinga tražiti naknadu pretrpljene štete zbog raskida ugovora, a davalac leasinga ima pravo tražiti naknadu pretrpljene štete zbog raskida ugovora od dobavljača predmeta leasinga. Svoje pravo na naknadu štete koje ima prema dobavljaču predmeta leasinga davalac leasinga može ustupiti korisniku leasinga. U slučaju prihvaćanja ustupanja korisnik leasinga ne može postavljati nikakav odštetni zahtjev prema davaocu leasinga.

Ako je davalac leasinga izabrao dobavljača predmeta leasinga, solidarno sa njim odgovara korisniku leasinga ako predmet leasinga nije isporučen korisniku leasinga, ako je isporučen sa zakašnjenjem ili ako predmet leasinga ima materijalni nedostatak.

Korisnik leasinga dužan je preuzeti predmet leasinga na način određen ugovorom o leasingu i ukoliko nije drugačije ugovoreno, korisnik leasinga je dužan izvršiti pregled predmeta leasinga kako bi ustanovio da predmet leasinga nema vidljivih nedostataka te pismeno potvrditi dobavljaču predmeta leasinga da je primio predmet leasinga. Od dana prijema predmeta leasinga, ugovor o leasingu proizvodi djejstvo i od tog dana je korisnik leasinga dužan plaćati leasing naknadu (član 48 Zakona F BiH).

Korisnik leasinga dužan je u skladu sa ugovorom ili namjenom predmeta leasinga koristiti predmet leasinga sa pažnjom dobrog privrednika, odnosno domaćina.

Korisnik leasinga dužan je održavati predmet leasinga u dobrom stanju i snositi sve troškove takvog održavanja, ukoliko ugovorom o leasingu nije drugačije određeno.

Gubitak predmeta leasinga ili gubitak njegove funkcije uzrokovan korištenjem predmeta leasinga ne oslobađa korisnika leasinga od njegovih obaveza određenih ugovorom o leasingu.

Korisnik leasinga dužan je davaocu leasinga plaćati naknadu u iznosima, rokovima i na način određen ugovorom o leasingu.

Korisnik leasinga dužan je po prestanku ugovora o leasingu bez odgađanja predmet leasinga vratiti davaocu leasinga na način i u stanju određenim ugovorom o leasingu, osim ako je u skladu sa ugovorom o leasingu ispunio uvjete kojima stiče pravo vlasništva nad predmetom

leasinga, pravo produženja ugovora o leasingu ili je za taj predmet leasinga sklopljen novi ugovor o leasingu.

Nakon raskida ugovora o leasingu korisnik leasinga je dužan vratiti predmet leasinga sa svim dijelovima i dodatnim elementima davaocu leasinga ili licu kojeg davalac leasinga odredi.

Korisnik leasinga ne odgovara za istrošenost predmeta leasinga koja nastane njegovim redovnim korištenjem, kao ni za promjene na njemu koje su izvršene u dogovoru sa davaocem leasinga.

Korisnik leasinga odgovoran je za štetu koju uzrokuje korištenjem predmeta leasinga suprotno ugovoru ili namjeni predmeta leasinga, bez obzira na to da li je predmet leasinga

koristio korisnik leasinga, lice koje radi po njegovom nalogu ili lice kome je on omogućio da koristi predmet leasinga.

Slične odredbe o pravima i obavezama ugovornih strana sadržane su i u članovima od 26. – 49 Zakona RS, s tim da Zakon o RS sadrži posebne odredbe o promjeni subjekata ugovora o finansijskom lizingu (član 32. i 33. Zakona).

7. Prestanak ugovora o finansijskom lizingu

Shodno članu 56. Zakona F BiH Ugovor o leasingu prestaje:

a) istekom roka na koji je zaključen,
b) prijenosom prava vlasništva sa davaoca leasinga na korisnika leasinga,
c) otkupom predmeta leasinga,
d) raskidom ugovora o leasingu,
e) uništenjem predmeta leasinga usljed djelovanja više sile, i
f) iz drugih razloga u skladu sa propisima kojima se uređuju obligacioni odnosi.

U ovim slučajevima davalac leasinga je dužan u roku od 15 dana od dana prestanka ugovora o leasingu podnijeti zahtjev za brisanje upisanih prava iz nadležnog registra.

Slične odredbe o prestanku ugovora o lizingu sadržane su i u članu 50 Zakona RS.

8. Posljedice prestanka ugovora o finansijskom lizingu

Kao što smo već istakli ugovor o lizingu može prestati na jedan od načina propisanih članom 56. Zakona F BiH, odnosno članom 50. Zakona RS.

Pored, kako smo vidjeli prestanka ugovora istekom perioda na koji je zaključen predviđeni su i prestanak ugovora za slučaj prijenosa vlasništva sa davaoca na korisnika lizinga predmeta lizinga ili otkupom predmeta lizinga, ali i slučajevi kada ugovor prestaje raskidom ugovora uništenjem predmeta lizinga usljed djelovanja više sile i iz drugih razloga predviđenih za prestanak ugovora po općim propisima kojima se uređuju obligacioni odnosi.

Ovdje ćemo se zadržati na odredbama entitetskih zakona kojima je uređen način i posljedice prestanka ugovora o lizingu za slučaj raskida ugovora.

S tim u vezi Zakon F BiH u članu 54. propisuje da davalac leasinga ima pravo, ako ugovorom o leasingu nije drugačije određeno, raskinuti ugovor o leasingu ako korisnik leasinga:

a) zakasni sa isplatom prve leasing naknade,
b) poslije isplate prve naknade korisnik leasinga zakasni sa dvije uzastopne leasing naknade,
c) bez pismene saglasnosti davaoca leasinga predmet leasinga da u podleasing trećoj strani,
d) znatno povrijedi odredbe ugovora koje se odnose na korištenje i održavanje predmeta leasinga.

Bez obzira na odredbe tač. a) i b) ovog člana davalac leasinga ima pravo da raskine ugovor o leasingu ako korisnik leasinga ne plati jednu od leasing naknada u ugovorenom roku, pod uvjetom da okolnosti jasno ukazuju da ni ostale naknade neće biti plaćene.

Da bi raskinuo ugovor o leasingu iz razloga navedenih u tač. a) i b) davalac leasinga dužan je obavijestiti korisnika leasinga o namjeri raskida ugovora ukoliko ne primi uplate prispjelih obaveza i ostaviti korisniku leasinga naknadni razumni rok za ispunjenje obaveza. Ugovor o leasingu ostaje na snazi ako korisnik leasinga plati iznos dužne naknade prije nego mu je dostavljena obavijest o raskidu ugovora.

Osnovna posljedica raskida ugovora od strane davaoca leasinga je njegovo pravo na povrat predmeta leasinga, kao i pravo na naknadu štete, iako zakonodavac nije jasno odredio šta se ima smatrati štetom za koju davalac leasinga ima pravo naknade, bez obzira što je kao modalitet utvrđivanja visine štete zakonodavac predvidio mogućnost da se izračuna visine štete za slučaj raskida može propisati samim ugovorom lizingu koja ne može prelaziti interese ispunjena ugovora. Šta u konkretnom slučaju imamo smatrati interesom ispunjenja ugovora otvoreno je i neriješeno pitanje.

Druga posljedica raskida ugovora je u gubitku prava korisnika leasinga posjedovanja i korištenja predmeta leasinga, a plaćene leasing naknade neće se smatrati plaćanjem predmeta leasinga i ne daju pravo korisniku leasinga na dio vlasništva nad predmetom leasinga.(član 55. Zakona F BiH)

Primjetno je da zakonodavac nije predvidio slučajeve u kojima pravo na raskid ugovora pripada korisniku leasinga, niti mogućnost naknade štete za korisnika leasinga ukoliko davalac leasinga povrijedi neku od ugovornih obaveza, iako se za takve slučajeve korisnik leasinga može pozvati na opće propise kojima su uređeni obligacioni odnosi, kako je to propisano članom 52. i 53. Zakona.

Zakon RS nudi nešto drugačiji okvir prestanka ugovora njegovim raskidom, a ujedno i preciznije definiran u odnosu na Zakon F BiH.

Naime, shodno članu 39. Zakona RS davalac lizinga ima pravo na raskid ugovora za slučaj da primalac lizinga nije platio prvu lizing ratu (naknadu).

U slučaju da je primalac lizinga u kašnjenju sa plaćanjem dvije uzastopne lizing rate, davaocu lizinga pripada pravo na raskid ugovora ili pravo na isplatu ostatka naknade zajedno sa kamatom.

Isto tako, davalac lizinga ima pravo na raskid ugovora i za slučaj ako primalac lizinga ne plati jednu od lizing rata u ugovorenom roku, pod uslovom da okolnosti očigledno ukazuju da ni ostale naknade neće biti plaćene.

U svim opisanim slučajevima davalac lizinga je obavezan da primaocu lizinga ostavi naknadni razumni rok za ispunjenje obaveze, pa ako ni u tom roku primalac lizinga ne izvrši svoju obavezu ugovor se raskida po samom zakonu.

Temeljna posljedica raskida ugovora je kao i u Zakonu F BiH pravo na povrat predmeta u posjed i naknada štete za davaoca lizinga (član 40. Zakona RS).

Za razliku od Zakona F BiH, Zakon RS predviđa mogućnost održaja ugovora na snazi od strane primaoca lizinga ukoliko ponudi davaocu lizinga određeno obezbjeđenje prihvatljivo za davaoca lizinga.

S druge strane, davaocu pripada pravo na raskid ugovora i za slučaj da je bez njegove saglasnosti primalac lizinga predmet lizinga dao trećoj osobi u podlizing(član 45. Zakona RS)

Za razliku od Zakona F BiH, Zakon RS predviđa i pravo primaoca lizinga da raskine ugovor i da za takav slučaj od davaoca lizinga ima pravo zahtijevati povrat naknade koju je platio do momenta raskida ugovora prema ugovoru o finansijskom lizingu, ali umanjenu za iznos koji predstavlja razumnu naknadu za korist koju je imao korištenjem predmeta lizinga.(član 35. stav 5. Zakona RS).

9. Podlizing

Shodno članu 51. Zakona F BiH korisnik leasinga može, uz pismenu saglasnost davaoca leasinga, osim ukoliko ugovorom o leasingu nije drugačije određeno, prenijeti predmet leasinga ili njegove dijelove, trećoj strani na korištenje

Prijenos predmeta leasinga na treću stranu koja će ga koristiti ne oslobađa korisnika leasinga njegove obaveze prema davaocu leasinga u skladu sa ugovorom o leasingu.

Rok o podleasingu ne smije prijeći rok ugovora o leasingu.

Pravo prijenosa predmeta leasinga na korištenje trećem licu može se isključiti ugovorom o leasingu ili njime drugačije urediti.

Slično rješenje sadržano je i u odredbama člana 45. Zakona RS.

10. Registracija ugovora o finansijskom lizingu

Članom 58. Zakona F BiH predviđena je registracija prava na osnovu ugovora o leasingu ovisno da li se radi i to kada je predmet ugovora nepokretna ili pokretna stvar.

Ako je predmet leasinga nepokretna stvar, pravo vlasništva na predmetu leasinga i prava na osnovu ugovora o leasingu nad predmetom leasinga upisuju se u skladu sa propisima kojima su uređeni upisi prava na nekretninama.

Ako je predmet leasinga pokretna stvar, registracija prava na osnovu ugovora o leasingu (posebno vlasničko pravo) vrši se u Registru zaloga u skladu sa propisima kojima se uređuje registracija zaloga.

Ako je predmet leasinga pokretna stvar za koju je posebnim zakonom propisana godišnja registracija, kao npr. motorna vozila, registracija prava vlasništva vrši se u skladu sa zakonom koji definira registraciju vlasništva nad vozilima.

Ako je predmet leasinga pokretna stvar, davalac leasinga je dužan podnijeti zahtjev za registraciju prava na osnovu ugovora o leasingu (posebno vlasničko pravo) te ostalih podataka iz ugovora o leasingu u skladu sa propisima kojima se uređuje registracija zaloga u roku od sedam dana od isporuke (član 59. Zakona F BiH).

Ako su u pitanju nepokretne stvari, davalac usluga leasinga je dužan podnijeti zahtjev za uknjižbu prava vlasništva i prava iz ugovora o leasingu u roku od 30 dana od ispunjenja svih uvjeta za uknjižbu

Zahtjev za promjenu ili brisanje podataka iz nadležnog registra davalac leasinga je dužan podnijeti u roku od 15 dana od dana nastupanja činjenica koje su tu promjenu ili brisanje podataka uvjetovale.

Slična rješenja sadržana su i u odredbama članova od 52. do 57. Zakona RS.

Među izuzetno važne zakone koji tretiraju i uređuju materiju zaključenja lizing pravnog posla ubraja se Okvirni zakon o zalozima koji je donesen na nivou BiH i objavljen u Službenom glasniku BiH broj :28/04

Ovaj zakon je značajan sa aspekta vrlo važne radnje registracije Ugovora o lizingu koja Davaocu lizinga pruža viši stepen pravne sigurnosti pri i nakon zaključenja lizing pravnog posla.

Naime, registracija Ugovora o lizingu, najprije Davaocu lizinga garantira i obezbjeđuje prednost nad ostalim povjeriocima u eventualno pokrenutom postupku izvršenja nad imovinom Korisnika lizinga, jer tako registrovani Ugovor ima karakter javne isprave i kao takav omogućava izlučenje stvari koja je data u lizing iz imovine Korisnika lizinga nad kojom se eventualno može provoditi postupak izvršenja.

S prednjim u vezi, naglašava se iznimna potreba registracije Ugovora o lizingu u cilju odgovarajuće zaštite Davaoca lizinga, kako bi isti mogao stvar koja je data u lizing isključiti iz imovine Korisnika lizinga nad kojom može biti pokrenut i provoditi se postupak izvršenja. U protivnom, bez registrovanog Ugovora o lizingu stvar koja je data u lizing mogla bi se povratiti samo u parničnom postupku, kada bi trebalo dokazivati postojanje pravnog naslova (Ugovora o lizingu) po osnovu kojeg se traži povrat stvari, a sve navedeno uključuje dugotrajniji i nesiguran postupak za povrat stvari i moguće izvršenje nad istom, što bi dovelo u vrlo nepovoljan položaj Davaoca lizinga.

Uz navedeno, potrebno je naglasiti da je Okvirni zakon o zalozima značajan i sa aspekta provođenja postupka za povrat stvari Davaocu lizinga koja je predmet Ugovora o lizingu.

Naime, ekstenzivnim tumačenjem moglo bi se govoriti da se radi o zakonu koji je kao lex specialis za pravni posao lizinga omogućio da se taj postupak provede brže u odnosu na postupak prema odredbama Zakona o parničnom i Zakona o izvršnom postupku.

Međutim, navedenim Zakonom, odredbe o izvršenju u skladu sa istim se principijelno odnose na založno pravo, te se stoga bez autentičnog tumačenja ovih odredaba Zakona još uvijek ne može govoriti o takvoj mogućnosti, s obzirom da se radi o odredbama koje zahtijevaju takvo tumačenje. Ukoliko bi autentično tumačenje (tumačenje donosioca Zakona) pokazalo da se odredbe o izvršenju mogu primjeniti i na pravni posao lizinga to bi značilo još jednu "stepenicu" više pravne sigurnosti i zaštite Davaoca lizinga koji bi na efikasniji i brži način u odnosu na postupak u parničnom i izvršnom postupku mogao stvar koja je data u lizing povratiti.

11. Prinudno izvršenje u finansijskom lizingu

Entitetski zakoni o lizingu ne sadrže posebne odredbe o prinudnom izvršenju nad predmetom lizinga ili iz osnova ugovora o lizingu.

Prinudno izvršenje na predmetu lizinga tako će biti provedeno u skladu sa općim pravilima i odredbama Zakona o izvršnom postupku F BiH (Službene novine F BiH br. :32/03), odnosno Zakona o izvršnom postupku RS (Službeni glasnik RS br. :59/03).

Shodno ovim entitetskim propisima predmetom izvršenja mogu biti pokretne i nepokretne stvari i prava. Predmetom ugovora o lizingu kao što smo već vidjeli mogu biti pokretne i nepokretne stvari, te se time može zaključiti da i predmet lizinga može biti predmetom prinudnog izvršenja na način i u situacijama koje determiniraju odredbe Zakona o izvršnom postupku.

11.1. Stečaj i likvidacija

U slučaju da se nad imovinom korisnika lizinga provodi postupak stečaja ili likvidacije Zakon F BiH u članu 50. propisuje zaštitu za davaoca lizinga prema kojoj je korisnik leasinga dužan bez odlaganja obavijestiti davaoca leasinga o pokretanju stečajnog ili likvidacionog postupka.

U slučaju stečaja korisnika leasinga, davalac leasinga ima pravo na izdvajanje predmeta leasinga (izlučno pravo) iz stečajne mase korisnika leasinga u skladu sa propisima koji uređuju stečajni postupak.

Zakon nije definirao prava korisnika lizinga za slučaj stečaja ili likvidacije davaoca lizinga, iako je predvidio posebnim odredbama da se nad imovinom lizing društva može provesti postupak stečaja ili likvidacije shodno posebnim zakonima o stečaju i likvidaciji.(član 84. i 85. Zakona FBiH).

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SAVREMENI UGOVORI U CRNOJ GORI

I. FINANSIJSKI LIZING[1]

Iako je stari Zakon o obligacionim odnosima iz 1978. godine regulisao ugovor o finansijskom lizingu, pojava velikog broja ovih ugovora u Crnoj Gori stvorila je potrebu da se preciznije i detaljnije, u posebnom zakonskom tekstu, uredi pitanje ovog posla. Crnogorski parlament je u decembru 2005. godine usvojio Zakon o finansijskom lizingu. Od 2005. godine do danas ovaj posao je postao popularniji i korišćeniji u Crnoj Gori.[2]

1) Osnovni koncepti i elementi

A. Značenje finansijskog lizinga

Posao finansijskog lizinga je pravni posao u kojem davalac finansijskog lizinga:

1) sa isporučiocem predmeta lizinga (isporučilac) ugovara sticanje prava svojine na predmetu lizinga, prema specifikaciji primaoca lizinga i pod uslovima koje odobrava primalac finansijskog lizinga (primalac lizinga), ukoliko davalac lizinga i isporučilac nijesu isto lice;
2) sa primaocem lizinga ugovara posao finansijskog lizinga kojim se obavezuje da na primaoca lizinga prenese ovlašćenje držanja i korišćenja predmeta lizinga na ugovoreno vrijeme, a primalac lizinga se obavezuje da plaća ugovorenu naknadu u ugovorenim ratama.[3]

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* Originalni tekst je na engleskom jeziku.

[1] Ovaj dio izvještaja o finansijskom lizingu počiva na uporednoj analizi odredaba Zakona o finansijskom lizingu Crne Gore i UNIDROIT Konvencije o međunarodnom finansijskom lizingu (Ottawa, 28. maj 1988. godine), koju Crna Gora još nije ratifikovala.

[2] Ministarstvo finansija – 2006. godine u Crnoj Gori je zaključeno 1147 ugovora o finansijskom lizingu (65 miliona eura), dok je 2009. godine zaključeno 2491 istih ugovora (115,6 miliona eura), što je povećanje za oko 117%. Lizing pokretnih stvari (automobili, vozila – različita) je najviše zastupljen u ovoj vrsti posla (70%), dok je lizing nepokretnosti imao udio u lizingu od oko 30%. U Crnoj Gori postoje četiri lizing kuće – Hipo Alpe Adria, S-lizing, Porsche LNLB – lizing. Odeljenja tri banke nude usluge lizinga – Crnogorska Komercijalna banka, Prva Banka Crne Gore i Opportunity banka.

[3] Član 2. ZAKON O FINANIJSKOM LIZINGU (u daljem tekstu: Zakon), Službeni Glasnik Republike Crne Gore, broj 81/05 od 29. decembra 2005. godine.

B. Obim finansijskog lizinga

Pravni posao finansijskog lizinga podrazumijeva najmanje jednu od sljedećih pravnih situacija:

1) sticanje prava svojine na predmetu lizinga istekom roka na koji je ugovor zaključen, ili
2) sticanje prava otkupa predmeta lizinga, u toku ili na kraju ugovorenog perioda lizinga po ugovorenoj cijeni, ili
3) obavezu povraćaja predmeta lizinga davaocu lizinga nakon isplate svih rata lizing naknade.[4]

C. Predmet finansijskog lizinga

Član 4. Zakona o finansijskom lizingu Crne Gore predviđa da predmet finansijskog lizinga može biti pokretna nepotrošna stvar (oprema, postrojenja, vozila i slično) ili nepokretnosti (zemljišta, zgrade i slično).[5] Definisanje predmeta finansijskog lizinga prema zakonskom tekstu Crne Gore razlikuje se od predmeta finansijskog lizinga UNIDROIT Konvencije. Predmet ugovora o finansijskom lizingu prema crnogorskom zakonu mogu biti, kako pokretne, tako i nepokretne stvari, od momenta zaključenja ugovora.

S druge strane, prema članu 1. UNIDROIT Konvencije o finansijskom lizingu, predmet lizinga obuhvata opremu, definisanu kao „postrojenja, kapitalna dobra ili ostala oprema". Ovdje se može konstatovati postojanje izvesne neodređenosti o tome da li su nepokretnosti (zemljišta, zgrade i slično) predmet UNIDROIT Konvencije, jer se članom 1. samo ukazuje na pokretne stvari. Međutim, član 4. obuhvata situacije kada se pokretna oprema pripaja ili inkorporira uz nepokretnost. U ovom slučaju, može postojati preinačenje u prirodi predmeta od pokretne stvari do nepokretnosti. Kada se ovo dogodi, odredbe Konvencije ne prestaju da važe „jedino zbog toga što oprema postaje fiksirana ili pripojena zemljištu." Pitanje je da li je oprema fiksirana za nepokretnost ili pripojena zemljištu. Ako jeste, uticaj na prava *inter se* davaoca lizinga i lica koje ima stvarna prava na zemljištu određuje se zakonom države gde se zemljište nalazi. Kako je utvrđeno crnogorskim zakonom, takva pokretna stvar postaje nepokretnost po namjeni.

Bitno je uočiti da UNIDROIT Konvencija ne predviđa situaciju kada je od momenta zaključenja ugovora predmet ugovora o finansijskog lizingu nepokretnost, iz čega jasno proizilazi da se načelno pod predmetom lizinga prema UNIDROIT Konvenciji smatraju samo pokretne stvari.

D. Subjekti u poslu finansijskog lizinga

Prema crnogorskom zakonu, u poslu finansijskog lizinga, jasno su izdiferencirana tri lica:

Davalac lizinga je vlasnik predmeta lizinga koji prenosi na primaoca lizinga ovlašćenje držanja i korišćenja predmeta lizinga, pod uslovima utvrđenim ugovorom. Davalac lizinga, u smislu ovog zakona, može biti domaće ili strano pravno ili fizičko lice, odnosno privredno društvo i preduzetnik.[6]

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[4] Član 3. Zakona.

[5] Član 3. Zakona.

[6] Član 6. Zakona.

Primalac lizinga, u smislu ovog zakona, je domaće ili strano pravno ili fizičko lice, odnosno privredno društvo i preduzetnik koji na ime držanja i korišćenja, odnosno sticanja prava svojine predmeta lizinga plaća lizing nadoknadu davaocu lizinga u skladu sa ugovorenim uslovima.[7]

Isporučilac predmeta lizinga, u smislu ovog zakona, je domaće ili strano pravno ili fizičko lice, odnosno privredno društvo i preduzetnik koji u skladu sa ugovorenim uslovima na davaoca lizinga prenosi pravo svojine na predmetu lizinga.[8] Davalac lizinga i isporučilac može biti isto lice.[9]

E. Osnovni principi koji uređuju finansijski lizing

Zakon o Finansijskom lizingu je koncipiran na način da predstavlja opšti okvir za finansijski lizing omogućujući ugovornim stranama da regulišu svoje poslovne odnose na najpogodniji način. Prema tome, postoje dva glavna principa koja su sadržana u tekstu ovog zakona – AUTONOMIJA VOLJA i PACTA SUNT SERVANDA (Zaključeni ugovor je zakon za ugovorne strane).

2) Unutrašnji i međunarodni finansijski lizing

Zakon o finansijskom lizingu ne sadrži posebne kvalifikacije o unutrašnjem ili međunarodnom lizingu, ali strane u poslu finansijskog lizinga mogu biti ili domaće ili međunarodne. Dakle, Zakon o finansijskom lizingu Crne Gore je primenjiv na sve poslove finansijskog lizinga gdje su ugovorne strane domaća ili strana fizička ili pravna lica. U odnosima sa međunarodnim elementom u kojima ugovorne strane nijesu odredile primjenu crnogorskog ili nekog drugog prava, primijeniće se odredbe međunarodnog privatnog prava.

Član 6. predviđa da „davalac lizinga je vlasnik predmeta lizinga koji prenosi na primaoca lizinga ovlašćenje držanja i korišćenja predmeta lizinga, pod uslovima utvrđenim ugovorom. U smislu ovog Zakona, davalac lizinga može biti domaće ili strano pravno ili fizičko lice, odnosno privredno društvo i preduzetnik. Takodje, Član 7. takođe predviđa da „primalac lizinga, u smislu ovog zakona, je domaće ili strano pravno ili fizičko lice, odnosno privredno društvo i preduzetnik koji na ime ovlašćenja držanja i korišćenja, odnosno sticanja prava svojine predmeta lizinga plaća lizing naknadu davaocu lizinga u skladu u skladu sa ugovorenim uslovima.“

UNIDROIT Konvencija o međunarodnom finansijskom lizingu (Ottawa, 28. maj 1988), član 3. predviđa da: „(1) Ova Konvencija se primenjuje kada davalac lizinga i primalac lizinga imaju svoja mjesta poslovanja u različitim državama i (a) one države i država u kojoj isporučilac ima svoje mjesto poslovanja iz ugovorne države; ili (b) su i ugovor o naručivanju i ugovor o lizingu uređeni zakonom ugovorne države (2). Pozivanje u ovoj Konvenciji na mjesto poslovanja jedne strane označava, ukoliko ta strana ima više od jednog mjesta poslovanja, mjesto poslovanja koje ima najbliži odnos sa relevantnim ugovorom i njegovim izvršenjem, imajući u vidu okolnosti koje strane poznaju ili razmatraju u svako doba pre ili po zaključenju tog ugovora.“ Prema tome, ukoliko je jedna od strana u poslu finansijskog lizin-

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[7] Član 7. Zakona.

[8] Član 8 Zakona.

[9] Član 2. Zakona.

ga u Crnoj Gori potpisnica Konvencije, ugovor može predvideti da se primenjuje UNIDROIT Konvencija. Inače, primenjuje se Zakon o finansijskom lizingu Crne Gore.

3) Forma i osnovne klauzule finansijskog lizinga

Ugovor o finansijskom lizingu obavezno sadrži: identifikacione podatke o ugovornim stranama; precizno određenje predmeta lizinga; mjesto, vrijeme i način isporuke predmeta lizinga; datum zaključenja ugovora, potpise ugovornih strana, rok na koji se ugovor o finansijskom lizingu zaključuje; ukupan iznos lizing naknade koju plaća primalac lizinga; iznos pojedinih rata naknade, njihov broj i vrijeme plaćanja i stopu ugovorene zatezne kamate; opciju sticanja svojine otkupa predmeta lizinga; način prestanka ugovora o finansijskom lizingu.[10]

Bitni element ugovora o finansijskom lizingu, kada su davaoci lizinga privredna društva ili banke, pored elemenata iz stava 1. ovog člana je i stopa ugovorene redovne kamate.[11]

Pored navedenih elemenata, ugovor o finansijskom lizingu može da sadrži i druge elemente kao što su: ugovornu stranu koja je obavezna da osigura predmet lizinga i rizike od kojih treba da bude osiguran, označene ugovorne strane koja preuzima obavezu da plati troškove i operativne troškove (troškovi transporta, montaže, demontaže, tehničkog unapređenja, zamene delova, servisa, tehničko-tehnološkog unapređenja), obučavanje osoblja primaoca lizinga za korišćenje predmeta lizinga, kao i druge elemente o kojima ugovorne strane postignu saglasnost.[12]

Ugovor o finansijskom lizingu mora biti zaključen u pisanoj formi.[13]

4) Prava i dužnosti strana u finansijskom lizingu

I. Prava i obaveze davaoca lizinga:

Davalac lizinga dužan je da pribavi predmet lizinga u skladu sa specifikacijom koju mu je dostavio primalac lizinga i odgovara primaocu lizinga za pravne nedostatke predmeta lizinga. Za materijalne nedostatke predmeta lizinga, primaocu lizinga odgovara isporučilac, ako drugačije nije ugovoreno. Davalac lizinga dužan je da, bez odlaganja, u pisanoj formi, obavijesti primaoca lizinga o prenosu prava svojine na predmetu lizinga na treće lice.[14]

Davalac lizinga je dužan da u pisanoj formi obavesti isporučioca koji odgovara za materijalne nedostatke predmeta lizinga o imenu odnosno nazivu lica koje je primalac lizinga po ugovoru o lizingu. Isto tako, davalac lizinga ima pravo da prenese pravo svojine na predmetu lizinga na treće lice, u kojem slučaju treće lice (novi vlasnik) stupa na mesto davaoca lizinga i preuzima sva prava i obaveze iz ugovora o finansijskom lizingu.

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[10] Član 5. paragraf 1. Zakona.

[11] Član 5. paragraf 2. Zakona.

[12] Član 5. paragraf 3. Zakona.

[13] Član 5. paragraf 4. Zakona.

[14] Članovi 9, 10, 11, 12 Zakona.

II Prava i obaveze primaoca lizinga:

Primalac lizinga ima pravo i obavezu da preuzme predmet lizinga na način, u vrijeme i na mjestu utvrđenim ugovorom o finansijskom lizingu. Isto tako, primalac lizinga dužan je da davaocu lizinga plaća lizing naknadu u iznosima, rokovima i na način koji su utvrđeni ugovorom. Ako ugovorne strane ne odrede drugačije, izmjene izvršene na predmetu lizinga od strane primaoca lizinga, koje se mogu odvojiti od predmeta lizinga vlasništvo su primaoca lizinga. Takodje, ako primalac lizinga o svom trošku i uz pisanu saglasnost davaoca lizinga bez narušavanja predmeta lizinga, izvrši izmjene koje se ne mogu odvojiti od predmeta lizinga, ima pravo na naknadu troškova izvršenih izmjena nakon raskida ugovora o finansijskom lizingu, ako nije drugačije ugovoreno. Primalac lizinga je dužan da, ukoliko drugačije nije ugovoreno, održava predmet lizinga u ispravnom stanju, da vrši sve neophodne popravke predmeta lizinga i da snosi troškove njegovog održavanja.[15]

Pravo primaoca lizinga da raskine ugovor zbog zakašnjele isporuke ili nesaobrazne isporuke od strane davaoca lizinga

Članovi 12. i 13. UNIDROIT Konvencije o međunarodnom finansijskom lizingu (Ottawa, 28. maj 1988), utvrđuju davaocu i primaocu lizinga pravo da raskinu ugovor u određenim situacijama. Član 12. određuje pravo primaocu lizinga da odbije opremu ili raskine ugovor o lizingu kada oprema nije isporučena ili je isporučena u docnji ili kada nije saobrazna ugovoru o isporuci. Prema UNIDROIT Konvenciji, davalac lizinga ima pravo da otkloni propust i da ponudi opremu koja je u skladu sa ugovorom o isporuci predmeta lizinga. Primalac lizinga ima pravo da zadrži naknadu za lizing, koja se plaća prema ugovoru o lizingu, sve dok davalac lizinga ne otkloni propust, da ponudi opremu u skladu sa ugovorom o isporuci predmeta lizinga. Kada primalac lizinga raskine ugovor o lizingu, primalac lizinga ima pravo da povrati svaku naknadu za lizing i druge iznose koji su plaćeni unaprijed i umanjeni za opravdani iznos za svaku korist koju je primalac lizinga stekao od opreme. Primalac lizinga ima prava prema davaocu lizinga samo ako je neisporuka, zakašnjenje u isporuci ili isporuke nesaobrazne opreme predstavlja rezultat propusta davaoca lizinga.

UNIDROIT Konvencija takođe definiše prava primaoca lizinga naspram isporučioca predmeta lizinga. Član 10. predviđa da su dužnosti isporučioca predmeta lizinga prema ugovoru o isporuci predmeta lizinga, takođe i dužnosti primaoca lizinga, imajući u vidu činjenicu da je on strana u tom ugovoru i da oprema treba da bude direktno isporučena njemu. Međutim, za istu povredu ugovora, isporučilac predmeta lizinga ne može biti odgovoran i davaocu lizinga i primaocu lizinga. Ugovor o isporuci predmeta lizinga primalac lizinga ne može prekinuti niti opozvati zbog propusta isporučioca predmeta lizinga bez saglasnosti samog davaoca lizinga.

Zakon Crne Gore samo davaocu lizinga omogućava da raskine ugovor zbog propusta primaoca lizinga u plaćanja ili zbog bitnog kršenja ugovornih odredbi koje se odnose na korišćenje i održavanje predmeta lizinga. Član 16. predviđa da davalac lizinga ima pravo da poništi ugovor o finansijskom lizingu u slučajevima kada davalac lizinga: 1) zadocni sa isplatom prve rate; 2) posle isplate prve rate, zadocni sa isplatom jedne ili više rata za period od najmanje 90 dana od dana njihovog dospijeća; 3) bitno povrijedi odredbe ugovora koje se odnose na korišćenje i održavanje predmeta lizinga. Primalac lizinga nema pravo da okonča ugovor zbog materijalnih nedostataka. Međutim, član 11. crnogorskog zakona predviđa da je isporučilac predmeta lizinga odgovoran primaocu lizinga za materijalne nedostatke predme-

[15] Članovi 13, 14, 15 Zakona.

ta lizinga, ukoliko ugovorom nije drugačije određeno. Davalac lizinga je obavezan da, u pisanoj formi, obavijesti isporučioca predmeta lizinga koji je odgovoran za materijalne nedostatke o imenu ili imenu kompanije subjekta-primaoca lizinga, prema ugovoru o lizingu. Obavještenje od strane davaoca lizinga mora biti podnijeto najkasnije u roku od 3. radna dana posle datuma zaključenja ugovora o lizingu.

Prenos prava

UNIDROIT Konvencija o međunarodnom finansijskom lizingu (Ottawa, 28. maj 1988. godine, član 14 određuje da:

„1. Davalac lizinga može da prenese ili na drugi način postupa sa svim ili nekim od njegovih prava naspram opreme ili prema ugovoru o lizingu. Takav prenos ne oslobađa davaoca lizinga njegovih dužnosti prema ugovoru o lizingu ili ne mijenja karakter ugovora o lizingu ili njegov pravni tretman kao što je predviđeno u ovoj Konvenciji.

2. Primalac lizinga može da prenese pravo korišćenja opreme ili neka druga prava prema ugovoru o lizingu samo uz saglasnost davaoca lizinga i prema pravima trećih strana."

Crnogorski zakon *o prenosu prava svojine na predmetu lizinga* trećem licu, u članu 12 predviđa: „Davalac lizinga ima pravo da prenese pravo svojine na predmetu lizinga na treće lice, u kojem slučaju treće lice (novi vlasnik) stupa na mjesto davaoca lizinga i preuzima sva prava i obaveze iz ugovora o finansijskom lizingu. Davalac lizinga dužan je da bez odlaganja, u pisanoj formi, obavijesti primaoca lizinga o prenosu prava svojine na predmetu lizinga na treće lice. Prenos prava svojine na predmetu lizinga na treće lice može se ugovorom isključiti."

Glavna razlika između crnogorskog zakona i UNIDROIT Konvencije se sastoji u tome da se prilikom prenosa prava svojine na predmetu lizinga na treća lica, prema UNDROIT-u, davalac lizinga ne oslobađa obaveza koje ima prema ugovoru o lizingu, niti se usljed toga mijenja karakter ugovora o lizingu i njegov pravni tretman određen Konvencijom. S druge strane, Zakonom Crne Gore se određuje da treća strana (novi vlasnik) stupa na mjesto davaoca lizinga i preuzima sva prava i obaveze iz ugovora o finansijskom lizingu.

5) Prestanak finansijskog lizinga

Osnovi za prestanak

Ugovor o lizingu prestaje istekom roka na koji je zaključen, prenosom prava svojine sa davaoca lizinga na primaoca lizinga, otkupom predmeta lizinga ili raskidom ugovora.[16]

Raskid ugovora zbog neispunjenja obaveza primaoca lizinga

Davalac lizinga ima pravo, ukoliko ugovorom nije drugačije određeno, da raskine ugovor o finansijskom lizingu ako primalac lizinga:

1) zadocni sa isplatom prve rate;
2) posle isplate prve rate zadocni sa isplatom jedne ili više rata za period od najmanje 90. dana od dana njihovog dospeća;
3) znatno povrijedi odredbe ugovora koje se odnose na korišćenje i održavanje predmeta lizinga.[17]

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[16] Član 18, paragraf 1 Zakona.

[17] Član 16. Zakona.

Propast predmeta lizinga usled više sile

Ugovor o lizingu prestaje ako predmet lizinga bude uništen usljed više sile.[18]

6) Posledice prestanka finansijskog lizinga

U slučajevima prestanka davalac lizinga je dužan da u roku od tri radna dana od dana prestanka ugovora o lizingu podnese zahtjev za brisanje lizinga iz odgovarajućeg registra.[19]

7) Podfinansijski lizing

Novi Zakon Crne Gore o finansijskom lizingu ne spominje i ne opisuje podfinansijski lizing. Međutim, Član 2. UNIDROIT Konvencije o Međunarodnom Finansijskom Lizingu (Ottawa, 28. maj 1988. godine) izričito dopušta podfinansijski lizing, za svaki lizing posao, koji se odnosi na istu opremu. Konvencija se primenjuje na posao podfinansijskog lizinga predviđajući da je lice, od koga je prvi davalac lizinga pribavio opremu, isporučilac predmeta lizinga i da je ugovor, prema kome je oprema tako pribavljena, ugovor o isporuci predmeta lizinga.

8) Registracija ugovora o finansijskom lizingu

Registracija nepokretnih stvari kao predmeta lizinga

Ugovor o finansijskom lizingu koji za predmet ima nepokretnost upisuje se u katastar nepokretnosti u skladu sa propisima kojima su uređeni upisi prava na nepokretnostima.[20]

Registracija pokretnih predmeta lizinga

Podaci iz ugovora o finansijskom lizingu čiji su predmet pokretne stvari, prestanak ugovora, kao i drugi potrebni podaci, upisuju se u Registar zaloga Republike Crne Gore u skladu sa odredbama zakona kojima su uređene zaloge na pokretnim stvarima.[21]

Obaveza upisa

Zahtev odnosno prijavu za upis tereta i ograničenja odnosno podataka iz ugovora o finansijskom lizingu iz člana 20. i 21. ovog zakona, davalac lizinga je dužan da podnese u roku od tri radna dana od dana zaključenja ugovora o finansijskom lizingu.[22]

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[18] Član 19. Zakona.

[19] Član 18. paragraf 2 Zakona.

[20] Član 20. Zakona.

[21] Član 21. Zakona. Takođe, Zakon o zalozi, Sl. List 38/02, član stav 9.

[22] Član 22. Zakona.

9) Prinudno izvršenje u finansijskom lizingu

Ako davalac lizinga raskine ugovor o finansijskom lizingu u skladu sa zakonom, a primalac lizinga odbije da dobrovoljno vrati predmet lizinga, davalac lizinga može sudu podnijeti predlog za donošenje rješenja o izvršenju, na osnovu kojeg će predmet lizinga biti oduzet primaocu lizinga i predat davaocu lizinga. Na osnovu predloga za izvršenje nadležni sud odražava ročište na kojem se utvrđuju samo sljedeće činjenice:

1) da postoji pravno valjan ugovor o finansijskom lizingu registrovan kod nadležnog organa;
2) da je došlo do neispunjenja obaveze od strane primaoca lizinga.

Teret dokazivanja u slučaju iz stava 1. ovog člana pada na teret primaoca lizinga.

Ukoliko sud odluči u korist davaoca lizinga, donijeće rješenje kojim će odrediti izvršitelja i naložiti mu da oduzme predmet lizinga od primaoca lizinga ili lica koje ima državinu na predmetu lizinga i da ga preda davaocu lizinga, pri čemu nije dužan da ih o sprovođenju izvršenja prethodno obavještava. Izvršitelj ne može odbiti da sprovede, odnosno nastavi sprovođenje izvršenja, osim ukoliko nije pruženo obezbjeđenje da će stvarni troškovi izvršenja biti plaćeni. Sud je dužan da o predlogu za izvršenje iz stava 1. ovog člana donese rešenje najkasnije u roku od tri dana od dana podnošenja istog. Postupak oduzimanja predmeta lizinga sprovodi se u roku od tri radna dana od dana usvajanja rešenja o oduzimanju u skladu sa Zakonom o izvršnom postupku. Protiv rešenja o izvršenju dozvoljena je žalba drugostepenom sudu u roku od pet dana od dana prijema rešenja. Podnošenje žalbe ne odlaže izvršenje.[23]

II. FRANŠIZING

U Crnoj Gori ne postoji zakon koji uređuje pravni posao franšizinga. Dok Zakon o obligacionim odnosima detaljno uređuje ugovor o licenci i zastupanju, koncept franšizinga ostaje van crnogorske regulative. Zbog ovakve pravne situacije, ne mogu se ponuditi odgovori, pristupi, niti rješenja karakteristična za crnogorsko zakonodavstvo. Takodje, usljed njihove zakonske neuređenosti, privredni subjekti u Crnoj Gori obično izbjegavaju primjenu ovog posla, i umjesto njega opredeljuju se za ugovore o licenciranju i distribuciji. Tačnije, posao čija sadržina najčešće odgovara ugovoru o licenciranju ili zastupanju često se u pravnom prometu predstavlja kao ugovor o franšizingu čime se stvara pravna nesigurnost i neizvjesnost.

Dakle, iako nijedan od postojećih zakona obično ne definiše ovaj ugovor, izraz „franšiza“ se pominje u nekim zakonima Crne Gore na sljedeći način:

(1) **Zakon o zaštitnim žigovima** *(Službeni Glasnik Srbije i Crne Gore broj 61/04 i 71/05):*

– Član 44. „Zaštitni žig ili pravo iz prijave može biti predmet ugovora o prenosu prava, lizingu, zaloge ili franšizi. Ugovor iz gore navedenog paragrafa mora biti u pismenoj formi i valjano registrovan po zahtevu jedne od ugovornih strana. Ukoliko ugovor nije valjano registrovan, takav ugovor ne može imati ikakvo dejstvo“.

[23] Član 17. Zakona.

– Član 53. paragraf 5. „Korišćenje zaštitnog žiga ne pretpostavlja plaćanje taksi za produženje važnosti zaštitnog žiga niti zaključenje ugovora o prenosu prava, lizinga, zaloge i franšize.“

(2) **Zakon o pravnoj zaštiti modela** *(Službeni Glasnik Srbije i Crne Gore broj 61/04):*

– Član 47. „Pravo na model i ili pravo iz prijave može biti predmet ugovora prenosa prava, lizinga, zaloge ili franšize.“

(3) Zakon o geografskim oznakama *(Službeni Glasnik Srbije i Crne Gore broj 48/08)*koji se primjenjuje od 1. septembra 2008. godine:

– Član 46. „Registrovano ime geografskog porekla i registrovana geografska oznaka ne mogu biti predmet ugovora o prenosu prava, lizinga, zaloge ili franšize.“

(4) Zakon o stranim ulaganjima *(Službeni Glasnik Srbije i Crne Gore 52/00):*

– Član 12. Investicija stranog investitora može se takođe ostvariti putem ugovora o lizingu, ugovora o franšizingu, ugovora o menadžmentu i ugovora o prodaji nepokretnosti u skladu sa zakonom.“

Kao što je ranije napomenuto, ne postoje sudski predmeti ili sporovi koji se odnose na ugovore o franšizi.[24] Većina autora čija djela su prisutna u Crnoj Gori pišu o opštim pojmovima i konceptima, kao i praksi relevantnoj za uporedna iskustva. Dakle, ovi radovi se zasnivaju samo na opštem znanju o franšizingu i opisivanju mehanizama njegovog funkcionisanja.[25]

Izuzetak u tome predstavlja jedan magistarski rad u kojemu je opširno pisano o prisustvu i problemima ugovora o franšizi u Crnoj Gori.[26] U pomenutom radu ukazano je da je veoma značajno raditi na unapređenju ovoga posla, jer su ugovori o franšizingu ključni element ekonomskog rasta i razvoja, a da isti u Crnoj Gori nije prisutan na adekvatan način i u potrebnoj mjeri. Analiza ukazuje da je ključna prepreka razvoja ovog tipa posla u Crnoj Gori njegova nedefinisanost našim zakonom, te usljed toga velika pravna neizvjesnost i nesigurnost. Iako prisutan u Crnoj Gori, ovaj posao je od relevantnih i zainteresovanih subjekata najčešće uređen i tretiran kao ugovor o licenci i zastupanju.[27]

Uz određeni skepticizam i sa izvjesnom rezervom mogli bismo govoriti o varijacijama ugovora o franšizingu kod nas u formi servisiranja i prodaje vozila u automobilskoj industriji (Audi, Toyota, Wolkswagen, Porsche lizing, Renault, Mercedes, Peugeot), dok se čisti oblik franšize nalazi kod DHL-a, industriji brendova (Beneton, najstarija franšiza u Crnoj Gori), industriji odjeće (Max Mara, Ermenegildo Zegna, Paul Shark), i neke uslužne djelatnosti kao Costa Cafe i Premier Best Western hotel. Iako još uvijek nedefinisane zakonom, franšize su rastući komercijalni fenomen u ekonomiji Crne Gore.

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[24] Radi ovog izveštaja kontaktirali smo sve sudove: trgovinski, prvostepeni, vrhovni i apelacioni sud. Oni su nas obavestili da nemaju podatke o faktičkim predmetima ili sporovima koji obuhvataju ugovore o franšizama.

[25] Profesor Dr Momir Dragasevic, Novi ugovori u međunarodnoj poslovnoj praksi, Službeni list Crne Gore, Podgorica, 2000.

[26] Radivoje Drobnjak, LLM., Franšizing kao faktor privrednog razvoja sa osvrtom na Crnu Goru i SNE sektor.

[27] Ugovor o licenciranju i ugovor o zastupanju, uređeni su u Zakonu o obligacionim odnosima (*Službeni Glasnik Srbije i Crne Gore broj 47/08),* Članovi 883-905 (Ugovor o distribuciji) i Članovi 778-803 (Ugovor o licenciranju).

III. FAKTORING

Pravo Crne Gore ne definiše niti posredno uređuje posao faktoringa. Zbog ovakve situacije ne može se odgovoriti na tražena pitanja o faktoringu. Iako su se neki crnogorski autori bavili pravnom doktrinom, uporednim iskustvima, i praskom uporednih sistema koja se odnosi na faktoring, pitanje zakonskog uređenja faktoringa u Crne Gore kao i njegovog prisustva na crnogorskom tržištu ostaje apsolutno nepokriveno. Radovi iz oblasti faktoringa u Crnoj Gori se uglavnom zasnivaju na uporednim međunarodnim rješenjima i iskustvima, te tako prenesena i usvojena znanja o ovom pojmu su sadržana u nastavne programe Univerziteta Crne Gore, udžbenike i monografije naših domaćih naučnika.[28]

Postoji samo jedan zakon koji spominje pojam faktoringa, i to je **Zakon o bankama:**

Član 6. „Aktivnosti banke – Pored poslovanja iz paragrafa 1. ovog člana, Banka može preduzeti sledeće poslove: (2) kupovina, prodaja i otkup dugovanja (faktoring i forfiting)..."

Kada je riječ o prisustvu ovog posla u praksi, treba napomenuti da, zbog nedostatka pravnog uređenja ovog ugovora, faktoring je ponuđen tržištu Crne Gore samo u dvije od jedanaest postojećih komercijalnih banaka.[29]

Mogli bismo da zaključimo da posao faktoringa nema *adekvatan tretman* u nacionalnom zakonodavstvu Crne Gore, te da je, usljed toga, razlog pravne neizvijesnosti proizveo opreznu primjenu i sporadično pribjegavanje ovom pravnom poslu.

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[28] Profesor Dr Momir Dragasevic, Novi ugovori u međunarodnoj poslovnoj praksi, Službeni list Crne Gore, Podgorica, 2000.

[29] U 2009. godini, prema Centralnoj banci Crne Gore, poslovi faktoringa iznosili su 78,000 evra u periodu od januara do septembra 2009. godine – Bilten Centralne banke Crne Gore. Oktobar 2009, procenjeno 12. februara 2010. godine.

<http://www.cb-mn.org/slike_i_fajlovi/fajlovi/fajlovi_publikacije/biltencbcg/2009/bilten_cbcg1009.pdf>

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SAVREMENI UGOVORI

FRANŠIZING

1) Osnovni koncept franšizinga

Na osnovu albanskog građanskog zakonodavstva i pod konkretnim uslovima koje propisuje Građanski zakonik[1], ugovor o franšizingu je posebno regulisan, te ovaj ugovor postaje jedan od tipičnih ugovora koji su regulisani ovim Zakonikom. Članovi 1056. do 1064. Građanskog zakonika predviđaju osnovne uslove za prilagođavanje ugovora o franšizingu. Franšizni odnosi predstavljaju kompleksne odnose koji u pogledu konkretnih elementa ugovora o franšizingu jasno su regulisani posebnim odredbama Građanskog zakonika. Radi valjane konstrukcije različitih elemenata ugovora o franšizingu, neophodno je uzeti u obzir i ostale zakonodavne elemente, tu obuhvatajući i intelektualnu svojinu i agencijske ugovore. Ugovor o franšizingu predstavlja novinu u albanskom zakonodavstvu. Međutim, za njega još uvek ne postoji kompletna i sveobuhvatna regulativa. U tekstu koji sledi videćemo na koji način albansko zakonodavstvo reguliše franšizne ugovorne odnose.

a) Značenje franšizinga

Na osnovu člana 1056. Građanskog zakonika ugovor o franšizingu sadrži pregled kontinuiranih obaveza koje nezavisna preduzeća moraju da zajednički promovišu tako razvijajući poslovanje i pružanje usluga u skladu sa pojedinačnim obavezama.

b) Delokrug ugovora o franšizingu

Delokrug ugovora o franšizingu je da precizno ustanovi franšizni zakonski odnos koji se sastoji od niza kontinuiranih obaveza na osnovu kojih ugovorne strane moraju da međusobno i zajednički promovišu i razvijaju poslovanje i pružanje usluga u skladu sa pojedinačnim odgovornostima koje proizlaze iz samog ugovora o franšizingu.

c) Predmet franšize

Predmet ugovora o franšizi je kreiranje standardnog pregleda nematerijalnih prava, primera, dijagrama, ideja vezanih za ostvarivanje profita, poslovanje i organizaciju i ostalih

* Originalni tekst je na engleskom jeziku.

[1] Zakon br. 7850 od 29.07. 1994., 'Građanski zakonik Republike Albanije,' sa izmenama i dopunama.

odgovarajućih znanja neophodnih za razvoj poslovanja, koji se daje primaocu franšize na raspolaganje.

d) Ugovorne strane u franšizingu

Ugovorne strane u franšizingu su:
1. Davalac franšize
2. Primalac franšize

Davalac franšize je ugovorna strana koja ima vlasništvo nad standardnim skupom nematerijalnih prava, primera, dijagrama, ideja o stvaranju profita, poslovanju i organizaciji, i ostalih odgovarajućih znanja neophodnih za dalji razvoj poslovanja.

Primalac franšize je lice koje prima gorepomenute koristi, dok istovremeno iste eksplicitno preuzima kroz ugovor o franšizingu.

2) Priroda i delokrug dodeljenih prava i odnos ugovornih strana

Ugovor o franšizingu[2] predstavlja sporazum dvaju nezavisnih kompanija, preduzeća ili preduzetnika. Da su, s druge strane, određene kompanije, preduzeća ili preduzetnici u međusobno zavisnom odnosu, tada bi se radilo o istom pravnom licu (na primer, matičnoj kompaniji i njenim podružnicama), ili bi čak eventualno bilo ispravno govoriti o ugovoru o radu. Svi smo upoznati sa velikim prodajnim lancima koji se bave prodajom robe i usluga, a koji se sastoje od velikog broja poslovnica koje prodaju samo proizvode određenih proizvođača,[3] koje su označene i obeležene na isti način, i koje na skoro identičan način uređuju unutrašnjost svojih poslovnih jedinica. Takvi prodajni lanci najčešće su posledica ugovora o franšizingu. To bi značilo da takve prodavnice nisu relevantne (kao što bi se moglo pretpostaviti) za proizvođača čiji proizvodi se u njima prodaju, dok istovremeno radnici koji rukovode takvim radnjama nisu zaposleni kod proizvođača proizvoda koji se tu prodaju. Naprotiv, kod ugovora o franšizingu, baš kao što smo ranije i pomenuli, upućuje se na nezavisne komercijalne preduzetnike koji na osnovu ugovora o franšizingu postaju deo prodajnog lanca, i tako stiču privilegiju (franšizu) da plasiraju proizvode određenog proizvođača koristeći žigove i ostala obeležja tog proizvođača.[4]

Pod uslovom da zaključe ugovor o franšizingu, nezavisna preduzeća tako ustanovljavaju pravni odnos koji se karakteriše izvršavanjem kontinuiranih obaveza i uzajamnih obligacija koje se odnose na promovisanje i razvoj poslovanja i pružanje usluga u skladu sa određenim obavezama koje proizilaze iz same prirode ugovora o franšizingu.

Franšizing upućuje na poslovni pristup u kome se u sopstvenom poslovanju upošljava i primenjuje poslovna filozofija nekog drugog pravnog lica. Ovo ponašanje obuhvata korišćenje opipljivih i neopipljivih poslovnih metoda (kao na primer oglašavanje i obuka), relevantnih za određeno poslovanje, koje primenjuje neko drugo lice koje je sastavni deo tog poslovanja. U teoriji se pretpostavlja da ugovor o franšizingu bolje odgovara kompanijama koje poseduju sledeće karakteristike:

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[2] Ugovor o franšizingu je obično ugovor koji sadrži standardne uslove, a koji se drugačije naziva i adhezijskim ugovorom.

[3] Takozvane robne marke.

[4] Manuale di Diritto Privato (*Priručnik o privatnom pravu)* (*14. izdanje*). Rea Torrente i Piero Schlesinger. *Giuffrè* Editore, str. 549.

– Preduzeća koja ostvaruju velike profite
– Preduzeća koja su osnovana na jedinstvenom ili neuobičajenom konceptu
– Preduzeća koja svojim poslovanjem obuhvataju veliku geografsku oblast
– Preduzeća koja su relativno laka za rukovođenje
– Preduzeća koja ne iziskuju prevelike menadžerske troškove
– Preduzeća koja imaju tendenciju rapidnog rasta[5]

U odnosu na gore navedeno, možemo reći da je osnov za sklapanje ugovora o franšizingu potreba za što efikasnijim obavljanjem i proširenjem uslužnih aktivnosti koje su često usmerene ka prodaji robe.

Član 1057. Građanskog zakonika predviđa da:

'*Davalac franšize je u obavezi da primaocu franšize preda standardni račun nematerijalnih prava, uzoraka, dijagrama, ideja vezanih za profit, poslovanje i organizaciju, i ostala odgovarajuća znanja neophodna za dalji razvoj poslovanja.*

'Istovremeno, davalac franšize je u obavezi da štiti ovakav program obaveza od povrede od strane trećih lica, da ih kontinuirano razvija i da primaocu franšize pruža podršku u implementaciji kroz davanje instrukcija, informacija i usavršavanja.'

Član 1058. ovog Zakonika navodi da su ugovorne strane prilikom pregovora vezanih za zaključivanje ugovora dužne da jedna drugu upoznaju sa komercijalnom stranom svog poslovanja koja je relevantna za ugovor o franšizingu, a naročito sa obavezama franšiznog programa i fiducijarnim principima. Ugovorne strane dužne su da ove informacije smatraju poverljivim i da ih čuvaju u skladu sa poslovnom tajnom, čak iako ne dođe do zaključivanja ugovora.

Strana koja prekrši ugovorne obaveze odgovorna za naknadu štete. Ovo pravo prestaje da važi nakon tri godine od dana zaključenja pregovora.

Ugovorna strana koja učestvuje u pregovorima može da zahteva nadoknadu troškova nastalih tokom samog postupka zakjučivanja ugovora, a koji nije zaključen zbog takve namere druge ugovorne strane.

Član 1059. Građanskog zakonika jasno navodi da '*Ugovor o franšizingu se mora zaključiti u pismenom obliku, time uključujuči, inter alia, jednoglasno definisanje obaveza svih ugovornih strana, trajanje ugovora i ostalih bitnih elemenata ugovora. Tekst ugovora mora da sadrži kompletan opis programa i franšiznih obaveza.*'

Prethodni član propisuje da je ugovor o franšizingu formalni vid ugovora pri čemu je njegova pismena forma neophodna radi *ad probationem* dejstva.

Član 1061. Građanskog zakonika jasno predviđa uslove koji se odnose na ograničenje konkurencije u franšiznim ugovornim odnosima. U konkretnom smislu, ovaj član uređuje da čak i nakon prestanka franšiznog ugovornog odnosa, ugovorne strane ostaju dužne da neguju poštenu konkurenciju.

Po tom osnovu, primalac franšize može da podleže zabrani lokalne konkurencije u periodu do jedne godine.

Ukoliko takva zabrana rezultira u smanjenu profesionalne aktivnosti primaoca franšize, on će u tu svrhu dobiti fer finansijsku kompenzaciju, bez obzira na prestanak ugovora.

[5] Primer korišćenja franšize predstavljaju velike kompanije (*Coca Cola*, *McDonalds*, i *Sign A Rama*) koje posluju u mnogim državama.

3) Trajanje ugovora i uslovi obnavljanja ugovora

Ugovor o franšizingu se može zaključiti na bilo koji period za koji su ugovorne strane saglasne. Član 1060. Građanskog zakonika navoda da, ukoliko se ugovorom ne precizira njegovo trajanje ili je isto duže od deset godina, svaka pojedinačna ugovorna strana ima pravo da od ugovora odustane uz otkazni rok od godinu dana. Stoga, u takvim slučajevima zakon predviđa određene rokove koji važe u postupku povlačenja određene ugovorne strane iz ugovornog odnosa. Međutim, ovaj odeljak se odnosi na njegovo trajanje. Građanski zakonik na isti način ne sadrži određene odredbe koje upućuju na uslove za obnavljanje ugovora, a koji su predmet dobre volje ugovornih strana i osnovnih odredbi ugovora.

4) Finansijska pitanja

Građanski zakonik ne predviđa posebne odredbe koje se odnose na finansijska pitanja vezana za ugovor o franšizingu. Ova pitanja uređena su poreskim zakonodavstvom.

5) Uloga davaoca franšize

Uloga davaoca franšize regulisana je članom 1057. Građanskog zakonika, i izložena u delu koji se odnosi na postojanje ugovornog odnosa između ugovornih strana u franšizingu. Ono što je važno naglasiti jeste da ugovorni odnos ustanovljen između ugovornih strana u franšizingu ostavlja dovoljno prostora za pregovore, te se stoga stvarno mogu valjano utvrditi ugovorni uslovi koji u finalnoj analizi utiču na formiranje uloge davaoca franšize.

6) Uloga poddavaoca franšize

Građanski zakonik ne sadrži posebne definicije koje se tiču uloge poddavaoca franšize. Njegova pozicija i prava i obaveza u ugovornom odnosu definišu same ugovorne strane.

7) Ugovor o podfranšizingu

Kao i po pitanju uloge poddavaoca franšize, Građanski zakonik ne sadrži bilo kakve posebne definicije koje bi se odnosile na ugovor o podfranšizingu.

8) Oglašavanje i kontrola oglašavanja

Upućujući na ugovor o franšizingu, predviđeno je da oglašavanje i kontrolu oglašavanja regulišu same ugovorne strane. Zakonodavstvo ne predviđa bilo kakva konkretna ograničenja u tom pogledu.

9) Snabdevanje opremom, proizvodima i uslugama

Kao što je ranije pomenuto, član 1057. Građanskog zakonika navodi da je davalac franšize u obavezi da primaocu franšize preda standardni pregled nematerijalnih prava, primera,

dijagrama, ideja vezanih za profit, poslovanje i organizaciju, kao i ostalih odgovarajućih znanja neophodnih za razvoj poslovanja. Istovremeno, davalac franšize je u obavezi da ovaj program obaveza zaštiti od bilo kakvih mogućih povreda od strane trećih lica, da ga istovremeno kontinuirano razvija, i da primaocu franšize pruža podršku u njegovoj implementaciji kroz instrukcije, informacije i usavršavanja. Detaljna uputstva o ovakvom snabdevanju nisu definisana već su stvar dobre volje ugovornih strana, koje mogu dalje i detaljnije da iste razrade.

10) Intelektualna svojina

Prava koja proizilaze na osnovu intelektualne svojine odnose se na davaoca franšize, koji je na osnovu člana 1057. Građanskog zakonika u obavezi da zaštiti programske obaveze od bilo kakvih mogućih povreda od strane trećih lica. U ovom trenutku valjalo bi pomenuti da su specifikacije na osnovu Zakona br. 9380 od 28.04.2005., ‘O autorskom pravu i ostalim srodnim pravima’ (*sa izmenama i dopunama*), i Zakona br. 9947 od 7.07.2008. ‘O industrijskom vlasništvu’ uzete u obzir. Ugovorne strane u ugovoru o franšizingu imaju slobodu da regulišu svoj odnos u odnosu na ostale elemente vezane za korišćenje proizvoda koji su zaštićeni kao intelektualna svojina.

11) Poslovna znanja i poslovne tajne

Poslovna znanja i poslovne tajne predstavljaju nasleđeni deo odnosa koji se ugovorom o franšizingu ustanovljava. Odredbe Građanskog zakonika jasno navode da je davalac franšize u obavezi da primaocu franšize preda standardni izveštaj o nematerijalnim pravima, uzorcima, dijagramima, idejama o profitu, poslovanju i organizaciji i ostalim odgovarajućim znanjima neophodnim za dalji razvoj poslovanja. Ovim se takođe obuhvataju i poslovna znanja i poslovne tajne. Na isti način, na osnovu člana 1058. Građanskog zakonika, tokom pregovora koji vode ka zaključenju ugovora, ugovorne strane dužne su da jedna drugu upoznaju sa stanjem komercijalnih pitanja koja se tiču ugovora o franšizingu, a naročito programa obaveza koje proizilaze iz franšize, i da jedna drugu informišu o fiducijarnim principima. Ugovorne strane dužne su da čuvaju poverljive informacije stečene tokom pregovora čak iako se ugovor o franšizingu ne zaključi. Po pitanju specifičnog karaktera ugovora o franšizingu, na osnovu člana 1061. Građanskog zakonika, zabrana konkurencije se prenosi da važi i nakon prestanka važenja ugovora. Ova tema je takođe izložena u delu koji se bavi ugovornim odnosom ustanovljenim na osnovu ugovora o franšizingu. Značenje koncepta poslovne tajne objašnjeno je u članu 18. Zakona br. 9901, od 14.04.2008., ‘O trgovcima i komercijalnim kompanijama.’[6]

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[6] Ovaj član predviđa da, ‘*1. Poslovna tajna obuhvata informacije koje određena kompanija smatra internim informacijama ili dokumentima, i koje štiti na odgovarajuće načine i koje bi, ako se prenesu na neovlašćena lica, uzrokovale nesagledivu štetu poslovnim interesima te kompanije.*

2. Informacije, koje na osnovu zakona moraju biti javne a koje se odnose na pravila vezana za kršenje zakona, ili koje se na osnovu valjane poslovne prakse i prinicpa koji definišu poslovnu etiku moraju obznaniti, ne predstavljaju poslovnu tajnu. Širenje ovakvih informacija smatra se u skladu sa zakonom, ako namera kojom se rukovode ovakvi postupci jeste zaštita javnih interesa.

3. Upravnici, članovi Upravnog odbora, nadzorni savet, članovi radničkih saveta i predsavnici radnika odgovorni su svojoj kompaniji za štetu nastalu širenjem poslovnih tajni do kojih su došli na osnovu svoje funkcije u toj kompaniji.

12) Pravni lek u slučaju neispunjavanja ugovornih obaveza

Davalac franšize odgovoran je za postojanje prava na, i znanja o franšizom programu obaveza. Ukoliko odgovarajuća prava nisu ustanovljena, ili ako je davalac franšize na bilo koji način povredio ugovorne obaveze svojom krivicom, primalac franšize ima pravo na umanjeni iznos ugovorene platne obaveze. Umanjeni iznos mora definisati u tu svrhu nezavisno i stručno lice. Primalac franšize ima pravo da zahteva nadoknadu štete nastale zbog nepostojanja određenih elemenata u programu obaveza ili nevaljanog izvršenja ili kompletnog neizvršenje ugovornih obaveza od strane davaoca franšize.[7]

Davalac franšize ima pravo da zahteva nadoknadu štete pretrpljene zbog kršenja ugovornih obaveza, a naročito zbog neodgovarajuće implementacije programa franšizinih obaveza od strane primaoca franšize.[8]

Na osnovu člana 1058. Građanskog zakonika, nadoknada nastale štete se na isti način primenjuje i kod predugovornih obaveza.

13) Prestanak ugovornog odnosa i njegove posledice

Kao što je već ranije pomenuto, stavovi 2. i 3. člana 1060. Građanskog zakonika navode da, ukoliko trajanje ugovora nije precizirano, ili ako je isto duže od deset godina, svaka pojedinačna ugovorna strana ima pravo da od ugovora odustane uz otkazni rok od godinu dana.

U slučaju prestanka važenja ugovora zbog njegovog isteka ili povlačenja jedne od ugovornih strana, i pre stvarnog podnošenja izveštaja o proteklim zbivanjima, savesne ugovorne strane treba da nastoje da se usaglase i obnove predmetni ugovor pod istim ili izmenjenim uslovima.

Na osnovu člana 1064. Građanskog zakonika, a u slučaju povrede ugovornih obaveza koja ozbiljno ugrožava svrhu razvijanja poslovanja, svaka ugovorna strana ima pravo da se odustane od ugovora bez otkaznog roka.

14) Ostale opšte odredbe

Građanski zakonik koji predstavlja pravni osnov za regulisanje ugovora o franšizi, ne predviđa ni jedan drugi element koji bi se odnosio na ostale odredbe ugovora. To znači da tokom sprovođenja zakonskih odredaba koje regulišu ugovore uopšte, ugovorne strane imaju slobodu da u sam ugovor o franšizingu umetnu ostale, zavisno od slučaja odgovarajuće odredbe.

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4. Osim ako drugačije nije definisano posebnim zakonom, sudski postupak protiv korišćenja prava određene kompanije mora se pokrenuti u roku od 3 godine od dana kada je registrovano predmetno kršenje. Odredbe tačke 3 člana 10 ovog zakona primenjuju se i na pokretanje zakonskog postupka protiv gorepomenutih lica.'

[7] Član 1062. Građanskog zakonika.

[8] Član 1063. Građanskog zakonika.

PRODAJA PRAVA POTRAŽIVANJA

1) Osnovni koncepti i elementi

Na osnovu albanskog zakonodavstva, ugovor o prodaji prava potraživanja predstavlja noviji ugovor koji se nije preterano koristio u praksi. To se ogleda u činjenici da pravna regulativa koja se odnosi na ovakav ugovor postala opipljiva samo u poslednjih par godina. U konkretnom smislu, Zakon br. 9630 od 30.10.2006., 'O prodaji prava potraživanja,' sa izmenama i dopunama, predstavlja prvi zakon koji takav ugovor reguliše. Uz osnovne koncepte obligacionih odnosa predviđenih ovim ugovorom, regulisanih Građanskim zakonikom, novi zakon o prodaji prava potraživanja predviđa dalje detalje koji se odnose na ugovorni odnos ustanovljen na osnovu ugovora o prodaji prava potraživanja. Svrha zakona o prodaji prava potraživanja je regulisanje odnosa ugovornih strana u ugovoru o prodaji prava potraživanja, i transfera novca sa računa klijenta. Stoga su u posebnom zakonu detaljnije izvučeni sledeći koncepti:

A. Značenje prodaje prava potraživanja

Ugovor o prodaji prava potraživanja[9] predstavlja ugovor zaključen u pismenoj formi između dobavljača i faktora na osnovu koga:

a) dobavljač ima pravo da proda ili prodaje faktoru zatečena potraživanja klijenta koja postoje u trenutku zaključenja ugovora o prodaji prava potraživanja, ili koja mogu biti naknadno zarađena na osnovu ugovora o prodaji robe ili usluga, zaključenog između dobavljača i njegovih klijenata, odnosno dužnika, osim ugovora o prodaji robe i/ili usluga kupljenih za ličnu ili kućnu upotrebu;
b) faktor obavlja najmanje dve od sledećih aktivnosti:
    i) dobavljaču omogućava finansiranje, uključujući i novčani ulog;
    ii) vodi evidenciju potraživanja ka klijentima;
    iii) prikuplja ta potraživanja;
    iv) štiti potrošača od nelikvidnosti dužnika koja može biti rezultat njihove finansijske nemogućnosti da plate;
c) dužnik o transferu potraživanja faktoru mora biti blagovremeno obavešten.

Ugovor o prodaji prava potraživanja zaključuje se vezano i za lokalna i međunarodna sredstva. Ugovor o prodaji prava potraživanja nije ugovor o zajmu ili ugovor o transferu novca na račun klijenta, i on se zaključuje isključivo radi omogućavanja prikupljanja potraživanja. U smislu ovog zakona, ugovor, u kome su faktor i dobavljač jedno te isto lice nije ugovor o prodaji prava potraživanja.

B. Delokrug ugovora o prodaji prava potraživanja

Na osnovu člana 2. Zakona br. 9630 od 30.10.2006., O prodaji prava potraživanja, sa izmenama i dopunama, svrha ugovora o prodaji prava potraživanja je da precizno obezbedi transfer potraživanja ka klijentu od dobavljača ka faktoru, koja u trenutku zaključivanja ugovora postoje ili koja mogu biti zarađena naknadno, i koja su zarađena na osnovu ugovora o prodaji robe i/ili usluga, zaključenog između dobavljača i njegovih klijenata. Ugovor o pro-

[9] Član 2. Zakona br. 9630 od 30.10.2006., O prodaji prava potraživanja, sa izmenama i dopunama.

daji prava potraživanja promoviše poslovne aktivnosti pod uslovima savremenog razvoja privrednih transakcija u skladu sa potrebama koje diktira tržišna ekonomija.

C. Predmet prodaje prava potraživanja

Predmet ugovora o prodaji prava potraživanja obuhvata postojeća ili buduća potraživanja ka klijentu, koja su zarađena ili će biti zarađena prodajom robe i/ili usluga od strane dobavljača klijentu (dužniku). Potraživanja klijenta koja predstavljaju predmet ugovora o prodaji prava potraživanja mogu bili lokalna ili međunarodna. Potraživanja ka klijentu se mogu i preneti pre zaključivanja ugovora na osnovu koga će biti zarađena. Potraživanja ka klijentu, bilo da su postojeća ili buduća se mogu preneti u celosti. Prenos celokupnog iznosa budućih potraživanja klijenta se može odnositi samo na novac zarađen na osnovu ugovora zaključenih na najduže 24 meseca od dana zaključivanja ugovora o prodaji prava potraživanja.

Odredbe ugovora o prodaji prava potraživanja važe čak iako pojedinačno ne identifikuju postojeća ili buduća potraživanja klijenta, koja predstavljaju predmet ugovora o prodaji prava potraživanja, ako je taj novac identifikovan prilikom zaključivanja ugovora o prodaji prava potraživanja ili u trenutku kada je zarađen. Odredbe ugovora o prodaji prava potraživanja koje propisuju prenos spornog budućeg novca koji će biti zarađen i koji će se nalaziti na računu klijenta ne zahtevaju zaključenje novog ugovora o prenosu novca sa računa klijenta u takvim slučajevima. Zaključenje ugovora koji su predviđeni članom 2. ovog zakona koji se odnose na isti novac koji se nalazi na računu klijenta između dobavljača i više od jednog faktora, a vezano za istog dužnika zabranjeno je. U slučaju da se takvi ugovori zaključe oni su ništavni. Ukoliko se takav postupak smatra prekršajem, kršenje ovih odredaba podleže zakonskim merama propisanim odredbama Krivičnog zakonika. Zaključenje ugovora o prodaji potraživanja nije suprotno zakonu ako postoji prethodni sporazum ugovornih strana za zaključenje takvih ugovora. [10]

D. Ugovorne strane u prodaji prava potraživanja

Ugovorne strane u prodaji prava potraživanja su:
1) faktor
2) dobavljač
3) dužnik

Faktor je pravno lice koje pruža usluge pomenute pod b), stav 1., član 2. Zakona o prodaji prava potraživanja koje prima određeni iznos kao uplatu koji može da obuhvata i određeni iznos na ime kamate za određeni period, kao što je to precizirano u ugovoru koji je zaključen između datih ugovornih strana.[11]

Sledeća pravna lica imaju pravo da vrše aktivnosti vezane za prodaju prava potraživanja:

a) banke i finansijske institucije koje posluju u skladu sa važećim zakonodavstvom na teritoriji Republike Albanije;
b) komercijalne kompanije koje se isključivo bave aktivnostima vezanim za prodaju prava potraživanja.

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[10] Član 3. Zakona br. 9630 od 30.10.2006., O prodaji prava potraživanja, sa izmenama i dopunama.

[11] Član 9. Zakona br. 9630 od 30.10.2006., O prodaji prava potraživanja, sa izmenama i dopunama.

Ukoliko je na teritoriji Republike Albanije ustanovljeno kao pod gore pomenuto b), faktor mora biti komercijalna kompanija koja posluje u skladu sa zakonom br. 7638 od 19.11.1992., „O komercijalnim kompanijama"[12], čiji početni kapital nije manji od Lekë 20 000 000 (dvadeset miliona), i koja je bar jednom izvršila gotovinsku uplatu u iznosu od Lekë 20 000 000 (dvadeset miliona)[13].

Dobavljač predstavlja lice koje je nosilac poslovnih delatnosti ustanovljenih u skladu sa zakonodavstvom zemlje porekla, i koje prodaje robu i/ili pruža usluge dužniku, a ima koristi od usluga faktora predviđenih pod b), stav 1., član 2. Zakona o prodaji prava potraživanja i dobija uplatu koja obuhvata i određeni iznos i/ili kamatu za određeni vremenski period, kao što je to precizirano u zaključenom ugovoru[14].

Dužnik je pravno lice koje kupuje robu i/ili usluge od dobavljača, obavlja privrednu delatnost i osnovano je u skladu za zakonodavstvom zemlje porekla[15].

2) Vrste ugovora o prodaji prava potraživanja

Postoje tri vrste ugovora o prodaji prava potraživanja:

a) lokalna prodaja potraživanja, bilo da je uvoz ili izvoz u pitanju;
b) prodaja prava potraživanja bez garancije, gde dobavljač ne pruža bilo kakvu garanciju faktoru u slučaju nelikvidnosti dužnika. Međutim, dobavljač u toj situaciji i dalje snosi odgovornost prema faktoru ako dužnik ne isplati celokupnu potrebnu sumu po svim ostalim osnovima osim nelikvidnost;
c) prodaja prava potraživanja uz garanciju, gde dobavljač pruža kompletnu garanciju faktoru da će dužnik uplatiti sav novac na račun klijenta.[16]

3) Prava i obaveze ugovornih strana koje učestvuju u prodaji prava potraživanja

Obaveze faktora na osnovu ugovora o prodaji prava potraživanja precizirane su članom 13. Zakona o prodaji prava potraživanja. U konkretnom smislu, faktor prihvata prenos dobavljačevih potraživanja prema klijentu u skladu sa ugovorom o prodaji prava potraživanja, u skladu sa članom 2. ovog zakona. Faktor pruža usluge u skladu sa ugovorom o prodaji prava potraživanja, u skladu sa pod b), stav 1., član 2. zakona o prodaji prava potraživanja.

S druge strane, dobavljač mora da ispuni svoje obaveze koje proizilaze iz ugovora o prodaji prava potraživanja. Dobavljač je odgovoran faktoru za postojanje i validnost novca koji se nalazi na računu klijenta, koji predstavlja predmet ugovora iz člana 3. zakona o prodaji prava

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[12] Ovaj zakon je zamenjen Zakonom br. 9901 od 14.04. 2008 'O trgovcima i komercijalnim kompanijama.'

[13] Član 10. Zakona br. 9630 od 30.10.2006., O prodaji prava potraživanja, sa izmenama i dopunama

[14] Član 11. Zakona br. 9630 od 30.10.2006., O prodaji prava potraživanja, sa izmenama i dopunama

[15] Član 12. Zakona br. 9630 od 30.10.2006., O prodaji prava potraživanja, sa izmenama i dopunama

[16] Član 5. Zakona br. 9630 od 30.10.2006., O prodaji prava potraživanja, sa izmenama i dopunama

potraživanja, i koji se faktoru prenosi bez naknade, protivljenja, duženja ili bilo kog drugog prava koje važi za treća lica. Na osnovu ugovora o prodaji prava potraživanja, dobavljač je u obavezi da ne kasnije od momenta kada faktor postaje nadležan, preda i da na raspolaganje faktoru u skladu sa članom 507. Građanskog zakonika sve informacije i dokumente koji potvrđuju postojanje novca na računu klijenta, tj. potraživanja, koja su predmet ugovora o prodaji prava potraživanja. Ukoliko dužnik, čak i nakon prijema obaveštenja u skladu sa članom 6. Zakona o prodaji prava potraživanja[17], plati greškom ili po bilo kom drugom osnovu u korist dobavljača, novac koji se nalazi na računu klijenta, koji je dobavljač preneo na faktora na osnovu ugovora o prodaji prava potraživanja, dobavljač je dužan da bez daljnjeg prenese .

Dužnik je dužan da primi obaveštenje o zaključenju ugovora o prodaji prava potraživanja koji se odnosi na novac koji se nalazi na računu klijenta i o identitetu faktora. Prava i obaveze dužnika navedene u ugovoru zaključenom između njega i dobavljača ostaju neizmenjene, nezavisno od promene ugovorne strane u čiju korist dužnik plaća potraživanja.[18]

Dužnik je u obavezi da faktoru plati samo pod uslovom ako nije upoznat sa postojanjem prioritetnog lica koje treba namiriti, i pod uslovom da je pismeno obaveštenje o transferu novca:

a) dužnik primio od strane faktora uz odobrenje dobavljača
b) identifikuje u meri u kojoj je to moguće potraživanja koje su prenešena u korist faktora koja dužnik mora da izmiri;
c) upućuje na potraživanja klijenta nastala na osnovu ugovora o prodaji robe i/ili usluga koji su zaključeni pre, ili u vreme davanja obaveštenja.

Pod uslovom da je obaveštenje poslato blagovremeno i na odgovarajući način, dužnik plaća faktoru u skladu sa uslovima ugovora koji su zaključili dobavljač i dužnik.[19]

Dužnik se oslobađa obaveze nakon izmirenja dugovanja u korist faktora u skladu sa odredbama člana 17. Zakona o prodaji potraživanja, kao i pod svim ostalim uslovima u kojima izmirenje obaveza u korist faktora dužnika oslobađa svih daljih obaveza.[20]

Dužnik ima pravo da uloži žalbu i sebe zaštiti od faktora i dobavljača. Ukoliko faktor uloži žalbu protiv dužnika na osnovu postojećih potraživanja, zarađenih na osnovu ugovora o prodaji robe i/ili usluga, dužnik ima pravo da faktoru iznese sve primedbe koje bi trebalo da iznese protiv dobavljača. Na isti način, dužnik ima pravo da od faktora zahteva nadoknadu novca isplaćenog dobavljaču, koji je zarađen u trenutku kada je dužnik primio pismeno obaveštenje o transferu sredstava na osnovu članova 6. i 17. Zakona o prodaji prava potraživanja. [21]

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[17] Član 6. Zakona o prodaji prava potraživanja predviđa:

'*1. Faktor ili dobavljač dužni su da dužniku upute pismeno obaveštenje, koje može biti u vidu faksa, elektronske poruke ili bilo kog drugog vida komunikacije koja se može reprodukovati na konkretan način. Obaveštenje se smatra datim prijemom od strane primaoca.*

2. Sadržaj obaveštenja treba da obuhvata izjavu o postojanju ugovora o prodaji prava potraživanja zaključenog između faktora i dobavljača, kao i identifikaciju faktora i potraživanja klijenta, koja predstavljaju predmet ugovora o prodaji prava potraživanja.'

[18] Član 16. Zakona br. 9630 od 30.10.2006., O prodaji prava potraživanja, sa izmenama i dopunama

[19] Član 17. Zakona br. 9630 od 30.10.2006., O prodaji prava potraživanja, sa izmenama i dopunama

[20] Član 18. Zakona br. 9630 od 30.10.2006., O prodaji prava potraživanja, sa izmenama i dopunama

[21] Član 19. Zakona br. 9630 od 30.10.2006., O prodaji prava potraživanja, sa izmenama i dopunama

Međutim, neispunjenje ili nevaljano ili neblagovremeno ispunjenje ugovora o prodaji robe i/ili usluga, bez ograničenja prava dužnika, u skladu sa članom 19. Zakona o prodaji prava potraživanja, dužniku ne daje automatsko pravo da zahteva povraćaj sredstava od faktora, čak iako ima pravo da isto zahteva od dobavljača. Dužnik, koji ima pravo da zahteva da mu dobavljač vrati novac koji je uplaćen faktoru na račun potraživanja, takođe ima pravo da zahteva da faktor vrati uplaćeni novac pod uslovom da faktor:

a) nije izvršio uplatu u korist dobavljača za novac koji se razmatra, ili ,
b) da je izvršio uplatu u korist dobavljača za novac koji se razmatra, i pored svesti da ugovor o prodaji robe i/ili usluga nije izvršen u potpunosti, na pravi način ili blagovremeno od strane dobavljača.[22]

4) Obezbeđenje u ugovoru o prodaji prava potraživanja

Faktor i dobavljač mogu predvideti postojanje određenih obezbeđenja prilikom prodaje prava potraživanja. Ta obezbeđenja mogu biti deponovana sredstva, zalog, jamstvo ili ostali vidove obezbeđenja u skladu sa važećim zakonskim odredbama.[23] Transakcije vezane za prodaju prava potraživanja, kao posebne vrste transakcija mogu se obezbediti obavezom o postojanju obezbeđenja predviđenog članovima od 530. do 607. Građanskog zakonika[24], i zakonom broj 8537 od 18.10.1999., 'O zalogu,' sa izmenama i dopunama.

5) Prenos kredita

Član 21. Zakona o prodaji prava potraživanja reguliše pravila za sukcesivan prenos novca faktoru ili licu u čiju korist se transfer vrši. U konkretnim uslovima, ovaj član navodi da:

'1. Kada dobavljač faktori plati na osnovu ugovora o prodaji prava potraživanja, u skladu sa ovim zakonom:

a) odredbe člana 3.[25] i 20. [26]ovog zakona, u skladu sa pod b) ovog člana, primenjuju se na svaki pojedinačni naredni transfer datog novca na treća lica;

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[22] Član 20. Zakona br. 9630 od 30.10.2006., O prodaji prava potraživanja, sa izmenama i dopunama.

[23] Član 15. Zakona br. 9630 od 30.10.2006., O prodaji prava potraživanja, sa izmenama i dopunama

[24] Kazneni uslovi, zaloga, hipoteka, jamac, kapara, povlastice, i prigovor na dužnikove pravne aktivnosti.

[25] Član 3. predviđa postojanje ugovora o prodaji prava potraživanja, i protumačen je u prethodnom tekstu.

[26] Član 20. Zakona o prodaji prava potraživanja predviđa sledeće:

'*1. Neizvršenje ili nevaljano ili neblagovremeno izvršenje ugovora o prodaji robe i/ili usluga bez kršenja prava dužnika, na osnovu člana 19. ovog zakona ga automatski ne ovlašćuje da od faktora zahteva povraćaj isplaćene sume, čak iako dužnik ima pravo da to isto zahteva od dobavljača.*

Dužnik, koji ima pravo da zahteva da dobavljač vrati novac koji je uplaćen faktoru na račun potraživanja, takođe ima pravo da zahteva da faktor vrati uplaćeni novac pod uslovom da faktor:

a) nije izvršio uplatu u korist dobavljača za novac koji se razmatra, ili ,

b) da je izvršio uplatu u korist dobavljača za novac koji se razmatra, i pored svesti da ugovor o prodaji robe i/ili usluga nije izvršen u potpunosti, na pravi način ili blagovremeno od strane dobavljača

b) odredbe člana 17.[27] i 20. ovog zakona primenjuju se u odnosu na lica koja uspešno prime dati novac, kao što je slučaj i sa faktorom.

2. Postojeći ili novi faktor dužniku upućuje obaveštenje o sukcesivnom prenosu sredstava.'

Stoga, prethodno navedena situacija odnosi se na slučajeve u kojima se prenos potraživanja vrši više puta u korist novih faktora. Bez obzira na to, član 22. Zakona o prodaji prava potraživanja jasno kaže da ugovor o prodaji prava potraživanja može da ograniči ili zabrani sukcesivan prenos potraživanja klijenta.

6) Registrovanje prodaje prava potraživanja

Prenos novca koji se nalazi na računu klijenta uz pomoć ugovora o prodaji prava potraživanja, kao i bilo kakva promena ili dopuna takvog ugovora, i prestanak njegovog važenja upisuje se u registar zaloge.[28] Registar zaloge funkcioniše u okviru i regulisan je Zakonom br. 8537 od 18.10.1999., O zalogu.

Prijava za registraciju transfera potraživanja klijenta kroz ugovor o prodaji prava potraživanja sadrži:

a) informacije o identitetu faktora, dobavljača i dužnika;

b) identifikaciju bilo kojih obezbeđenja koja su regulisana ugovorom o prodaji prava potraživanja;

c) potpise lica koja podnose prijavu za registraciju ugovora o prodaji prava potraživanja, i prenos potraživanja.[29]

Gorenavedene informacije upisuju se u registar nakon podnošenja prijave za upis, i imaju prioritet nad prijavama trećih lica.[30] Faktor, dobavljač i dužnik mogu zahtevati upis koji se odnosi na određeni zakonski postupak koji se vodi vezano za ugovor o prodaji prava potraživanja. Taj upis sadrži podatke o raspisu za peticiju o zakonskim pravima, i njegov kratak opis. Takođe, moguće je registrovati i odricanje od raspisa za peticiju o zakonskim pravima i druge relevantne odluke.[31]

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[27] Član 17. navodi da, '*1. Dužnik je u obavezi da faktoru plati samo pod uslovom ako nije upoznat sa postojanjem prioritetnog lica koje treba namiriti, i pod uslovom da je pismeno obaveštenje o transferu novca:*

a) dužnik primio od strane faktora uz odobrenje dobavljača

b) identifikuje u meri u kojoj je to moguće potraživanja koje su prenešena u korist faktora koja dužnik mora da izmiri;

c) upućuje na potraživanja klijenta nastala na osnovu ugovora o prodaji robe i/ili usluga koji su zaključeni pre ili u vreme davanja obaveštenja.

2. Pod uslovom da je obaveštenje poslato blagovremeno i na odgovarajući način, dužnik plaća faktoru u skladu sa uslovima ugovora koji su zaključili dobavljač i dužnik.'

[28] Član 23. Zakona br. 9630 od 30.10.2006., O prodaji prava potraživanja, sa izmenama i dopunama

[29] Član 24. Zakona br. 9630 od 30.10.2006., O prodaji prava potraživanja, sa izmenama i dopunama

[30] Član 25. Zakona br. 9630 od 30.10.2006., O prodaji prava potraživanja, sa izmenama i dopunama

[31] Član 26. Zakona br. 9630 od 30.10.2006., O prodaji prava potraživanja, sa izmenama i dopunama

Upis u registar zaloge proizvodi dejstvo ka trećim licima. Pretpostavlja se da su treća lica upoznata sa postojanjem transfera koji je upisan u registar. Podaci upisani u registar ne koriste se da bi se dokazalo vlasništvo, osim ako nije drugačije navedeno, ili dokazalo postojanje bilo kog drugog prava vezanog za prenos potraživanja ka klijentu kroz ugovor o prodaji prava potraživanja, ili kao dokaz validnosti određene zakonske transakcije.[32]

7) Ostala pitanja vezana za prodaju prava potraživanja

Aktivnosti vezane za prodaju prava potraživanja su pod nadzorom Narodne banke Albanije. Tako, na osnovu člana 28. Zakona o prodaji prava potraživanja, aktivnosti vezane za prodaju prava potraživanja, kao što je to precizirano članom 2. ovog zakona, koje vrše lica navedena u članu 10., pored nadzornih organa predviđenih zakonom, podležu nadzoru i regulativi Narodne banke Albanije, u skladu sa odredbama Zakona o bankama u Republici Albaniji, i pratećim zakonskim aktima koji su u skladu sa tom svrhom.

Isto tako, Zakon o prodaji prava potraživanja posebno reguliše fiskalna pitanja vezana za prodaju prava potraživanja. Za potrebe poreza na dodatu vrednost, prodaja prava potraživanja se smatra finansijskom uslugom.[33]

Član 31. Zakona o prodaji prava potraživanja posebno reguliše stečaj, reorganizaciju ili likvidaciju faktora i dužnika. Tako, na osnovu ovog člana, odredbe važećeg zakonodavstva koje se primenjuju na ispitivanje faktora pred sudom važe i u postupku stečaja, reorganizacije i likvidacije. Ovaj postupak regulisan je Zakonom o stečaju iz 2002.

Kada dužnik pokrene stečajni postupak, postupak reorganizacije ili likvidacije, njegova obligacija izmirenja potraživanja ka faktoru:

a) se pred sudom smatra kao neizmirena obaveza;
b) se pred sudom smatra kao izmirena obaveza u slučaju da je obezbeđena;
c) i dalje je predmet istih prava i obaveza kao što je to navedeno u članovima 16. i 17. ovog zakona.

FINANSIJSKI LIZING

1) Osnovni koncepti i elementi

Albanski građanski zakon tek od relativno nedavno predviđa zakonsku regulativu za sklapanje ugovora o finansijskom lizingu. Pre devedesetih, tadašnje važeće zakonodavstvo nije predviđalo uslove za takve ugovore. Tek 1994. godine nakon usvajanja novog Građanskog zakonika, zakon o finansijskom lizingu postaje valjano regulisan (njegovi glavni aspekti), i time postaje tipičan ugovor. Međutim, kao što ćemo videti nešto kasnije, Građanski zakonik iz 1994. ne reguliše uslove za sklapanje ugovora o finansijskom lizingu na jedan sveobuhvatan način, i time ostavlja prostor za nedorečenost. U tom smislu, Albanija je usvojila

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[32] Član 26. Zakona br. 9630 od 30.10.2006., O prodaji prava potraživanja, sa izmenama i dopunama

[33] Član 30. Zakona br. 9630 od 30.10.2006., O prodaji prava potraživanja, sa izmenama i dopunama

poseban zakon koji jasno reguliše sve krucijalne elemente koji su relevantni za ugovor o finansijskom lizingu. Ovo je zakon br. 9396 od 12.05.2005. 'O finansijskom lizingu,' sa izmenama i dopunama. Broj kompanija koje se bave finansijskim lizingom u Albaniji, uključujući i kompanije poput *Tirana Leasing* sh.a, *Raiffeisen Leasing* sh.a, *LandesLease* sh.a, i *Bileasing* sh.a., se od tada bitno povećao.

A. Značenje finansijskog lizinga

Član 849. Građanskog zakonika Republike Albanije navodi da:

'*Na osnovu ugovora o finansijskom lizingu, jedna ugovorna strana je u obavezi da drugoj ugovornoj strani stavi na raspolaganje određenu pokretnu ili nepokretnu stvar, na određeni period, uz novčanu naknadu koja se isplaćuje u ratama, utvrđenu na osnovu procenjene vrednosti tog objekta, tokom trajanja ugovora i eventualno ostale elemente u skladu sa pristankom ugovornih strana.*

'Predmet mora biti zarađen ili napravljen od strane zalagodavca u skladu sa željama i opisom zalogoprimca, pri čemu zalogoprimac ima pravo da ostvari vlasništvo na istim po isteku ugovora uz plaćanje određene novčane sume.

'Zalogodavac snosi odgovornost prema zalogoprimcu u skladu sa opštim pravilima koja rukovode neispunjavanje ili neblagovremeno ispunjavanje obaveze stavljanja na raspolaganje određenog predmeta, kao i za sve nepravilnosti tog predmeta.

'Ugovor može sadržati odredbe koje propisuju da pre zahtevanja da se poštuju prava zalogodavca, zalogoprimac mora da zahteva da lice koje vrši primopredaju predmetne stvari koja je predmet ugovora (dobavljač) poštuje njegova prava ili prenos prava na zalogoprimce. '

Član 1§11. Zakona br. 9396 od 12.05.2005. 'O finansijskom lizingu,' sa izmenama i dopunama, predviđa da, '*Finansijski lizing predstavlja pravni odnos u kom zalogodavac kupuje od dobavljača stvar koju zalogoprimac bira (od onih koje su dostupne) i daje ga zalogoprimcu na korišćenje na određeni rok, uz cenu utvrđenu ugovorom, pri čemu nakon isteka tog ugovora, zalogoprimac može taj predmet da kupi, nastavi da ga koristi ili vrati zalogodavcu.*' Uobičajeni finansijski lizing ima sledeće odlike:

a) određeni predmet zalogoprimac bira potpuno nezavisno od zalogodavca;
b) taj predmet zalogodavac kupuje, ili kao što to može biti slučaj, zalogodavac stvara uz pomoć vlastitih finansijskih sredstava da bi ga dao zalogoprimcu na korišćenje na osnovu ugovora o lizingu, u skladu sa zaključenim ugovorom, ili ugovorom koji će biti zaključen, a o kome dobavljač je potpuno obavešten;
c) iznajmljivanje se vrši u vidu plaćanja rata koje se obračunavaju na osnovu stope amortizacije te stvari, nekog njenog dela, ili njenih osnovnih celina;
d) po isteku ugovora, zalogoprimac je u obavezi da predmetnu stvar kupi, davajući unapred određenu simboličnu svotu novca, u skladu sa dogovorom ugovornih strana ili kao što je ustanovljeno u trenutku pozivanja na pravo na kupovinu, obnovi ugovor na određeni period, uz ratu koja će biti niža od početne, ili da isti predmet vrati zalogodavcu.

Koncept direktnog finansijskog lizinga sadržan je u tački 14. članu 1. Zakona o finansijskom lizingu. Stoga, direktan finansijskih lizing je vrsta lizinga gde zalogodavac daje određeni predmet koji je u njegovom/njenom vlasništvu zalogoprimcu na korišćenje na određeno vreme po čijem isteku zalogoprimac ima obavezu da taj predmet kupi za određenu cenu, produži trajanje ugovora ili predmet vrati. Pod uslovima finansijskog lizinga, zalogodavac je i

vlasnik datog predmeta i sa zalogoprimcem je isključivo u vezi radi davanja tog predmeta na korišćenje. Za razliku od finansijskog lizinga koji je ugovoren između dobavljača i zalogodavca, a u odnosu na direktan finansijski lizing:

a) zalogodavac, zajedno sa tim predmetom, zalogoprimcu pruža pomoć i usluge održavanja;
b) predmeti koji se daju u zakup su prvenstveno iste vrste;
c) zalogoprimac ima više izbora da raskine ugovor pre njegovog isteka, uz poštovanje preliminarnog otkaznog roka.[34]

B. Delokrug finansijskog lizinga

Finansijski lizing predstavlja savremeno srednjeročno i dugoročno finansiranje namenjeno za preduzeća i praktikante u cilju sticanja čvrstih stvari, naime, opreme i nepokretnosti za profesionalno korišćenje. On predstavlja alternativu bankarskom finansiranju. Finansijski lizing je idealan za mala i srednja preduzeća. On istovremeno predstavlja visoko efikasan aranžman za mala preduzeća koja imaju potrebu da unaprede svoje poslovanje i prilagode se tržišnim potrebama. Bez obzira na svrhu finansijskog lizinga koja kao i bilo koji drugi ugovor o lizingu ima za cilj korišćenje određene pokretnosti ili nepokretnosti, krajnji cilj ugovora o finansijskom lizingu za razliku od tradicionalnog najma, zaključenog između datih ugovornih strana jeste pravo zalogoprimca da postane vlasnik. Analiza Građanskog zakonika jasno podvlači ovu osobinu finansijskog lizinga. Međutim, mnoga druga pitanja, od oblika ovakvog ugovora, njegovih osnovnih uslova, trajanja, ili slučajeva kod kojih takav ugovor prestaje da važi, nisu jasno definisana članom 849. ovog Zakonika. Kao što je ranije pomenuto, odredbe zakona br. 9396 od 12.05.2005., ‘O finansijskom lizingu,’ sa izmenama i dopunama, treba da popune postojeće praznine.

C. Predmet finansijskog lizinga

Predmet ugovora o finansijskog lizingu može biti i određena pokretna stvar i nepokretnost, pod uslovom da su pojedinačno precizirane, zato što, kada ugovorne strane nisu predvidele mogućnost da zalogoprimac dati predmet otkupi, isti se po isteku ugovora vraća. Ukoliko taj predmet obuhvata pojedinačne elemente koji se mogu izbrojati, izmeriti i slično, sam predmet ugovora bi uslovio da to onda ne bi bio ugovor o finansijskom lizingu već ugovor o zajmu. Predmet ugovora mora biti verovatan, u skladu sa zakonodavstvom, definisan ili moguć za definisanje.[35] Primena ove odredbe Građanskog zakonika predstavlja preduslov za valjano zaključenje ovakvog ugovora (*Član 663. Građanskog zakonika*).

D. Ugovorne strane u finansijskom lizingu

Ugovorne strane u finansijskom lizingu su zalogoprimac, zalogodavac i dobavljač.

‘Zalogoprimac’ predstavlja pravno ili fizičko lice koje može steći pravo vlasništva nakon korišćenja datog predmeta tokom celokupnog trajanja ugovora o finansijskom lizingu, i po plaćanju svih dospelih finansijskih obaveza vezanih za korišćenje tog predmeta i konačne kupovne cene.[36]

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[34] Član 2§2/3. Zakona br. 9396 od 12.05.2005., ‘O finansijskom lizingu,’ sa izmenama i dopunama.

[35] Član 678. Građanskog zakonika Repulike Albanije.

[36] Član 1§13. Zakona br. 9396 od 12.05.2005., ‘O finansijskom lizingu,’ sa izmenama i dopunama.

‘Zalogodavac’ predstavlja pravno lice koje poseduje isključivo pravo vlasništva nad datim predmetom, koji zalogoprimcu daje za pravo da isti drži i koristi u određenom roku trajanja ugovora o finansijskom lizingu, pod uslovima utvrđenim ugovorom.[37]

‘Dobavljač’ predstavlja fizičko ili pravno lice koje na osnovu ugovora o nabavci prodaje dati predmet zalogodavcu, koji isti kasnije daje zalogoprimcu na korišćenje.[38]

Pored gorepomenutih, član 3. Zakona o finansijskom lizingu precizira da zalogodavac, koji nije finansijska institucija ili banka ne može da obavlja aktivnosti osim onih vezanih za finansijski lizing, a koji prilikom registracije kao pravno lice kod suda mora posedovati kapital koji nije manji od Lekë 20 000 000. Stoga je zalogoprimac ugovorna strana koja nastoji da od zalogodavca kupi predmet koji je zalogodavac naručio od dobavljača, a dao zalogoprimcu na korišćenje u vidu finansijskog lizinga. Obaveze zalogoprimca mogu se pretpostaviti na osnovu garancija ustanovljenih ugovorom o obezbeđenju zaključenom između zalogoprimca i garanta. Dobavljač predstavlja stranu koja poseduje, proizvodi ili stvara određenu predmetnu stvar na osnovu specifikacija koje zalogoprimac zahteva, i potom isti prodaje zalogodavcu za određenu prodajnu cenu.

Pravna lica koja se bave bankarskim ili finansijskim poslovima se mogu baviti i finansijskim lizingu pod uslovom da za to imaju pravo na osnovu prava stečenih registracijom ili na osnovu dozvole za rad.[39]

E. Osnovni principi finansijskog lizinga

Osnovni principi koji važe za odnose u finansijskom lizingu posebno su naglašeni u dva člana albanskog zakona o finansijskom lizingu. Ovi principi upućuju na regulativu koja se odnosi na pravo vlasništva nad određenim predmetom koji predstavlja predmet ugovora o finansijskom lizingu, i rizike vezane za takav odnos.

Član 9. ovog zakona jasno navodi da se određeni predmet daje zalogoprimcu na korišćenje na određeni period, pri čemu isti ostaje u vlasništvu zalogodavca, a koje se može preneti na zalogoprimca u slučaju da ovaj odluči da upotrebi svoje pravo i isti kupi, pod uslovima koji su navedeni u ugovoru o finansijskom lizingu. Kada je ugovorni odnos prekinut pre isteka krivicom zalogoprimca, rate koje su plaćene kao najam ne računaju se kao rate u svrhu kupovine, što znači da plaćanje tih rata zalogoprimcu ne daje mogućnost sticanja vlasništva. S druge strane, zalogoprimac gubi pravo državine i daljeg korišćenja tog predmeta, koji se vraća zalogodavcu. Dalje, član 10. Zakona o finansijskom lizingu predviđa elemente vezane za prenos rizika koji proizilaze iz ugovora o finansijskom lizingu, što znači da nakon zalogoprimčevog preuzimanja predmetne stvari u državinu, sve rizike vezane za tu pokretnost ili nepokretnost, nenameran gubitak, krađu, prevremeni gubitak mogućnosti za korišćenje snosi on/ona.

2) Komercijalna priroda finansijskog lizinga

Član 5. Zakona o finansijskom lizingu precizira da ako se ugovor o finansijskom lizingu zaključuje sa zalogoprimcem koji je fizičko lice koje nije registrovalo svoju privrednu delatnost, takav ugovor o finansijskom lizingu smatra se nekomercijalnim po svojoj prirodi, i samim tim podleže opštim ugovornim pravilima. *Argumentum ad contrario* znači da, ako se

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[37] Član 1§12. Zakona br. 9396 od 12.05.2005., ‘O finansijskom lizingu,’ sa izmenama i dopunama.

[38] Član 1§6. Zakona br. 9396 od 12.05.2005., ‘O finansijskom lizingu,’ sa izmenama i dopunama.

[39] Član 4. Zakona br. 9396 od 12.05.2005., ‘O finansijskom lizingu,’ sa izmenama i dopunama.

ugovor o finansijskom lizingu zaključuje sa zalogoprimcem koji je fizičko lice koje je registrovalo svoju privrednu delatnost ili kompaniju, takav ugovor o finansijskom lizingu smatra se komercijalnim, i u tom slučaju pored opštih ugovornih pravila važe još i posebne odredbe kojima se reguliše delatnosti privrednih subjekata.

Delatnost finansijskog lizinga i sva lica koja obavljaju ovu delatnost i u tu svrhu pribavljaju dozvole pod nadzorom su Narodne banke Albanije u skladu sa odredbama ovog zakona, tj. Zakona o bankama u Republici Albaniji, i pratećih zakonskih akata donešenih u tu svrhu.[40]

3) Trajanje finansijskog lizinga

Može se reći da je trajanje lizinga vezano za dva faktora. Prvi je mera potrošnje (amortizacija) samog predmeta, a druga ima veze sa činjenicom da li je u pitanju pokretna ili nepokretna stvar.

Stoga, pokretne stvari koje će se utrošiti u roku od 5 godina daju se u zakup na najmanje godinu dana, dok pokretne stvari koje će se utrošiti u roku dužem od 5 godina mogu se dati u zakup na period od najmanje 2 godine.[41] Nepokretnosti se mogu dati u zakup na period od najmanje 3 godine.[42]

Ti periodi računaju se od dana prihvatanja određenog predmeta do dana finalne isplate.

Uopšteno, ugovori o finansijskom lizingu nisu kratkoročni. Zakonom je utvrđeno minimalno trajanje ugovora o lizingu, te stoga ugovori zaključeni na kraći vremenski period od minimalno propisanog se ne smatraju ugovorima o finansijskom lizingu. Ovo je zakonska posledica koju ugovorne strane snose ako nisu postupile u skladu sa odredbama koje preciziraju minimalno trajanje ugovora o finansijskom lizingu.

Normalno je da je minimalno trajanje ugovora o lizingu koji se odnosi na stvari koje će biti korišćene najmanje 5 godina i duže.

Po istom osnovu, i s obzirom na prirodu nepokretnosti, verujem da je minimalni period od 3 godine za lizing nepokretnosti odgovarajući.

4) Domaći i međunarodni finansijski lizing

Finansijski lizing smatra se domaćim ukoliko se predmet koji se daje pod lizing nalazi na teritoriji Republike Albanije, i zalogodavac i zalogoprimac imaju stalno prebivalište u Republici Albaniji. Finansijski lizing smatra se međunarodnim ako i zalogodavac i zalogoprimac, ili bar jedan od njih nemaju sedište ili trajno prebivalište u Republici Albaniji. U tom slučaju, finansijski lizing se reguliše na osnovu međunarodnog zakona o finansijskom lizingu, ili zavisno od slučaja, kroz bilateralne sporazume u kojima je Republika Albanija ugovorna strana.[43]

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[40] Član 43/1. Zakona br. 9396 od 12.05.2005., 'O finansijskom lizingu,' sa izmenama i dopunama.

[41] Član 6. Zakona br. 9396 od 12.05.2005., 'O finansijskom lizingu,' sa izmenama i dopunama..

[42] Član 7. Zakona br. 9396 od 12.05.2005., 'O finansijskom lizingu,' sa izmenama i dopunama.

[43] Član 8. Zakona br. 9396 od 12.05.2005., 'O finansijskom lizingu,' sa izmenama i dopunama.

5) Oblik i osnovne odredbe finansijskog lizinga

Što se tiče oblika, ugovor o finansijskom lizingu izrađuje se u pismenoj formi ili uz prisustvo notara ukoliko sadrži uslove koji omogućavaju vandsudsko sticanje određenog predmeta, i gde ugovor prestaje da važi pre isteka zbog nevaljanog ponašanja zalogoprimca.[44] U ovom slučaju, ugovorne strane uz ugovor o finansijskom lizingu mogu potpisati i dokument o ponovnom sticanju predmetne stvari koji se vodi kao aneks i sastavni deo ugovora. Vansudsko ponovno sticanje predmetne stvari vrši se u skladu sa uslovima predviđenim ugovorom o lizingu.

Zakonsko delovanje koje je valjano istaknuto u pismenoj formi kao obavezno na osnovu zakona smatra se nevaljanim samo ako je tako predviđeno zakonom. U svim ostalim slučajevima, zakonsko delovanje je validno čak i u odsustvu pismene forme. Međutim, u tom slučaju postupak dokazivanja uz pomoć svedoka nije moguć. Stoga, ako se ugovor o finansijskom lizingu ne zaključi u pismenoj formi to ne znači automatski da taj ugovor neće biti validan, ali postoji mogućnost da se u slučaju potrebe ne može dokazati uz pomoć svedoka.

Isto tako, ugovor o finansijskom lizingu mora sadržati, *inter alia*, sledeće:

a) opis predmetne stvari na način na koji se ona može raspoznati;
b) inicijalni period trajanja i pravo zalogoprimca da ugovor obnovi više puta; međutim, obnavljanje ugovora moguće je samo ako predmetna stvar može da nadživi potrebe zbog kojih se daje pod lizing;
c) pravo zalogoprimca da predmetnu stvar kupi, kao i relevantnu cenu ili način za obračunavanje te cene;
d) broj i iznos rata, ili način za njihovo obračunavanje;
e) slučajeve u kojima zalogoprimac odbija predmetnu stvar;
f) slučajeve koji se odnose na prekid važenja ugovora i postupak za zalogoprimčevo ponovno sticanje predmetne stvari;
g) obavezu ugovornih strana da pokriju administrativne troškove, uključujući i tehničku podršku, troškove vezane za održavanje i usluge podrške koje se odnose na korišćenje predmetne stvari;
h) odgovornost trećih lica;
i) obavezu obezbeđenja predmetne stvari;
j) obaveze ugovornih strana u slučaju da se predmetna stvar pokaže kao neispravna.[45]

Poglavlje 5. Zakona o finansijskom lizingu ističe par osnovnih principa koji važe kod ovakvih ugovora. U konkretnom smislu, u pogledu vlasništva, predmetna stvar se daje zalogoprimcu u državinu i na korišćenje na određeno vreme, dok zalogodavac ostaje njen vlasnik, dok se isto vlasništvo prenosi se na zalogoprimca u skladu sa uslovima ugovora o lizingu u slučaju da zalogoprimac odluči da isti kupi. Međutim, postoje i ograničenja prava zalogoprimca na kupovinu predmetne stvari. Stoga, ako se ugovor otkaže pre njegovog isteka zbog krivice zalogoprimca, isplaćene rate ne smatraju se ratama koje idu u prilog kupovini, što znači da plaćanje tih rata zalogoprimcu ne daje za pravo da predmetna stvar postane njegovo vlasništvo. U tom slučaju, potonji takođe gubi svoje pravo na državinu. [46]

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[44] Član 11. Zakona br. 9396 od 12.05.2005., 'O finansijskom lizingu,' sa izmenama i dopunama.

[45] Član 12. Zakona br. 9396 od 12.05.2005., 'O finansijskom lizingu,' sa izmenama i dopunama.

[46] Član 9. Zakona br. 9396 od 12.05.2005., 'O finansijskom lizingu,' sa izmenama i dopunama.

Član 10. Zakona o finansijskom lizingu predviđa da pored slučajeva u kojima se u ugovoru navodi drugačije, prilikom preuzimanja predmetne stvari od strane zalogoprimca, svi rizici vezani za istu, uključujući i štetu, nenameran gubitak, krađu ili gubitak mogućnosti korišćenja se prenose na zalogoprimca. Prenos rizika na zalogoprimca predstavlja jednu od glavnih karakteristika finansijskog lizinga.

6) Prava i obaveze ugovornih strana u finansijskom lizingu

Prava i obaveze ugovornih strana u finansijskom lizingu čine srž tog ugovora. Sledeći odeljak posvećen je pravima i obavezama ugovornih strana u finansijskom lizingu.

Prava i obaveze ugovornih strana u finansijskom lizingu podeljene su prema licima koja mogu biti ugovorne strane, a to su zalogodavac, zalogoprimac i dobavljač. Detaljnija specifikacija prava i obaveza vrši se sporazumno od strane ugovornih strana, uz vođenje računa da ta specifikacija nije suprotna odredbama ovog zakona, Građanskog zakonika i ostalih zakona koji se odnose na finansijski lizing.

Prava i obaveze zalogodavca.

1- Zalogodavac ima pravo da prima uplate u ratama od zalogoprimca u skladu sa uslovima ustanovljenim ugovorom.

On/ona takođe ima pravo na korist od kupovne cene ako je predviđeno da će se predmetna stvar nakon isteka ugovora prodati.

2 – Zalogodavac ni u kom smislu nije odgovoran za predmetnu stvar koja se daje zalogoprimcu na držanje i korišćenje, pod uslovom da nije drugačije predviđeno u ugovoru o finansijskom lizingu. Jedini izuzetak ovom pravilu je slučaj gde postoje žalbe trećih lica koje proizilaze iz postupaka ili neizvršavanja obaveza zalogodavca.[47]

Zalogodavac ne može biti odgovoran zalogoprimcu ili trećem licu za smrt, telesnu povredu ili nevezanu štetu nanetu imovini koju je uzrokovala predmetna stvar, bilo da je u svojstvu zalogodavca ili vlasnika te stvari.[48]

3 – Zalogodavac ima pravo da proveri da li se predmetna stvar valjano koristi i održava, i ispita finansijsku dokumentaciju zalogoprimca koja se odnosi na finansijski lizing tokom trajanja ugovora o finansijskom lizingu.

4 – Zalogodavac je u obavezi da zalogoprimcu obezbedi kompletno i nesmetano korišćenje predmetne stvari. Stoga je on odgovoran za postupke trećih lica koji se kose, onemogućavaju ili ograničavaju zalogoprimčevo kompletno korišćenje predmetne stvari, ukoliko to nije situacija koju je zalogoprimac prihvatio na osnovu svog znanja i pod postojećim uslovima.[49]

U tom smislu, bilo koji uslov naveden u ugovoru o finansijskom lizingu koji eliminiše ili ograničava odgovornost zalogodavca po pitanju zakonskih nedostataka predmetne stvari smatra se nevažećim.

5 – Zalogodavac je u obavezi da predmetnu stvar isporuči zalogoprimcu u slučajevima u kojima ugovor ne predviđa da takvu isporuku treba da izvrši dobavljač na način opisan u ugovoru o nabavci.[50]

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[47] Član 14. Zakona br. 9396 od 12.05. 2005., 'O finansijskom lizingu,' sa izmenama i dopunama.

[48] Član 14. Zakona br. 9396 od 12.05. 2005., 'O finansijskom lizingu,' sa izmenama i dopunama.

[49] Član 23. Zakona br. 9396 od 12.05. 2005., 'O finansijskom lizingu,' sa izmenama i dopunama.

[50] Član 15. Zakona br. 9396 od 12.05. 2005., 'O finansijskom lizingu,' sa izmenama i dopunama.

U bilo kom slučaju, isporuka se mora izvršiti uz poštovanje uslova propisanih ugovorom o lizingu.

6 – Zalogodavac je u obavezi da pismeno obavesti dobavljača o nameri kupovine predmetne stvari radi davanja pod zakup zalogoprimcu, u skladu sa ugovorom o lizingu koji su zalogodavac i zalogoprimac zaključili.[51]

Ova obaveza se mora ispuniti pre ili u trenutku potpisivanja ugovora o nabavci.

7 – Zalogodavac je u obavezi da zalogoprimcu nadoknadi gubitke pretrpljene zbog njegovog neizvršavanja ugovornih obaveza. Zavisno od slučaja, to se može učiniti umanjenjem budućih iznosa rata za vrednost ukupne pretrpljene štete, ili njenog dela, koje se plaćaju za predmetnu stvar .

Zalogodavac nije u obavezi da zalogoprimcu nadoknadi štetu koja je nastala ako je zalogoprimac primio predmetnu stvar i pritom je u trenutku zaključenja takvog ugovora bio apsolutno svestan da je kompletno korišćenje date stvari ograničeno ili umanjeno.

Prava i obaveze zalogoprimca:

1 – Zalogoprimac ima pravo da odabere predmetnu stvar i dobavljača bez oslanjanja na zalogodavčeve sposobnosti i diskreciju.[52]

Zalogoprimac prihvata uslove pod kojima se predmetna stvar isporučuje u meri u kojoj oni ne ugrožavaju njegove interese.

U slučaju da je zalogoprimac saglasan sa uslovima ugovora o nabavci, na osnovu koga zalogodavac stiče puno vlasništvo, naredne promene uslova ugovora o nabavci ne utiču na prava zalogoprimca, osim u slučajevima kada je on/ona saglasna sa tim promenama.

2 – Zalogoprimac ima pravo da razmotri da li predmetna stvar odgovara opisu navedenom u ugovoru o finansijskom lizingu.

Ukoliko predmetna stvar ne odgovara opisu iz ugovora o lizingu, ili ako dobavljač ili zalogodavac ne isporuči predmetnu stvar ili to učini sa zakašnjenjem ili ne obazirući se na uslove ugovora, zalogoprimac ima pravo da:

a) Predmetnu stvar ne prihvati;
b) Otkaže ugovor o lizingu;
c) Suspenduje plaćanje rata iz ugovora sve dok se predmetna stvar ne isporuči u skladu sa uslovima ugovora o lizingu;
d) Primi nadoknadu za štetu pretrpljenu na osnovu zalogodavčevog neispunjavanja ugovornih obaveza, i zavisno od slučaja, umanji iznos rata koje sleduju za iznos pretrpljene štete.[53]

Ukoliko je predmetna stvar ona o kojoj su se ugovorne strane u finansijskom lizingu sporazumele, zalogoprimac je ne može odbiti. Stoga, zalogoprimac je u obavezi da stvar koja predstavlja predmet ugovora prihvati ako je ona u skladu sa uslovima propisanim ugovorom.

Na isti način zalogoprimac ne može odbiti predmetnu stvar koju daje zalogodavac, ako je prihvatio obećanje dobavljača da će svi nedostaci i razlike između traženog i isporučenog biti otklonjeni.[54]

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[51] Član 13. Zakona br. 9396 od 12.05. 2005., 'O finansijskom lizingu,' sa izmenama i dopunama.

[52] Član 14. Zakona br. 9396 od 12.05. 2005., 'O finansijskom lizingu,' sa izmenama i dopunama.

[53] Član 16. Zakona br. 9396 od 12.05. 2005., 'O finansijskom lizingu,' sa izmenama i dopunama.

[54] Član 20. Zakona br. 9396 od 12.05. 2005., 'O finansijskom lizingu,' sa izmenama i dopunama.

Ako je zalogoprimac prihvatio predmetnu stvar na osnovu zalogodavčevog obećanja i garancije, a koji dato obećanje i garanciju ispuni ali uz zakašnjenje, zalogoprimac ima pravo da na osnovu pismenog obaveštenja koje se upućuje zalogodavcu predmetnu stvar odbije.[55]

3 – Plaćanje najamne cene predstavlja najočigledniju obavezu zalogoprimca.
Osim ako ta obaveza nije ispunjena u datom roku iz ugovora, zalogodavac ima pravo da zahteva raskid ugovora. Ovo pitanje će se razmatrati nešto kasnije u tekstu prilikom razmatranja slučajeva za raskid ugovora o finansijskom lizingu.
Najamnina se uobičajeno plaća na mesečnom nivou. Međutim, postoje i slučajevi u kojima se ugovorne strane dogovore drugačije.
U stvari, najamnina na nepokretnosti se češće plaća na godišnjem nivou najviše zbog toga što za ovu kategoriju objekata važe uglavnom dugoročni ugovori.

4 – Osim ako ugovorom nije drugačije ugovoreno, zalogoprimac je u obavezi da predmetnu stvar uzetu u najam koristi i održava o svom trošku.
Predmetna stvar se naravno mora koristiti u skladu sa njenom svrhom iz ugovora. U protivnom, zalogoprimac je odgovoran za sve pretrpljene gubitke, nezavisno od toga da li ga je on/ona lično ili neko drugo u tu svrhu ovlašćeno lice koristilo.[56]

5 – Kao što je već pomenuto prilikom razmatranja osobina finansijskog lizinga, zalogoprimac, osim ako nije drugačije precizirano ugovorom, snosi sve rizike vezane za predmetnu stvar, tu uključujući i nastalu štetu, mogući gubitak, krađu ili prevremeni gubitak mogućnosti za korišćenje.

Prava i obaveze dobavljača.

Pod uslovom da dobavljač stupa u ugovorni odnos za zalogodavcem na osnovu ugovora o nabavci, njegova prava i obaveze jasno se definišu tim ugovorom.
Stoga je dobavljač u obavezi da određenu robu koja je predmet ugovora isporuči garantujući za njen kvalitet i da vlasništvo nad tom robom prenese na zalogodavca.
Jedna zanimljivost koja se odnosi na dobavljača kao ugovornu stranu u finansijskom lizingu jeste njegovo/njeno pravo da primi pismeno obaveštenje od zalogodavca da ovaj kupuje predmetnu stvar radi izdavanja zalogoprimcu. Osim ako nije drugačije precizirano ugovorom, dobavljač isporučuje predmetnu stvar zalogoprimcu a ne zalogodavcu (kupcu).
Još jedna interesantna stvar ogleda se u činjenici da zalogoprimac bira i stupa u kontakt sa dobavljačem, a ne zalogodavac iako je on u svojstvu kupca. Ovo u osnovi predstavlja posebnost ugovora o finansijskom lizingu.
Na osnovu ugovora o nabavci, obaveze dobavljača prema zalogodavcu obuhvataju i davanje garancije, bilo eksplicitne ili implicitne. Dobavljač takođe, ako je zalogoprimac jedna od ugovornih strana ima obavezu i prema njemu, međutim uvek u granicama interesovanja zalogoprimca za odnos ugovora o lizingu i ugovora o nabavci, bez kršenja uslova ugovora o nabavci i prava dobavljača koja proizilaze iz takvog ugovora. Takvo učešće zalogoprimca ima za cilj da obezbedi zaštitu njegovih/njenih interesa u ugovoru o nabavci, koji ni u kom slučaju ne mora biti koncipiran tako da zalogoprimac preuzima obaveze na osnovu tog ugovora. Bez obzira na učešće zalogoprimca u ugovoru o nabavci, on nikada ne preuzima odgovornosti na osnovu tog ugovora. Zalogoprimac nema pravo da raskida ili da zahteva raskid ugovora o nabavci, niti ima pravo da traži umanjenje prodajne cene za predmetnu stvar, bez odobrenja zalogodavca.

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[55] Član 18. Zakona br. 9396 od 12.05. 2005., 'O finansijskom lizingu,' sa izmenama i dopunama.
[56] Član 25. Zakona br. 9396 od 12.05. 2005., 'O finansijskom lizingu,' sa izmenama i dopunama.

7) Prestanak važenja ugovora o finansijskom lizingu

Zakon o finansijskom lizingu predviđa tri načina za okončanje ugovora o lizingu: 1) okončanje ugovora o lizingu pod normalnim uslovima, 2) okončanje ugovora o lizingu od strane zalogodavca, 3) okončanje ugovora o lizingu od strane zalogoprimca.

1- Normalno okončanje

Ugovor o lizingu se smatra okončanim pod normalnim uslovima ako to okončanje nije uzrokovano nepoštovanjem ugovornih odredaba bilo koje od ugovornih strana. Ugovor se smatra okončanim ako je:

a – ugovorni rok naveden u ugovoru istekao.

U ovom slučaju, ugovor je izvršio svoju funkciju i doneo željene rezultate. Obično se nakon isteka ovog roka ugovor se smatra okončanim; međutim ugovorne strane mogu sporazumno da odluče da ugovor produže na isti rok.

b – zalogodavac, zalogoprimac ili dobavljač u stečaju.

U slučaju da zalogoprimac ode pod stečaj, predmetna stvar koja je predmet lizinga ne ubraja se u njegovu stečajnu imovinu (domašaj stečaja), niti kao garancija poverenika, već se vraća zalogodavcu. To se čini zato što zalogodavac tokom trajanja ugovora o lizingu ima vlasništvo nad tom predmetnom stvari. Predmetna stvar koja jasno ne pripada zalogoprimcu vraća se zalogodavcu.

U tom trenutku smatra se da je ugovor okončan i njegovo dejstvo prekinuto. Međutim, neophodno je imati u vidu da ništa u tom postupku ne sme biti protivno odredbama Zakona o stečajnom postupku.

U slučaju stečaja dobavljača, potonji nije u mogućnosti da isporuči ili napravi predmetnu stvar koju zahteva zalogoprimac zato što njegova imovina podleže stečajnim merama, i stoga neće imati odgovarajuća sredstva za to. Isto važi i ako je on vlasnik predmetne stvari, pod uslovom da će potonji biti obuhvaćen stečajnim merama, i učiniti sve u svojoj moći da se ostvare prava poverenika. Slažem se da je sve do sada rečeno validno pod uslovom da ugovor o nabavci između zalogodavca i dobavljača još uvek nije potpisan, jer ako jeste, pravo vlasništva nad predmetnom stvari prenosi se na zalogodavca, i samim tim stečaj dobavljača ne utiče na ugovor o finansijskom lizingu sve dok zalogoprimac ne podnese bilo kakvu prijavu koja ima veze sa obavezama dobavljača.

Sve u svemu, stečaj zalogodavca rezultira prekidom ugovora o finansijskom lizingu, pod uslovom da predmetna stvar doprinosi ispunjenju obaveza zalogodavca prema trećim licima. Međutim, zakon predviđa mogućnost zalogoprimca da ugovor o finansijskom lizingu prenese na novog vlasnika predmetne stvari.

Znači, ‘Kada, što se tiče zalogodavca, stečajni postupak koji je u toku ne obuhvata sjedinjavanje ili preuzimanje, zalogoprimac ima pravo da ugovor o finansijskom lizingu prenese na novog vlasnika predmetne stvari, ili da plati ukupnu sumu za najam i tako stekne vlasništvo nad tom stvari nakon isteka ugovora o lizingu. (Član 60).

c – predmetna stvar uništena ili izgubljena

U ovom slučaju, prekid ugovora je očigledan, pošto predmet ugovora prestaje da postoji. *Ugovorne strane sporazumno donose odluku o prekidu ugovora.* .

U slučaju kada jedna ugovorna strana ne ispuni svoje ugovorne obaveze, druga ugovorna strana, zavisno od slučaja, ima pravo da zahteva ispunjenje tih obaveza ili raskid ugovora, osim za naknadu štete.[57]

Sledeći član Građanskog zakonika koji navodi da se ugovor ne može raskinuti ako jedna od ugovornih strana ne ispuni svoje ugovorne obaveze je malo važan za interese druge ugovorne strane. Umesto toga, interesi druge ugovorne strane moraju biti ugroženi u meri u kojoj postaje nemoguće da se ugovor sprovede. Takvi interesi mogu biti gubitak vrednosti samog ugovora za zalogoprimca.

Osim u slučajevima koji su jasno objašnjeni u zakonu, o kojima ćemo nešto kasnije, ugovorne strane prilikom zaključenja ugovora mogu da preciziraju uslove pod kojima se isti raskida ako se ugovorene obaveze ne ispune na način na koji se to zahteva. U tom slučaju ugovor se raskida kada jedna od ugovornih strana drugoj ugovornoj strani stavi do znanja da će pribeći uslovima koji omogućavaju raskid ugovora.

2 – Raskid od strane zalogodavca.

Član 28. Zakona o finansijskom lizingu predviđa pravo zalogodavca za raskine ugovor o lizingu pre njegovog isteka u slučaju da:

Zalogoprimac ne plati prvu ratu u ugovorenom roku.

Zalogoprimac uplati prvu ratu, ali zatim ne uplati par narednih rata na vreme, a čiji ukupan iznos iznosi 20 procenata ukupne vrednosti najamnine. U tom slučaju, zalogodavac osim što ima pravo da ugovor raskine, takođe ima pravo da zahteva da zalogoprimac uplati sve zakasnele rate plus pripadajuću kamatu.

Zalogoprimac nije ispunio ni jedan od uslova ugovora, i takvo stanja potraje i narednih 20 dana nakon prijema obaveštenja od strane zalogodavca kojim se upozorava na poštovanje ugovornih uslova.

Garancija zalogoprimca postaje nelikvidna ili ode pod stečaj, pri čemu zalogoprimac nije u mogućnosti da u roku od 30 dana od dana prijema pismenog zahteva za davanje nove garancije nađe novu garanciju koja je zalogodavcu prihvatljiva kao zamena.

Zalogodavac, koji želi da raskine ugovor zbog gorepomenutih razloga, u obavezi je da zalogoprimca o tome obavesti u roku od sedam dana pre pokretanja postupka za ponovno sticanje predmetne stvari. Ovim se zalogoprimcu omogućava da izvrši zakasnelu uplatu ili ispoštuje ugovorne obaveze.

3 – Raskid od strane zalogoprimca.

Zalogoprimac ima pravo da raskine ugovor o lizingu u sledećim slučajevima:

Pre prihvatanja predmetne stvari, gde ista nije dostavljena u skladu sa ugovorom;

Nakon prihvatanja predmetne stvari, zbog zalogoprimčevog neispunjavanja obaveza;

Nakon prihvatanja predmetne stvari, kada zalogodavac zalogoprimcu ne garantuje puno korišćenje iste. U tom slučaju, moraju se ispoštovati sledeći uslovi:

- neispunjavanje obaveza uzrokovalo je gubitak koristi koje bi zalogoprimac trebalo da ima na osnovu ugovora o finansijskom lizingu;
- zalogoprimac mora da uputi pismeno obaveštenje zalogodavcu o nepoštovanju ugovornih obaveza, pri čemu zalogodavac u ponuđenom roku ne ispravi grešku.

[57] Član 698. Građanskog zakonika Republike Albanije.

8) Posledice raskida ugovora o finansijskom lizingu

Raskid ugovora u slučaju neispunjavanja obaveza uglavnom retroaktivno utiče na ugovorne strane, osim u slučaju ugovora koji se izvršavaju na stalnom i periodičnom osnovu kod kojih se posledice raskida ugovora ne odnose na prethodne delatnosti.[58]

Stoga posledice raskida ugovora o finansijskom lizingu ne utiču na aktivnosti prethodno realizovane između zalogodavca i zalogoprimca. Zalogodavac, čak iako je ugovor raskinut zbog njegovog neispunjavanja obaveza, nije u obavezi da zalogoprimcu vrati novac primljen u vidu najamnine. Ovo je u osnovi glavni element koji ovaj ugovor razlikuje od kupoprodajnih ugovora sa kojima se često meša u praksi.

Član 30. Zakona o finansijskom lizingu predviđa određena prava zalogodavca u slučaju raskida ugovora. U tom slučaju, zalogodavac ima pravo da:

a) Preuzme predmetnu stvar;
b) Zahteva neposredno plaćanje svih zaostalih rata;
c) Zahteva nadoknadu pretrpljene štete; i
d) Pokrivanje svih dodatnih troškova nastalih zbog neispunjavanja obaveza zalogoprimca, uz umanjenje tržišne vrednosti preuzete predmetne stvari.

Zakon ne predviđa posledice raskida ugovora po zalogoprimca. Međutim, jasno je da u slučaju raskida ugovora krivicom zalogodavca, zalogoprimac osim što predmetnu stvar mora da vrati, ima pravo na naknadu pretrpljene štete koja je nastala raskidom ugovora pre njegovog isteka.

Isto tako on ima pravo na bilo koji prekomerni iznos koji je zalogodavac primio na ime potraživanja iz člana 30.

Zakon takođe predviđa u korist zalogoprimca postupak za sticanje predmetne stvari kroz sekvestraciju u onim slučajevima u kojima zalogoprimac ne preda traženu stvar dobrovoljno u roku od 10 dana od dana prijema zahteva.

Ovaj postupak bazira se na činjenici da je ugovor o finansijskom lizingu izvršne prirode, što znači da na osnovu člana 510. Zakona o parničnom postupku, obavezno izvršenje se može ostvariti samo na osnovu izvršnog naređenja. Kada se ugovor raskida krivicom zalogoprimca, naredba nadležnog suda sprovodi se od strane sudskog izvršioca.

Član 33. zakona predviđa zaštitu trećih lica čija su prava ugrožena sekvestracijom predmetne stvari. U tom slučaju, ova lica mogu od nadležnog suda zahtevati:

a) Suspendovanje postupka, pod uslovom da je dokazano da zalogoprimac ni pod kojim uslovima nije prekršio ugovorne obaveze i odredbe zakona, i vraćanje predmetne stvari zalogoprimcu;
b) ispunjavanje jednog ili više uslova ovog zakona od zalogodavca;
c) uklanjanje uslova da svako pojedinačno lice mora da ispuni određene zakonske uslove ukoliko su ti uslovi nepotrebni, ili neosnovani;
d) nadoknadu troškova za pokrenuti sudski postupak koji je neosnovan.

Sudbina promena, poboljšanja ili dopuna predmetne stvari.

Moramo napomenuti da u ovom slučaju zakon predviđa slobodno postupanje ugovornih strana. Zakonska regulativa je validna ako ugovorne strane nisu precizirale drugačije. Međutim, ugovorne odredbe ne smeju biti protivne odredbama Građanskog zakonika u ovoj oblasti.

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[58] Član 703. Građanskog zakonika Republike Albanije.

Što se tiče specifičnih poboljšanja koje zalogoprimac može da učini predmetnoj stvari, član 36§1. predviđa da zalogoprimac ostaje vlasnik tih poboljšanja.

Prilikom poboljšanja predmetne stvari koja je zalogoprimac realizovao o svom trošku i uz saglasnost zalogodavca, kada se ta poboljšanja ne mogu fizički odvojiti od same stvari bez dodatnih negativnih posledica, zalogoprimac ima pravo na nadoknadu koja je jednaka vrednosti učinjenih poboljšanja, u slučaju da se nakon isteka ugovora predmetna stvar vraća zalogodavcu. (*Član 36§2*).

Zakon ne predviđa način na koji se može utvrditi vrednost tih poboljšanja. U ovom slučaju, može poslužiti način na koji je regulisan ugovor o tradicionalnom najmu. To znači da se mora voditi računa o korisnim ishodima poboljšanja i njihovoj konverziji izraženoj u najnižim vrednostima.

Što se tiče dopuna, član 37. zakona predviđa da ukoliko se radi o pokretnim stvarima koje zalogodavac daje u najam na osnovu ugovora o finansijskom lizingu, i koje su pripojene ili neodvojive od nepokretnosti ili drugih pokretnih stvari na koje treća lica polažu određena prava, potonji ne utiču na pravo vlasništva zalogodavca nad pokretnostima koje su predmet ugovora o finansijskom lizingu.

Osiguranje.

Član 38. zakona predviđa osiguranje predmetne stvari, koja je predmet ugovora, od bilo kakve povrede i rizika vezanih za uništenje, gubitak, krađu, smanjenje vrednosti ili gubitak mogućnosti korišćenja.

Često je slučaj da ugovorne strane ne ostvare svoje napore da osiguranje obuhvate svrhom ugovora. U tom slučaju, zakon predviđa da je, ako se odredbe ugovora ne ispune, zalogoprimac, tj. korisnik predmetne stvari dužan da garantuje za njeno osiguranje.

9) Podfinansijski lizing

Dodatne odredbe Zakona o finansijskom lizingu (član 34.) regulišu pitanja vezana za podfinansijski lizing.

Na osnovu takvih ugovora, zalogoprimac ima pravo da celokupnu stvar da pod zakup tj. podfinansijski lizing, uz obaveznu saglasnost zalogodavca. U protivnom, zalogodavac će biti primoran ta takav ugovor raskine i zahteva nadoknadu. Čak iako zalogodavac da svoju saglasnost, zalogoprimac i dalje polaže račune zalogodavcu.

U slučaju neispunjavanja platežnih obaveza zalogoprimca ili podzalogoprimca, kada se predmetna stvar nalazi kod podzalogoprimca na osnovu ugovora o podfinansijskom lizingu, zalogodavac ima pravo da tu stvar preuzme direktno od podzalogoprimca u skladu sa istim postupkom koji važi u slučajevima preuzimanja predmetne stvari od zalogoprimca.

Trajanje podfinansijskog lizinga ni u kom slučaju ne može biti duže od ugovora o lizingu. Međutim, podfinansijski lizing predstavlja zanošenje u korist zalogoprimca u onim instancama gde iz različitih razloga on nije u mogućnosti da ispuni svoje obaveze u skladu sa uslovima iz ugovora.

10) Registracija ugovora o finansijskom lizingu

Član 42. zakona navodi da se ugovori o finansijskom lizingu na nepokretnostima, koji sadrže uslove za sticanje vlasništva nad tim objektima, ili mogućnost zalogoprimca da isti kupi, registruju u skladu sa uslovima Građanskog zakonika Republike Albanije i Zakona o registraciji nepokretnosti.

S druge strane, ugovori o finansijskom lizingu na pokretne stvari na osnovu ovog zakona upisuju se u registar zaloge u skladu sa Zakonom o zalogu. Dejstvo registracije ili neregistrovanje ugovora o finansijskom lizingu koje utiče na pravo vlasništva i ostala prava zalogodavca i trećih lica regulisano je Zakonom o zalogu.[59]

11) Prinudno izvršenje u finansijskom lizingu

Ugovor o finansijskom lizingu ima izvršno dejstvo u pogledu ponovnog sticanja stvari koja je predmet ugovora o finansijskom lizingu, i sprovodi se od strane sudskog izvršioca nakon izdate naredbe za izvršenje od strane nadležnog suda u kojoj sud navodi svoj stav u roku od 5 dana od podnošenja peticije. Sud, koji izdaje naredbu za izvršenje takođe ustanovljava i aktivnosti koje sudski izvršilac obavlja za sekvestraciju stvari i njeno vraćanje zalogodavcu ili ovlašćenom licu. U ovom postupku sud primenjuje odredbe predviđene Zakonom o parničnom postupku.

Sudski izvršilac upućuje obaveštenje o postupanju zalogoprimcu u roku od 5 dana od njegovog izdavanja, i ako zalogoprimac u roku od 10 dana od dana prijema obaveštenja ne ispuni tražene obaveze i dobrovoljno ne vrati predmetnu stvar, sudski izvršilac odmah odlučuje o njenoj sekvestraciji. Ako sudski izvršilac utvrdi da nakon isteka roka od 10 dana izvršenje više nije moguće, on odmah pokreće prinudno izvršenje pristupajući sekvestraciji stvari koja je predmet finansijskog lizinga i vraća je zalogodavcu.

Ukoliko ne izvrši sekvestraciju stvari, sudski izvršilac je dužan da zalogodavcu odmah uputi pismeno obaveštenje, najkasnije u roku od 10 dana od dana kada je postupak za sekvestraciju pokrenut. [60]

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[59] Član 43. Zakona br. 9396 od 12.05. 2005. 'O finansijskom lizingu,' sa izmenama i dopunama.

[60] Član 32. Zakona br. 9396 od 12.05. 2005. 'O finansijskom lizingu,' sa izmenama i dopunama.

COMPARATIVE ANALYSES

Prof. Dr. *Goran Koevski**

MODERN CONTRACTS

FRANCHISING

Chapter 1

In this Chapter we are covering the franchising concept in the following South East European countries: the Republic of Croatia, the Republic of Serbia, Bosnia and Herzegovina, the Republic of Montenegro, the Republic of Albania and the Republic of Macedonia.[1] The emphasis in the analyses is given to the following issues related to franchising contract:

1. Fundamental concept of franchising
   - Meaning of franchising.
   - Scope of the contract of franchising.
   - The object of franchising.
   - Parties in the franchising contract.
2. The role of the franchisor
3. The role of the franchisee
4. The sub-franchise agreement

1. FUNDAMENTAL CONCEPT OF FRANCHISING

1.1. History and commercial background

Franchise is a relatively new commercial concept derived from the new *lex mercatoria*. This transaction was established and developed in the USA in the mid twentieth century and was introduced to Europe, primarily, by American companies such as McDonald's, Coca-Cola etc.[2]

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* Original text is written in English language

[1] The text within this Chapter 1 embodies a summary of the views of the country reporters who prepared the materials for the Civil Law Forum related to Modern Contracts.

[2] On franchise in Serbian literature, see, e.g., M.Draškić, *Ugovor o franšizingu ("Franchise Contract"),* Belgrade, 1983; M.Draškić, *Međunarodno privredno ugovorno pravo ("International Commercial Contract Law"),* Belgrade, 1990, pp.358-365; M.Vasiljević, *Trgovinsko pravo ("Commercial Law"),* Belgrade, 2006, pp. 267-273; R.Vukadinović, *Međunarodno poslovno pravo ("International Business Law")*, Kragujevac, 2009, pp.263-277; M.Parivodić, *Pravo međunarodnog franšizinga ("International Franchise Law"),* Belgrade, 2003.

The franchising is even newer concept in the countries in the region and became recognizable part of the respective economies mainly through the breakdown of the former socialist (communist) regimes and the introduction of the market economy in the early 1990's.

For example, the franchising concept was introduced in Croatia by foreign franchisors (the first one was *Mc Donald's*) and it still continues to represent mainly a type of foreign business penetration in the newly emerged markets.[3]

1.2. Legal nature of franchising

Depending on the case may be and the will of the parties of the contract, the franchising contract commonly represents *mixti juris* or better *sui generis* contract that comprises elements of other either named (typical) or unnamed contracts of the autonomous trade practice such as: sale and purchase agreement, licence agreement, technology transfer contract, lease and purchase agreement, distributorship agreement, loan contract, employment contract, commercial agency contract, financial investment contract, etc.

Similarly, legal institutes of different legal branches can be encountered: the Intellectual property law, the Competition Law, the Company Law, the Fiscal Law, the Consumer Protection and the Product Liability Law, the Insurance Law, the Labor Law, the Foreign Investments Law, etc.[4]

Thus, apart from the general principles of the national laws on obligations and/or civil codes, the special provisions of both other related named contracts and special (*lex specialis)* laws shall apply.

1.3. Meaning of franchising, scope of the contract of franchising, the object of franchising and parties in the franchising contract

A Franchise contract is a (1) bilaterally binding contract between (2) the issuer of the franchise (Franschisegeber in German or Franchisor in English speaking countries) and (3) one or more individual beneficiaries of the franchise (Franschisenehmer in German or Franchisee in English speaking countries), which, as (4) a distribution system for goods and services, is (5) used by legally and financially independent enterprises (business undertakings) (6) that have joined their know-how and capital in a vertical form of cooperation.

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[3] In the following years, several other companies entered the Croatian market such as US franchise *Subway* and Hungarian *Fornetti*, which is now the biggest one with more then 400 franchisee all over Croatia. According to the assessment of the Croatian franchise association there are currently around 150 franchises operating in Croatia from which around 30 domestic ones and they operate on the near 1000 locations and employ more than 16000 people. Last available official data for Croatia are for the year 2007. In Montenegro and in the other countries in the region the franchising concept is represented: in selling and post-sale maintenance of vehicles in the automobile industry (Audi, Toyota, VW, Renault, Mercedes), in providing services (DHL, Costa Cafe), in clothing industry (Benetton, Max Mara, Pall Shark) and in some hotel services establishments (Best Western, Premier Hotel). In Bosnian and Herzegovina the franchising concept is mainly represented within the automobile industry (VW, Seat, Scoda, Porsche). In the Republic of Macedonia, the franchise notion is rather exception than a rule. At the moment, following brands are present in the country, as subject of a franchising network: Mango, McDonalds, Diners, Fornetti and the only Macedonian industrial franchisor Alkaloid, which managed to franchise its brand Caffetin in Russia.

[4] UNIDROIT, Annex 3 au Guide sur les Accords Internationaux de Franchise Principale, www.unidroit.org.

1.4. Elements of the Definition of the Franchise Contract

- The franchisor grants the franchisee (exclusive) right to sell specific (1) goods (clothes, shoes, fast-food, toys etc.) or to provide specific services (2) (consulting services regarding computer software, hotel services, rent-a-car services, etc);
- The franchisor licences the franchisee to use a commercial formula (business and technical methods and the enterprise management model), as well as a standardized, uniform and complete system for sale of goods and/or services;
- The system for marketing of goods and services is standardized through an appropriate operational program for the separation of responsibilities between the partners;
- The franchisee fully adopt and continuously replicate and use the commercial policy and recognizable image owned by the franchisor;
- Franchisee are offered continuous commercial and technical support in conducting activities, which are subject of the franchise; and
- Franchisee generates secure and continuous profit, and in return, provides its own financial and other investments and pays the franchisor a determined monetary reward.

1.5. Elements of the Franchise Contract

- Both parties are equal and fully independent and both act in their own name and in their own account;
- Transfer of, i.e. providing a licence for the right to use a world-renowned and uniform business method and image;
- Cooperation between the parties to the contract on a continuous and long-term basis;
- Continuous support provided by the franchisor;
- Unless otherwise provided by law in the respective countries, the franchise contract in practice is usually concluded in writing and may become formal if the parties to the contract prescribe a form as a prerequisite of its validity. Pursuant to the technique of conclusion, the franchise contract is, as a rule, concluded as a contract by adhesion; and
- An *intuitu personae* character of the contract, i.e. it entails exceptional close professional relationship of trust between the franchisor and the franchisee, so that the development of a sub-franchising network shall be subject to full control and approval by the franchisor.

1.6. Current legal framework related to franchise agreement in the South East European Countries

The franchising contract, with exception of the Republic of Albania, is not regulated as a named, typical contract in the respective national legislations of the analyzed countries.

Within the Albanian civil legislation i.e. the Civil Code,[5] the contract of franchising is very precisely regulated, with this becoming one of the typical contracts prescribed by this Code.[6]

Under Article 1056 of the Albanian Civil Code, the contract of franchising contains an set of continuous obligations by which independent enterprises are mutually obliged to jointly promote and develop trade, and provision of services, pursuant to separate obligations.

In the other countries legislation brief mentioning related to franchise contracts exists in some specific legislation, primarily within the competition and the antitrust law.[7]

In Montenegrin legislation, the franchise as a commercial activity and the franchise contract as a legal instrument for practical implementation of the franchise is mentioned within the: the Trademark Law,[8] the Law on Legal Protection of Design,[9] the Law on Geographical Indications[10] and the Foreign Investment Law.[11]

Despite the fact that there is no explicit regulation, it is still possible to identify the basic elements of franchise contract due to the already developed business practice and the competition law regulation, and of course the existing international, primarily soft law, sources for regulating the franchise contract.[12]

In the present business practice of the countries in the region, entering into franchise contract results primarily as a result of the general principle of freedom to contract. This approach entails greater precision and knowledge when drafting specific rights and duties of the contracting parties.

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[5] The Law No 7850 of 29 July 1994 'Civil Code of the Republic of Albania,' as amended.

[6] See: articles 1056 through to 1064 of the Civil Code. Franchise relations are very complex relations, and for a correct construction and interpretation of the different elements of the contract of franchising, other parts of the legislation must also be taken into account, including intellectual property and the agency contract. However, it has not yet received comprehensive and all-inclusive legal regulation.

[7] See: *Croatian Competition Act* (OG 122/03) and the *Regulation on block exemptions granted to certain categories of vertical agreements* (OG 51/04). In Bosnia and Herzegovina see: the Decision on group exemption of agreements between commercial entities operating on various levels of production or distribution (vertical agreement) – "*Official Gazette of Bosnia and Herzegovina" number 18/06;* the Decision on group exemption of agreements on distribution and servicing of motor vehicles – "*Official Gazette Bosnia and Herzegovina"* number 16/06). In the Republic of Macedonia, franchise agreements are regulated in the Law on Protection of Competition (See: Official Gazette of the Republic of Macedonia, no. 4/2005, 70/2006 and 22/2007). Article 5, paragraph 1, line 14 provides the definition of a franchise agreements. On the basis of Article 8 paragraph 2 of the Law on Protection of Competition, the Government of the Republic of Macedonia adopted a Regulation on Block Exemption of Vertical Agreements on Exclusive Distribution Rights, Selective Distribution Rights, Exclusive Purchasing Rights and Franchising (See: Official Gazette of the Republic of Macedonia, no. 91/2005).

[8] See: Official Gazette of the SM, No. 61/04, 71/05 – articles 44, 53.

[9] See: Official Gazette of the SM, No. 61/04 – article 47.

[10] See: Official Gazette of the SM, No. 48/08 – article 46.

[11] See: Official Gazette of the SM, No. 52/00 – article 12.

[12] At the EU level, the Commission has, within the competition regulations, adopted its Ordinance 4087/88 pertaining to a block of exceptions to the categories of franchise agreements from November 30, 1988. A significant role in regulating franchise is also played by the European Code of Ethics for Franchise, adopted by the European Franchise Federation on 23.09.1972, terms and conditions of business transactions by the International Franchise Association (IFA) and the ICC model Contract on Franchise. Within the UNIDROIT, Legal Guideline for the International Master Franchise Agreements was developed in 1988 and revised in 2007, as well as the Model Law on Disclosure in Franchise in 2002. Franchise rules are also comprised in the *Draft Common Frame of Reference*.

However, there is still no case law developed related to franchise contract in the countries in the region.

1.7. New legislative approaches related to franchise contracts

It is interesting to state that in some countries in the region there are some pending legislative activities leading to the normative, hard law regulation of the franchise contract. This is the case with the Republic of Serbia and Bosnia and Herzegovina.

In the development of the Serbian Draft Civil Code, the question on whether the franchise contract should be regulated by the law arose. The main issue is whether it is better just to refer to analogues application of the elements of already known and named contracts connected to the nature of franchising or to recognize the *sui generis* combination of the franchising contract. On these grounds, editors of the Serbian Draft Civil Code have opened a discussion on this yet unsolved issue and presented the possible Draft of the provisions of the franchise contract.[13]

Similarly, in the 2003 Draft Law on Obligations of Bosnia and Herzegovina contains special provisions on franchising (Articles 934 to 941) giving the basic features of the nature of this contract, the general rights and duties of the franchisor, as well as the general rights and obligations of the franchisee, the mandatory written form of the contract is required, provisions are given related to contract termination etc.

1.8. Voluntary (soft law) regulation of the franchise agreement

Interesting approach in regulating the franchise contract in the region has Croatia via adopting of the *European code of ethics for franchising* by the Croatian franchise association.[14]

The Croatian Code of ethics contains provisions on the definitions of franchising and know-how, guiding principles, recruitment, advertising and disclosure, selection of individual franchisees, the franchise contract and the relationship of Code to master franchise contracts. Particularly interesting are provisions on pre-contractual disclosure, which rely greatly on the UNIDROIT Model disclosure Law 2002. Article 5 of the Code regulates franchise agreement where the necessary minimum content requirements for the franchise agreement are given as well.

Although this Code applies only to the members of the Association and the failure to meet the requirements may not result by the legal invalidity of the agreement (but only termination of membership in the Association), this Code is a valuable and practical guideline in Croatia.

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[13] *Rad na izradi Građanskog zakonika Republike Srbije, Izveštaj Komisije sa otvorenim pitanjima ("Development of the Civil Code of the Republic of Serbia, Report of the Commission with Open Issues"),* Belgrade, 2007, p. 292 and onward.

[14] Croatian franchise association (www.fip.com.hr, hereinafter: Association) was established in 2002 as non-for-profit, nongovernmental association with main objectives to promote and advertise franchise business in the Republic of Croatia and the region. Two more institutions can provide assistance and expert advice to franchisers: Franchise centre *Pro maturo* in Zagreb (www.promaturo.hr) and *Franchise centre* in Osijek. (www.fransiza.hr). Croatian franchise association is a member of *European Franchise Federation* (www.eff-franchise.com).

2. THE ROLE OF THE FRANCHISOR

The rights and obligations of the parties depend on the single individual case of franchise agreement.

Generally, the contractual obligations and rights of the franchisor can be divided on the following basis:

a) Pre-contractual obligations of the franchisor
b) In-term contractual obligations and rights of the franchisor
c) Post-term contractual obligations of the franchisor

a)

Pre-contractual obligations of the franchisor

In the countries in the region there is no explicit regulation as to the pre-contractual information duty of franchisor based on the UNIDROIT model franchising disclosure law. However, it is expected that the franchisor should provide the franchisee with sufficient information to encourage it to enter into the agreement. Here we mean that the franchisee should be provided with enough technical information essential for familiarizing itself with the basic features of the respective franchising, at least with the potential results that may derive out of successfully implemented franchise.

b)

In-term contractual obligations of the franchisor

- The franchisor shall disclose as much information as possible in the appropriate documentation, through which the franchise business concept is materialized – the so-called *corpus mechanicum* (operational manuals, training program, materials for franchise marketing, brochures, applications, public announcements, operational manuals of the franchisor, application for franchisee registration etc.);
- The franchisor shall transfer to the franchisee the business franchising formula as a complete and uniform system;
- The franchisor shall offer the franchisee continuous support:
  - Support in installing and maintaining the formula;
  - Support in transfer and implementation of know-how;
  - Obligation to deliver the goods regularly, if the franchisor is the manufacturer of the goods or conducts pre-selection of the goods to be distributed;
- The franchisor holds a subsidiary liability in case of third party claims towards the franchisee, in case of non-uniformity of characteristics of goods or services sold to the third parties by the franchisee, pursuant to the franchise contract. In third party claims towards the franchisee, relating to the products manufactured by the franchisor, the franchisor holds a joint liability together with the franchisee; etc.

In-term contractual rights of the franchisor

- Right to control and oversight of system operations;
- Right to protection of the intellectual property rights package;
- Right to a compensation for the provided business formula and the inclusion as an integral part of a single, uniform distribution franchising network.

c)

Post-term obligations and rights of the franchisor

- Depending on the special provisions in the agreement, the franchisor shall buy back all goods that remained in position of the franchisee after termination of the agreement (buy-back clause) at a price previously determined in the agreement or according to assessment by an independent expert or shall allow the franchisee to keep selling those goods, but without the right to refer to a trade mark or a logo of the franchisor in its business premises;
- Right to stipulate for a non-competition clause for the franchisee for a predetermined period of time after termination of the franchise agreement;
- The franchisor must provide for appropriate compensation to the franchisee if post-term non-competition clause is stipulated; etc.

3. THE ROLE OF THE FRANCHISEE

Similarly as with the case of the franchisor, the contractual obligations and rights of the franchisee can be divided on the following basis:

a) Pre-contractual obligations of the franchisee
b) In-term contractual obligations and rights of the franchisee
c) Post-term contractual obligations of the franchisee

a)

Pre-contractual obligations of the franchisee

Special attention should be paid to the obligation of the franchisee to keep a trade secrets acquired during the pre-contractual negotiations.

b)

In-term contractual obligations of the franchisee

- Obligation to promote the franchisor's business method;
- Payment of the appropriate compensation to the franchisor, both for the initial inclusion in the network (entrance fee), as well as compensations related to the use of intellectual property rights (royalties);
- Sub-licensing of the business formula shall be completely prohibited of shall be allowed only upon prior approval of the franchisor;
- Obligation to submit regular reports to the franchisor;
- Obligation to protect trade secrets;
- Obligation to inform the franchisor of claims and infringements of the business franchising formula by third parties located in the local market where franchise operates especially those claims related to intellectual property rights and know-how;
- Obligation to participate in advertising costs;
- Obligation to continuously disclose the fact that it is a independent entity;
- Obligation not to compete with the franchisor during the period of the agreement;
- Obligation for membership in a local franchising association, if such exists; etc.

In-term contractual rights of the franchisee

- Right to an undisturbed use of the transferred package of rights contained in the business franchising formula;
- Right to non-interference by the franchisor regarding the manner in which it utilizes the transferred package of rights contained in the franchise, except concerning franchisor's right to control and oversight of system operations and of the franchising network;

c)

Post-term obligations and rights of the franchisee

- Obligation of the franchisee to return the entire property and all assets (documentation regarding the rights contained in the franchise package) to the franchisor;
- Obligation of the franchisee to stop using and to remove from its business premises the trade name, mark, stamp or logo of the franchisor and to stop creating the impression that it is still part of the franchising chain of the franchisor;
- Obligation of the franchisee to keep as trade secrets all information and know-how, which it obtained on the basis of the franchise agreement, for a period of time in which the rights in the franchise agreement are protected by law;
- Obligation not to compete with the franchisor for a period of time after termination of the agreement, which non-competition clause must be limited in time (i.e. maximum period of one year after termination of the contract);
- Right of the franchisee to demand appropriate compensation for the duration of the non-competition clause after regular termination of the agreement; etc.

4. THE SUB-FRANCHISE AGREEMENT

With exception of the Serbian Draft Civil Code, in the other countries in the region there is no specific regulation for the three-tier franchise agreements.

The Serbian Draft Civil Code, prescribes a solution that allows for the franchise contract to stipulate the right of the franchisee to transfer exclusive rights, or a part of such rights that had been transferred onto him in the franchise contract to a third party with consent of the franchisor.[15]

[15] The contract may prescribe an obligation of the franchisee to transfer these rights to a certain person and for a defined period of time. Contract on sub-franchise cannot be concluded for a time period exceeding the duration of the franchise contract. Nullity of the franchise contract imposes nullity of the sub-franchise contract as well. The franchisee has a subsidiary liability for damages caused to the franchisor by the actions of the sub-franchisee, unless otherwise specified in the contract. Rules of the Draft of the Franchise Contract apply to the sub-franchise contract, unless different implications stem from the nature of the sub-franchise.

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FRANCHISING

TERM OF THE AGREEMENT AND CONDITIONS FOR THE RENEWAL

None of the national laws from the reports contain explicit provisions on the issues of term and conditions of renewal of franchising agreements. Therefore, it is within the party autonomy for the parties to agree on the duration of their agreement and in the absence of the latter the general principles of law shall apply. Generally, there are no limits as to the duration of the franchise agreement (except of those of public policy). Franchising agreement concluded for a limited period of time will end upon the expiry of time. The tacit continuation of the execution of the agreement shall be regarded as a prolongation of agreement for an indefinite period of time. The franchising agreement for an indefinite period of time may be terminated by giving a notice of termination because of valid reasons. The termination takes place after a certain period of time, depending on the agreement of the parties, usually after an adequate period of notice with an immediate effect. The reasons for the termination may be agreed by the parties and are usually reasons due to which a party may not be reasonably expected to continue with the execution of the agreement. This solution is fully in accordance with the Croatian law. The Albanian and Serbian law explicitly provide that if an agreed term is longer than ten years, each party is entitled to give up a contract giving notice one year in advance (the Albanian law) or six months (the Serbian law).

The general principles of law are also applicable in a corresponding way on a renewal. In accordance with the Croatian law the parties may explicitly agree on the renewal of the franchising agreement concluded for a limited period of time or, may tacitly continue to perform the agreement in which case this shall be considered as a prolongation of an agreement for an indefinite period of time. The same solution may be found in other countries. For example, the Serbian law contains a more detailed solution on this issue. The franchisor may refuse to conclude the franchising agreement for a new period of time, with the promise that he will not enter into analogous franchise contracts with third persons, whose effects would extend to the territory that was subject to the expired franchise contract, for a period of three years following the expiration of the franchise contract. If the franchisor decides to transfer the rights which were the object of the expired contract to a third person prior to the expiry of this three year period, he is obliged to propose to the franchisee the conclusion of a new contract or to compensate him for the losses caused. The conditions for entering into the new

* Original text is written in English language

Notice: This part of survey is based on the national reports.

contract may not be any less favorable for the franchisee than the terms of the expired contract.

Although, the issues of term and renewal greatly fall into the area of party autonomy, in practice the franchising agreements are often concluded for a longer period of time while the franchisee should have enough time to return his investment and gain profit.

FINANCIAL MATTERS

One of the main purposes of franchising agreement is to acquire gain for both parties, and therefore, it is agreed in return for a fee. The Croatian law specifies that a franchisor provides a franchisee with the rights "in return for a direct or indirect fee". In accordance with the Serbian law a franchisee shall be in obligation to pay a franchisor a fee for the rights granted. The amount shall be agreed by the parties usually in accordance with the percentage of profit or turnover. Other national laws mention no details on this issue but they generally provide for the application of the party autonomy and general principles of law.

In practice, the franchisee will pay two types of fees. The initial fee, which must be determined in the franchise agreement, constitutes the initial payment for the use of the business method. It is a single payment at the time of the contract formation. Secondly, the franchisee shall be in obligation to pay royalty or continuing franchise fee. This fee is payable during the performance of the contract for the continuous exploitation of franchise, licensed rights and ongoing assistance. In practice, it is usually calculated in the percentage of the turnover and on a periodical basis such as quarterly, every half a year etc, depending on the agreement of the parties.

On the issue of price determination, it is solely within the area of party autonomy. Parties are free to determine the value of compensation and manner of payment. In the Croatian and Serbian law, when determining the fee, the analogy is often made with the sale and purchase agreements, or with lease agreements in some cases. Tax questions are regulated by tax legislation.

ADVERTISING AND THE CONTROL OF ADVERTISING

None of the national laws contain specific provisions on the issues of advertising. However, the business practice and literature are showing that the franchise agreement always contains a clause on the control of the advertising and promotional activities, most usually by the franchisor. If there is no such direct contractual agreement of the parties the franchising contract shall at least contain an obligation of the franchisee to invest his best efforts to promote and preserve the reputation of the franchisee network. In the eyes of the consumer there should be no difference between the franchisor and franchisee business premises. Usually, the control of the advertising activities shall be in the hands of the franchisor. He will be entitled to approve the use of business and advertising materials, advertising guidelines and corresponding translations. In practice, most usually the franchisor will initiate a campaign on the highest level and then the other members -the franchisee must follow the same pattern of advertising on lower national or regional level. The costs of advertising shall be covered by the franchisor although they are originally collected through periodical payments of the franchise fee (unless otherwise agreed by the parties).

SUPPLY OF EQUIPMENT, PRODUCTS AND SERVICES

Supply of equipment, products and services may be performed either directly from the franchisor or from the supplier designated by the franchisor. For the franchise network to function properly, to maintain integrity and quality and to be "the one" in the eyes of the consumers, it is important for the franchisees to have the same type and quality of products and services. The quality of standards is usually maintained through the supply of the key products and services by the same suppliers which are previously approved by the franchisor. By being a supplier or designating a supplier the franchisor holds a monopolistic position on the market and tends to define conditions on its own benefit. Additional question here is whether the franchisee is allowed to buy products from the supplier not designated by the franchisor. Such situation in Croatia is regulated by the legislation on monopolistic position on the market and competition. The Croatian solution prohibits absolute tie-up franchising supply agreements of equipment, products and services, thus allowing the franchisee to buy products from the other supplier. This Block exemption shall apply to vertical franchise agreement provided that the market share held by the supplier does not exceed thirty percent of the relevant market on which he sells the products and does not exceed the total annual turnover provided by the law (fifty million). Other country reports hold no specification on this issue, but franchising is mentioned in their competition and antitrust legislation as well. Therefore, it might be expected that they hold similar provisions on this issue.

Product liability issues are governed by the general provisions of the law. In particular, in Serbia, according to the Draft law, the franchisor shall be held liable for the non-conformity of the supplied goods and services together with supplier. Their responsibility is joint against third party's claims and as regards to the products supplied by the franchisee.

INTELLECTUAL PROPERTY

The main component of franchising agreements is the transfer of know-how and IP rights in particular trademarks and signs, trade names, copyright and related rights, patents, designs, and geographical indications, but also external packaging, design of business premises, internal decoration in accordance with the terms agreed in the contract. These rights are the basic elements of franchising system and therefore must be adequately transferred and protected. The legal basis of licensing or "transfer of rights to use goods and services" from the franchisor to the franchisee is the licensing agreement. The license usually does not result with the transfer of IP rights but rather only in granting the permission to use the rights. In most jurisdictions under survey, the licensing agreement is regulated either by the general law on contracts or it is mentioned in a specific legislation (*lex specialis*). For example, in accordance with the Croatian and Montenegrin draft law, the licensing agreement must be made in writing and must be registered upon a request of one of the contractual parties. The same could be stated for other IP rights that require registration as a precondition for their protection in particular trademarks, patents and designs.

Copyright and other related rights are not subject to a license agreement since they are regulated in most countries from the survey by the separate specific legislative acts. They include author's moral and economic rights or author's creative activity expressed in objective form. In Croatia the author transfers only the right of exclusive or non-exclusive exploitation of copyright, usually for remuneration by concluding the copyright agreement. Copyright and other related rights need not be registered to acquire legal protection.

As regards to the extent of the licensed rights, the franchisor must license the right to use IP rights to the franchisee in such extent which allows the franchisee to perform the franchisee business and keep the identity of franchise network. The rights transferred must be continuous and free from the third parties' claims and aspirations. In this respect the Serbian draft law provides that the franchisor is responsible for the existence and content of the rights transferred to the franchisee, as well as for the information conferred to the franchisee, which are necessary for the realization of the programs defined in the rights transferred. In case of an infringement of this obligation, the franchisee is entitled to terminate the contract or to decrease the fee owed to the franchisor in the amount determined by an independent expert. The similar solution could be found in the Croatian law.

KNOW-HOW AND TRADE SECRETS

The franchisor is under the obligation to transfer to the franchisee the know-how necessary for the conduct of the franchise business activities. The know-how is usually considered to be a body of non-patented practical information resulting from experience and tested by the franchisor, which is secret, substantial and identified. All these elements may be found in the express legal definitions of the know-how in the Croatian and Albanian law, but are also found in the general principles of law and literature of the Bosnian, Serbian, Macedonian and Montenegrin law. The know-how also includes knowledge about technical aspects of the production, secrets and means, but also elements of business method, financial management, marketing and relationship with customers. Most usually, it is transferred in the form of "operating manual" which represents the integral part of the franchise agreement. Additionally, in business practice, the know-how is also a broader concept and refers to providing education to the franchisee's employees and ongoing assistance, instruction and education with the business, which is most usually performed orally.

On the other hand, the franchisee is under obligation to keep the information provided to him as a secret, not only during the performance of the agreement but also in regard to the information disclosed in negotiations and after the termination of the agreement. This obligation is often stated through the confidentiality clause in the franchising agreement. All national legislations recognize the obligation to keep a trade secret (Croatia, Bosnia, Albania, Serbia, Macedonia, Montenegro Reports). If obligation of keeping a business secret is not explicitly agreed in the contract it may always derive from the general rules of law and the principles of good faith and fair dealing. In Serbian Draft law this obligation is regulated explicitly. The franchisee is obliged not to disclose the confidential information or business secrets of the franchisor, conferred to him during the duration of the contract, to third parties. This obligation remains standing following the termination of the franchise contract.

REMEDIES FOR NON-PERFORMANCE

None of the national laws under survey contain specific provisions on the remedies for non-performance of franchising agreement. Therefore, they should be judged in accordance with the general rules for non-performance of contract, mostly deriving from the general principles of law incorporated in the national Codes of obligations. It may be concluded from the reports that, according to the Croatian, Serbian and Bosnian law, non-performance of contractual obligations is considered to be a breach of contract, unless otherwise agreed by the parties. In such a case, the other party may terminate an agreement by simple statement previously giving party in breach additional time period for fulfillment of obligation. If the

obligation is not fulfilled not even in this additional period, the other party shall have a right to terminate an agreement by giving adequate notice of termination. Additional period of time must be provided if it is obvious from all the circumstances that the party infringing the obligation cannot fulfill its obligation in additional time period. Court participation in termination of agreement is not required. According to the Albanian law, for the infringement of contractual obligation by mistake the franchisee is entitled to reduce the payment. The reduced amount shall be determined by the impartial expert. There are also no explicit provisions on the form of the notice of termination (it may be performed orally as well), but it must be given in such a way that the termination is explicit and in a manner that gives the opposite party an opportunity to be certain in the real intent of the contract termination. The similar solutions are also expected in other countries under reports.

Termination of the agreement by the consent of the parties is also possible. Although in Serbia this is possible only with the fixed contracts where fulfillment of obligation in due time is an important element of agreement.

Finally, after termination, the damaged party shall always have a right for compensation of damages in accordance with the general rules from the Laws of obligations. Compensation of damages is accepted in all the national laws under review.

THE END OF THE RELATIONSHIP AND ITS CONSEQUENCES

In all jurisdictions under survey, the termination of franchising agreement is regulated by the general principles of law. Except the termination of contractual relationship by giving notice of termination as described in the previous chapter, the franchising agreement concluded for a definite time period terminates after expiry of the agreed time period. The franchising agreement concluded for an indefinite period of time terminates upon notice of cancelation of agreement by one of the parties, unless otherwise agreed. Some national laws prescribe that if a franchising agreement is concluded for a period longer than ten years, the notice of cancelation must be given six months (Serbia) or one year (Albania) before the termination takes effect. The franchising agreement may also terminate due to changes of contractual circumstances, expiration of rights, insolvency, bankruptcy or forced liquidation procedures by one or both parties. The Serbian Draft law explicitly provides for the termination of franchising agreements for those reasons, but other national laws contain similar provisions in *lex specialis*.

As regards to the legal consequences, the main legal consequence of termination of contractual relationship is that both parties cease to exist and are free from any further contractual obligations under franchising agreement, except the liability for damages. Furthermore, both parties are in obligation to return what they gained based on the franchise agreement. Finally, all individual exclusive IP rights must be terminated and licensed back to their owner. Adequate changes in the Register of IP Rights must be performed in accordance with the *lex specialis*. Other consequences of termination may include obligation of the franchisee to keep a business secret and confidentiality of data, to restrain from operating a competition business and stop using trademarks and signs, trade names, patents, designs and other IP rights. In some cases the franchisee has an opportunity to exercise a buy-out option of the assets transferred to him by the franchisor in accordance with the terms of franchise agreement. The Serbian Draft law explicitly provides that the franchisee must return all the leased assets to the franchisor, stop using words, elements, marks, and other brand distinctions granted by the franchisor. These legal consequences could be explicitly found in the Croatian and Macedonian law, but similar solutions (although not mentioned in the reports) may be expected in other countries under survey as well.

CONCLUDING REMARKS

From the analysis based on the country reports, it may be concluded that the business practice of franchising is relatively new and undeveloped in all the countries under survey. The most common franchising networks are Fornetti, McDonalds, Mango, Zara and producers in car industry. Except Albania, none of the countries have a special legal provisions regulating exclusively franchising agreement so most issues previously discussed are governed by the general principles of law deriving from the Civil Codes and Codes of obligation and *lex specialis*, especially in connection to transfer of intellectual property rights. The court practice on franchising is also relatively poor and legal literature is mostly based on the foreign experiences. To summarize:

Albania is the only country from the survey where franchising agreement is explicitly regulated by the provisions of the Civil Code, but despite that fact the franchising itself is still relatively new concept and has not yet received comprehensive and all-inclusive legal regulation.

In Bosnia and Herzegovina there are no explicit legal provisions on franchising. Franchising is only mentioned in the area of competition law and in the Decision on group exemption on agreements between commercial entities operating on various levels of production or distribution. Additionally, the Draft Law of the Code of obligations from 2003. contains separate provisions on franchising, thus creating a possibility of regulation of franchising agreement in the future.

The similar could be stated for the Republic of Croatia. There are no explicit provisions regulating all aspects of franchising agreement so general principles from the Code of obligations shall apply. However, the franchising agreement is explicitly defined by the Croatian Competition Act and Regulation on block exemptions granted to certain categories of vertical agreements. Finally, although the concept of franchising is relatively new in Croatia, in the last decade one may observe a rapid development of voluntary regulation and Franchise associations providing rules and guidelines for performance of franchising activities, thus showing growing interest for this form of business.

National report shows that the franchise networks in the Republic of Macedonia are more exception than a rule and that there is no legal practice regarding franchise agreements. However, the franchise agreement is explicitly defined and recognized by the Law on the protection of competition and a Regulation on Block Exemption of vertical agreements on exclusive distribution rights, selective distribution rights, exclusive purchasing rights and franchising.

The same could be stated for Montenegro. There is no law regulating franchising, so the parties in principle avoid designating their transactions as franchising and instead opt for licensing and distribution contracts. The author of report justifies this attitude due to the uncertainty of law regulation. The "franchising agreement" is only mentioned in Montenegro by the Trademark law, the Law on protection of design, the Law on geographical indications and the Foreign investment law, but without regulating the agreement itself.

Finally, in Serbia franchising agreement is a relatively new commercial contract derived from l*ex mercatoria* and therefore is not regulated by the Serbian law, but classified as innominate contract with the application of general provisions of the Law on obligations. Yet, in the Republic of Serbia there is an ongoing discussion on the possible Draft of the provisions of the franchise contracts, thus showing a greater interest of recognition and regulation of franchising as a growing business method.

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COMPARATIVE ANALYSIS OF LEGAL ISSUES IN FINANCIAL LEASING[1]

Due to the increased use of financial lease contracts and the necessity to respond to the needs of the contemporary business trade, laws on leasing were slowly enacted and developed to ensure legal security and further to promote its use. Although financial leasing has been in widespread use and regulated within the broader framework of general laws such as the Civil Code in Albania, or The Law on Torts and Contracts in Bosnia and Herzegovina, Croatia, Macedonia, Montenegro and Serbia, the increased use of this specific type of credit transaction has triggered the need for more particular laws on financial leasing. Therefore financial leasing has been regulated through the enactment of specific laws on these transactions.

Since 2002, all countries that are subject of this analysis, such as Albania, Bosnia and Herzegovina, Croatia, Macedonia, Montenegro and Serbia, have promulgated specific laws dealing with the financial lease contract. In 2002, Macedonia passed the Law on Leasing to cover both financial and operating leasing.[2] Serbia, on the other hand, enacted the Law on the Financial leasing in May 2003;[3] Albania in May 2005[4] and Montenegro in December 2005.[5] Not less eager in adoption of the Leasing Act was Croatia in 2006,[6] whereas the Leasing Law of the Republic of Srpska was passed in 2006,[7] and Leasing Law of the Federation of the Bosnia and Herzegovina, in January 2009.[8]

FUNDAMENTAL CONCEPTS AND ELEMENTS

A. Meaning of financial leasing.

In these herein analyzed legislative texts on financial leasing or leasing in general, with the exception of the law of Macedonia, the financial lease transaction is determined by pro-

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* Original text is written in English language

[1] This comparative analysis on the meaning, scope, object, parties, terms, commercial nature, and the form of the financial leasing, is based on the respective national reports and the legislative text of the UNIDROIT Convention on International Financial Leasing (Ottawa, 28 May 1988), which none of the herein discussed countries, has ratified yet.

[2] Official Gazette of the Republic of Macedonia, No. 4/2002, 49/2003, 13/2006 and 88/2008.

[3] Official Gazette of the Republic of Serbia, No. 55/20093, dated May 27, 2003.

[4] Official Gazette of the Republic Albania, No.9396 dated May 12, 2005.

[5] Official Gazette of the Republic of Montenegro, No 81/05 dated December 29, 2005.

[6] Official Gazette of the Republic of Croatia, No. 135/2006, dated December 13, 2006.

[7] Official Gazette of the Republic of Srpska, No. 70/07

[8] Official Gazette of the Federation of Bosnia and Herzegovina, No. 85.98, dated January 3, 2009.

viding strict definitions of two key constituent elements. The first element, embodied in the supply/delivery/purchase/sale agreement description, presents the relation between the lessor and supplier, and the second, deals with the lessor and lessee relations, known as a lease contract. Although the main structure, scope and parties of all provided definitions are identical, there are some differences, which will be discussed under different subtopics of this paper. Financial leasing transaction can generally be described as a transaction in which the lessor (a) on the specifications of the lessee, enters into a supply agreement with a supplier under which the lessor acquires the lease object on terms approved by the lessee and, (b) enters into an agreement (the leasing agreement) with the lessee, granting to the lessee the right to use the equipment in return for the payment of rentals.[9]

B. Scope of financial leasing.

Montenegrin law (Art. 3) and Albanian law (Art.1) provide the most precise content of the scope of financial leasing, comprising the following legal situations: (1) acquisition of the ownership right on the object of financial leasing, upon the expiration of the contractual period; or (2) acquisition of right to purchase the leased object during or at the end of the leasing period at the agreed price; or, (3) obligation to return the leased object to the lessor after the payment of all leasing installments.[10]

C. The object of financial leasing.

Some laws on financial leasing do not precisely determine the nature of the lease object. Those legal systems may have to resort to various legal methods of analysis (such as systematic and expansive interpretation, and application by analogy of the provisions of other national laws) to determine whether the leased object can be movable and immovable. While Montenegrin and Macedonian Law stipulate that the object of financial leasing may be movable durable asset (equipment, plants, vehicles, and similar) or immovable asset (land, buildings and similar), Bosnia and Herzegovina Law, other than providing that the object of leasing has to be specified by the lessee (Article 35 Of the BandH Leasing Law), does not offer an explicit definition of, nor does it define, the object of leasing. By implication, the object of leasing could be all mobile and immobile items that are not outside trade and are not restricted in trade.[11] The same approach has been followed in the Croatian law[12], so that the

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[9] In Albania, Law on Financial leasing, Article 1§11, Article 5, para 2 and 3 of the Leasing Law of the Federation of Bosnia and Herzegovina, and Article 6 of the Leasing Law of the Republic of Srpska, Art 7.3 of the Croatian Law on Leasing, Article 2 of the Montenegrin Law on Financial Leasing, Article 2 of the Serbian law on Financial Leasing.

[10] Other countries construe financial leasing as covering a wide range of transactions. In addition, in Albania, financial leasing covers long-term financing earmarked for undertakings and practitioners in order to acquire solid elements, namely, equipment and immovable property for professional use. It represents an alternative to bank financing. In Bosnia and Herzegovina, leasing is reserved only for leasing societies that are founded and operate in accordance with this Law on the territory of the Federation of Bosnia and Herzegovina (hereinafter: F BandH) and for branch offices of leasing societies with seats in the Republic of Srpska (hereinafter: RS) and Brcko District of Bosnia and Herzegovina (hereinafter BD) or exceptionally for the bank whose seat is in BandH, or its organizational division with its seat in RS or BD under the conditions and in the manner laid down by rules regulating bank operations in BandH. In Croatia, the Croatian Leasing Act applies to both financial and operating leasing transactions and to both domestic and international leasing transactions while UNIDROIT Convention is applicable only to international financial leasing transactions.

[11] Emir Salihovic, National report on Modern Contracts for Bosnia and Herzegovina

[12] Under the Property and other property rights Act (OG 91/96, 73/00, 114/01, 79/06, 141/06, 146/08, 38/09, 153/09)

object of leasing may be any movable or immovable asset governed by the rules on the property and other real rights (rights *in rem*). The Serbian Law on Financial leasing, following the UNIDROIT Convention, [13] is solely in the determination that the object of financial lease, i.e. the leased asset, is restricted to only a durable movable property (Article 4).

D. Parties in financial leasing.

The parties to financial leasing are the lessee, lessor, and supplier, with variations regarding the possibility of the lessor and supplier being the same person, as in the Montenegrin, Croatian, Federation law, or remaining silent on the issue and thus creating some legal uncertainties, as in the Republic of Srpska (when treated as an operating leasing contract Art. 7 of the RS Leasing Law). The detailed presentations given by the national reports on the financial leasing contract have shown that differences also occur in the legal conditions, nature, status and content of the obligation of the parties relevant for this arrangement. Some of the laws were very restrictive, requiring compliance with certain very rigid conditions on the part of the lessor (as the case is with the Serbian, Croatian, and Albanian law), whereas some of the legal texts have chosen very lenient and liberal approaches in determining the status of the lessor, even prescribing that physical persons can assume the roles of the lessor, lessee and supplier (such as in the Montenegrin law).

The lessor in financial leasing is defined differently under these laws. Under the Montenegrin Law (I Chapter II Articles 6, 7 and 8 of the Law) the lessor can be any domestic or foreign legal entity or physical person, or business organization and entrepreneur, whereas Article 3 and 12 the of Law on financial leasing in Albania stipulates that the lessor, if not a financial institution or bank, cannot carry on leasing activities, unless registered as a juridical person with the capital of at least Lekë 20 000 000. Similarly, in Bosnia and Herzegovina and the Republic of Srpska, the lessor is defined as a juridical person having its seat in the Bosnia and Herzegovina territory and being registered for leasing transactions. According to the Croatian law, the lesssor is any physical or juridical person that holds a right to perform leasing activities under the terms of the law[14] and who is duly registered and licensed for

[13] Under Article 1 of the UNIDROIT law, the financial leasing agreement covers equipment, defined as "plant, capital goods or other equipment." There may be uncertainty as to whether immovables (land, buildings and similar) are subject to the UNIDROIT law since Article 1 seems to contemplate purely movables. Article 4 covers situations where the movable equipment becomes attached to an immovable (transforms to an immovable). In this case, there may be a transformation in the nature of the object from movable to immovable. When this occurs, the provisions of the Convention shall not cease to apply "merely because the equipment has become a fixture to or incorporated in land." The question of whether or not the equipment has become a fixture to or incorporated in land, and if so the effect on the rights *inter se* of the lessor and a person having real rights in the land, shall be determined by the law of the State where the land is situated. However, UNIDROIT law does not specifically provide for situations where the object is an immovable from the start and not just one transformed to an immovable by attachment or incorporation to land.

[14] Such activity may now only be performed by the following: (1) domestic leasing company duly registered and licensed under the Croatian law to engage in leasing activities; (2) leasing company in any EU member state authorized and registered for the leasing activities; (3) Croatian branch of the leasing company of the member state or a third country authorized and registered for the leasing activities; (4) bank registered under the Croatian law, a bank registered in any EU member state or their Croatian branches and a bank registered under a law of any third country, but only limited - under the terms and conditions defined in the Croatian banking regulations. (Art 6.1.) If we additionally take into account the strict statutory provisions for leasing companies (Art 7-29.) the new regulation thus clearly narrowed the circle of potential lessors (for example minimum capital is now 1 million HRK, which is app 7.3 million EUR).

leasing activities, whereas under Article 10 of the amended Law on Financial Leasing of 2005 in Serbia, the lessor is a company with the capital 100,000 euros at least, established in accordance with the Company law, and is licensed to perform NBS financial lease in accordance with the Law on Financial Leasing. The lessee under various laws can be generally defined as any physical or juridical person, to whom the lessor transfers the authority to possess and use the lease object, in accordance with the terms of the contract.

The supplier, on the other hand is defined under the Albanian, Bosnian, Croatian, Macedonian, Montenegrin and Serbian law as any physical or juridical person (duly registered and authorized) that transfers the right of ownership of the leased object to the lessor, in accordance with the agreed terms.

E. Basic principles governing financial leasing.

The national reports from Serbia and Montenegro aptly described the principles underlying the Law on financial leasing. The laws on financial leasing allow the contracting parties to regulate their business relations to them in the most proper way. Therefore, there are two main principles incorporated in the text of this law – the AUTONOMY OF CHOICE (Volition) and the *PACTA SUNT SERVANDA* (Agreements must be kept). Although not expressly stated in the other analyzed country reports, by implication, the principles of autonomy of will and *pacta sunt servanda* form the underlying basis for financial lease contracts. In financial lease transactions, special importance is also given to the principles of equality of the parties, the principle of good faith (*bona fide)* and honesty, the principle prohibiting the creation and exploitation of a monopoly position, the principle of equivalence of mutual contributions, and application of good business practice.

COMMERCIAL NATURE OF FINANCIAL LEASING.

Some of the legislative texts (i.e., the Albanian law) precisely specify the situations when the financial lease contract is treated as a commercial contract. On the other hand, the majority of the legislative texts do not have specific provisions covering this issue (i.e., the Montenegrin law). In this case, only the application of general rules can assist in distinguishing between financial lease contracts that are either commercial or non-commercial in nature and the consequent application of principles designed for commercial contracts or the rules prescribed for general contractual legal transactions in the case of non- commercial contracts.

One of the examples of the detailed legislative determination of the nature of this contract is the Albanian law. Article 5 of Albanian law on financial leasing specifies that, where the lessee in the financial leasing contract is a physical person, and has not registered his/its commercial activities, the financial leasing contract is considered to be non-commercial in nature, and is subject to the general rules governing contracts. According to *argumentum ad contrario*, where the lessee in the financial leasing contract is a physical person and has registered his/its commercial activities, or is a company, the financial leasing contract will be considered as commercial in nature, and will be subject to specific provisions regulating the commercial activities.[15]

[15] Asim Vokshi, National report on Modern Contracts for the Republic of Albania.

Under Article 8 of Serbian Law on Financial Leasing the lease contract is treated as commercial in nature, under the terms of the Law on Civil Obligations, except in cases where the lessee is a physical person who does not perform the activity registered in order to gain profit. [16] The same practice has grown in Montenegro, so that whenever the lessee is a physical person, with the registered business profit driven activity, acting as a lessee, the specific provisions of the Law on Civil Obligations that refers to the commercial contracts will be applied; and when the lessee is a physical person who does not perform an economic activity as profession, the general rules of the Law on Torts and Obligations will be applied. Therefore, whenever the contracting parties of the financial lease are considered as commercial entities, the financial lease contract will be treated as of exclusively commercial nature. A somewhat different way of defining the commercial nature of financial leasing can be viewed through the application of competent laws governing in some ways the financial lease contract. In Croatia, all matters not covered by the provisions of financial leasing laws should be resolved in the conformity with the general principles of law embodied in the Croatian Code of obligations. Statutory provisions of leasing companies and liquidation shall be subject to the provisions of the Company law Act, unless otherwise provided by the Leasing Act. Bankruptcy and forced execution issues are governed by the Bankruptcy Act and Forced execution Act. Accountant and taxation issues are governed by the specific legislation (*lex specialis*). [17]

TERMS IN FINANCIAL LEASING.

Financial lease transactions are treated under the various laws as lasting contracts with permanent execution of obligations. However, there are two approaches to prescribing the duration of the lease contract. Some laws on financial leasing, such as in Albania, expressly define the minimal leasing period, whereas some laws on financial leasing, such as the Croatian and Montenegrin, only state that the term and duration of financial leasing are obligatory contractual elements that should be agreed upon by the parties at the time of contracting.

Article 6 of the Albanian law specifically provides that: 1) movable objects to be consumed within 5 years are let under lease for at least one year; 2) movable objects to be consumed for an extended period of more than 5 years may be let under lease for a period of at least 2 years, where Article 7 of the same law stipulates that immovable objects may be let under lease for a minimal period of 3 years. [18] The minimum term for which the contract may be concluded in Serbia (Article 3 of Serbian Law) and Bosnia and Herzegovina may not be less than two years from the contract conclusion date (Article 36 of the F BandH), whereas this period in Republic of Srpska may not be less than 6 months (Article 9 of the RS Law). Although financial leasing agreement in Croatia and Montenegro (Art.5 of Montenegro law) must be concluded for a fixed period of time, agreed at the moment of the signing, in these laws there is no explicit provision on the minimum or maximum duration of the contract. Theoretically this would mean the parties are free to agree on any term.[19]

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[16] Jelena Perovic, National report on Modern contracts for the Republic of Serbia.

[17] Ana Keglevic, National report on Modern Contracts for the Republic of Croatia.

[18] Asim Vokshi, National report on Modern Contracts for the Republic of Albania.

[19] Ana Keglevic, National report on Modern Contracts for the Republic of Croatia.

DOMESTIC AND INTERNATIONAL FINANCIAL LEASING

The national reports from the regional countries indicate that some countries have precise and very distinct criteria for distinguishing domestic from international financial leasing. On the other hand, there are examples of some legal systems whose texts do not clearly provide for this distinction. A common underlying theme, however, is that whenever the transaction involves a domestic lease contract, national law is applied and whenever an international element occurs, in all regional countries, unless something different provided in the contract, general principles and rules of the international private law, i.e. conflicts of law, are applied. [20]

One of the excellent legislative examples that distinguish between domestic and international financial lease contracts is the Republic Albania. Article 8 provides that the financial leasing will be domestic when the following conditions occur: 1) the lease object in the territory of Republic of Albania, and 2) the lessor and the lessee have permanent residence in the Republic of Albania. Therefore, financial leasing will be international if both the lessor and the lessee or, either of them, do not have their headquarters or permanent residence in the Republic of Albania. In such case, financial leasing is regulated by international law on financial leasing, or as per the case, through a bilateral agreement to which the Republic of Albania is a party.[21] Leasing societies in Bosnia and Herzegovina can perform financial leasing transactions only if they have been established under its laws and on its territory. Whenever parties are engaged in a transaction involving an international element, Article 19 The *Law on resolving conflict of laws,* 1983 provides that the terms of the contracts, unless otherwise agreed by the parties, will be defined by the international agreement or by the use of international private law rules.[22] Similarly, when the financial lease is concluded as domestic contract, undoubtedly the respective national laws on Financial Leasing in Serbia, and Montenegro will apply. The mentioned national laws in these countries will apply, also when, by the autonomy of the will of the parties, that particular law is stipulated in the contract as the applicable law. In the absence of *electio iuris* clause, these laws will be applied if the rules of the international private law are applicable. Financial leasing transactions in Croatia may be either domestic or international depending on whether the parties have their principal place of business (registration) or habitual residence in the same or in different states . If the lessee is established or has habitual residence in the Republic of Croatia, the lease agreement shall be governed by the provisions of the Croatian law; and if the lessee is established or has residence in a member state, the lease agreement shall be the subject to the law of that member state. The parties may, however, stipulate by contract that a different law can govern the transaction. In all other cases the law applicable to an international lease agreement shall be determined in accordance with the provisions of the Croatian Act on conflict of laws (OG 53/91, 88/01).[23]

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[20] The applicable international law on the matter is the UNIDROIT Convention on International Financial Leasing (Ottawa, 28 May 1988) Article 3 provides that: “(t)his Convention applies when the lessor and the lessee have their places of business in different States and (a) those States and the State in which the supplier has its place of business are Contracting States; or (b) both the supply agreement and the leasing agreement are governed by the law of a Contracting State.” Thus, if one of the parties to the financial leasing is a signatory to the Convention, the contract can stipulate that the UNIDROIT Convention applies

[21] Asim Vokshi, National report on Modern Contracts for the Republic of Albania.

[22] Emir Salihovic, National report on Modern Contracts for Bosnia and Herzegovina.

[23] Ana Keglevic, National report on Modern Contracts for the Republic of Croatia.

FORM AND BASIC CLAUSES OF FINANCIAL LEASING

The legislative texts of Albania,[24] Bosnia and Herzegovina, Croatia, Macedonia, Montenegro and Serbia, require that financial lease agreements be in writing in order to be valid. Failure to provide the financial leasing in writing renders the contract invalid, so that this form is considered as forma *esentialia*, or form *ad solemnitatem*. In addition to the requirement that the lease be in writing and/or verified by a notary, different laws prescribe other compulsory *exempli causa* or *inter alia* defined elements. Therefore, the written form requirement and the presence of these obligatory elements are the common criteria prescribed in all the mentioned laws. Further analysis of the reports from Albania, Bosnia and Herzegovina, Montenegro, Macedonia and Croatia show that the laws prescribe the same elements, with very few differences, as compulsory ones. Since several laws are analyzed here, it is difficult to create a list of the essential elements that all these laws consider as obligatory. Each national law separately considers as obligatory elements that must be present in financial leasing: identification of the contractual parties; a defining of the leased object; place, time and manner of delivery of the leased object; date of concluding the contract, signatures of the parties to the contract, duration of the financial leasing contract; total amount of the leasing fee to be paid by the lessee; amount of individual fee installments, their number and time of payment and rate of agreed default interest; option of acquiring the ownership or purchasing the leased object; manner of termination of the financial leasing contract.

In addition to those obligatory provisions the lease agreement may also contain other provisions not compulsory in nature usually such as clauses on the following: risks against which the leased object must be insured and the class of insurance; place, time, and manner of the delivery of the leased object; transport charges and installation charges in cases of a complex object of the leasing; maintenance expenses of the leased object, options for training of the employees of a lessee, as well as other conditions subject to the party disposition. The laws do not preclude the inclusion of additional elements deemed advisable by the contracting parties and the list is not exhaustive or inclusive. Under the essential principle of the financial leasing of autonomy of will, every other element can become an essential element of contract, when the contractual parties consent and stipulate on such terms.

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[24] Under Albanian law the valid financial leasing contract in writing, or before the notary public, if it contains conditions allowing out-of-court acquisition of the object, where the contract terminates before its expiration through the lessee's fault. In this case, along with the financial leasing contract the parties may sign the re-acquisition document as an annex to and a constituent part of the contract. Out-of-court re-acquisition of the object is performed in compliance with the conditions laid down in the lease contract.

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FINANCIAL LEASE
Comparative analysis of legislative solutions

INTRODUCTION

Comparative analysis provided in this treatise will look into similarities and differences of legislative solutions in the field of financial lease in the Southeastern European countries, in the segments pertaining to the rights and obligations of contractual parties in the financial leasing contracts, contract termination, consequences of financial lease contract termination, subleasing, contract register as well as enforcement in financial lease contracts. It is important to emphasize that Southeast European countries adopted laws regulating the matters covered by this analysis in 2002, i.e. created financial frameworks for the terms concerning financial lease contracts, as one of the legal transactions that had previously been relatively unknown and had drawn its legislative form from other laws, primarily the Law on Obligations.[1]

Bearing in mind the wide application and significance of the lease contracts in international affairs, it is important to point out that this institute has been regulated through unified rules of the international commercial law. International legislative framework for financial lease application is provided by the UNIDROIT Convention on International Financial Leasing. This Convention was adopted in Ottawa, on May 28, 1988.

1. RIGHTS AND OBLIGATIONS OF CONTRACTUAL PARTIES IN FINANCIAL LEASE CONTRACTS

In line with legislative solutions in the encompassed Southeast European countries, the rights and obligations of the lessor and lessee can be found in the following scope, for the lessor: obligation of acquiring the object of lease on the side of the lessor, protection in case of lessee's bankruptcy, disclaimer of liability for material defects, disclaimer of liability for damages caused by the object of lease, liability for the legal defects, reporting to the lessor, contractual limitation or disclaimer of liability of the lessor and transfer of property rights over the object of lease.

On the other hand, the scope of rights and obligations of the lessee encompasses: taking over the object of lease, termination of the contract due to failure of delivery, use of the object

* Original text is in local language.

[1] The Laws were published in the Official Gazettes of the respective countries (Macedonia 4/02, 49/03, 13/06, 88/08, Serbia 55/03, Montenegro 81/05, Croatia 135/06, Bosnia and Herzegovina – RS and FBandH 70/07 and 85/08, Albania 9396)

of lease and its maintenance, payment of the lease, risk of accidental destruction or damage to the object of lease, return of the object of lease, mandatory insurance, transfer of the object of lease to a third party for use etc.

In the scope of the presented rights and obligations of parties to the financial lease contract, the mutual characteristics of rights and obligations in the observed legislative systems stand out; these follow, more or less, the solutions from the International Convention on Financial Lease. The following rights and obligations can be designated as common denominators:

The rights and obligations of the lessor:[2]

- Transfer of the object of lease for use,
- Obligation of acquisition of the object of lease
- Obligation of maintaining the object of lease
- Obligation of transfer of property rights over the object of lease;
- Right to lease;
- Right of inspection of the object of lease;
- Right of terminating the contract (often incurred if the lessee is in default with payment of two consecutive leases, if he fails to use the object of lease with due care, if he fails to insure the object or in case of false information entered into the lease contract)

Therefore, the lessor is primarily obliged to acquire the object of the lease and allow the lessee to use it in the appropriate manner, in accordance with its intended use.

On the other hand, rights and obligations of the lessee are structured as:

- Obligation of the payment of the lease
- Obligation of use of the object of the lease in the aforementioned manner, in line with its intended use
- Obligation of supervision by the lessor (manner of use)
- Obligation of returning the object of the lease after the expiry of the contract period
- Obligation of insuring the object of the lease
- Right of use of the object
- Right of repurchase of the object or extension of the lease

When it comes to liability for material and legal defects, the legislations have adopted certain different solutions.

Thus, for example, the Croatian Law prescribes that the lessor is liable to the lessee for legal defects, except for the cases in which the lessee was notified on the existing legal defects.[3]

In case that the third party has absolute rights, the lease contract is terminated by force of law with a compensation for damages. If the legal defects merely limit the lessee's rights, the lessee has the options of:

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[2] Individual rights and obligations of parties to the contract have been prescribed in Articles 14-25 of the Law in the Republic of Serbia, Articles 13-23 of the Albanian Law, 40-50 of the FBandH and 26-49 of the RS BandH Law, as well as in Articles 39-74 of the Croatian Law, 9-16 of the Montenegrin Law etc. in the observed legislative systems.

[3] Article 41 of the Law on Lease of the Republic of Croatia

- Termination of the contract and the compensation for damages
- Decrease in the lease and the compensation for damages.

Solutions of entity laws in Bosnia and Herzegovina are somewhat different. Thus, by concluding a lease contract, the lessor transfers to the lessee the requirements he may have towards the supplier of the object of lease, pursuant to liability for the legal and material defects, unless it was otherwise agreed in the contract (Article 42 of the Law in Federation of BandH).

If the object of lease has a certain material or legal defect and the lessee has failed to realize his rights, transferred to him, towards the supplier of the object, he has no rights towards the lessor on the grounds of material or legal defects and especially not the right to termination of contract or reduction of the lease.

The lessor, in the Albanian Law, bears no liability for the object of lease being transferred to the possession and use of the lessee, unless if otherwise prescribed in the financial lease contract. The only exception to this rule is the case where there are appeals from third parties derived from the lessor's actions or failure to meet obligations.[4]

The Law on Financial Lease of the Republic of Serbia comprises a solution pursuant to which the lessor is liable if a third party has a right over the object of lease that would exclude, decrease or limit unhindered possession by the lessee, where the lessee has neither been informed on the existence of such a right nor did he agree to take over the object of lease encumbered by such right – liability for legal defects.[5]

The Montenegrin legislators have transferred the liabilities for legal defects to the lessor, while, like in other observed legislative systems, liability for material defects lies with the supplier of the object of lease.

2. TERMINATION OF THE FINANCIAL LEASE CONTRACT

The most common reasons for the termination of a the financial lease contract in the observed legislation are:

a) expiration of the time period for which it had been concluded;
b) transfer of the property rights from the lessor to the lessee;
c) repurchase of the object of thelease;
d) dissolution of the lease contract;
e) destruction of the object of the lease due to a *force majeure*; and
f) other reasons in line with regulations pertaining to obligations.[6]

3. CONSEQUENCES OF TERMINATION OF THE CONTRACT ON FINANCIAL LEASE

As we have noted, a financial lease contract may be terminated in one of the manners prescribed by the Law in the observed legislative systems.

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[4] Article 14. of the Law no. 9396 from 12.05.2005, 'On the financial lease' with amendments and additions.

[5] Article 18. of the Law on Financial Lease of the Republic of Serbia

[6] Article 56 of the FBandH Law and Article 50 of the RS BandH Law, Article 41 – 47 of the Law of Republic of Croatia, Article 40 – 43 of the Law of the Republic of Serbia etc.

In addition to termination of the contract due to expiry of the time period for which it had been concluded, termination of the contract *via* the transfer of property rights over the object of lease to the lessee or *via* the repurchase of the said object have also been prescribed, as have the cases in which the contract is terminated through dissolution, destruction of the lease object due to *force majeure* and other reasons prescribed for the termination of contract, pursuant to the general regulations pertaining to obligations.

We will now look into provisions of the observed Laws in the analyzed legislative systems in the Southeastern Europe, regulating the manner and consequences of termination of financial lease contract through dissolution.

The Law in FBandH, in its Article 54, prescribes that the lessor has a right, unless otherwise specified in the lease contract, to terminate the lease contract if the lessee:

a) is late with the payment of the first lease,
b) following the payment of the first lease, the lessee is late with two consecutive lease payments[7],
c) without written consent from the lessor, the lessee subleases the object of lease to a third party,
d) commits a serious infringement of the provisions of the contract pertaining to use and maintenance of the object of lease.

Regardless of the provisions from items a) and b) of this Article, the lessor has the right to terminate the lease contract if the lessee fails to pay one of the leases in the prescribed time period, if the circumstances clearly show that he will also fail to pay any future leases.

In addition to the general rules of the Law on Obligations, the Law on Financial Lease of the Republic of Serbia prescribes special rules on: (i) dissolution of the financial lease contract by the lessee due to failure of delivery of the object of lease, delay in delivery or material defects of the object of lease; (ii) rules on dissolution of the financial lease contract by the lessor due to lack of the lease payments; (iii) rules on dissolution of the financial lease contract by the lessor in case of unauthorised transfer of the object of lease by the lessee to a third party.[8]

In the Albanian Law, the lessor has the right to terminate a financial lease contract prior to its expiry if:

- the lessee fails to pay the first lease in the agreed period,
- lessee pays the first lease, but then fails to pay several subsequent leases in time, with the leases not paid in due time amounting to 20% of the total amount of lease. In such a case, in addition to having the right to terminate the contract, the lessor also has the right to demand that the lessee pays all belated leases plus the appropriate interest.[9]

Similar solutions have also been kept in the Montenegrin Law.[10]

Croatian legislators have prescribed, in Articles 44 and 45, that the contract could be terminated in case the lease is not paid (right of the lessor to terminate the contract) and in case the object of the lease is not supplied (right off the lessee to terminate the contract).

Macedonian legislators defined termination (dissolution) of the lease contract for the case that any of the parties to the contract fails to comply with all obligations undertaken by

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[7] Similar solution has been kept in Article 45 of the Croatian Law

[8] Article 26 of the Law on Financial Lease of the Republic of Serbia

[9] Article 28 of the Albanian Law

[10] Article 16 of the Montenegrin Law

the lease contract. In such a case, dissolution of a lease contract is performed in writing, within 5 days. Remaining solutions and cases providing for contract dissolution are almost identical to other observed legislative systems (dissolution due to failure of delivery, dissolution due to lack of lease payments etc.).

4. SUBLEASE

When it comes to subleasing the object of the lease (transfer of the object to a third party for use), the observed legislative systems have similar solutions.

Thus, pursuant to the Law on Financial Lease of the Republic of Serbia, the lessee may transfer the object of lease, in whole or in part, for use to a third party, with the written consent of the lessor. The lessor may terminate the contract and demand a compensation of damage if the lessee has, without his written consent, transferred the object of lease for use to a third party. Special procedure for acquisition of tenure over the object of the lease, prescribed by this Law, may also be applied in this case of contract dissolution. Transfer of the object of lease to a third party does not release the lessee from the obligations towards the lessor undertaken pursuant to the lease contract. Transfer of the object of the lease for use to a third party may be excluded or otherwise prescribed by the contract.[11]

Pursuant to the Article 51 of the Law of FBandH, the lessee can, with the written consent from the lessor, transfer the object of the lease or its parts, to a third party for use, unless if otherwise specified in the lease contract.

Transfer of the object of the lease to a third party that would use it does not release the lessee from his obligations to the lessor, undertaken in the lease contract.

Time period of the sublease must not exceed the time period of the lease contract.

The right of transfer of the object of the lease to a third party may be excluded or otherwise prescribed in the lease contract.[12]

Croatian legislators also have similar solutions pertaining to cases of sublease of the object of the lease to third parties.[13]

Montenegrin legislators did not emphasize provisions of sublease or transfer of the object of the lease for use to a third party in the Law, but the UNIDROIT Convention on the International Financial Leasing applies. This Convention was adopted in Ottawa on May 28, 1988 and it has provided for regulation of this matter in the Montenegrin legal text.

Albanian Law comprises the same solutions as the solutions from Croatian, Serbian and BandH legislators.[14]

5. REGISTRATION OF THE FINANCIAL LEASE CONTRACT

Registration of the right pursuant to a financial lease contract is innate to the observed legislative systems. Specific of the BandH legal system is that, in addition to the regulation of lease in the entities, a significant part with regards to registration is played by the state Framework Pledge Law.

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[11] Article 35. of the Law of the Republic of Serbia

[12] Same solution is prescribed in Article 45 of the Law of the RS BandH

[13] Article 47 of the Law of the Republic of Croatia

[14] Article 34. of the Albanian Law

Article 58 of the Law of the F BandH prescribes registration of rights pursuant to lease law depending on whether the object of lease is a movable or an immovable asset.

If the object of lease is an immovable, property rights over the object of lease and rights pursuant to lease contract are registered in line with legislation regulating the registration of rights over immovables.

If the object of the lease is a movable, rights pursuant to a lease contract (special ownership rights) is registered in the Register of pledges in line with legislation regulating the registration of pledges.

If the object of lease is a movable for which annual registration is prescribed in the special law, such as, e.g. motor vehicles, rights of ownership are registered in line with the law defining registration of ownership right over vehicles.

If the object of the lease is a movable, the lessor is obliged to submit a request for registration of rights pursuant to a lease contract (special ownership right) and other information from the lease contract, in line with regulations pertaining to registration of pledges within seven days from the delivery (Article 59 of the Law of theF BandH).

If the object of lease is an immovable, the lessor is obliged to submit a request for registration of rights of the ownership and rights from the lease contract within 30 days of the day all conditions for registration are met.

The lessor is obliged to submit a request for modification or deletion of information from the register within 15 days from the day the facts dictating the modification or deletion arise.

Similar solutions are comprised in provisions of Articles 52 to 57 of the Law of the RS.

Among the extremely important laws regulating the matter of concluding lease, as legal transactions, the Framework Law on Pledge adopted at the BandH level and published in the Official Gazette of the BandH no. 28/04.

This Law is significant from the aspect of the very important action of registering Lease Contracts, which gives the lessor a higher degree of the legal security even after the conclusion of the lease, as legal transactions.

Registration of the Lease Contract, first of all provides the lessor with a guarantee, giving him an advantage over other creditors in the possible execution procedure over the lessee's assets, as a contract registered in such a manner has the traits of a public document and, as such, allows for extraction of the object of lease from the assets of the lessee, which could be subject to enforcement.

Relating thereto, the exceptional need of registering Lease Contracts is emphasized, to allow for adequate protection of the lessor, so that the lessor can exclude the object of the lease from the lessee's assets, which could be subject to initiation and performance of enforcement proceedings. If this were not the case, without a registered Lease Contract, the object of the lease could be restored only in a litigation proceeding, where existence of a legal title (Lease Contract) would have to be proven, as the grounds for restoration of the said object. All this includes a long, uncertain procedure for the restoration of the object of the lease and possible enforcement over it, which would lead the lessor into a highly unfavourable position.

In addition, it should be noted that the Framework Law on Pledge is also important from the aspect of procedures for restoration of the object of lease to the lessor.

With extensive interpretation, it could be stated that this is a law that is a *lex specialis* for the legal transaction of the lease, enabling this procedure to be performed faster in comparison to the procedure pursuant to the provisions of the Law on Litigation and the Law on Enforcement Proceedings.

However, in the said Law, provisions on enforcement in line with this Law rely, in principle, on the pledge law, so without an authentic interpretation of these legal provisions, one could still not state to such a possibility, being that these provisions request such an interpretation. If an authentic interpretation (interpretation of the legislators) would show that enforcement provisions may be applied to the legal transaction of the lease, this would mean an extra „step" of legal security and protection of the lessor, which would enjoy a more efficient and faster procedure to retrieve the object of the lease than is provided in the litigation and enforcement proceeding.

The Law on the Financial Lease of the Republic of Serbia also prescribes rules relevant to the financial lease register (Articles 43-51). Registration of information from the financial lease contract in this registry *has no constitutive character*, meaning that the financial lease contract is concluded and exists regardless of the registration. The Financial Lease Register is prescribed in this law to allow for legal security of business transactions. The Law comprises only general rules on financial lease, while its functioning and method of operation are closely regulated in the appropriate bylaw.

Croatian legislators have also designated lease registration as declaratory, prescribing a special Agency for the maintenance of the Register.[15]

Registration of lease contracts and rights and obligations contained therein, pursuant to the Montenegrin Law, is also performed in case the object of the lease is a movable or an immovable.[16]

Similar solutions are provided in the Albanian Law as well.[17]

6. ENFORCEMENT PROCEEDINGS IN CASES OF FINANCIAL LEASE

Pursuant to the provisions of Article 30 of the Law of the Republic of Serbia, parties to the contract may ascertain, in minutes kept before a competent court in an non- litigious proceeding that, in case of failure of payment of the lease by lessee once it becomes due and in line with the contract, the lessor has the right to take possession of the object of lease. The signed minutes on the agreement of parties to the contract has the legal power of a court settlement and is an enforcement document, with regards to the appropriate provisions of the Law on Enforcement Proceedings. The lessor is, thereby, provided with an option of petitioning the enforcement court without initiating a litigious proceeding and to, pursuant to the aforementioned contract which is an enforcement document, requests the restoration of the object of the lease. In this context, it should be mentioned that, in case public notaries are introduced into the Serbian legal system, this matter would be significantly simplified, being that certification of a document with the public notary could represent the grounds for direct petition to the enforcement court.

Entity lease laws comprise no special provisions on enforcement over the object of lease, or on the basis of the lease contract.

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[15] Article 52. – 54. of the Law of the Republic of Croatia

[16] Article 20 and 21 of the Law of the Republic of Montenegro prescribes conditions and method of registration.

[17] Article 42. of the Law of the Republic of Albania

Enforcement procedure over the object of the lease will, therefore, be performed in line with the general rules and provisions of the Law on Enforcement Proceedings of the FBandH (Official journal FBandH no. 32/03) or the Law on Enforcement Proceedings of the RS (Official Gazette of the RS no. 59/03).

in line with these entity regulations, movables, immovables and rights can all be subject to enforcement. As we have seen, movables and immovables may be the object of a lease contract, meaning that the object of lease may also be subject to enforcement proceedings in the manner and under the circumstances determined by the provisions of the Law on Enforcement Proceedings.

If insolvency proceedings or liquidation is being performed over the assets of the lessee, the Law of the FBandH prescribes protection for the lessor, pursuant to which the lessee is obliged to inform the lessor, without delay, on the initiation of insolvency or liquidation proceedings.

In case of the lessee's insolvency, the lessor has a right to extraction of the object of the lease (extraction right) from the insolvency estate of the lessee, in line with the regulations pertaining to the bankruptcy proceedings.

The Law has not defined the rights of lessees in case of insolvency or liquidation of the lessor, although this was envisaged in the special provisions, stating that insolvency or liquidation procedure cannot be initiated over the estate of a leasing company, pursuant to special laws on insolvency and liquidation (Article 84 and 85 of the Law of the FBandH).

Similar solutions can be seen in the Law of the RS (Article 25 of the RS Law).

Enforcement over movables or immovables of the lessor, when the movable or immovable that was the object of a lease contract is in possession of the lessee, is preformed pursuant to the provisions of the Enforcement Law[18].

In the Montenegrin Law as well, enforcement is performed in line with the provisions of the Law on Enforcement Proceedings.[19]

Pursuant to the provisions of the Albanian Law, the Financial Lease Contract is enforceable with respect to repossession of the object of the financial lease contract and is performed by the court executors following the issue of enforcement order by the competent court, in which the court states its position within 5 days of the submission of the petition. The court issuing the enforcement order also defines activities that the court executor will perform in order to sequestrate the object and return it to the lessor or another authorised party. In these proceedings, the court applies the provisions of the Law on Litigation Proceedings.

The court executor will send a notice on the actions undertaken to the lessee, within 5 days of its issue and if the lessee fails to meet the required obligations within 10 days of the receipt of the notice, voluntarily returning the object in question, the court executor will immediately adopt a decision on its sequestration. If the court executor ascertains that, after the expiry of the 10 day period, enforcement is no longer possible, he immediately initiates enforcement proceedings, sequestering the object of the financial lease and returning it to the lessor. If he fails to sequestrate the items, the court executor is obliged to send a written notification to the lessor immediately, at the latest within 10 days from the date that the sequestration proceedings were initiated. [20]

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[18] People's Journal of the Republic of Croatia no: 57/95, 29/99, 173/03, 194/03, 151/04, 88/05, 121/05, 67/08,

[19] See Article 17 of the Law on the Financial Lease of the Republic of Montenegro

[20] Article 32. of the Law no. 9396 from May 12, 2005. 'On financial lease,' with amendments and additions.

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MODERN CONTRACTS

COMPARATIVE ANALYSIS

The basic concept of factoring

A factoring contract, as a contemporary trade contract which has developed from *lex mercatoria*, is not legally regulated in the legal systems of Croatia, Serbia, Macedonia, Bosnia and Herzegovina, and Montenegro. Certain aspects of factoring are regulated by special regulations in the field of banking or foreign exchange business.

In Serbia, the proposed regulation of factoring contracts is presented in the preliminary draft Civil Law Code of Serbia, published in May 2010 (Articles 1274-1285). The preliminary draft regulates the following issues of the factoring contract: the concept of contract, the contents of contract, the form of contract, receivables that are the subject of ceding, the effect of ceding of receivables, the right of the factor to collect from the debtor, the risk of debt collection from the debtor, the responsibility of the client for the existence and validity of the transferred receivable, informing the debtor, complaints by the debtor, the right of the debtor to return the amounts paid to the factor, successive factoring (National Paper for Serbia, author Prof. Dr. Jelena Perović).

In Macedonia, in February 2007, a Factoring Study was undertaken, with the purpose to answer certain issues and dilemmas related to the development of factoring in Macedonia (National Paper for Macedonia, author Prof. Dr. Goran Koevski).

The national papers state that factoring is primarily a financial instrument of significance primarily for banks and financial institutions, exercised in practice through factoring contracts. Thus, the National Paper for Croatia (author Ana Keglević, LL.M.), states that the reports from the Croatian Financial Services Supervisory Agency are showing that there are 14 factoring companies currently operating in Croatia and the volume of factoring activities amounts 2.736.001 thousand HRK for the year 2009 (app 375.000.000 thousand EUR). Latter number of factoring companies is related to companies that perform factoring activities and are in obligation to submit their financial reports to the Agency. However, the Agency holds no power to license them (unlike leasing companies) but is authorised, according to the Agency Law (OG 140/05) only to perform supervision.[1] The relevant data are included also in the National Paper for Macedonia (author Prof. Dr. Goran Koevski) which states that factoring, as a financial service, is at the moment offered by a few companies in the Republic of Macedonia: a) *Prvi Factor*, Factoring Company doo Skopje, a joint company of NLB d.d.

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* Original text is in local language.

[1] The national reporter from Croatia specifies that the Croatian national program for the accession to the EU specifies factoring as one type of financial services (see, national report from Croatia, Mr. Ana Keglević, LL.M.)

and SID Bank d.d., which offers several types of factoring: domestic, export factoring etc.; b) EOS Matrix doo Skopje, which is a part of a leading group in debt management in South-Eastern Europe and offers services in the area of receivables management and debt collection, in both B2B and B2C relationships and c) FINEA Factoring, Factoring Company doo from Maribor, the Republic of Slovenia, which is gradually becoming the leading company in factoring on the markets of former Yugoslavia. The National Paper for Montenegro (author Dr. Aneta Spaić) states that in Montenegro, due to the lack of legal regulation of this contract, factoring has been offered to the Montenegro market only in two out of the eleven existing and functioning commercial banks. The National Paper for Bosnia and Herzegovina (author Emir Salihović) states that while factoring services are being introduced, it is expected that the size of the factoring market will be around 0,4% of the Gross National Product (GNP). According to information from the Central bank of Bosnia and Herzegovina (CBBandH)), 2007, GNP in Bosnia and Herzegovina was 21,641 million KM. This suggests that Bosnia and Herzegovina could expect a factoring market of around 86 million (0,4% of GNP) even short term (1-2 years). In the middle-term period (3-5 years), the factoring market is expected to reach around 432 million KM (i.e. 2% GNP) based on GNP projected growth.

Some national papers provide general definitions of factoring. Thus, the National Paper for Croatia states: „Factoring agreement means an agreement concluded between one party (the supplier) and another party (the factor) pursuant to which the supplier sells and assigns its receivables arising from the agreements of sale of goods and services made with third persons, his customers (the debtors) in exchange for remuneration with the purpose to finance his continued business. The main functions of factoring are: financing, recourse responsibility (*delcredere*) and providing other services directly or indirectly related to factoring (such as investigation of credit health of debtors, taxation, bookkeeping, advertising of services etc). " (author Mr. Ana Keglević, LL.M.). According to the National Paper for Macedonia „The factoring agreement is defined as (1) a long-term contractual relationship between one party – the seller (client) and another party – the factoring institution (factor), whereby a) the client transfers to the factor, at a discount, its short-term contractual monetary claims before their due date, which result from contracts for the sale of goods or provision of services between it – the client, and its buyer (debtor), except regarding those goods and services that were purchased for personal, family or domestic use; b) the factor, for a certain fee, accepts to collect those claims, if it finds that the solvency of the client's debtors is good, by informing the debtors of this transfer, regardless of whether the client or the factor bears the risk for the collection of said claims" (author Prof. Dr. Goran Koevski). The National Paper for Serbia states that the difficulties related to providing a definition of factoring contracts result from different types of this transaction, especially because the factor may take over the obligation to collect from the debtor the transferred receivable either in the case when the factor purchases it – the so-called true factoring, or in the case when the factor takes over the obligation to guarantee the collection to the client – the so-called un-true factoring (author Prof. Dr. Jelena Perović). For these reasons, the preliminary draft of the Civil Law Code of Serbia (Article 1274) proposes as alternatives three possible definitions of factoring contract. Alternative 2 of the preliminary draft takes over the solution used in the UNIDROIT Convention on International Factoring and includes the following statement: »By a factoring contract, one party, who is the supplier of goods or services (the client) undertakes to cede to the other party of the contract (the factor) receivables which have already been created or future receivables in relation to third parties from contacts related to the sale of goods and services or works performed, while the factor undertakes, for a fee and costs coverage, to perform at least two of the following obligations: 1. to provide advance financing to the client (payment

of receivables before their due date, including loans and advance payments related to such receivables); 2. to collect the transferred receivables; 3. to guarantee to the client the collection of such receivables (undertaking the risk of collection in case of debtor's insolvency); 4. to maintain records of the client's receivables".

In terms of its legal features, a factoring contract is an innominate, two-party obliged and onerous contract, a contract with permanent execution of prestation and a contract signed *intuitu personae.* In practice, such a contract is most frequently entered into in writing and may become formal if the parties to the contract agree such a form as a requisite for its effect. Depending on the mode of how the contract is entered into, the factoring contract is, as a rule, entered into as a contract of adhesion. Factoring contracts are of mixed legal nature (containing certain elements of cession contracts, loan agreements, guarantee agreements, service agreements, etc.).

The sources of law, apart from the special regulations regulating specific aspects of factoring, include the general operating conditions of factoring companies, model and template contracts, trade habits, and general rules of contract. Internationally, factoring is regulated by the UNIDROIT Convention on International Factoring of 1988, which may serve as a model in developing the relevant national rules on factoring.

The review of national papers leads to the general conclusion that factoring is not accurately regulated by relevant national legislations, which is a significant obstacle for the practice of this legal transaction in business practice.

Types of factoring contracts

A factoring contract is a broad legal framework for different types of factoring transactions entered into in practice. They are categorized with respect to the specific factoring transaction resulting from them or by the elements contained in individual contracts. The review of national papers[2] allows the conclusion that the following classifications are the most common ones in the doctrine of comparative law:

- According to the territorial criterion, there is national and international factoring. International factoring, as a rule, implies four parties: the seller (client), his national factor, the foreign buyer (debtor) and the corresponding factor in the country of the buyer;
- According to the obligation and the function of factoring, there is real factoring and quasi factoring. The real factoring (*Old Line Factoring; Conventional Notification Factoring*) is such a factoring contract in which the factor buys the receivables of the client with a discount at the due time or before due time thus undertaking credit provision or other factoring services. This type of factoring does not include the guarantee function of the factor because the receivable is purchased definitely, while on the other hand based on a special provision in the contract the client may guarantee the factor the possibility of collecting from the debtor. The quasi factoring is such a factoring in which the factor undertakes the receivable solely in order to collect in instead of the client and as a rule it guarantees the collection of the receivable;
- According to the type of underlying business from which the receivables which are the subject of factoring resulted, there is factoring in export or import (general factoring transactions) and factoring in other transactions (special factoring);

[2] See the national papers of Serbia (author Prof. Dr. Jelena Perović), Croatia (author Mr. Ana Keglević, LL.M.) and Macedonia (Prof. Dr. Goran Koevski).

- According to how open the factoring transaction is in relation to the information that the debtor from the primary transaction has concerning the transfer of the receivable, factoring can be open or hidden;
- Depending on whether there is one factor or several factors („factor of a factor"), there is direct and indirect factoring;
- Factoring payable after maturity of the account receivable. This is a type of factoring that lacks its financing function. The factor buys client's short-term accounts receivable on their due date. There is no advance, as is the case in true factoring agreements.

The rights and obligations of parties to the contract

The primary obligation of the client from the factoring contract is to transfer the receivable to the factor. The transfer is made through a cession contract. After the transfer of the main receivable to the factor the accompanying rights are also transferred (the right to rank of priority of collection, the right of pledge, right to interest, penalties under the contract, etc.). For the transfer of receivables to come into effect it is not necessary for the debtor to give his approval or be informed thereof.

In this respect, the National Paper for Serbia (author Prof. Dr. Jelena Perović) states that the preliminary draft of the Civil Law Code of Serbia implies that the debtor shall be informed in writing and such information shall include: data and documents based on which it is possible with certainty to identify which receivables have been transferred; data about the factor or the successive factor; instructions and data about the banking account to which the debtor is to make payment of the debt. This notification shall be considered to be given also in the case when it is communicated by telegram, telefax, E-mail or other usual means of communication which make it possible to serve as evidence of the content of the notification and to identify without doubt the identity of the sender, as well as evidence of receipt of the notification by the debtor. The debtor is not obliged to make payment for the transferred receivable to the factor, or the successive factor, if he was not informed accordingly, but his obligation to the client remains. Execution to the client before receipt of the notification is in effect and relieves the debtor of any obligation, but in such a case the client is obliged without delay to transfer the collected amounts relevant to the transferred receivables in favor of the factor (Article 1282). The debtor has the right to file complaints to the factor the same as he could file to the client until the time of being notified of the transfer. The debtor may file a complaint against the transfer of the receivable only if the debtor's receivable became due at the latest at the time of receipt of the notification about the transfer of the receivable to the factor (Article 1283). The client is responsible to the factor for the actual existence of the receivable which is the subject of the transfer at the time when the transfer was made and is responsible for the possibility to collect the transferred receivable, unless otherwise agreed in the contract. The client is responsible for the possibility to collect the receivables which have become due at the moment of transfer, and for the transfers which are not yet due he is responsible that they can be collected when they do become due (Article 1281).

The obligations of the factor differ depending on the specific type of the factoring transaction. Generally speaking, the obligations of the factor refer to the collection of the receivable, providing credits, guaranteeing the collection and delivery of other services. In terms of the rights of the factor, the preliminary draft of the Civil Law Code of Serbia includes provisions regarding the right of the factor to collect from the debtor, regarding the risk of collection of the receivable from the debtor, and regarding the successive factoring.

According to the preliminary draft, if the factoring contract refers to the transfer of receivables for collection (the purchase of the receivables of the agent to the debtor), the factor is entitled to all the sums he receives from the debtor based on the execution of the transferred receivable, and the client is not responsible to the factor if these sums are lower than the price at which the receivable was transferred to the factor. On the other hand, if according to the factoring contract the receivable was transferred to the factor solely for the purpose of collection (in order to secure the collection), and if the transfer contract does not stipulate otherwise, the factor is obliged to hand over to the client the calculation of collection and hand over to him the amount exceeding the amount of debt of the client to the factor based on the factoring contract. If the amounts collected from the debtor are lower than the receivable of the factor to the client based on the transfer of receivables, the client remains responsible to the factor for the remaining part of the debt (Article 1279).

If the factoring contract implies the transfer of receivables for collection, the factor takes upon itself the risk of collection of the transferred receivable. In case of such collection of receivables, the client shall exceptionally be responsible for the risk of collection even upon the transfer of the receivables in the following cases: 1) if the client, at the moment of contract signature with the debtor was or should have been aware that the debtor is incapable of payment; or 2) if the client failed to provide to the factor all the data and documents in his possession or if he was in possession of knowledge but failed to inform the factor accordingly, if such knowledge is relevant to determine the existence and the amount of receivables or collection thereof, not later than at the moment of transfer. If the factoring contract refers solely to the collection of receivables (in order to secure the collection), the burden of risk may also be agreed otherwise (Article 1280).

The factor may further transfer the receivable to the next factor (successive factoring) only if this is allowed by the factoring contract. The successive factor is the legal successor of the contract made between the client and the factor, or between two factors, and he undertakes all rights and obligations from the preceding factoring contract. The above described obligation of notification of the debtor applies also to the successive factoring (Article 1285).

The National Paper for Croatia states in detail the rights and obligations of the parties to a factoring contract (author Mr. Ana Keglević, LL.M.), and the analysis of this issue in the Macedonian legislation is provided in the National paper for Macedonia (author Prof. Dr. Goran Koevski).

Asim Vokshi, LL.M

SECURITIES IN RELATION TO FACTORING CONTRACTS, SUCCESSION OF CREDITS AND THE REGISTRY OF FACTORING

SECURITIES IN RELATION TO THE FACTORING CONTRACT

In relation to securities in the factoring contract, the common element of all the countries under survey is that in general all kind of legal securities can be used to guarantee the factoring contract.

In Albania the factor and supplier may foresee securities for factoring transactions in the contract of factoring. The securities include the deposit, pledge, liens, surety, or other securities, in accordance with the effective legal provisions.[1] Factoring transactions, as specific types of obligations, may be ensured by all the obligation securities laid down in Articles 530 through to 607 of the Civil Code,[2] and Law No 8537 of 18 October 1999 'On the pledge,' as amended.

In Bosnia and Herzegovina securities in relation to the factoring contract are based on the rules of obligation law. So, the general securities for obligations apply at the factoring contract as well.

According to the Croatian legislation the basic rules as regard to the transfer of security rights are:

1. All accessory rights such as mortgage, fix and floating charges, lien, guarantee, priority in payment, interests etc. shall be transferred *ex lege* (Art 81. CO) to the factor together with the receivables at the moment of assignment.
2. Non-accessory rights such as fiduciary transfer of ownership, as a rule, are not transferable and it should be extinguished with the assignment of the receivables. However, there is no clear position on the question on non-accessory security rights in Croatian literature especially in regard to the land.

Generally, all interests and security rights in land have to be recorded in the Land Register in accordance with the provisions of the Land registration Act and Property and other real rights Act. Therefore transfer of securities in relation to factoring shall always have to be observed in relation to the special legislation governing securities.

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* Original text is written in English language

[1] Article 15 of Law No 9630 of 30 October 2006 'On factoring,' as amended.

[2] Penal conditions, liens, mortgage, surety, down payment, privileges for, and objection to the debtor's juridical activities.

In Macedonia securities of the factoring contract don't have a specific regulation. The same rules that apply to securities in general, apply even in the factoring relations.

Montenegro law does not define, describe and regulate factoring. This doesn't mean that there is no use in practice of factoring. In this case, the general rules of obligations apply at securities in relation to the factoring contract.

In Serbia general rules of obligations and securities law apply to the securities in factoring contracts, depending on the type and nature of the security used. When it comes to securities law, in the Serbian legal system, chattel mortgage is regulated by the Law on Obligations (Articles 966 - 988), registered pledge on moveable assets is regulated in the Law on Pledges on Moveable Assets Listed in the Register[3] while the hypothec is regulated by the Law on Hypothec.[4] Pursuant to the general rule of the Law on Obligations on the transfer of claims by a contract (cession), auxiliary rights are transferred to the receiver together with the claim, such as the right of preferential payment, hypothec, pledge, rights from the contracts with guarantors, rights to interest, contractual penalty etc. Still, the party transferring the right may transfer the object of the pledge to the receiver solely if the pledgor consents to it, otherwise it remains in the possession of the party transferring the rights to keep, on behalf of the receiver (Art. 437 par. 1 and 2). With regards to the special rules on the factoring contract, the Draft prescribes that auxiliary rights are transferred to the factor (right of preferential payment, pledge rights, rights to interest, contractual penalty etc) together with the transfer of claim, in the manner and in the scope prescribed by the factoring contract (Art. 4 par. 5).

SUCCESSION OF CREDITS

In Albania aarticle 21 of Law 'On factoring' governs the rules for the successive transfer of money to the factor or the subject in favour of which the transfer is made. In concrete terms, this article specifies that:

'1. Where the supplier pays the factor the client account money on the basis of the contract of factoring, in accordance with this law:

a) the provisions of Articles 3[5] and 20[6] of this law, in accordance with letter 'b' of this article, shall be enforced for each and every further transfer of the money under discussion onto third parties;

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[3] "Official Gazette of the Republic of Serbia", May 30, 2003, no. 57.

[4] "Official Gazette of the Republic of Serbia", 115/2005.

[5] Article 3 provides for the contract of factoring, and is expounded earlier on.

[6] Article 20 of Law 'On factoring,' stipulates that:

'*1. Failure to execute or the irregular or delayed execution of the contract for sale of goods and/or services, without impairing the debtor's rights, under Article 19 of this law, shall not immediately entitle him to require that the factor returns the paid amount, even if the debtor is entitled to require that the supplier returns this amount.*

2. The debtor, which enjoys the right to require that the supplier returns the amount paid to the factor for the client account money, shall be entitled to require that the factor returns the amount under discussion, where the factor:

a) has not made a payment in favour of the supplier for the money under discussion; or,

b) has made a payment in favour of the supplier for the money under discussion, while being aware of the failure to execute or the irregular or delayed execution of the contract for sale of goods and/or services by the supplier.'

b) the provisions of Articles 17[7] and 20 of this law shall be enforced in respect of the subjects, which successively receive the money under discussion, the same as in the case of the factor.

2. The existing or new factor shall provide notice to the debtor on the successive transfer.'

Hence, the preceding situation concerns the case where the transfer of the client account money takes place more than once in favour of the new factors. Notwithstanding, article 22 of Law 'On factoring' expressly states that the contract of factoring may limit or prohibit sales or successive transfers of the client account money.

In Bosnia and Herzegovina succession in relation to the factoring contract is based on the rules of obligation law. So, the general rules of succession that apply to obligations, apply at the factoring contract as well.

The Croatian law has no clear statutory regulation on succession of credits nor the prohibition of succession in relation to the factoring contract. In that case the general rules for assignment of rights shall be applicable accordingly.

The same can be said for the Republic of Macedonia, where the regulations regarding factoring and factoring agreements are not clearly defined. Despite the fact that there is no specific law on factoring in the Republic of Macedonia, this doesn't mean that there is absolutely no legal framework for this type of contractual relationship-factoring. In relation to succession in the factoring contract, the general rules of obligations apply as well.

As it was mentioned above, Montenegro law does not define, describe and regulate factoring. In this case, the general rules of obligations apply at succession in relation to the factoring contract.

In Serbian legal system there is no regulation on the issue of succession of credits in the factoring contract. General rules of succession of credits can still be applied.

THE REGISTRY OF FACTORING

In Albania the transfer of the money held in the client account through the contract of factoring, any change or addition, and termination of the contract of factoring are entered in the pledge registry.[8] The pledge registry functions and is regulated by Law No 8537 of 18 October 1999 'On the pledge', as amended, as well as the subordinate legal acts enacted in furtherance of and pursuant to this law.

Application form for the registration of the transfer of the client account money through the contract of factoring contains:

a) data on the identification of the factor, supplier and debtor;
b) identification of any collateral regulated by the contract of factoring;

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[7] Article 17 states that, '*1. The debtor shall be obliged to pay the factor provided only that he is not aware of the priority that another subject must be paid, and provided that the written notice about the transfer of money:*

a) is provided to the debtor by the supplier or the factor, with the supplier's consent;

b) identifies, to the extent possible, the client account money transferred in favour of the factor to which the debtor must pay the funds;

c) refers to the client account money earned on the basis of a contract for sale of goods and/or services concluded prior to or at the time that the notice is given.

2. With the notice having been duly provided, the debtor pays the factor in accordance with the terms and conditions of the contract concluded between the supplier and the debtor.'

[8] Article 23 of Law No 9630 of 30 October 2006 'On factoring,' as amended.

c) signature of the person applying for the registration of the contract of factoring, and the transfer of the client account money.[9]

The data outlined in the above are entered in the registry upon submission of the registration application, and take priority over third parties' claims.[10] The factor, supplier or debtor may require that a note on some lawsuit brought over the contract of factoring be entered in the register. The note contains data on the identification of the writ for petition of legal rights, and a brief description of it. Likewise, waiver of the writ for petition of legal rights, or other decisions relevant to it may also be registered.[11]

Entry in the pledge registries has effects for third parties. It is presumed that third parties have knowledge about the existence of transfers entered in the registry. The data entered in the registry are not used to prove ownership, except as otherwise stated, or to prove any other right in respect of the transfer of the client account money through the contract of factoring, or as proof of the validity of a legal transaction.[12]

Because in Bosnia and Herzegovina there is no specific regulation of the factoring contract, the registry of factoring doesn't exist. The same can be said for Croatia, Macedonia, Montenegro, and Serbia.

OTHER ISSUES RELEVANT TO FACTORING

In Albania the factoring activities are subject to supervision by the Bank of Albania. So, under Article 28 of Law 'On factoring,' factoring activities, as specified by Article 2 of this law, which are carried out by the subjects provided for in Article 10, besides as prescribed by this law, are supervised and regulated by the Bank of Albania, in accordance with the provisions of the Law 'On the banks in the Republic of Albania,' and the subordinate legal acts enacted pursuant to it for that purpose.

Likewise, Law 'On factoring' specifically governs fiscal issues surrounding factoring. For the purpose of the value added tax, factoring is considered as a financial service.[13]

Article 31 of Law 'On factoring' also specifically regulates bankruptcy, reorganisation or liquidation of the factor and debtor. So, under this article, in the process of bankruptcy, reorganisation or liquidation, the provisions of the effective legislation are applicable to examination of the factor in court. This procedure is regulated by Law 'On bankruptcy' of 2002.

And, where the debtor initiates a bankruptcy, reorganisation or liquidation procedure, its obligation to pay the client account money to the factor:

a) is considered by court as an uncovered obligation;
b) is considered by court as a covered obligation, provided that it is covered by one of the securities;
c) continues to be subject to the same rights and obligations, as stated in Articles 16 and 17 of this law.

In Bosnia and Herzegovina there is no specific regulation in relation to the factoring contract, so for this reason there isn't any special system of survey of factoring transactions.

In the Croatian practice for a long time there was a dispute weather the banks were allowed to perform factoring activities on the Croatian market. This uncertainty was put to an

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[9] Article 24 of Law No 9630 of 30 October 2006 'On factoring,' as amended.

[10] Article 25 of Law No 9630 of 30 October 2006 'On factoring,' as amended.

[11] Article 26 of Law No 9630 of 30 October 2006 'On factoring,' as amended.

[12] Article 26 of Law No 9630 of 30 October 2006 'On factoring,' as amended.

[13] Article 30 of Law No 9630 of 30 October 2006 'On factoring,' as amended.

end by the new Banking Act. Now, it is explicitly allowed for the banks to perform factoring activities (Art 6.2.) subject to a previous approval from the Croatian National Bank.

Factoring in Croatia is mentioned by the following regulation: Code of obligations (OG 35/05, 41/08) within the assignment of rights, Banking Act (OG 84/02, 141/06), whereas it is specified the banks are allowed to perform activities of factoring, Instructions on the application of the Ordinance of bank capital adequacy (OG 195/03, 41/2006, 130/2006, 14/2008, 31/2008, 33/2008, 18/2009) and Law on foreign exchange (OG 96/03, 140/05, 132/06, 150/08, 92/2009, 153/2009) whereas the factoring is mentioned as one type of credit financing and the Instructions on the application of the Ordinance of the conditions and procedure of money transfer with foreign countries (OG 136/05, 176/04, 88/05, 18/06, 24/06, 132/07) whereas it is recognised that a foreign bank may perform factoring operations in the Republic of Croatia. Additionally, Croatian national program for the accession to the EU specifies factoring as one type of financial services.

Factoring is mentioned in the following laws in the Republic of Macedonia:

- Law on Banks; [14]
- Law on Prevention of Money Laundering and Other Proceeds from Crime and Financing of Terrorism; [15]
- Law on Foreign Exchange Operations; [16]
- Law on Establishing the Macedonian Bank for Development Promotion; [17]
- Company Law; [18]
- Law on Contractual Pledge; [19] and
- Law on Obligations of the Republic of Macedonia.[20]

It can be concluded that regulations regarding factoring and factoring agreements in the Republic of Macedonia are not clearly defined, which does not allow interested entities (sellers, buyers and financing institutions) to fully utilise the advantages of these, relatively new business transactions. Perhaps some tax concession could be offered for these transactions, so that they would become more attractive to the interested entities.

In Montenegro when the issue is on the practice and application of factoring it is to state that, due to the lack of the legal regulation of this contract, factoring has been offered to the market only in two out of the eleven existing and functioning commercial banks.[21] This is an activity that can be supervised by the central bank, along with other matters that can be object of supervision.

Serbia has no specific information in relation to the issues above.

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[14] See: Official Gazette of the Republic of Macedonia, no. 67/2007 и 90/2009.

[15] See: Official Gazette of the Republic of Macedonia, no. 4/2008.

[16] See: Official Gazette of the Republic of Macedonia, no. 34/2001, 49/2001, 103/2001, 51/2003 и 81/2008

[17] See: Official Gazette of the Republic of Macedonia, no. 24/98, 6/2000 и 109/2005.

[18] See: Official Gazette of the Republic of Macedonia, no. 28/2004, 84/2005, 25/2007 и 87/2008.

[19] See: Official Gazette of the Republic of Macedonia, no. 05/2003, 4/2005 и 87/2007.

[20] See: Official Gazette of the Republic of Macedonia, no. 18/2001, 78/2001, 04/2002, 59/2002, 05/2003, 84/2008 81/2009 и 161/2009.

[21] In 2009, according to the Central Bank of Montenegro, there factoring transactions involved Euros 78,000 in the period Jan.-Sept. 2009 - Bulletin of Central bank of Montenegro, October 2009, accessed on 12 Feb. 2010 <http://www.cb-mn.org/slike_i_fajlovi/fajlovi/fajlovi_publikacije/biltencbcg/2009/bilten_cbcg1009.pdf>

KOMPARATIVNE ANALIZE

Prof. Dr. *Goran Koevski**

SAVREMENI UGOVORI

FRANŠIZA

Poglavlje 1

U ovom Poglavlju se bavimo konceptom franšize u sledećim zemljama Jugoistočne Evrope: Republici Hrvatskoj, Republici Srbiji, Bosni i Hercegovini, Republici Crnoj Gori, Republici Albaniji i Republici Makedoniji.[1] Naglasak u analizama je dat na sledećim pitanjima u vezi sa ugovorom o franšizi:

1. Osnovni koncept franšize
    - Značenje franšize.
    - Obim ugovora o franšizi.
    - Predmet franšize.
    - Strane u ugovoru o franšizi.
2. Uloga davaoca franšize
3. Uloga korisnika franšize
4. Ugovor o podfranšizi

1. OSNOVNI KONCEPT FRANŠIZE

1.1. Istorija i pozadina poslovnog koncepta

Franšiza je relativno novi komercijalni koncept koji je potekao iz novog *lex mercatoria*. Ova transakcija je osnovana i razvijena u S.A.D. sredinom dvadesetog veka i u Evropu su je uvele prvenstveno američke kompanije kao što su McDonald's, Coca-Cola itd.[2]

Franšiza je još noviji koncept u zemljama regiona i postala je prepoznatljivi deo odgovarajućih privreda uglavnom nakon raspada bivših socijalističkih (komunističkih) režima i uvođenja tržišne privrede početkom devedesetih godina.

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* Originalni tekst je na engleskom jeziku.

[1] Tekst u okviru ovog Poglavlja 1 predstavlja sumiranje pogleda izveštača o zemljama koji su pripremili materijale za Forum za građansko pravo u vezi sa Savremenim ugovorima.

[2] O franšizi u srpskoj literaturi vidi, npr. , M.Draškić, *Ugovor o franšizingu ("Franchise Contract"),* Beograd, 1983; M.Draškić, *Međunarodno privredno ugovorno pravo ("International Commercial Contract Law"),* Beograd, 1990, str.358-365; M.Vasiljević, *Trgovinsko pravo ("Commercial Law"),* Beograd, 2006, str. 267-273; R.Vukadinović, *Međunarodno poslovno pravo ("International Business Law")*, Kragujevac, 2009, str.263-277; M.Parivodić, *Pravo međunarodnog franšizinga ("International Franchise Law"),* Beograd, 2003.

Na primer, koncept franšize su u Hrvatsku uneli strani davaoci franšize (prvi je bio *McDonald's*) i ona i dalje predstavlja uglavnom jedan od tipova stranog poslovnog prodora na novonastalim tržištima.[3]

1.2. Pravna priroda franšize

U zavisnosti od konkretnog slučaja i volje ugovornih strana ugovor o franšizi obično predstavlja *mixti juris* ili radije *sui generis* ugovor koji sadrži elemente bilo imenovanih (tipskih) ili neimenovanih ugovora autonomne trgovinske prakse kao što su: kupoprodajni ugovor, ugovor o licenci, ugovor o transferu tehnologije, ugovor o zakupu i kupovini, ugovor o distributerstvu, ugovor o zajmu, ugovor o zaposlenju, ugovor o komercijalnom zastupništvu, ugovor o finansijskog investiciji itd.

Slično ovome, mogu se nabrojati pravni instituti različitih pravnih grana: pravo intelektualne svojine, pravo konkurencije, pravo o preduzećima, fiskalno pravo, pravo o zaštiti potrošača i odgovornosti za proizvod, pravo osiguranja, radno pravo, pravo o stranim investicijama itd.[4]

Stoga, pored opštih principa nacionalnih prava o obligacijama i/ili građanskih zakonika, primenjivaće se i posebne odredbe i drugih srodnih imenovanih ugovora i posebnih (*lex specialis)* zakona.

1.3. Značenje franšize, obima ugovora o franšizi, predmet franšize i strane u ugovoru o franšizi

Ugovor o franšizi je (1) dvostrano obavezujući ugovor između (2) davaoca franšize (Franschisegeber u zemljama gde se govori nemački jezik ili Franchisor u zemljama gde se govori engleski jezik) i (3) jednog ili više pojedinačnih korisnika franšize (Franschisenehmer u zemljama gde se govori nemački jezik ili Franchisee u zemljama gde se govori engleski jezik), koji kao (4) a distributivni sistem za robe i usluge se (5) koristi od pravno i finansijski nezavisnih preduzeća (poslovnih preduzeća) (6) koja su udružila svoj know-how i kapital u jednoj vertikalnoj formi kooperacije.

1.4. Elementi definicije ugovora o franšizi

– Davalac franšize daje korisniku franšize (ekskluzivno) pravo da prodaje određenu (1) robu (odeću, obuću, brzu hranu, igračke itd.) ili da pruža određene usluge (2)

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[3] Narednih nekoliko godina još nekoliko drugih kompanija je ušlo na hrvatsko tržište, kao što je američka franšiza *Subway* i mađarska *Fornetti*, koja je sada najveća sa više od 400 korisnika franšize po celoj Hrvatskoj. Prema proceni Hrvatske asocijacije za franšize trenutno oko 150 franšiza deluje u Hrvatskoj od kojih oko 30 domaćih i one rade na blizu 1000 lokacija i zapošljavaju više od 16000 ljudi. Poslednji dostupni zvanični podaci za Hrvatsku su oni za godinu 2007. U Crnoj Gori i u drugim zemljama u regionu koncept franšize je zastupljen: u prodajnom i postprodajnom održavanju vozila u automobilskoj industriji (Audi, Toyota, VW, Renault, Mercedes), u pružanju usluga (DHL, Costa Cafe), u industriji odeće (Benetton, Max Mara, Paul & Shark) i u nekim ustanovama hotelskih usluga (Best Western, Premier Hotel). U Bosni i Hercegovini koncept franšize je uglavnom predstavljen u okviru automobilske industrije (VW, Seat, Škoda, Porsche). U Republici Makedoniji postojanje franšize je više izuzetak nego pravilo. U ovom momentu sledeći brendovi su prisutni u zemlji, kao predmet franšizne mreže Mango, McDonalds, Diners, Fornetti i jedini makedonski industrijski davalac franšize Alkaloid, koji je uspeo da u franšizu svoj brend Caffetin u Rusiji.

[4] UNIDROIT, Annex 3 au Guide sur les Accords Internationaux de Franchise Principale, www.unidroit.org.

(usluge konsaltinga u vezi računarskog softvera, hotelske usluge, usluge rent-a-car-a itd.);

– Davalac franšize daje korisniku franšize licencu da koristi komercijalnu formulu (poslovne i tehničke metode i model upravljanja preduzećem), kao i standardizovani, uniformni i kompletni sistem za prodaju robe i/ili usluga;
– Sistem za marketing robe i usluga je standardizovan preko odgovarajućeg operativnog programa za razdvajanje odgovornosti izmešu partnera;
– Korisnik franšize u potpunosti usvaja i neprekidno replicira i koristi komercijalnu politiku i prepoznatljivi imidž koji poseduje davalac franšize;
– Korisniku franšize se nudi kontinuirana komercijalna i tehnička podrška u obavljanju aktivnosti koje su predmet franšize; i
– Korisnik franšize stvara sigurni i kontinuirani profit a zauzvrat obezbeđuje sopstvene finansijske i druge investicije i plaća davaocu franšize utvrđenu novčanu nadoknadu.

1.5. Elementi ugovora o franšizi

– Obe ugovorne strane su jednake i u potpunosti nezavisne i obe deluju u svoje sopstveno ime i za svoj sopstveni račun;
– Transfer odn. pružanje licence za pravo korišćenja svetski poznatog i uniformnog poslovnog metoda i imidža;
– Saradnja između ugovornih strana na kontinuiranoj i dugoročnoj osnovi;
– Kontinuirana podrška koju obezbeđuje davalac franšize;
– Osim ako je drugačije predviđeno zakonom u odgovarajućim zemljama, ugovor o franšizi se u praksi obično zaključuje u pismenoj formi i može biti formalan ako ugovorne strane propišu formu kao preduslov za njegovu validnost. Shodno tehnici zaključivanja, ugovor o franšizi se po pravilu zaključuje kao ugovor po pristupanju; i
– *Intuitu personae* karakter ugovora odn. on povlači za sobom izuzetno blizak profesionalni odnos poverenja između davaoca franšize i korisnika franšize tako da će stvaranje mreže podfranšize biti predmet potpune kontrole i odobrenja od strane davaoca franšize.

1.6. Sadašnji pravni okvir u vezi sa ugovorom o franšizi u zemljama Jugoistočne Evrope

Ugovor o franšizi, sa izuzetkom Republike Albanije, nije regulisan kao imenovani, tipski ugovor u odgovarajućim nacionalnim zakonodavstvima analiziranih zemalja.

U okviru albanskog građanskog zakonodavstva odn. u Građanskom zakoniku,[5] ugovor o franšizi je veoma precizno regulisan i tako je postao jedan od tipskih ugovora koje je propisao ovaj Zakonik.[6]

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[5] Zakon br. 7850 od 29. jula 1994. 'Građanski zakonik Republike Albanije,' sa izmenama.

[6] Vidi: članovi od1056 do 1064 Građanskog zakonika. Odnosi franšize su veoma složeni odnosi i za pravilnu konstrukciju i tumačenje različitih elemenata ugovora o franšizi moraju se takođe uzeti u obzir drugi delovi zakonodavstva uključujući ugovor o intelektualnoj svojini i ugovor o zastupništvu. Međutim, oni još nisu temeljno i sveobuhvatno pravno regulisani.

Po članu 1056 albanskog Građanskog zakonika ugovor o franšizi sadrži skup kontinuiranih obaveza kojima su nezavisna preduzeća međusobno obavezan da da zajednički promovišu i razvijaju trgovinu i pružanje usluga, shodno zasebnim obavezama.

U zakonodavstvima drugih zemalja kratko pominjanje ugovora o franšizi postoji u nekim specifičnim zakonodavstvima, prvenstveno u okviru zakona o konkurenciji i protiv stvaranja trustova.[7]

U crnogorskom zakonodavstvu franšiza je komercijalna aktivnost a ugovor o franšizi kao pravni instrument za praktičnu primenu franšize je pomenut u okviru: Zakona o žigovima,[8] Zakona o pravnoj zaštiti dizajna,[9] Zakona o oznakama geografskog porijekla[10] i Zakona o stranim ulaganjima.[11]

I pored činjenice da nema izričitog regulisanja ipak je moguće identifikovati osnovne elemente ugovora o franšizi usled već razvijene poslovne prakse i propisa prava o konkurenciji i, naravno, postojećih međunarodnopravnih izvora, prvenstveno neobavezujućeg prava, za regulisanje ugovora o franšizi.[12]

U sadašnjoj poslovnoj praksi zemalja u regionu zaključivanje ugovora o franšizi je prvenstveno rezultat opšteg principa slobode zaključivanja ugovora. Ovaj pristup povlači za sobom veću preciznost i znanje kada se propisuju određena prava i dužnosti ugovornih strana.

Međutim, još uvek ne postoji razvijena sudska praksa u vezi sa ugovorom o franšizi u zemljama regiona.

1.7. Novi zakonodavni pristupi u vezi sa ugovorima o franšizi

Zanimljivo je navesti da u nekim zemljama regiona predstoje neke zakonodavne aktivnosti koje vode ka normativnom, zakonskom regulisanju ugovora o franšizi. Ovo je slučaj sa Republikom Srbijom i Bosnom i Hercegovinom.

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[7] Vidi: *Hrvatski zakon o konkurenciji* (OG 122/03) i *Propisi o skupnom izuzeću dodeljenom izvesnim kategorijama vertikalnih ugovora* (OG 51/04). U Bosni i Hercegovini vidi: Odluka o grupnom izuzeću ugovora između komercijalnih entiteta koji deluju na različitim nivoima proizvodnje ili distribucije (vertikalni ugovor) – "*Službeni glasnik Bosne i Hercegovine" broj 18/06;* Odluka o grupnom izuzeću ugovora o distribuciji i servisiranju motornih vozila– " *Službeni glasnik Bosne i Hercegovine "* broj 16/06). U Republici Makedoniji ugovori o franšizi su regulisani u Zakonu o zaštiti od konkurencije (Vidi: Službeni list Republike Makedonije, br. 4/2005, 70/2006 i 22/2007). Član 5, paragraf 1, alineja 14 pruža definiciju ugovora o franšizi. Na osnovu člana 8 paragraf 2 Zakona o zaštiti od konkurencije Vlada Republike Makedonije je usvojila Propis o skupnom izuzeću vertikalnih ugovora o ekskluzivnim pravima distribucije, selektivnim pravima distribucije, ekskluzivnim pravima kupovine i franšize (Vidi: Službeni list Republike Makedonije, br. 91/2005).

[8] Vidi: Službeni list SM, br. 61/04, 71/05 – članovi 44, 53.

[9] Vidi: Službeni list SM, br. 61/04 – član 47.

[10] Vidi: Službeni list SM, br. 48/08 – član 46.

[11] Vidi: Službeni list SM, br. 52/00 – član 12.

[12] Na nivou EU, Komisija je u okviru propisa o konkurenciji, usvojila Uredbu 4087/88 koja se odnosi na skup izuzetaka na kategorije ugovora o franšizi od 30. novembra 1988. Značajnu ulogu u regulisanju franšize takođe je odigrao Evropski etički kodeks za franšizu, koji je usvojila Evropska federacija za franšizu na dan 23.09.1972, uslovi poslovnih transakcija od Međunarodne asocijacije za franšizu (IFA) i ICC model Ugovora o franšizi. U okviru UNIDROIT, Pravne smernice za Međunarodne Master ugovore o franšizi donesene 1988. godine i revidirane 2007. godine, kao i Model Zakona o otkrivanju u franšizi u 2002 godini. Pravila franšize se takođe sadrže u *Draft Common Frame of Reference (Nacrt Opšteg okvira referenci)*.

Tokom pripreme nacrta Građanskog zakonika Srbije postavilo se pitanje da li bi ugovor o franšizi trebalo regulisati zakonom. Glavni problem je da li je bolje samo se pozvati na analognu primenu elemenata već poznatih i imenovanih ugovora povezanih sa prirodom franšize ili priznati *sui generis* kombinaciju ugovora o franšizi. Na tim osnovama su uređivači nacrta Građanskog zakonika otvorili raspravu o ovom još nerešenom pitanju i predstavili mogući nacrt odredbi ugovora o franšizi.[13]

Slično tome, Nacrt Zakona o obligacijama Bosne i Hercegovine iz 2003. godine sadrži posebne odredbe o franšizi (članovi 934 do 941) koje predviđaju osnovne odlike prirode ovog ugovora, opšta prava i dužnosti davaoca franšize kao i opšta prava i obaveze korisnika franšize, obaveznu pismenu formu ugovora, odredbe predviđene u vezi sa raskidom ugovora itd.

1.8. Dobrovoljno (neobavezno) regulisanje ugovora o franšizi

Zanimljiv pristup u regulisanju ugovora o franšizi u regionu ima Hrvatska preko usvajanja *Evropskog etičkog kodeksa za franšizu* od strane Hrvatske asocijacije za franšizu.[14]

Hrvatski etički kodeks sadrži odredbe o definicijama franšize i know-how, vodećim principima, regrutovanju, reklami i otkrivanju, izboru pojedinačnih korisnika franšize, ugovoru o franšizi i odnosu Kodeksa sa master ugovorima o franšizi. Naročito su zanimljive odredbe od predugovornom otkrivanju koje se u velikoj meri oslanjaju na UNIDROIT Model zakona o otkrivanju iz 2002. Član 5 Kodeksa reguliše ugovor o franšizi gde su takođe dati neophodni minimalni uslovi sadržine za ugovore o franšizi.

Mada se ovaj Kodeks primenjuje samo na članove Asocijacije i propust za zadovoljavanje uslova ne mora da rezultuje sa pravnim nevaženjem ugovora (već samo okončanjem članstva u Asocijaciji), ovaj Kodeks je vredna i praktična smernica u Hrvatskoj.

2. ULOGA DAVAOCA FRANŠIZE

Prava i obaveze ugovornih strana zavise od pojedinačnog slučaja ugovora o franšizi.

Generalno, ugovorne obaveze i prava davaoca franšize mogu se razvrstati na sledećoj osnovi:

a) Predugovorne obaveze davaoca franšize
b) Obaveze i prava davaoca franšize tokom roka ugovora
c) Obaveze davaoca franšize nakon roka ugovora

a)

Predugovorne obaveze davaoca franšize

U zemljama regiona nema eksplicitnog regulisanja u vezi obaveze predugovornog obaveštavanja davaoca franšize na osnovu UNIDROIT modela zakona otkrivanja franšize.

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[13] *Rad na izradi Građanskog zakonika Republike Srbije, Izveštaj Komisije sa otvorenim pitanjima ("Development of the Civil Code of the Republic of Serbia, Report of the Commission with Open Issues"),* Beograd, 2007, str 292 i dalje.

[14] Hrvatska asocijacija za franšizu (www.fip.com.hr, u daljem tekstu: Asocijacija) je osnovana 2002. godine kao neprofitna, nevladina asocijacija sa glavnim ciljevima da promoviše i reklamira poslove franšize u Republici Hrvatskoj i regionu. Još dve institucije mogu da pruže pomoć i stručne savete davaocima franšize: Centar za franšizu *Pro maturo* u Zagrebu (www.promaturo.hr) i *Franchise centre* u Osijeku. (www.fransiza.hr). Hrvatska asocijacija za franšizu je član *Evropske Federacije za franšizu* (www.eff-franchise.com).

Međutim, očekuje se da davalac franšize obezbedi korisniku franšize dovoljno informacija da bi ga ohrabrio da zaključi ugovor. Ovim mislimo da bi korisniku franšize trebalo pružiti dovoljno tehničkih informacija od suštinskog značaja za upoznavanje sa osnovnim odlikama odgovarajuće franšize, barem sa potencijalnim rezultatima koje bi mogao da postigne iz uspešno primenjene franšize.

b)

Ugovorne obaveze davaoca franšize tokom roka ugovora

- Davalac franšize će otkriti što je moguće više informacija u odgovarajućoj dokumentaciji, preko koje se poslovni koncept franšize materijalizuje – takozvani *corpus mechanicum* (operativni priručnici, program obuke, materijali za marketing franšize, brošure, prijave, javna saopštenja, operativni priručnici za korisnika franšize, prijava za registraciju korisnika franšize itd.);
- Davalac franšize će preneti na korisnika franšize poslovnu formulu franšize kao jedan kompletni i uniformni sistem;
- Davalac franšize će ponuditi korisniku franšize kontinuiranu podršku:
  - Podršku u instalaciji i održavanju formule;
  - Podršku u transferu i primeni know-how;
  - Obaveza da redovno isporučuje robu ako je davalac franšize proizvođač robe ili da vrši predselekciju robe koja će biti distribuisana;
- Davalac franšize ima supsidijarnu odgovornost u slučaju potraživanja treće strane prema korisniku franšize u slučaju neusaglašenosti karakteristika robe ili usluga prodatih trećim stranama od strane korisnika franšize, shodno ugovoru o franšizi. Kod potraživanja treće strane prema korisniku franšize u vezi sa proizvodima proizvedenim od strane davaoca franšize, davalac franšize ima solidarnu odgovornost zajedno sa korisnikom franšize; itd.

Ugovorna prava davaoca franšize tokom roka ugovora

- Pravo da kontroliše i nadzire rad sistema;
- Pravo na zaštitu paketa prava intelektualne svojine;
- Pravo na nadoknadu za obezbeđenu poslovnu formulu i učešće kao integralnog dela pojedinačne, uniformne distributivne franšizne mreže.

c)

Obaveze i prava davaoca franšize nakon roka ugovora

- U zavisnosti od posebnih odredbi ugovora, davalac franšize će otkupiti svu robu koja je ostala na položaju korisnika franšize nakon okončanja ugovora (klauzula o otkupu) po ceni koja je prethodno utvrđena u ugovoru ili prema proceni nezavisnog veštaka ili će dozvoliti korisniku franšize da nastavi da prodaju robu ali bez prava da se poziva na robni znak ili logo davaoca franšize u svojim poslovnim prostorijama;
- Pravo da ugovara klauzulu zabrane konkurencije za korisnika franšize za unapred određeni period vremena nakon okončanja ugovora o franšizi;
- Davalac franšize mora da obezbedi odgovarajuću nadoknadu korisniku franšize ako je ugovorena klauzula zabrane konkurencije nakon roka ugovora; itd.

3. ULOGA KORISNIKA FRANŠIZE

Slično kao u slučaju davaoca franšize, ugovorne obaveze i prava korisnika franšize se mogu razvrstati na sledećoj osnovi:

a) Predugovorne obaveze korisnika franšize
b) Obaveze i prava korisnika franšize tokom roka ugovora
c) Obaveze korisnika franšize nakon roka ugovora

a)

Predugovorne obaveze korisnika franšize

Posebnu pažnju bi trebalo obratiti na obavezu korisnika franšize da čuva trgovinske tajne pribavljene tokom predugovornih pregovora.

b)

Ugovorne obaveze korisnika franšize tokom roka ugovora

– Obaveza promovisanja poslovnog metoda davaoca franšize;
– Plaćanje odgovarajuće nadoknade davaocu franšize, i za prvobitno uključenje u mrežu (nadoknada za ulazak) kao i nadoknade u vezi sa korišćenjem prava intelektualne svojine (autorskih prava);
– Podlicenciranje poslovne formule biće u potpunosti zabranjeno ili će biti dozvoljeno samo uz prethodnu dozvolu davaoca franšize;
– Obaveza podnošenja redovnih izveštaja davaocu franšize;
– Obaveza zaštite trgovinskih tajni;
– Obaveza obaveštavanja davaoca franšize o potraživanjima i kršenjima poslovne franšizne formule od strane trećih strana na lokalnom tržištu gde korisnik franšize deluje naročito onih potraživanja koja se odnose na prava intelektualne svojine i know-how;
– Obaveza učešća u troškovima reklame;
– Obaveza kontinuiranog otkrivanja činjenice da je nezavisni entitet;
– Obaveza da ne bude konkurencija davaocu franšize tokom roka ugovora;
– Obaveza za članstvo u lokalnoj asocijaciji franšize, ako takva postoji; itd.

Ugovorna prava obaveze korisnika franšize tokom roka ugovora

– Pravo na neometanu upotrebu prenesenog paketa prva koji se sadrži u poslovnoj formuli franšize;
– Pravo na nemešanje od strane davaoca franšize u vezi načina na koji koristi preneseni paket prava koji se sadrži u franšizi osim u vezi prava davaoca franšize da kontroliše i nadzire operacije sistema i franšizne mreže;

c)

Obaveze i prava korisnika franšize nakon roka ugovora

– Obaveza korisnika franšize da vrati celokupno vlasništvo imovinu i svu imovinu (dokumentaciju u vezi sa pravima koja se sadrže u paketu franšize) davaocu franšize;

- Obaveza korisnika franšize da prestane da koristi i ukloni iz svojih poslovnih prostorija trgovinske oznake, žig, pečat ili logo davaoca franšize i da prestane da stvara utisak da je još uvek deo franšiznog lanca davaoca franšize;
- Obaveza korisnika franšize da čuva kao poslovnu tajnu sve informacije i know-how, koje je pribavio na osnovu ugovora o franšizi u periodu vremena u kojem su prava u ugovoru u franšizi zaštićena zakonom;
- Obaveza da ne bude konkurencija davaocu franšize u jednom periodu vremena nakon okončanja ugovora, pri čemu klauzula zabrane konkurencije mora biti ograničena u vremenu (tj. maksimalno jednu godinu nakon raskida ugovora);
- Pravo korisnika franšize da zahteva odgovarajuću nadoknadu za trajanje klauzule zabrane konkurencije nakon redovnog okončanja ugovora; itd.

4. UGOVOR O PODFRANŠIZI

Sa izuzetkom Nacrta Građanskog zakonika Srbije, u drugim zemljama regiona nema posebnih propisa za troslojne ugovore o franšizi.

Nacrt Građanskog zakonika Srbije propisuje rešenje koje dozvoljava da ugovor o franšizi ugovori pravo korisnika franšize da prenese ekskluzivna prava ili deo tih prava koja su prenesena na njega ugovorom o franšizi na treću stranu uz pristanak davaoca franšize.[15]

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– Za zakonodavstvo u oblasti prava intelektualne svojine vidi web stranu Državne kancelarije za intelektualnu svojinu Republike Hrvatske www. dziv.hr/en/
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FRANŠIZING

TRAJANJE UGOVORA I USLOVI ZA PRODUŽENJE

Nijedan od nacionalnih zakona u izveštajima ne sadrži eksplicitne odredbe o pitanjima trajanja i uslovima produženja franšiznih ugovora. Prema tome, strane se dogovaraju u okviru autonomije ugovornih strana o trajanju svog ugovora i u odsustvu potonjeg primenjivaće se opšti principi zakona. Uopšte govoreći, ne postoje granice što se tiče trajanja franšiznog ugovora (osim onih koji predstavljaju javnu politiku). Franšizni ugovor, koji je zaključen na ograničeni vremenski period, biće okončan po isteku tog vremenskog perioda. Prećutni nastavak izvršenja ugovora smatraće se kao produženje ugovora na neodređeni vremenski period. Franšizni ugovor na neodređeni vremenski period može biti okončan davanjem obaveštenja o okončanju iz valjanih razloga. Okončanje se dešava posle izvesnog vremenskog perioda u zavisnosti od dogovora između strana, obično posle odgovarajućeg perioda obaveštenja o okončanju i odmah stupa na snagu. Razlozi za okončanje mogu biti dogovoreni između ugovornih strana i to su obično razlozi zbog kojih se opravdano ne može očekivati da jedna strana nastavi da izvršava ugovor. Ovo rešenje je u potpunosti u skladu sa hrvatskim zakonom. Albanski i srpski zakon izričito određuje da ukoliko je dogovoreni rok trajanja duži od deset godina, svaka strana ima pravo da odustane od ugovora davanjem obaveštenja o tome godinu dana unapred (albanski zakon) ili šest meseci unapred (srpski zakon).

Opšti principi zakona su primenljivi na odgovarajući način i na produženje. U skladu sa hrvatskim zakonom ugovorne strane mogu izričito da se dogovore o produženju franšiznog ugovora zaključenog na ograničeni vremenski period ili mogu prećutno produžiti ugovor na neodređeni vremenski period. Isto rešenje postoji i u drugim zemljama. Na primer, srpski zakon sadrži podrobnije rešenje o ovom pitanju. Davalac franšize može odbiti da zaključi franšizni ugovor na novi vremenski period uz obećanje da neće zaključivati slične franšizne ugovore s trećim licima, a čije bi se dejstvo proširilo na teritoriju koja je bila predmet isteklog franšiznog dokumenta, na period od tri godine po isteku franšiznog ugovora. Ukoliko davalac franšize odluči da prenese prava koja su bila predmet isteklog ugovora trećem licu pre isteka ovog perioda od tri godine, on je obavezan da predloži primaocu franšize zaključivanje novog ugovora ili da mu nadoknadi prouzrokovane gubitke. Uslovi za zaključivanje novog ugovora ne mogu biti nepovoljniji za primaoca franšize od uslova u isteklom ugovoru.

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* Originalni tekst je na engleskom jeziku
Beleška: Ovaj deo elaborata zasnovan je na nacionalnim izveštajima.

Iako pitanja uslova i produženja većinom potpadaju u oblast autonomije ugovornih strana, franšizni ugovor se često zaključuje za duži vremenski period tokom koga bi primalac franšize imao dovoljno vremena da povrati svoju investiciju i ostvari dobit.

FINANSIJSKA PITANJA

Jedna od glavnih svrha franšiznog ugovora je da se ostvari dobit za obe strane i on se, prema tome, dogovora radi naknade koja se zauzvrat dobija.. Hrvatski zakon određuje da davalac franšize obezbeđuje primaocu franšize prava "za direktnu ili indirektnu naknadu koja se zauzvrat dobija". U skladu sa srpskim zakonom, primalac franšize biće u obavezi da plati davaocu franšize naknadu za dodeljena prava. Iznos će dogovoriti ugovorne strane najčešće u skladu sa procentom dobiti ili obrta. Drugi nacionalni zakoni ne pominju podatke o ovom pitanju, ali najčešće predviđaju primenu autonomije strana i opšte principa zakona.

U praksi, primalac franšize platiće dve vrste naknade. Početna naknada mora biti određena u franšiznom ugovoru i sačinjava početno plaćanje za korišćenje poslovne metode. To je pojedinačno plaćanje u vreme oblikovanja ugovora. Drugo, primalac franšize biće u obavezi da plaća tantijeme ili neprekinutu naknadu od primaoca franšize. Ova naknada je plativa tokom vršenja ugovora radi kontinuiranog korišćenja franšize, licenciranih prava i tekuće pomoći. U praksi se ona obično izračunava u procentu obrta i periodično – kvartalno, polugodišnje, itd., u zavisnosti od dogovora između strana.

Pitanje određivanja cena spada isključivo u oblast autonomije strana. Strane su slobodne da odrede vrednost kompenzacije i način plaćanja. U hrvatskom i srpskom zakonu, kada se naknada određuje, često se pravi analogija sa kupoprodajnim ugovorima ili u nekim slučajevima sa lizing ugovorima. Pitanja oporezivanja su regulisana poreskim zakonodavstvom.

REKLAMIRANJE I UPRAVLJANJE REKLAMIRANJEM

Nijedan od nacionalnih zakona ne sadrži određene odredbe o pitanjima reklamiranja. Međutim, praksa i literatura pokazuju da franšizni ugovor uvek sadrži klauzulu o upravljanju reklamiranja i promotivnih aktivnosti, najčešće od strane davaoca franšize. Ukoliko ne postoji takav direktni ugovorni dogovor strana, franšizni ugovor će barem sadržati obavezu primaoca franšize da uloži svoje najbolje napore da promoviše i sačuva reputaciju mreže primaoca franšize. U očima potrošača ne treba da bude razlike između poslovnih prostorija davaoca franšize i primaoca franšize. Uglavnom, upravljanje reklamnih aktivnosti biće u rukama davaoca franšize. On će imati pravo da odobri korišćenje poslovnog i reklamnog materijala, reklamnih smernica i odgovarajućih prevoda. U praksi davalac franšize najčešće će pokrenuti kampanju na najvišem nivou a potom i drugi članovi – primalac franšize mora slediti istu šemu reklamiranja na nižem nacionalnom ili regionalnom nivou. Troškove reklamiranja pokrivaće davalac franšize, iako se ti troškovi prvobitno naplaćuju kroz periodična plaćanja naknade za franšizu (osim ukoliko se strane nisu drugačije dogovorile).

NABAVKA OPREME, PROIZVODA I USLUGA

Nabavka opreme, proizvoda i usluga može biti izvršena direktno ili indirektno od davaoca franšize ili od isporučioca koga odredi davalac franšize . Za franšiznu mrežu, da bi ispravno funkcionisala, održala integritet i kvalitet i bila "jedina" u očima potrošača, važno je za primaoce franšize da imaju istu vrstu i kvalitet proizvoda i usluga. Kvalitet standarda se uglavnom održava putem nabavke ključnih proizvoda i usluga od istih isporučilaca, koje je prethodno odobrio davalac franšize. Time što je isporučilac ili određuje isporučioca, davalac franšize drži monopolsku poziciju na tržištu i nastoji da definiše uslove za svoju sopstvenu dobrobit. Dodatno pitanje je da li je davaocu franšize dozvoljeno da kupuje proizvode od isporučioca koga nije odredio davalac franšize. Takva situacija u Hrvatskoj regulisana je zakonodavstvom o monopolskom položaju na tržištu i konkurenciji. Hrvatsko rešenje zabranjuje apsolutno vezivanje franšiznih ugovora o isporuci opreme, proizvoda i usluga i tako omogućuje primaocu franšize da kupuje proizvode od drugog isporučioca. Blok izuzeće primenjivaće se na vertikalni franšizni ugovor pod uslovom da tržišni udeo koji ima isporučilac ne prelazi trideset odsto relevantnog tržišta na kome on prodaje proizvode i ne prelazi ukupni godišnji obrt koji određuje zakon (pedeset miliona). Drugi nacionalni izveštaji ne pružaju pojedinosti o ovom pitanju, ali franšizing se pominje u njihovom zakonodavstvu o konkurenciji i antitrustu. Prema tome, moglo bi se očekivati da oni imaju slične odredbe o ovom pitanju.

Pitanja o odgovornosti proizvoda uređuju opšte odredbe zakona. Posebno u Srbiji, prema Nacrtu zakona, davalac franšize biće odgovoran za neusklađenost isporučenih dobara i usluga zajedno sa isporučiocem. Njihova odgovornost je zajednička naspram potraživanja treće strane i što se tiče proizvoda koje isporučuje primalac franšize.

INTELEKTUALNA SVOJINA

Glavna komponenta franšiznig ugovora je prenošenje veština (know-how) i prava intelektualne svojine u pojedinim zaštitnim znacima i natpisima, trgovačkim imenima, autorskim pravima i srodnim pravima, patentima, dizajnu i geografskim indikacijama, ali i u spoljašnjoj ambalaži, dizajnu poslovnih prostorija, unutrašnjem uređenju u skladu sa uslovima dogovorenim u ugovoru. Ova prava su osnovni elementi franšizing sistema i shodno tome moraju biti adekvatno preneseni i zaštićeni. Pravna osnova licenciranja ili "prenosa prava za korišćenje robe i usluga" od davaoca franšize do primaoca franšize je ugovor o licenciranju. Licenca se uglavnom ne dobija kao rezultat prenosa prava intelektualne svojine već je pre rezultat dodeljivanja dozvole za korišćenje prava. U većini zakonodavstava koji se analiziraju, ugovor o licenciranju regulisan je ili opštim zakonom o ugovorima ili je pomenut u posebnom zakonodavstvu (*lex specialis*). Na primer, u skladu sa hrvatskim i crnogorskim nacrtima zakona, ugovor o licenciranju mora biti sačinjen u pismenom obliku i mora biti registrovan na zahtev jedne od ugovornih strana. Isto se može tvrditi za ostala prava intelektualne svojine, koja zahtevaju registraciju kao preduslov za njihovu zaštitu u pojedinim zaštitnim znacima, patentima i dizajnu.

Autorsko pravo i ostala srodna prava nisu predmet ugovora o licenci zbog toga što su ona regulisana u većini zemalja iz ovog elaborata posebnim određenim zakonodavnim aktima. Ona uključuju autorov moral i ekonomska prava ili autorovu kreativnu aktivnost izraženu u objektivnom obliku. U Hrvatskoj autor prenosi samo pravo ekskluzivnog ili neekskluzivnog korišćenja autorskog prava, uglavnom radi nagrađivanja zaključivanjem ugovora o autorskom pravu. Autorsko pravo i ostala srodna prava ne moraju biti registrovana da bi se pribavila pravna zaštita.

Što se tiče obima licenciranih prava, davalac franšize mora licencirati pravo radi korišćenja prava intelektualne svojine na primaoca franšize u takvom obimu koji omogućuje primaocu franšize da izvršava posao primaoca franšize i čuva identitet franšizne mreže. Prenesena prava moraju biti neprekidna i slobodna od potraživanja i aspiracija trećih strana . U tom pogledu srpski nacrt zakona određuje da je davalac franšize odgovoran za postojanje i sadržaj prava prenesenih na primaoca franšize, kao i za informacije poverene primaocu franšize koje su neophodne za realizaciju programa definisanih u prenesenim pravima. U slučaju povrede ove obaveze, primalac franšize ima pravo da okonča ugovor ili da smanji naknadu koju duguje davaocu franšize u iznosu koji odredi nezavisni ekspert. Slično rešenje može se naći u hrvatskom zakonu.

VEŠTINE (KNOW-HOW) I TRGOVAČKE TAJNE

Davalac franšize je pod obavezom da prenese primaocu franšize veštine (know-how), koje su neophodne za sprovođenje franšiznih poslovnih aktivnosti. Veštine (know-how) se uglavnom smatraju da su telo nepatentiranih praktičnih informacija koje su rezultat iskustva i ispitane od strane davaoca franšize, a koje su tajne, bitne i identifikovane. Svi ovi elementi mogu se naći u izričitim pravnim definicijama veština (know-how) u hrvatskom i albanskom zakonu, ali se takođe nalaze i u opštim principima zakona i literature Bosne, Srbije, Makedonije i Crne Gore. Veštine (know-how) takođe uključuju znanje o tehničkim aspektima proizvodnje, tajne i sredstva, ali i elemente poslovne metode, finansijskog menadžmenta, marketinga i odnosa sa klijentima. Najčešće se prenosi u formi „radnog priručnika" koji predstavlja sastavni deo franšiznog ugovora. Pored toga, u poslovnoj praksi veštine (know-how) takođe predstavljaju jedan širi koncept i odnose se na pružanje obrazovanja zaposlenom osoblju od strane primaoca franšize i neprekidnu pomoć, podučavanje i obrazovanje uz posao, koji se najčešće vrše usmenim putem.

S druge strane, primalac franšize je pod obavezom da pružene informacije drži u tajnosti, ne samo tokom izvršenja ugovora već i u odnosu na informacije saopštene tokom pregovora i posle okončanja ugovora. U franšiznom ugovoru ova obaveza je često izložena u klauzuli o poverljivosti. Sva nacionalna zakonodavstva priznaju obavezu da čuvaju trgovačku tajnu (izveštaji Hrvatske, Bosne, Albanije, Srbije, Makedonije i Crne Gore). Ukoliko obaveza čuvanja poslovne tajne nije izričito dogovorena u ugovoru, ona može uvek biti izvedena iz opštih pravila zakona i bona fide principa i fer poslovanja. U srpskom nacrtu zakona ova obaveza je eksplicitno regulisana. Primalac franšize je obavezan da ne obelodanjuje poverljive informacije ili poslovne tajne davaoca franšize, koje su mu poverene tokom trajanja ugovora, trećim stranama. Ova obaveza ostaje trajna i posle okončanja franšiznog ugovora.

PRAVNA SREDSTVA ZA NEIZVRŠENJE

Nijedan od nacionalnih zakona iz ovog elaborata ne sadrži određene odredbe o pravnim sredstvima za neizvršenje franšiznog ugovora. One treba, shodno tome, da budu procenjene u skladu sa opštim pravilima za neizvršenje ugovora koja većinom proističu iz opštih principa zakona ugrađenih u nacionalne Zakonike o obaveznim odnosima. Iz izveštaja se može zaključiti, prema zakonima Hrvatske, Srbije i Bosne, da se neizvršenje ugovornih obaveza smatra kršenjem ugovora, osim ukoliko se strane nisu drugačije dogovorile. U takvom slučaju, druga strana može da okonča ugovor jednostavnom izjavom dajući prethodno strani koja je načinila prekršaj dodatni vremenski period za ispunjenje obaveze. Ukoliko obaveza nije ispunjena niti u ovom dodatnom vremenskom periodu, druga strana imaće pravo da okonča ugovor davanjem odgovarajućeg obaveštenja o okončanju. Dodatni vremenski period mora biti određen ukoliko je očigledno iz svih okolnosti da strana koja krši obavezu ne može ispuniti svoju obavezu u dodatnom vremenskom periodu. Učešće suda u okončanju ugovora nije potrebno. Prema zakonu Albanije, za kršenje ugovorne obaveze zbog greške primalac franšize ima pravo da umanji plaćanje. Umanjeni iznos odrediće nepristrasni ekspert. Takođe, ne postoje izričite odredbe na formularu obaveštenja o okončanju (ono može biti i usmeno), ali ono mora biti dato na takav način da je okončanje izričito i na način koji omogućuje da suprotna strana bude sigurna o stvarnoj nameri da se ugovor okonča. Slična rešenja očekuju se i u drugim zemljama iz izveštaja.

Okončanje ugovora pristankom strana je takođe moguće. Iako je u Srbiji ovo moguće samo u fiksnim ugovorima gde je ispunjenje obaveze u dospelo vreme važan elemenat ugovora.

Najzad, posle okončanja, oštećena strana imaće uvek pravo na obeštećenje u skladu sa opštim pravilima iz Zakona o obaveznim odnosima. Obeštećenje je prihvaćeno u svim nacionalnim zakonima koji se revidiraju.

KRAJ ODNOSA I NJEGOVE POSLEDICE

U svim zakonodavstvima iz elaborata okončanje franšiznog ugovora regulisano je opštim principima zakona. Osim okončanja ugovornog odnosa davanjem obaveštenja o okončanju, kao što je to opisano u prethodnom odeljku, franšizni ugovor zaključen za određeni vremenski period biva okončan po isteku dogovorenog vremenskog perioda. Franšizni ugovor zaključen za neodređeni vremenski period biva okončan po obaveštenju o otkazivanju ugovora od jedne od strana, osim ukoliko to nije drugačije dogovoreno. Neki nacionalni zakoni propisuju da ukoliko je franšizni ugovor zaključen za period duži od deset godina, obaveštenje o otkazivanju mora biti dato šest meseci (Srbija) ili jednu godinu (Albanija) pre nego što okončanje stupi na snagu. Franšizni ugovor takođe može biti okončan zbog izmena ugovornih okolnosti, isteka prava, nesolventnosti, bankrotstva ili prinudnog likvidacionog postupka od jedne od strana. Srpski nacrt zakona izričito predviđa okončanje franšiznog ugovora iz tih razloga, ali drugi nacionalni zakoni sadrže slične odredbe u *lex specialis*.

Što se tiče pravnih posledica, glavna pravna posledica okončanja ugovornog odnosa je da obe strane prestaju da postoje i oslobođene su svakih daljih ugovornih obaveza po franšiznom ugovoru, osim odgovornosti za obeštećenje. Osim toga, obe strane su u obavezi da vrate ono što su zaradile na osnovu franšiznog ugovora. Konačno, sva pojedinačna ekskluzivna

prava intelektualne svojine moraju biti okončana i njihova licenca vraćena njihovom vlasniku. Odgovarajuće izmene u Registru prava intelektualne svojine moraju biti realizovana u skladu sa *lex specialis.* Druge posledice okončanja mogu uključiti obavezu primaoca franšize da čuva poslovnu tajnu i poverljivost podataka, da se uzdrži od vođenja konkurentskog posla i da prestane da koristi zaštitne znake i znake, trgovačka imena, patente, dizajn i druga prava intelektualne svojine. U nekim slučajevima davalac franšize ima priliku da iskoristi opciju otkupa imovine koju mu je preneo davalac franšize u skladu sa uslovima franšiznog ugovora. Srpski nacrt zakona izričito propisuje da primalac mora vratiti svu iznajmljenu imovinu davaocu franšize, mora prestati da koristi reči, elemente, oznake i druga obeležja robne marke, koje mu je dao davalac franšize. Ove pravne posledice mogu se eksplicitno naći u zakonu Hrvatske i Makedonije, ali slična rešenja (iako nisu pomenuta u izveštajima) mogu se takođe očekivati i u drugim zemljama koje se analiziraju.

ZAKLJUČNE PRIMEDBE

Iz analize zasnovane na izveštajima zemalja, može se zaključiti da je poslovna praksa franšizinga relativno nova i nerazvijena u svim zemljama koje se analiziraju. Najčešće franšizne mreže su Fornetti, McDonalds, Mango, Zara i proizvođači u auto industriji. Osim Albanije, nijedna od zemalja nema posebne pravne odredbe koje eksplicitno regulišu franšizni ugovor tako da je većina prethodno razmatranih pitanja uređena opštim principima zakona koji proizilazi iz Građanskog Zakonika i Zakonika o obaveznim odnosima i *lex specialis*, naročito u vezi toga da se prenesu prava intelektualne svojine. Sudska praksa o franšizingu je takođe relativno siromašna i pravna literatura je uglavnom zasnovana na inostranom iskustvu. Da sumiramo:

Albanija je jedina zemlja iz elaborata gde je ugovor o franšizingu izričito regulisan odredbama Građanskog Zakonika, ali uprkos toj činjenici franšizing je relativno novi koncept i još nije sveobuhvatno pravno regulisan.

U Bosni i Hercegovini ne postoje eksplicitne pravne odredbe o franšizingu. Franšizing se samo pominje u oblasti zakona o konkurenciji i u Odluci o grupnom izuzeću od ugovora između komercijalnih subjekata koji rade na različitim nivoima proizvodnje ili distribucije. Pored toga, Nacrt Zakona Zakonika o obaveznim odnosima iz 2003. godine sadrži posebne odredbe o franšizingu i tako se stvara mogućnost regulisanja ugovora o franšizingu u budućnosti.

Slično se može tvrditi za Republiku Hrvatsku. Ne postoje eksplicitne odredbe koje regulišu sve aspekte ugovora o franšizingu tako da će se primenjivati opšti principi iz Zakonika o obaveznim odnosima. Međutim, ugovor o franšizingu je eksplicitno definisan hrvatskim Zakonom o Konkurenciji i Propisu o blok izuzećima odobrenim izvesnim kategorijama vertikalnih ugovora. Konačno, iako je koncept franšizinga relativno nov u Hrvatskoj, u poslednjoj dekadi može se primetiti brz razvoj dobrovoljnog regulisanja i činjenicu da franšizne asocijacije određuju pravila i smernice za izvršavanje franšiznih aktivnosti i na taj način pokazuju rastući interes za ovaj oblik poslovanja.

Nacionalni izveštaj pokazuje da su franšizing mreže u republici Makedoniji više izuzetak nego pravilo i da ne postoji pravna praksa što se tiče franšiznih ugovora. Međutim, franšizni ugovor je eksplicitno definisan i priznat Zakonom o zaštiti konkurencije i Propisom o Blok Izuzeću vertikalnih ugovora o ekskluzivnim distributerskim pravima, selektivnim distributerskim pravima, ekskluzivnim pravima za kupovinu i franšizing.

Isto bi se moglo tvrditi i za Crnu Goru. Nema zakona koji reguliše franšizing, tako da strane u principu izbegavaju da imenuju svoje poslovanje kao franšizing i umesto toga odlučuju se za ugovore o licenciranju i distribuciji. Autor izveštaja opravdava ovakav stav zbog nedoumice koja postoji u zakonskoj regulativi. „Ugovor o franšizingu“ se samo spominje u Crnoj Gori u Zakonu o zaštitnim znacima, Zakonu o zaštiti dizajna, Zakonu o geografskim indikacijama i Zakonu o stranim investicijama, ali bez regulisanja samog ugovora.

Konačno, u Srbiji ugovor o franšizingu je relativno novi komercijalni ugovor koji je proizišao iz *lex mercatoria* i prema tome nije regulisan srpskim zakonom već je klasifikovan kao neimenovani ugovor s primenom opštih odredbi Zakona o obaveznim odnosima. Ipak, u Republici Srbiji postoji neprekidna debata o mogućem Nacrtu odredbi franšiznih ugovora i na taj način se pokazuje veće interesovanje priznavanja i regulisanja franšizinga kao rastuće poslovne metode.

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KOMPARATIVNA ANALIZA PRAVNIH PITANJA U FINANSIJSKOM LIZINGU[1]

Zbog povećanog korišćenja ugovora o finansijskom lizingu i neophodnosti da se odgovori na potrebe savremenog trgovinskog poslovanja, zakoni o lizingu su sporo propisivani i rađeni zbog obezbeđivanja pravne sigurnosti i daljeg unapređenja njegovog korišćenja. Iako je finansijski lizing u širokoj upotrebi i regulisan je unutar šireg okvira opštih zakona kao što su Građanski Zakonik u Albaniji, ili Zakon o Deliktima i Ugovorima u Bosni i Hercegovini, Hrvatskoj, Makedoniji, Crnoj Gori i Srbiji, povećano korišćenje ove specifične vrste kreditne transakcije aktiviralo je potrebu za posebnim zakonima o finansijskom lizingu. Shodno tome, finansijski lizing je regulisan propisivanjem specifičnih zakona o ovakvim poslovima.

Od 2002. godine, sve zemlje koje su predmet ove analize, kao što su Albanija, Bosna i Hercegovina, Hrvatska, Makedonija, Crna Gora i Srbija, proglasile su specifične zakone koji se bave i finansijskim i operativnim lizingom[2]. Srbija, s druge strane, propisala je Zakon o finansijskom lizingu u maju mesecu 2003. godine[3]. Albanija u maju mesecu 2005. godine[4] i Crna Gora u decembru mesecu 2005. godine[5]. Hrvatska nije bila ništa manje revnosna da usvoji Zakon o lizingu 2006. godine[6], dok je Zakon o lizingu Republike Srpske donet 2006. godine[7], a Zakon o lizingu Federacije Bosne i Hercegovine u januaru 2009. godine[8].

FUNDAMENTALNI POJMOVI I ELEMENTI

A. Značenje finansijskog lizinga

U zakonodavnim tekstovima o finansijskom lizingu ili lizingu uopšte, koji se ovde analiziraju, s izuzetkom zakona Makedonije, posao finansijskog lizinga je određen davanjem

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* Originalni tekst je na engleskom jeziku.

[1] Ova komparativna analiza o značenju, području rada, objektu, stranama, uslovima, komercijalnoj prirodi i formi finansijskog lizinga zasnovana je na odnosnim nacionalnim izveštajima i zakonodavnom tekstu UNDROIT Konvencije o Međunarodnom Finansijskom Lizingu (Otava, 28. maj 1988. godine), koje nijedna od zemalja o kojima se ovde govori nije još ratifikovala.

[2] Službeni list Republike Makedonije, br. 4/2002, 49/2003, 13/2006 i 88/2008.

[3] Službeni list Republike Srbije, br. 55/2009, 27. maj 2003.

[4] Službeni list Republike Albanije, br. 9396 od 12. maja 2005.

[5] Službeni list Republike Crne Gore, br. 81/05 od 29. decembra 2005.

[6] Službeni list Republike Hrvatske, br. 135/2006 od 13. decembra 2006.

[7] Službeni list Republike Srpske, br. 70/07.

[8] Službeni list Federacije Bosne i Hercegovine, br. 85/98 od 3. januara 2009.

tačnih definicija za dva ključna sastavna elementa. Prvi element, koji je oličen u opisu ugovora o nabavci/isporuci/kupovini/prodaji, predstavlja odnos između davaoca lizinga i isporučioca, a drugo, bavi se odnosima između davaoca i primaoca lizinga, poznatih kao ugovor o lizingu. Iako su glavna struktura, područje rada i strane identični su svim datim definicijama, postoje i neke razlike o kojima će se raspravljati u raznim sekundarnim temama u ovom radu. Posao finansijskog lizinga može uopšteno biti opisan kao posao u kome davalac lizinga (a), po specifikacijama primaoca lizinga, zaključuje ugovor o isporuci s isporučiocem prema kome davalac lizinga pribavlja predmet lizinga pod uslovima koje odobri primalac lizinga i (b) sklapa ugovor (ugovor o lizingu) s primaocem lizinga dajući primaocu lizinga pravo da koristi opremu uz plaćanje troškova iznajmljivanja. [9]

B. Područje rada finansijskog lizinga

Zakon Crne Gore (član 3.) i Zakon Albanije (član 1.) daju najprecizniji sadržaj područja rada finansijskog lizinga, obuhvatajući sledeće pravne situacije: (1) sticanje prava svojine na objektu finansijskog lizinga po isteku ugovornog perioda; ili (2) sticanje prava kupovine objekta lizinga tokom i na kraju perioda lizinga po dogovorenoj ceni; ili (3) obaveza vraćanja objekta lizinga davaocu lizinga posle plaćanja svih rata lizinga[10].

C. Objekt finansijskog lizinga

Neki zakoni o finansijskom lizingu ne određuju precizno prirodu objekta lizinga. Takvi pravni sistemi mogu da pribegavaju različitim pravnim metodama analize (kao što su sistematska i rastegljiva interpretacija i primena analogijom odredaba drugih nacionalnih zakona) da bi odredili da li objekt lizinga može biti pokretna ili nepokretna stvar. Dok zakoni Crne Gore i Makedonije određuju da objekt finansijskog lizinga može biti pokretna neutrošena imovina (oprema, postrojenja, vozila i slično) ili nepokretne stvari (zemljište, zgrade i slično), zakon Bosne i Hercegovine, osim što predviđa da objekt lizinga mora biti određen od strane primaoca lizinga (član 35. Zakona o Finansijskom Lizingu Bosne i Hercegovine), ne nudi eksplicitnu definiciju objekta lizinga niti ga definiše. Po implikaciji, objekt lizinga mogu biti sve pokretne i nepokretne stvari koje nisu izvan trgovanja i nisu ograničena u trgovanju[11]. Isti pristup se sledi u zakonu Hrvatske[12] tako da objekt lizinga može biti svaka pokretna ili

[9] U Albaniji, Zakon o Finansijskom Lizingu, član 1 § 11, član 5, paragraf 2 i 3 Zakona o Finansijskom Lizingu Federacije Bosne i Hercegovine i član 6 Zakona o Lizingu Republike Srpske, član 7.3 Zakona o Lizingu Hrvatske, član 2 Zakona o Finansijskom Lizingu Crne Gore, član 2 Zakona o Finansijskom Lizingu Srbije.

[10] Druge zemlje tumače finansijski lizing da on obuhvata široki opseg poslova. Pored toga, u Albaniji, finansijski lizing obuhvata dugoročno finansiranje rezervisano za angažmane i stručnjake da bi pribavili čvrste elemente, naime, opremu i nepokretnu imovinu za profesionalnu upotrebu. To predstavlja alternativu bankarskom finansiranju. U Bosni i Hercegovini, lizing je rezervisan samo za osnovana lizing društva koja rade u skladu sa ovim Zakonom na teritoriji Federacije Bosne i Hercegovine (u daljem tekstu: F BiH) i za filijale ili lizing društva sa sedištima u Republici Srpskoj (u daljem tekstu: RS) i Brčko Distriktu Bosne i Hercegovine (u daljem tekstu: BD) ili, izuzetno, za banku čije je sedište u B BiH, ili njeno organizaciono odeljenje sa sedištem u RS ili BD pod uslovima i na način određen pravilima koji uređuju bankarske operacije u BiH. U Hrvatskoj, hrvatski Zakon o Lizingu primenjuje se na poslove finansijskog i operativnog lizinga i na domaće i međunarodne lizing poslove, dok se UNIDROIT Konvencija primenjuje samo na međunarodne poslove finansijskog lizinga.

[11] Emir Salihović, Nacionalni izveštaj o savremenim ugovorima za Bosnu i Hercegovinu.

[12] Prema Zakonu o imovinskom i ostalim imovinskim pravima (Službeni list 91/96, 73/00, 114/01, 79/06, 146/08, 38/09, 153/09)

nepokretna imovina koju uređuju pravila o imovini i druga stvarna prava (prava *in rem*). Srpski Zakon o finansijskom lizingu, sledeći UNIDROIT Konvenciju[13], jedino primenjuje određivanje da je objekt finansijskog lizinga, npr. iznajmljena imovina, ograničen samo na trajnu pokretnu imovinu (član 4).

D. Strane u finansijskom lizingu

Strane u finansijskom lizingu su primalac lizinga, davalac lizinga i isporučilac sa varijacijama koje se odnose na to da davalac i primalac lizinga budu jedna ista osoba, kao u zakonima Crne Gore, Hrvatske i Federacije Bosne i Hercegovine. Ali, postoje i neke pravne nedoumice kada se o datom pitanju ne piše, kao u Republici Srpskoj (kada se tretira kao ugovor o operativnom lizingu, član 7. Zakona o lizingu Republike Srpske.

Podrobna izlaganja koja daju nacionalni izveštaji o ugovoru o finansijskom lizingu pokazala su da razlike postoje takođe i u pravnim uslovima, prirodi, statusu i sadržaju obaveze strana, koji su relevantni za ovaj aranžman. Neki zakoni su bili veoma restriktivni, zahtevajući povinovanje izvesnim vrlo krutim uslovima od strane davaoca lizinga (kao što je to slučaj sa zakonom Srbije, Hrvatske i Albanije), dok su neki pravni tekstovi odabrali veoma popustljive i liberalne pristupe u određivanju statusa davaoca lizinga, čak propisujući da fizička lica mogu preuzeti uloge davaoca lizinga, primaoca lizinga i isporučioca (kao što je to u zakonu Crne Gore).

Davalac lizinga u finansijskom lizingu različito je definisan prema ovim zakonima. Prema zakonu Crne Gore (Odeljak II, članovi 7. i 8. ovog Zakona) davalac lizinga može biti svaki domaći ili inostrani subjekat ili fizičko lice, ili poslovna organizacija i preduzetnik, dok član 3. i 12. Zakona o finansijskom lizingu u Albaniji određuje da davalac lizinga, ukoliko nije finansijska institucija ili banka, ne može da vodi delatnost lizinga ukoliko nije registrovan kao pravosudno lice sa kapitalom od najmanje 20.000.000 leka. Slično ovome, u Bosni i Hercegovini i Republici Srpskoj, davalac lizinga je definisan kao pravosudno lice sa sedištem na teritoriji Bosne i Hercegovine i registrovan je za poslove lizinga. Prema zakonu Hrvatske davalac lizinga je svako fizičko ili pravosudno lice koje ima pravo da vrši delatnost lizinga prema odredbama zakona[14] i koje je propisno registrovano i licencirano za vršenje delatnosti

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[13] Prema članu 1 UNIDROIT zakona, ugovor o finansijskom lizingu obuhvata opremu definisanu kao "postrojenja, investicijska dobra ili ostala oprema". Može biti nedoumice o tome da li nepokretne stvari (zemljište, zgrade i slično) potpadaju pod UNIDROIT zakon zbog toga što član 1 razmatra samo pokretne stvari. Član 4 pokriva situacije kada pokretna oprema biva priključena nepokretnoj stvari (pretvara se u nepokretnu stvar). U ovom slučaju može postojati transformacija u prirodi objekta od pokretne stvari u nepokretnu. Kada se ovo dogodi, odredbe Konvencije neće prestati da se primenjuju "samo zato što je oprema postala predmet koji je stalan na zemlji ili je ugrađen u zemlju". Pitanje o tome da li je oprema postala stalan predmet i ugrađena u zemlju ili ne, a ukoliko jeste uticaj na prava *under se* davaoca lizinga i osobe koja ima stvarna prava na zemljište, biće određeno zakonom države gde se zemljište nalazi.. Međutim, UNIDROIT zakon posebno ne predviđa situacije gde je objekt nepokretna stvar od početka i nije samo transformisana u nepokretnu stvar pričvrščenjem ili ugradnjom u zemlju.

[14] Takvu delatnost sada mogu vršiti samo sledeći: (1) domaća lizing kompanija propisno registrovana i licencirana prema zakonu Hrvatske da se može baviti delatnostima lizinga; (2) lizing kompanija u svakoj zemlji članici Evropske unije, ovlašćena i registrovana za delatnosti lizinga; (3) hrvatska filijala lizing kompanije zemlje članice treće zemlje ovlašćena i registrovana za delatnosti lizinga; (4) banka registrovana prema zakonu Hrvatske, banka registrovana u svakoj zemlji članici Evropske unije ili njihove hrvatske filijale i banka registrovana prema zakonu svake treće zemlje, ali samo s ograničenjem – prema uslovima definisanim u bankarskim propisima Hrvatske. (član 6.1.). Ukoliko dodatno uzmemo u obzir stroge statutorne odredbe za lizing kompanije (članovi 7-29), novi propis je tako jasno suzio krug potencijalnih davalaca lizinga (npr. minimalni kapital je sada 1 milion hrvatskih kuna, što je oko 7.3 miliona evra).

lizinga, dok prema članu 10. izmenjenog Zakona o Finansijskom Lizingu od 2005. godine u Srbiji, davalac lizinga je kompanija s kapitalom od najmanje 100.000 evra, koja je osnovana u skladu sa Zakonom o Finansijskom Lizingu. Primalac lizinga, prema raznim zakonima, može biti uopšteno definisan kao svako fizičko ili pravosudno lice na koje davalac lizinga prenosi ovlašćenje da poseduje i koristi objekt lizinga u skladu sa odredbama ugovora.

Isporučilac, s druge strane, prema zakonima Albanije, Bosne, Hrvatske, Makedonije, Crne Gore i Srbije, definisan je kao svako fizičko ili pravosudno lice (propisno registrovano i ovlašćeno), koje prenosi pravo vlasništva nad objektom lizinga u skladu sa dogovorenim uslovima.

E. Osnovni principi koji uređuju finansijski lizing.

Nacionalni izveštaji iz Srbije i Crne Gore podesno su opisali principe, koji su u osnovi Zakona o finansijskom lizingu. Zakoni o finansijskom lizingu omogućuju ugovorne strane da regulišu svoje poslovne odnose na najispravniji način. Prema tome, postoje dva glavna principa koja su ugrađena u tekst ovog zakona – AUTONOMIJA IZBORA (snaga volje) i PACTA SUNT SERVANDA (zaključeni ugovor je zakon za ugovorne strane). Iako to nije izrazito iskazano u ostalim analiziranim izveštajima zemalja, principi autonomije volje i *pacta sunt servanda*, implikacijom, formiraju osnovu za ugovore o finansijskom lizingu. U poslovima finansijskog lizinga, posebni značaj se takođe daje principima jednakosti strana, principu dobronamernosti (bona fide) i poštenja, principu koji zabranjuje stvaranje i eksploataciju monopolskog položaja i principu ekvivalencije uzajamnih doprinosa i primeni dobre poslovne prakse.

KOMERCIJALNA PRIRODA FINANSIJSKOG LIZINGA

Neki od zakonodavnih tekstova (npr. albanski zakon) precizno određuje situacije kada se ugovor o finansijskom lizingu tretira kao komercijalni ugovor. S druge strane, većina zakonodavnih tekstova nemaju određene odredbe koje obuhvataju ovo pitanje (npr. crnogorski zakon). U ovom slučaju, samo primena opštih pravila može pomoći da se napravi razlika između ugovora o finansijskom lizingu, koji su ili komercijalni ili nekomercijalni po svojoj prirodi, i potonje primene principa ustanovljenih za komercijalne ugovore ili pravila propisana za opšte ugovorne pravne poslove u slučaju nekomercijalnih ugovora.

Jedan od primera podrobnog zakonodavnog određivanja prirode ovog ugovora jeste albanski zakon. Član 5. albanskog zakona o finansijskom lizingu određuje da, tamo gde je primalac lizinga u ugovoru o finansijskom lizingu fizičko lice i nije registrovao svoje komercijalne delatnosti, ugovor o finansijskom lizingu se smatra da je nekomercijalni po svojoj prirodi i podleže opštim pravilima koji uređuju ugovore. Prema *argumentum ad contrario,* gde je primalac lizinga u ugovoru o finansijskom lizingu fizičko lice i registrovao je svoje komercijalne delatnosti, ili je kompanija, ugovor o finansijskom lizingu smatraće se komercijalnim po svojoj prirodi i podleže određenim odredbama koje regulišu komercijalne delatnosti[15].

Prema članu 8. Zakona o finansijskom lizingu Srbije, ugovor o lizingu se tretira kao komercijalni po svojoj prirodi prema odredbama Zakona o obaveznim odnosima, osim u

[15] Asim Vokshi, Nacionalni izveštaj o Savremenim Ugovorima za Republiku Albaniju.

slučajevima kada je primalac lizinga fizičko lice koje ne vrši registrovanu delatnost radi sticanja dobiti[16]. Ista praksa se razvila i u Crnoj Gori tako da kadgod je primalac lizinga fizičko lice s registrovanom poslovnom delatnošću radi dobiti, delujući kao primalac lizinga, primenjivaće se određene odredbe Zakona o obaveznim odnosima koji se odnosi na komercijalne ugovore; kada je primalac lizinga fizičko lice koje ne vrši privrednu delatnost kao profesiju, primenjivaće se opšta pravila Zakona o deliktima i obaveznim odnosima. Prema tome, kadgod se ugovorne strane finansijskog lizinga smatraju komercijalnim subjektima, ugovor o finansijskom lizingu tretiraće se isključivo kao oni komercijalne prirode. Nešto drugačiji način definisanja komercijalne prirode finansijskog lizinga može biti posmatran kroz primenu odgovarajućih zakona koji, na neki način, uređuju ugovor o finansijskom lizingu. U Hrvatskoj, sve stvari koje nisu obuhvaćene odredbama zakona o finansijskom lizingu treba rešavati u skladu sa opštim principima zakona ugrađenog u Zakonik o obaveznim odnosima Hrvatske. Statutorne odredbe lizing kompanija i likvidacija biće podložne odredbama Zakona o kompanijama, osim ukoliko nije drugačije određeno u Zakonu o lizingu. Pitanja bankrotstva i prinudnog izvršenja uređena su Zakonom o bankrotstvu i prinudnom izvršenju. Pitanja računovođe i oporezivanja uređuje određeno zakonodavstvo (*lex specialis*) [17].

ROKOVI U FINANSIJSKOM LIZINGU

Poslovi finansijskog lizinga se tretiraju prema različitim zakonima kao trajni ugovori s stalnim izvršenjem obaveza. Međutim, postoje dva pristupa za propisivanje trajanja ugovora o lizingu. Neki zakoni o finansijskom lizingu, kao što je to slučaj u Albaniji, izričito određuju minimalni period lizinga, dok neki zakoni o finansijskom lizingu, kao hrvatski i crnogorski, samo navode da su rok i trajanje finansijskog lizinga obavezni ugovorni elementi o kojima strane treba da se dogovore prilikom sklapanja ugovora.

Član 6. zakona Albanije određeno navodi da: 1) pokretne stvari za upotrebu u roku od 5. godina se izdaju u najam za period od najkraće godinu dana; 2) pokretne stvari za upotrebu za produženi period duže od 5. godina mogu biti izdate u najam pod lizingom za period od najkraće 2. godine, a član 7. istog zakona predviđa da nepokretne stvari za izdavanje u najam mogu biti iznajmljene pod lizingom za minimalni period od 3. godine[18]. Minimalni rok za zaključenje ugovora u Srbiji (član 3. zakona Srbije) i Bosni i Hercegovini, ne može biti kraći od dve godine od datuma zaključenja ugovora (član 36. F BiH), dok ovaj period u Republici Srpskoj ne može biti kraći od 6. meseci (član 9 zakona RS). Iako ugovor o finansijskom lizingu u Hrvatskoj i Crnoj Gori (Član 5. zakona Crne Gore) mora biti zaključen za fiksni vremenski period, dogovoren u trenutku potpisivanja, u ovim zakonima nema izričite odredbe o minimalnom ili maksimalnom trajanju ugovora. Teoretski, ovo bi značilo da su strane slobodne da se dogovore o bilo kom roku trajanja[19].

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[16] Jelena Perović, Nacionalni izveštaj o Savremenim ugovorima za Republiku Srbiju.

[17] Ana Keglević, Nacionalni izveštaj o Savremenim Ugovorima za Republiku Hrvatsku.

[18] Asim Vokshi, Nacionalni izveštaj o Savremenim Ugovorima za Republiku Albaniju.

[19] Ana Keglević, Nacionalni izveštaj o Savremenim Ugovorima za Republiku Hrvatsku.

DOMAĆI I MEĐUNARODNI FINANSIJSKI LIZING

Nacionalni izveštaji iz regionalnih zemalja ukazuju da neke zemlje imaju precizne i veoma jasne kriterijume za razlikovanje domaćih od međunarodnih ugovora o finansijskom lizingu. S druge strane, postoje primeri nekih pravnih sistema čiji tekstovi ne opisuju jasno ovu razliku. Međutim, zajednička osnovna tema je da se primenjuje nacionalni zakon kadgod posao uključuje domaći ugovor o lizingu. Kadgod dođe do međunarodnog elementa, u svim regionalnim zemljama, osim ukoliko nešto drugačije nije određeno u ugovoru, primeniće se opšti principi i pravila međunarodnog privatnog zakona, npr. konflikti zakona[20].

Jedan od izvanrednih zakonodavnih primera koji razlikuju domaće i međunarodne ugovore o finansijskom lizingu jeste Republika Albanija. Član 8. određuje da će finansijski lizing biti domaći kada se dogode sledeći uslovi: 1) objekt lizinga na teritoriji Republike Albanije i 2) davalac lizinga i primalac lizinga imaju stalni boravak u Republici Albaniji. Prema tome, finansijski lizing biće međunarodni ukoliko i davalac lizinga i primalac lizinga ili, svaki od njih, nemaju svoje sedište ili stalan boravak u Republici Albaniji. U takvom slučaju, finansijski lizing je regulisan međunarodnim zakonom o finansijskom lizingu, ili po pojedinačnom slučaju, bilateralnim sporazumom čiji je učesnik Republika Albanija[21]. Lizing društva u Bosni i Hercegovini mogu vršiti poslove finansijskog lizinga samo ukoliko su ustanovljena prema njenim zakonima i na njenoj teritoriji. Kadgod se strane uključe u neki posao koji obuhvata međunarodni elemenat, član 19. *Zakona o rešavanju konflikata zakona,* 1983. određuje da će odredbe ugovora, osim ukoliko se strane drugačije ne dogovore, biti definisane međunarodnim sporazumom ili upotrebom pravila međunarodnog zakona o privatnim odnosima[22].

Slično ovome, kada se finansijski ugovor o lizingu zaključi kao domaći ugovor, nesumnjivo će se primenjivati odnosni nacionalni zakoni o finansijskom lizingu u Srbiji i Crnoj Gori. Pomenuti nacionalni zakoni u ovim zemljama primenjivaće se takođe autonomijom volje ugovornih strana, kada je taj konkretan zakon određen u ugovoru kao primenljivi zakon. U odsustvu klauzule *electio iuris* primenjivaće se ovi zakoni ako su primenljiva pravila međunarodnog zakona o privatnim odnosima. Poslovi finansijskog lizinga u Hrvatskoj mogu biti ili domaći ili međunarodni, u zavisnosti od toga da li strane imaju svoje glavno mesto poslovanja (registracija) ili boravište u istoj ili različitim državama. Ukoliko je primalac lizinga osnovan ili ima boravište u Republici Hrvatskoj, odredbe hrvatskog zakona urediće ugovor o lizingu; a ukoliko je primalac lizinga uspostavljen ili ima boravište u zemlji članici, ugovor o lizingu podleže zakonu te zemlje članice. Međutim, strane mogu ugovorom odrediti da jedan različiti zakon uređuje ovaj posao. U svim ostalim slučajevima, zakon koji se primenjuje na međunarodni ugovor o lizingu biće određen u skladu sa odredbama hrvatskog Zakona o konfliktu zakona (Službeni list 53/91, 88/01) [23].

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[20] Primenljivi međunarodni zakon o ovoj stvari je UNIDROIT Konvencija o Međunarodnom Finansijskom Lizingu (Otava, 28. maj 1988.). Član 3 određuje da:"(Ova) Konvencija se primenjuje kada davalac lizinga i primalac lizinga imaju svoje mesto poslovanja u različitim državama i (a) te države i država u kojoj isporučilac ima svoje mesto poslovanja su ugovorne države; ili (b) i ugovor o isporuci i ugovor o lizingu uređuje zakon ugovorne države." Na taj način, ukoliko je jedna od strana u finansijskom lizingu potpisnica Konvencije, ugovor može odrediti da se primenjuje UNIDROIT Konvencija.

[21] Asim Vokshi, Nacionalni izveštaj o Savremenim Ugovorima za Republiku Albaniju.

[22] Emir Salihović, Nacionalni izveštaj o Savremenim Ugovorima za Bosnu i Hercegovinu.

[23] Ana Keglević, Nacionalni izveštaj o Savremenim Ugovorima za Republiku Hrvatsku.

MODEL I OSNOVNE KLAUZULE FINANSIJSKOG LIZINGA

Zakonodavni tekstovi Albanije[24], Bosne i Hercegovine, Hrvatske, Makedonije, Crne Gore i Srbije, zahtevaju da ugovori o finansijskom lizingu budu u pismenom obliku da bi bili punovažni. Ukoliko to nije učinjeno, ugovor će biti nevažeći, tako da se ovaj oblik smatra oblikom *esentialia* ili oblikom *ad solemnitatem.* Uz zahtev da ugovor bude u pisanom obliku i/ili overen od strane beležnika, različiti zakoni propisuju druge obavezne *exempli clausa* ili *inter alia* definisane elemente. Prema tome, zahtev za pisani oblik i prisustvo ovih obaveznih elemenata su opšti kriterijumi propisani u svim pomenutim zakonima. Dalja analiza izveštaja iz Albanije, Bosne i Hercegovine, Crne Gore, Makedonije i Hrvatske, pokazuju da zakoni propisuju iste elemente, s veoma malim razlikama, kao obavezne elemente. S obzirom na to da je ovde analizirano nekoliko zakona, teško je napraviti jedan spisak bitnih elemenata koje svi ovi zakoni smatraju obaveznim. Svaki nacionalni zakon posebno razmatra obavezne elemente koji moraju biti prisutni u finansijskom lizingu: identifikacija ugovornih strana; definisanje objekta lizinga; mesto, vreme i način isporuke objekta lizinga; datum zaključenja ugovora, potpisi strana u ugovoru, trajanje ugovora o finansijskom lizingu; ukupni iznos naknade za iznajmljivanje koji plaća primalac lizinga; iznos pojedinačnih rata, njihov broj i vreme plaćanja i dogovorena standardna kamata; izbor pribavljanja vlasništva ili kupovine objekta lizinga; način okončanja ugovora o finansijskom lizingu.

Pored ovih obaveznih odredbi, ugovor o lizingu takođe može sadržati druge odredbe koje nisu obavezne po svojoj prirodi, a to su obično sledeće klauzule: rizici protiv kojih objekt lizinga mora biti osiguran i kategorija osiguranja; mesto, vreme i način isporuke objekta lizinga; troškovi transporta i instalacije u slučajevima nekog složenog objekta lizinga; troškovi održavanja objekta lizinga, opcija obučavanja nameštenika primaoca lizinga, kao i drugi uslovi koji zavise od dispozicije ugovorne strane. Zakoni ne isključuju uključivanje dodatnih elemenata koje ugovorne strane smatraju poželjnim, a čiji spisak nije potpuni ili zaključni. Prema bitnom principu autonomije volje finansijskog lizinga, svaki drugi elemenat postaje bitni elemenat ugovora kada ugovorne strane daju svoju saglasnost i ugovore takve odredbe.

[24] Prema albanskom zakonu važeći je ugovor o finansijskom lizingu u pisanoj formi ili overen od strane javnog beležnika kada sadrži uslove koji omogućuju vansudsko pribavljanje objekta i kada je ugovor okončan pre svog isteka zbog greške primaoca lizinga[24]. U ovom slučaju, zajedno sa ugovorom o finansijskom lizingu, strane mogu potpisati dokumenat o ponovnom pribavljanju kao aneks i sastavni deo ugovora. Vansudsko pribavljanje objekta vrši se u skladu sa uslovima utvrđenim u ugovoru o lizingu.

*Emir Salihović**, dipl.iur

FINANSIJSKI LIZING
Komparativna analiza zakonodavnih rješenja

UVOD

Komparativna analiza koja je obuhvaćena u ovom tekstu prikazuje sličnosti i razlike zakonodavnih rješenja u oblasti finansijskog lizinga na tlu zemalja jugoistočne Evrope i to u segmentima kao što su prava i obaveze ugovornih strana kod ugovora o finansijskom lizingu, prestanak ugovora, posljedice prestanka ugovora o finansijskom lizingu, podlizing, registar ugovora, kao i prinudno izvršenje kod ugovora o finansijskom lizingu.

Važno je naglasiti da su od 2002. godine zemlje jugoistočne Evrope donijele zakone kojima su uređena pitanja iz ove analize, odnosno stvorile zakonodavni okvir kojim je normiran ugovor o finansijskom lizingu, kao jedan od do tada relativno nepoznatih pravnih poslova koji je svoju zakonodavnu formu crpio iz drugih zakona, a primarno zakona o obligacionim odnosima.[1]

S obzirom na široku primjenu i značaj ugovora o lizingu u međunarodnom prometu bitno je ukazati na izvršeno regulisanje ovog instituta putem uniformnih pravila međunarodnog poslovnog prava. Međunarodni pravni okvir za primjenu finansijskog lizinga obezbjeđen je UNIDROIT Konvencijom o međunarodnom finansijskom lizingu (UNIDROIT Convention on International Financial Leasing). Konvencija je usvojena u Otavi, 28. maja 1988. godine.)

1. PRAVA I OBAVEZE UGOVORNIH STRANA U UGOVORU O FINANSIJSKOM LIZINGU

Prema zakonodavnim rješenjima u posmatranim zemljama jugoistočne Evrope prava i obaveze davaoca i primaoca lizinga kreću su u rasponu prava i obaveza davaoca lizinga i to : obaveza pribavljanja predmeta lizinga na strani davaoca lizinga, zatim zaštita u slučaju stečaja primaoca lizinga, isključenje odgovornosti za materijalne nedostatke, isključenja odgovornosti za štetu prouzrokovanu predmetom lizinga, odgovornosti za pravne nedostatke, obavještavanje davaoca*,* ugovorno ograničenje ili isključenje odgovornosti davaoca lizinga, te prenos prava vlasništva-svojine na predmetu lizinga.

S druge strane, raspon prava i obaveza primaoca lizinga obuhvata: preuzimanje predmeta lizinga, raskid ugovora zbog neisporuke, korišćenje predmeta lizinga i održavanje predme-

* Originalni tekst je na lokalnom jeziku.

[1] Zakoni su objavljeni u službenim glasilima (Makedonija 4/02, 49/03, 13/06, 88/08, Srbija 55/03, Crna Gora 81/05, Hrvatska 135/06, BiH – RS i F BiH 70/07 i 85/08, Albanija 9396)

ta lizinga, plaćanje lizing naknade, rizik za slučajnu propast ili oštećenje predmeta lizinga, vraćanje predmeta lizinga , obaveza osiguranja, predaja predmeta lizinga drugom na korišćenje i sl.

U rasponu izloženih prava i obaveza ugovornih strana u ugovoru o finansijskom lizingu izdvajaju se i zajedničke karakteristike prava i obaveza u posmatranim zakonodavstvima koja su manje-više pratila rješenja iz Konvencije o međunarodnom finansijskom lizingu, te se zajedničkim imeniocem mogu označiti sljedeća prava i obaveze :

Prava i obaveze davaoca lizinga :[2]

- Ustupanje predmeta na korištenje
- Obveza pribavljanja predmeta
- Obveza održavanja predmeta
- Obveza prijenosa vlasništva na predmetu
- Pravo na lizing naknadu
- Pravo pregleda predmeta lizinga
- Pravo na raskid ugovora (često nastupa ako primalac kasni s otplatom dviju uzastopnih naknada, ako ne upotrebljava predmet s dužnom pažnjom, ako ne osigura predmet, netačni podaci kod sklapanja ugovora)

Dakle, davalac lizinga je prvenstveno u obavezi da pribavi predmet lizinga, omogući primaocu njegovo korišćenje shodno namjeni i svrsi predmeta lizinga.

S druge strane, prava i obaveze primaoca lizinga strukturiraju se kao :

- Obaveza isplate naknade
- Obaveza korištenja predmeta lizinga na ugovoreni način u skladu s njegovom namjenom
- Obaveza omogućavanja nadzora od strane davaoca (način iskorištavanja predmeta)
- Obaveza vraćanja predmeta nakon isteka ugovorenog roka
- Obaveza osiguranja predmeta
- Pravo na upotrebu i korišćenje predmeta
- Pravo na otkup predmeta ili produženje lizing ugovora

Kada je u pitanju odgovornost za materijalne i pravne nedostatke zakonodavtsva imaju određena različita rješenja.

Tako prema Hrvatskom zakonu davatelj odgovara primatelju za pravne nedostatke, osim za slučaj ako je primatelj lizinga obaviješten o pravnim nedostacima.[3]

U slučaju da je pravo trećeg apsolutno ugovor o lizingu se raskida po samom zakonu uz naknadu štete.

Ako pravni nedostaci samo ograničavaju pravo primaoca – primaoc ima opciju

- Raskid i naknada štete
- Sniženje naknade i naknada štete

Rješenja entitetskih zakona u BiH su nešto drugačija. Tako, zaključenjem ugovora o lizingu davalac lizinga ustupa korisniku (primaocu) lizinga zahtjeve koje ima prema dobavljaču predmeta lizinga na osnovu odgovornosti za pravne i materijalne nedostatke, osim ako ugovorom nije drugačije ugovoreno. (član 42. Zakona F BiH).

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[2] Pojedinačna prava i obaveze ugovornih strana propisana su u članovima 14-25 Zakona Republike Srbije, zatim članovima 13-23 Albanskog zakona, 40-50 Zakona F BiH i 26-49 RS BiH, kao i u odredbama članova 39-74 Hrvatskog zakona, članovima 9-16 i dalje Zakona Republike Crne Gore i sl. u posmatranim zakonodavtsvima.

[3] Član 41. Zakona o leasingu R Hrvatske

Ukoliko predmet lizinga ima neki materijalni ili pravni nedostatak, a korisnik lizinga je propustio prema dobavljaču predmeta lizinga vršiti ustupljena prava, on nema nikakva prava na osnovu materijalnih ili pravnih nedostataka prema davaocu lizinga, a posebno ne pravo na raskid ugovora ili smanjenje lizing naknade.

Zalogodavac - davalac lizinga u Albanskom zakonu ni u kom smislu nije odgovoran za predmetnu stvar koja se daje zalogoprimcu na držanje i korišćenje, pod uslovom da nije drugačije predviđeno u ugovoru o finansijskom lizingu. Jedini izuzetak ovom pravilu je slučaj gdje postoje žalbe trećih lica koje proizilaze iz postupaka ili neizvršavanja obaveza zalogodavca.[4]

Zakon o finansijskom lizingu R Srbije sadrži rješenje prema kojem davalac lizinga odgovara ako na predmetu lizinga postoji pravo trećeg lica koje isključuje, umanjuje ili ograničava neometanu državinu primaoca lizinga, a o čijem postojanju primalac lizinga nije obavješten, niti je pristao da uzme predmet lizinga opterećen tim pravom – odgovornost za pravne nedostatke.[5]

Crnogorski zakonodavac odgovornost za pravne nedostatke vezuje za davaoca lizinga, dok slično drugim posmatranim zakonodavstvima odgovornost za materijalne nedostatke vezuje za isporučioca – dobavljača predmeta lizinga.

2. PRESTANAK UGOVORA O FINANSIJSKOM LIZINGU

Najčešći načini prestanka ugovora o lizingu u posmatranim zakonodavstvima su :

a) istek roka na koji je zaključen,
b) prijenosom prava vlasništva sa davaoca lizinga na korisnika lizinga,
c) otkupom predmeta lizinga,
d) raskidom ugovora o lizingu,
e) uništenjem predmeta lizinga usljed djelovanja više sile, i
f) iz drugih razloga u skladu sa propisima kojima se uređuju obligacioni odnosi.[6]

3. POSLJEDICE PRESTANKA UGOVORA O FINANSIJSKOM LIZINGU

Kao što smo već istakli ugovor o lizingu može prestati na jedan od načina propisanih zakonom u posmatranim zakonodavstvima.

Pored, kako smo vidjeli prestanka ugovora istekom perioda na koji je zaključen predviđeni su i prestanak ugovora za slučaj prijenosa vlasništva sa davaoca na korisnika lizinga predmeta lizinga ili otkupom predmeta lizinga, ali i slučajevi kada ugovor prestaje raskidom ugovora, uništenjem predmeta lizinga usljed djelovanja više sile i iz drugih razloga predviđenih za prestanak ugovora po općim propisima kojima se uređuju obligacioni odnosi.

Ovdje ćemo se zadržati na odredbama posmatranih zakona u analiziranim zakonodavstvima na tlu jugoistočne Evrope kojima je uređen način i posljedice prestanka ugovora o lizingu za slučaj raskida ugovora.

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[4] Član 14. Zakona br. 9396 od 12.05. 2005., 'O finansijskom lizingu,' sa izmjenama i dopunama.

[5] Član 18. Zakona o finansijskom lizingu R Srbije

[6] Član 56. Zakona F BiH i član 50. Zakona RS BiH, član 41. – 47. Zakona R Hrvatske, član 40. – 43. Zakona R Srbije i sl.

S tim u vezi Zakon F BiH u članu 54. propisuje da davalac lizinga ima pravo, ako ugovorom o lizingu nije drugačije određeno, raskinuti ugovor o lizingu ako korisnik lizinga:

a) zakasni sa isplatom prve lizing naknade,
b) poslije isplate prve naknade korisnik lizinga zakasni sa dvije uzastopne lizing naknade[7],
c) bez pismene saglasnosti davaoca lizinga predmet lizinga da u podlizing trećoj strani,
d) znatno povrijedi odredbe ugovora koje se odnose na korištenje i održavanje predmeta lizinga.

Bez obzira na odredbe tač. a) i b) ovog člana davalac lizinga ima pravo da raskine ugovor o ako korisnik lizinga ne plati jednu od lizing naknada u ugovorenom roku, pod uvjetom da okolnosti jasno ukazuju da ni ostale naknade neće biti plaćene.

Pored opštih pravila Zakona o obligacionim odnosima, Zakon o finansijskom lizingu R Srbije predviđa i posebna pravila o: (i) raskidu ugovora o finansijskom lizingu od strane primaoca lizinga zbog neisporuke predmeta lizinga, docnje u isporuci ili materijalnih nedostataka na predmetu lizinga; (ii) pravila o raskidu ugovora o finansijskom lizingu od strane davaoca lizinga zbog neplaćanja lizing naknade; (iii) pravila o raskidu ugovora o finansijskom lizingu od strane davaoca lizinga u slučaju neovlašćene predaje predmeta lizinga od strane primaoca lizinga trećem licu.[8]

Pravo zalogodavca-davaoca lizinga da raskine ugovor o lizingu prije njegovog isteka prema Albanskom zakonu postoji u slučaju da:

– Zalogoprimac-primalac lizinga ne plati prvu ratu u ugovorenom roku.
– Zalogoprimac-primalac lizinga uplati prvu ratu, ali zatim ne uplati par narednih rata na vrijeme, a čiji ukupan iznos iznosi 20 procenata ukupne vrijednosti najamnine. U tom slučaju, zalogodavac osim što ima pravo da ugovor raskine, takođe ima pravo da zahtijeva da zalogoprimac uplati sve zakasnjele rate plus pripadajuću kamatu.[9]

Slična rješenja sadržana su i u Crnogorskom zakonu.[10]

Hrvatski zakonodavac je u odredbama članova 44. I 45. Predvidio raskid ugovora za slučaj neplaćanja naknade (pravo na raskid od strane davatelja lizinga) i za slučaj neisporuke predmeta lizinga (pravo na raskid primatelja lizinga).

Makedonski zakonodavac je prestanak (raskid) ugovora o lizingu definirao za slučaj da bilo koja od ugovornih strana ne izvrši u cijelosti obaveze koje je preuzela zaključenjem ugovora o lizingu. U tom slučaju raskid ugovora o lizingu podnosi se pismenim putem u roku od pet dana. Ostala rješenja i slučajevi za raskid su na tragu i gotovo su identična drugim posmatranim zakonodavstvima (raskid zbog neisporuke, raskid zbog neplaćanja lizing naknade i sl.)

4. PODLIZING

Kada je riječ o davanju predmeta lizinga trećem na korištenje (podlizing) posmatrana zakonodavtsva imaju veoma slična rješenja.

Tako, prema Zakonu o finansijskom lizingu R Srbije, primalac lizinga može predmet lizinga, u cjelini ili pojedinim dijelovima, dati na korišćenje trećem licu uz pismenu sagla-

[7] Slično rješenje je sadržano u članu 45. Hrvatskog zakona
[8] Član 26. Zakona o finansijskom lizingu R Srbije
[9] Član 28. Albanskog zakona
[10] Član 16. Zakona Crne Gore

snost davaoca lizinga. Davalac lizinga može da raskine ugovor i da zahtijeva naknadu štete ako je primalac lizinga, bez njegove pismene saglasnosti, predao predmet lizinga na korišćenje trećem licu. Poseban postupak za sticanje državine na predmetu lizinga predviđen ovim Zakonom može se primjeniti i u ovom slučaju raskida ugovora. Predaja predmeta lizinga na korišćenje trećem licu ne oslobađa primaoca lizinga obaveza koje iz ugovora o lizingu ima prema davaocu lizinga. Predaja predmeta lizinga na korišćenje trećem licu može se ugovorom isključiti ili drukčije predvidjeti.[11]

Shodno članu 51. Zakona F BiH korisnik lizinga može, uz pismenu saglasnost davaoca lizinga, osim ukoliko ugovorom o lizingu nije drugačije određeno, prenijeti predmet lizinga ili njegove dijelove, trećoj strani na korištenje

Prijenos predmeta lizinga na treću stranu koja će ga koristiti ne oslobađa korisnika lizinga njegove obaveze prema davaocu lizinga u skladu sa ugovorom o lizingu.

Rok o podlizingu ne smije prijeći rok ugovora o lizingu.

Pravo prijenosa predmeta lizinga na korištenje trećem licu može se isključiti ugovorom o lizingu ili njime drugačije urediti.[12]

Hrvatski zakonodavac također ima slična rješenja u slučajevima davanja predmeta lizinga trećem na korištenje.[13]

Crnogorski zakonodavac nije izdvojio u zakonskom tekstu odredbe o podlizingu ili davanju predmeta lizinga trećem na korištenje, ali je shodna primjena UNIDROIT Konvencije o međunarodnom finansijskom lizingu (UNIDROIT Convention on International Financial Leasing). Konvencija je usvojena u Otavi, 28. maja 1988. godine.) obezbjedila i regulirala ovo pitanje i kod Crnogorskog zakonodavca.

Albanski zakon sadrži ista rješenja kao što su rješenja Hrvatskog, Srpskog i BH zakonadavaca.[14]

5. REGISTRACIJA UGOVORA O FINANSIJSKOM LIZINGU

Upis (registracija) prava na osnovu ugovora o lizingu imanentno je posmatranim zakonodavstvima. Posebnu specifičnost ima BH zakonodavstvo s obzirom na činjenicu da pored entitetskog uređenja lizinga u pogledu registracije značajnu ulogu igra i državni Okvirni zakon o zalozi.

Naime, Članom 58. Zakona F BiH predviđena je registracija prava na osnovu ugovora o leasingu ovisno da li se radi i to kada je predmet ugovora nepokretna ili pokretna stvar.

Ako je predmet leasinga nepokretna stvar, pravo vlasništva na predmetu leasinga i prava na osnovu ugovora o leasingu nad predmetom leasinga upisuju se u skladu sa propisima kojima su uređeni upisi prava na nekretninama.

Ako je predmet leasinga pokretna stvar, registracija prava na osnovu ugovora o leasingu (posebno vlasničko pravo) vrši se u Registru zaloga u skladu sa propisima kojima se uređuje registracija zaloga.

Ako je predmet leasinga pokretna stvar za koju je posebnim zakonom propisana godišnja registracija, kao npr. motorna vozila, registracija prava vlasništva vrši se u skladu sa zakonom koji definira registraciju vlasništva nad vozilima.

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[11] Član 35. Zakona R Srbije

[12] Isto rješenje je i u članu 45. Zakona RS BiH

[13] Član 47. Zakona R Hrvatske

[14] Član 34. Albanskog zakona

Ako je predmet leasinga pokretna stvar, davalac leasinga je dužan podnijeti zahtjev za registraciju prava na osnovu ugovora o leasingu (posebno vlasničko pravo) te ostalih podataka iz ugovora o leasingu u skladu sa propisima kojima se uređuje registracija zaloga u roku od sedam dana od isporuke (član 59. Zakona F BiH).

Ako su u pitanju nepokretne stvari, davalac usluga leasinga je dužan podnijeti zahtjev za uknjižbu prava vlasništva i prava iz ugovora o leasingu u roku od 30 dana od ispunjenja svih uvjeta za uknjižbu

Zahtjev za promjenu ili brisanje podataka iz nadležnog registra davalac leasinga je dužan podnijeti u roku od 15 dana od dana nastupanja činjenica koje su tu promjenu ili brisanje podataka uvjetovale.

Slična rješenja sadržana su i u odredbama članova od 52. do 57. Zakona RS.

Među izuzetno važne zakone koji tretiraju i uređuju materiju zaključenja lizing pravnog posla ubraja se Okvirni zakon o zalozima koji je donesen na nivou BiH i objavljen u Službenom glasniku BiH broj :28/04

Ovaj zakon je značajan sa aspekta vrlo važne radnje registracije Ugovora o lizingu koja Davaocu lizinga pruža viši stepen pravne sigurnosti pri i nakon zaključenja lizing pravnog posla.

Naime, registracija Ugovora o lizingu, najprije Davaocu lizinga garantira i obezbjeđuje prednost nad ostalim povjeriocima u eventualno pokrenutom postupku izvršenja nad imovinom Korisnika lizinga, jer tako registrovani Ugovor ima karakter javne isprave i kao takav omogućava izlučenje stvari koja je data u lizing iz imovine Korisnika lizinga nad kojom se eventualno može provoditi postupak izvršenja.

S prednjim u vezi, naglašava se iznimna potreba registracije Ugovora o lizingu u cilju odgovarajuće zaštite Davaoca lizinga, kako bi isti mogao stvar koja je data u lizing isključiti iz imovine Korisnika lizinga nad kojom može biti pokrenut i provoditi se postupak izvršenja. U protivnom, bez registrovanog Ugovora o lizingu stvar koja je data u lizing mogla bi se povratiti samo u parničnom postupku, kada bi trebalo dokazivati postojanje pravnog naslova (Ugovora o lizingu) po osnovu kojeg se traži povrat stvari, a sve navedeno uključuje dugotrajniji i nesiguran postupak za povrat stvari i moguće izvršenje nad istom, što bi dovelo u vrlo nepovoljan položaj Davaoca lizinga.

Uz navedeno, potrebno je naglasiti da je Okvirni zakon o zalozima značajan i sa aspekta provođenja postupka za povrat stvari Davaocu lizinga koja je predmet Ugovora o lizingu.

Naime, ekstenzivnim tumačenjem moglo bi se govoriti da se radi o zakonu koji je kao lex specialis za pravni posao lizinga omogućio da se taj postupak provede brže u odnosu na postupak prema odredbama Zakona o parničnom i Zakona o izvršnom postupku.

Međutim, navedenim Zakonom, odredbe o izvršenju u skladu sa istim se principijelno odnose na založno pravo, te se stoga bez autentičnog tumačenja ovih odredaba Zakona još uvijek ne može govoriti o takvoj mogućnosti, s obzirom da se radi o odredbama koje zahtijevaju takvo tumačenje. Ukoliko bi autentično tumačenje (tumačenje donosioca Zakona) pokazalo da se odredbe o izvršenju mogu primjeniti i na pravni posao lizinga to bi značilo još jednu "stepenicu" više pravne sigurnosti i zaštite Davaoca lizinga koji bi na efikasniji i brži način u odnosu na postupak u parničnom i izvršnom postupku mogao stvar koja je data u lizing povratiti.

Zakon o finansijskom lizingu R Srbije predviđa i pravila relevantna za registar finansijskog lizinga (čl.43-51.). Upis podataka iz ugovora o finansijskom lizingu u ovaj registar *nema konstitutivni karakter*, što znači da se ugovor o finansijskom lizingu punovažno zaključuje i egzistira bez obzira na upis. Registar finansijskog lizinga ovim Zakonom je predviđen radi zaštite pravne sigurnosti poslovnog prometa. Zakon sadrži samo opšta pravila o registru

finansijskog lizinga, dok su njegovo funkcionisanje i način rada biti bliže uređeni odgovarajućim podzakonskim aktom.

Hrvatski zakonodavac je registraciju lizinga također označio deklaratornom i odredio posebnu Agenciju za vođenje registra.[15]

Registracija ugovora o lizingu i prava i obaveza sadržanih u istom prema Crnogorskom zakonu se također vrši za slučaj da je predmet lizinga pokretna ili nepokretna stvar.[16]

Slična rješenja data su i u Albanskom zakonu.[17]

6. PRINUDNO IZVRŠENJE U FINANSIJSKOM LIZINGU

Prema pravilima odredbe čl.30. Zakona R Srbije, ugovorne strane mogu, pred nadležnim sudom, u vanparničnom postupku, zapisnički utvrditi da su se sporazumjele da, u slučaju neplaćanja lizing naknade od strane primaoca lizinga o dospjelosti i u skladu sa ugovorom, davalac lizinga ima pravo de predmet lizinga preuzme u državinu. Potpisani zapisnik o sporazumu ugovornih strana ima snagu sudskog poravnanja koje predstavlja izvršnu ispravu, u smislu odgovarajućih odredaba Zakona o izvršnom postupku. Tim putem, davaocu lizinga pružena je mogućnost da se, bez pokretanja parničnog postupka, obrati izvršnom sudu i na osnovu pomenutog sporazuma koji predstavlja izvršnu ispravu, zahtjeva povraćaj predmeta lizinga. U tom kontekstu, potrebno je napomenuti da bi, u slučaju uvođenja javnih bilježnika u pravni sistem Srbije, ovo pitanje bilo značajno pojednostavljeno, s obzirom da bi ovjera kod javnog beležnika mogla predstavljati osnov za direktno obraćanje izvršnom sudu.

Entitetski zakoni o lizingu ne sadrže posebne odredbe o prinudnom izvršenju nad predmetom lizinga ili iz osnova ugovora o lizingu.

Prinudno izvršenje na predmetu lizinga tako će biti provedeno u skladu sa općim pravilima i odredbama Zakona o izvršnom postupku F BiH (Službene novine F BiH br. :32/03), odnosno Zakona o izvršnom postupku RS (Službeni glasnik RS br. :59/03).

Shodno ovim entitetskim propisima predmetom izvršenja mogu biti pokretne i nepokretne stvari i prava. Predmetom ugovora o lizingu kao što smo već vidjeli mogu biti pokretne i nepokretne stvari, te se time može zaključiti da i predmet lizinga može biti predmetom prinudnog izvršenja na način i u situacijama koje determiniraju odredbe Zakona o izvršnom postupku.

U slučaju da se nad imovinom korisnika lizinga provodi postupak stečaja ili likvidacije Zakon F BiH propisuje zaštitu za davaoca lizinga prema kojoj je korisnik leasinga dužan bez odlaganja obavijestiti davaoca leasinga o pokretanju stečajnog ili likvidacionog postupka.

U slučaju stečaja korisnika leasinga, davalac leasinga ima pravo na izdvajanje predmeta leasinga (izlučno pravo) iz stečajne mase korisnika leasinga u skladu sa propisima koji uređuju stečajni postupak.

Zakon nije definirao prava korisnika lizinga za slučaj stečaja ili likvidacije davaoca lizinga, iako je predvidio posebnim odredbama da se nad imovinom lizing društva može provesti postupak stečaja ili likvidacije shodno posebnim zakonima o stečaju i likvidaciji.(član 84. i 85. Zakona F BiH).

Slična rješenja sadržana su u Zakonu RS (član 25. Zakona RS).

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[15] Član 52. – 54. Zakona R Hrvatske

[16] Članom 20. i 21. Zakona R Crne Gore su propisani uslovi i način registracije.

[17] Član 42. Zakona R Albanije

Izvršenje nad pokretninama ili nepokretnostima davatelja leasinga kada se pokretnina ili nepokretnost koja je predmet ugovora nalazi u posjedu primatelja lesainga i provodi se u skladu sa odredbama Ovršnog zakona[18].

I u Crnogorskom Zakonu izvršenje se provodi shodno odredbama Zakona o izvršnom postupku.[19]

Shodno odredbama albanskog zakona, Ugovor o finansijskom lizingu ima izvršno dejstvo u pogledu ponovnog sticanja stvari koja je predmet ugovora o finansijskom lizingu, i sprovodi se od strane sudskog izvršioca nakon izdate naredbe za izvršenje od strane nadležnog suda u kojoj sud navodi svoj stav u roku od 5 dana od podnošenja peticije. Sud, koji izdaje naredbu za izvršenje takođe ustanovljava i aktivnosti koje sudski izvršilac obavlja za sekvestraciju stvari i njeno vraćanje zalogodavcu ili ovlašćenom licu. U ovom postupku sud primenjuje odredbe predviđene Zakonom o parničnom postupku.

Sudski izvršilac upućuje obaveštenje o postupanju zalogoprimcu u roku od 5 dana od njegovog izdavanja, i ako zalogoprimac u roku od 10 dana od dana prijema obaveštenja ne ispuni tražene obaveze i dobrovoljno ne vrati predmetnu stvar, sudski izvršilac odmah odlučuje o njenoj sekvestraciji. Ako sudski izvršilac utvrdi da nakon isteka roka od 10 dana izvršenje više nije moguće, on odmah pokreće prinudno izvršenje pristupajući sekvestraciji stvari koja je predmet finansijskog lizinga i vraća je zalogodavcu.

Ukoliko ne izvrši sekvestraciju stvari, sudski izvršilac je dužan da zalogodavcu odmah uputi pismeno obaveštenje, najkasnije u roku od 10 dana od dana kada je postupak za sekvestraciju pokrenut. [20]

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[18] Narodne novine R Hrvatske broj : 57/95, 29/99, 173/03, 194/03, 151/04, 88/05, 121/05, 67/08,

[19] Vidi o tome član 17. Zakona o finansijskom lizingu R Crne Gore.

[20] Član 32. Zakona br. 9396 od 12.05. 2005. 'O finansijskom lizingu,' sa izmjenama i dopunama.

Prof. Dr. *Jelena Perović**

MODERNI UGOVORI

KOMPARATIVNA ANALIZA

Osnovna koncepcija faktoringa

Ugovor o faktoringu, kao moderan ugovor poslovnog prometa proistekao iz *lex mercatoria*, nije zakonski regulisan u pravnim sistemima Hrvatske, Srbije, Makedonije, Bosne i Hercegovine i Crne Gore. Pojedini aspekti faktoringa regulisani su posebnim propisima koji se odnose na oblast bankarskog i deviznog poslovanja.

U Srbiji, predlog regulative ugovora o faktoringu iznesen je u prednacrtu Građanskog zakonika Srbije publikovanog u maju 2010. godine (čl.1274-1285). Prednacrt uređuje sledeća pitanja ugovora o faktoringu: pojam ugovora, sadržina ugovora, forma ugovora, potraživanja koja su predmet ustupanja, dejstvo ustupanja potraživanja, pravo faktora na naplatu od dužnika, rizik naplate potraživanja od dužnika, odgovornost klijenta za postojanje i valjanost prenetog potraživanja, obaveštavanje dužnika, prigovori dužnika, pravo dužnika na povraćaj iznosa isplaćenih faktoru, sukcesivni faktoring (Nacionalni referat za Srbiju, autor Prof. Dr. Jelena Perović).

U Makedoniji, u februaru 2007. godine, izrađena je Studija o faktoringu, putem koje se nastojalo odgovoriti na određena pitanja i dileme vezane za razvoj faktoringa u ovoj državi (Nacionalni referat za Makedoniju, autor Prof. Dr. Goran Koevski).

U nacionalnim referatima ističe se da faktoring na prvom mestu predstavlja metod finansiranja značajan za banke i finansijske institucije, koji se u praksi realizuje putem ugovora o faktoringu. Tako, u nacionalnom referatu Hrvatske (autor Mr. Ana Keglević, LL.M.), ističe se da reports from the Croatian Financial Services Supervisory Agency are showing that there are 14 factoring companies currently operating in Croatia and the volume of factoring activities amounts 2.736.001 thousand HRK for the year 2009 (app 375.000.000 thousand EUR). Latter number of factoring companies is related to companies that perform factoring activities and are in obligation to submit their financial reports to the Agency. However the Agency holds no power to license them (unlike leasing companies) but is authorised, according to the Agency Law (OG 140/05) only to perform supervision.[1] Odgovarajući podaci sadržani su i u nacionalnom referatu Makedonije (autor Prof. Dr. Goran Koevski) u kome se navodi da factoring, as a financial service, is at the moment offered by a few companies in the Republic of Macedonia: a) *Prvi Faktor*, Factoring Company doo Skopje, a joint compa-

* Originalni tekst je na lokalnom jeziku.

[1] The national reporter from Croatia specifies that the Croatian national program for the accession to the EU specifies factoring as one type of financial services (see, national report from Croatia, Mr. Ana Keglević, LL.M.)

ny of NLB d.d. and SID Bank d.d., which offers several types of factoring: domestic, export factoring etc.; b) EOS Matrix doo Skopje, which is part of a leading group in debt management in South-eastern Europe and offers services in the area of receivables management and debt collection, in both B2B and B2C relationships and c) FINEA Factoring, Factoring Company doo from Maribor, Republic of Slovenia, which is gradually becoming the leading company in factoring on the markets of former Yugoslavia. U nacionalnom referatu Crne Gore (autor Dr. Aneta Spaić) konstatuje se da u Crnoj Gori, due to the lack of the legal regulation of this contract, factoring has been offered to the Montenegro market only in two out of the eleven existing and functioning commercial banks. U nacionalnom referatu Bosne i Hercegovine (autor Emir Salihović) navodi se da while factoring services are being introduced, it is expected that the size of the factoring market will be around 0,4% of the Gross National Product (GNP). According to information from the Central bank of Bosnia and Herzegovina (CBBandH)), 2007, GNP in Bosnia and Herzegovina was 21,641 million KM. This suggests that Bosnia and Herzegovina could expect a factoring market of around 86 million (0,4% of GNP) even short term (1-2 years). In the middle-term period (3-5 years), the factoring market is expected to reach around 432 million KM (i.e. 2% GNP) based on GNP projected growth.

U pojedinim nacionalnim referatima date su opšte definicije ugovora o faktoringu. Tako, u nacionalnom referatu Hrvatske navodi se: „Factoring agreement means an agreement concluded between one party (the supplier) and another party (the factor) pursuant to which the supplier sells and assign its receivables arising from the agreements of sale of goods and services made with third persons, his customers (the debtors) in exchange for remuneration with the purpose to finance his continued business. The main functions of factoring are: financing, recourse responsibility (*delcredere*) and providing other services directly or indirectly related to factoring (such as investigation of credit health of debtors, taxation, bookkeeping, advertising of services etc)." (autor Mr. Ana Keglević, LL.M.). Prema nacionalnom referatu Makedonije, „The factoring agreement is defined as (1) a long-term contractual relationship between one party – the seller (client) and another party – the factoring institution (factor), whereby a) the client transfers to the factor, at a discount, its short-term contractual monetary claims before their due date, which result from contracts for the sale of goods or provision of services between it – the client, and its buyer (debtor), except regarding those goods and services that were purchased for personal, family or domestic use; b) the factor, for a certain fee, accepts to collect those claims, if it finds that the solvency of the client's debtors is good, by informing the debtors of this transfer, regardless of whether the client or the factor bears the risk for the collection of said claims" (autor Prof. Dr. Goran Koevski). U nacionalnom referatu Srbije konstatuje se da teškoće definisanja ugovora o faktoringu nastaju zbog različitih vrsta ovog posla, a naročito zbog toga što faktor može preuzeti obavezu da naplati od dužnika preneto potraživanje bilo u slučaju kad ga otkupljuje – tzv. pravi faktoring, bilo u slučaju kad samo preuzima obavezu da klijentu garantuje naplatu – tzv. nepravi faktoring (autor Prof. Dr. Jelena Perović). Iz tih razloga, u prednacrtu Građanskog zakonika Srbije (član 1274.) su alternativno predložene tri moguće definicije ugovora o faktoringu. Alternativa 2 prednacrta koja prihvata rešenje UNIDROIT Konvencije o međunarodnom faktoringu sadrži sledeće određenje: "Ugovorom o faktoringu jedna strana, koja je isporučilac robe ili vršilac usluga (klijent) obavezuje se da ustupi drugoj strani (faktoru) potraživanja već nastala ili buduća prema trećem licu iz ugovora o prodaji robe ili vršenja usluga, ili iz izvršenog rada, a faktor se obavezuje da uz naknadu i naplatu troškova izvrši najmanje dve od sledećih obaveza: 1. da avansno finansira klijenta (isplata potraživanja pre dospelosti, uključujući

zajam i avansne isplate u vezi tih potraživanja); 2. da naplati preneta potraživanja; 3. da garantuje klijentu naplatu tih potraživanja (preuzima rizik naplate potraživanja u slučaju nelikvidnosti dužnika); 4. da vodi evidenciju o potraživanjima klijenta".

Prema svojim pravnim osobinama, ugovor o faktoringu predstavlja neimenovan, dvostrano obavezan i teretan ugovor, ugovor sa trajnim izvršenjem prestacija i ugovor koji se zaključuje *intuitu personae.* U praksi, ovaj ugovor najčešće se zaključuje u pismenoj formi i može postati formalan ako ugovorne strane predvide formu kao uslov njegove punovažnosti. Prema tehnici zaključenja, ugovor o franšizingu se, po pravilu, zaključuje kao ugovor po pristupu. Ugovor o faktoringu je mešovite pravne prirode (elementi ugovora o cesiji, ugovora o kreditu, ugovora o garanciji, ugovora o delu, i sl.).

U izvore prava, pored posebnih propisa koji uređuju pojedine aspekte faktoringa, ulaze opšti uslovi poslovanja faktoring kompanija, tipski i formularni ugovori, trgovački običaji, kao i opšta pravila ugovornog prava. Na međunarodnom planu, faktoring je regulisan UNIDROIT Konvencijom o međunarodnom faktoringu iz 1988. godine, koja može poslužiti kao model prilikom izrade odgovarajućih nacionalnih pravila o faktoringu.

Analiza nacionalnih referata vodi opštem zaključku da faktoring nije precizno regulisan odgovarajućim nacionalnim propisima, što predstavlja značajnu smetnju za realizaciju ovog pravnog posla u praksi poslovnog prometa.

Vrste ugovora o faktoringu

Ugovor o faktoringu predstavlja širok pravni okvir za različite oblike posla faktoringa koji se u praksi zaključuju. Njihova kategorizacija prema konkretnim vrstama faktoring posla vrši se prema sadržini tj. elementima svakog konkretnog ugovora. Analiza nacionalnih referata[2] daje mesta zaključku da u doktrini uporednog prava u načelu preovlađuju sledeće klasifikacije:

- prema teritorijalnom kriterijumu, razlikuje se domaći i međunarodni faktoring. U međunarodnom faktoringu, po pravilu, učestvuju četiri subjekta: prodavac (klijent), njegov domaći faktor, kupac u inostranstvu (dužnik) i korespondentni faktor u zemlji kupca;
- prema kriterijumu predmeta obaveze i funkcije faktoringa, razlikuje se pravi faktoring i nepravi (kvazi) faktoring. Pravi faktoring (*Old Line Factoring; Conventional Notification Factoring*) je takav ugovor kod koga faktor otkupljuje potraživanje klijenta uz diskont o dospelosti ili otkupljuje potraživanje pre dospelosti vršeći time kreditiranje i druge faktoring usluge. Kod ovog faktoringa izostaje garantna funkcija faktora jer je potraživanje definitivno otkupljeno, a s druge strane na osnovu posebne odredbe u ugovoru ustupilac potraživanja (klijent) može garantovati faktoru naplativost potraživanja od dužnika. Nepravi faktoring je, faktoring kod kog faktor preuzima potraživanje samo radi naplate za ustupioca i po pravilu garantuje za naplativost potraživanja;
- prema vrsti osnovnog posla iz koga potiču potraživanja koja su predmet otkupa, razlikuje se faktoring u izvoznim poslovima ili izvozni faktoring (opšti faktoring poslovi) i faktoring u ostalim poslovima (posebni faktoring poslovi);

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[2] V. nacionalne referate Srbije (autor Prof. Dr. Jelena Perović), Hrvatske (autor Mr. Ana Keglević, LL.M.) i Makedonije (Prof. Dr. Goran Koevski).

- prema otvorenosti faktoring posla u odnosu na obaveštenost dužnika iz osnovnog posla o prenosu potraživanja, razlikuje se otvoreni i skriveni faktoring;
- prema tome da li u poslu postoji jedan ili više faktora („factor of a factor"), razlikuje se direktni i indirektni faktoring;
- factoring payable after maturity of the account receivable. This is a type of factoring that lacks its financing function. The factor buys client's short-term accounts receivable on their due date. There is no advance, as is the case in true factoring agreements.

Prava i obaveze ugovornih strana

Osnovna obaveza klijenta iz ugovora o faktoringu je da na faktora prenese potraživanje. Ovaj prenos vrši se putem ugovora o cesiji. Sa prenosom glavnog potraživanja na faktora prelaze i sporedna prava (pravo prvenstvene naplate, založna prava, prava na kamatu, ugovornu kaznu, i dr.). Za punovažnost prenosa potraživanja na faktora nije potrebna saglasnost dužnika ali je potrebno da on o tome bude obavešten.

U tom pogledu, u nacionalnom referatu Srbije (autor prof. Dr. Jelena Perović) navodi se da prednacrt Građanskog zakonika Srbije predviđa da obaveštenje dužnika mora biti učinjeno u pismenoj formi i da mora sadržati: podatke i isprave na osnovu kojih se sa izvesnošću mogu utvrditi potraživanja koja su ustupljena; podaci o faktoru ili sukcesivnom faktoru; uputstvo i podaci o bankarskom računu na koji dužnik treba da plati dug. Smatra se da je ovo obaveštenje dato i u slučaju kad je upućeno telegramom, telefaksom, elektronskom poštom ili drugim uobičajenim sredstvom komunikacije, koja omogućuju dokaz o sadržini obaveštenja i nesumnjivo utvrđenje identiteta pošiljaoca, kao i dokaz o prijemu obaveštenja od strane dužnika. Dužnik nije u obavezi da plati ustupljeno potraživanje faktoru, odnosno sukcesivnom faktoru, ako nije obavešten na navedeni način, ali njegova obaveza prema klijentu ostaje. Ispunjenje izvršeno klijentu pre obaveštenja o ustupanju punovažno je i oslobađa dužnika obaveze, ali je u tom slučaju klijent dužan da bez odlaganja naplaćene sume koje se odnose na ustupljena potraživanja prenese na faktora (čl.1282). Dužnik ima pravo na sve prigovore prema faktoru koje bi mogao istaći i klijentu do časa kada je saznao za ustupanje. Dužnik može istaći faktoru prigovor prebijanja njegovog potraživanja samo pod uslovom da je dužnikovo potraživanje dospelo najkasnije u momentu dobijanja obaveštenja o ustupanju potraživanja faktoru (čl.1283). Klijent odgovara faktoru za postojanje potraživanja koje je predmet ustupanja u času kada je izvršeno ustupanje i odgovara za naplativost ustupljenog potraživanja, ako drukčije nije ugovoreno. Klijent odgovara za naplativost dospelih potraživanja u momentu njihovog ustupanja, a za nedospela potraživanja u času dospelosti (čl.1281).

Obaveze faktora razlikuju se u zavisnosti od vrste konkretnog faktoring posla. Najopštije rečeno, obaveze faktora odnose se na naplatu potraživanja, kreditiranje, garancije naplate i vršenje ostalih usluga. U pogledu prava faktora, prednacrt Građanskog zakonika Srbije sadrži odredbe o pravu faktora na naplatu od dužnika, o riziku naplate potraživanja od dužnika, kao i o sukcesivnom faktoringu.

Prema prednacrtu, ako je ugovorom o faktoringu ugovoren prenos potraživanja radi naplate (otkup potraživanja agenta prema dužniku), faktor ima pravo na sve sume koje dobija od dužnika na ime ispunjenja prenetog potraživanja, a klijent ne odgovara faktoru ako su te sume manje od cene po kojoj je potraživanje ustupljeno faktoru. S druge strane, ako je ugovorom o faktoringu potraživanje preneto na faktora samo na naplatu (u cilju obezbeđenja naplate), a ugovorom o ustupanju potraživanja nije predviđeno drukčije, faktor je dužan da klijentu preda obračun naplate i preda mu sumu koja prelazi visinu duga klijenta prema fak-

toru na osnovu ugovora o faktoringu. Ako novčana sredstva naplaćena od dužnika budu manja od potraživanja koja faktor ima prema klijentu po osnovu ustupanja potraživanja, klijent ostaje u obavezi prema faktoru za ostatak duga (čl.1279).

Ako je ugovorom o faktoringu ugovoren prenos potraživanja radi naplate, rizik naplate ustupljenog potraživanja faktor preuzima na sebe. U slučaju ovakve naplate potraživanja, klijent će izuzetno snositi rizik naplate i posle ustupanja potraživanja: 1) ako je klijent u času zaključenja ugovora sa dužnikom znao ili morao znati da dužnik nije sposoban za plaćanje; ili 2) ako klijent nije dostavio faktoru sve podatke i isprave koje je posedovao ili imao saznanja o njima niti je o tome obavestio faktora, a koji su od značaja za utvrđivanje postojanja i visine, kao i naplatu potraživanja, najkasnije u vreme njihovog ustupanja. Ako je ugovorom o faktoringu ugovoren prenos potraživanja samo za naplatu (u cilju obezbeđenja naplate), teret rizika naplate može biti ugovoren i na drukčiji način (čl.1280).

Faktor može ustupljeno potraživanje dalje ustupiti narednom faktoru (sukcesivni faktoring) samo ako je to ugovorom o faktoringu dopušteno. Sukcesivni faktor je pravni sledbenik iz ugovora zaključenog između klijenta i faktora, odnosno između dva faktora, i on preuzima prava i obaveze iz ugovora prethodnog faktora. Na sukcesivni faktoring primenjuje se gore navedena obaveza obaveštavanja dužnika (čl.1285).

Nacionalni referat Hrvatske detaljno navodi prava i obaveze ugovornih strana iz ugovora o faktoringu (autor Mr. Ana Keglević, LL.M.), a analizu ovog pitanja u makedonskom pravu data je u nacionalnom referatu Makedonije (autor Prof. Dr. Goran Koevski).

Asim Vokshi, LL.M*

OSIGURANJA U ODNOSU NA UGOVOR O FAKTORINGU, SUKCESIJA KREDITA I REGISTAR FAKTORINGA

OSIGURANJA U ODNOSU NA UGOVOR O FAKTORINGU

U odnosu na osiguranja u ugovoru o faktoringu, zajednički elemenat za sve zemlje, koje su obuhvaćene pregledom, je taj da najčešće sve vrste pravnih osiguranja mogu biti upotrebljene radi garancije ugovora o faktoringu.

U Albaniji, faktor i isporučilac mogu predvideti osiguranja za poslovanja u oblasti faktoringa u samom ugovoru o faktoringu. Osiguranja obuhvataju depozit, zalog, pravo retencije, jemstvo ili druga osiguranja u skladu sa delotvornim pravnim odredbama[1]. Poslovanja u oblasti faktoringa, kao specifične vrste obaveza, mogu biti osigurana svim osiguranjima obaveza koje su utvrđene u članovima 530. do 607. Građanskog zakonika[2] i Zakonom broj 8537. of 18. oktobra 1999. godine 'O zalogu' sa izmenama.

U Bosni i Hercegovini, osiguranja u odnosu na ugovor o faktoringu su zasnovana na propisima zakona o obaveznim odnosima. Na taj način, opšta osiguranja za obaveze primenjuju se i na ugovor o faktoringu.

Prema zakonodavstvu Hrvatske, osnovna pravila u odnosu na prenos stvavrnopravnih osiguranja su sledeća:

1. Sva sporedna prava kao što su hipoteka, fiksni i plivajući izdaci, pravo retencije, garancija, prvenstvo plaćanja, interesi, itd. biće preneseni *ex lege* (član 81. CO) faktoru zajedno sa dugovanjima u trenutku ustupanja.
2. Prava koja nisu sporedna, kao fiducijarni prenos vlasništva, po pravilu, nisu prenosiva i treba da budu izuzeta iz ustupanja dugovanja. Međutim,u hrvatskoj literaturi ne postoji jasan položaj po pitanju stvarnopravnih osiguranja koja nisu sporedna, a naročito u odnosu na zemljište.

Najčešće, svi interesi i stvarnopravna osiguranja na zemljištu moraju biti zabeleženi u Zemljišnom registru u skladu sa odredbama Zakona o registraciji zemlje i imovine i drugih stvarnopravnih akata. Shodno tome, prenos osiguranja u odnosu na faktoring moraće uvek da bude posmatran u odnosu na osiguranja koja reguliše posebno zakonodavstvo.

U Makedoniji, osiguranja ugovora o faktoringu nisu određeno regulisana. Ista pravila koja se inače primenjuju na osiguranja, primenjuju se i na odnose u faktoringu.

Zakon Crne Gore ne definiše, ne opisuje i ne reguliše faktoring. Ovo ne znači da faktoring ne postoji u praksi. U ovom slučaju, opšta pravila o obavezama primenjuju se na osiguranja u odnosu na ugovor o faktoringu.

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* Originalni tekst je na engleskom jeziku.

[1] Član 15 Zakona broj 9630 od 30. oktobra 2006. godine 'O faktoringu', kao što je izmenjen.

[2] Kazneni uslovi, prava retencije, hipoteka, jemstvo, kapara, prednosti i neodobravanja za dužnikove pravosudne aktivnosti.

U Srbiji, opšta pravila zakona o obavezama i osiguranjima primenjuju se na osiguranja u ugovorima o faktoringu u zavisnosti od vrste i prirode korišćenog osiguranja. Što se tiče zakona o osiguranjima, u srpskom pravnom sistemu hipoteka na pokretnim stvarima je regulisana Zakonom o obligacionim odnosima (članovi 966-988, registrovani zalog pokretne imovine je regulisan Zakonom o zalogu pokretne imovine navedene u registru[3], dok je hipoteka regulisana Zakonom o hipotekama[4]. Shodno opštem pravilu Zakona o obligacionim odnosima o prenosu potraživanja ugovorom (cesija), pomoćna prava se prenose primaocu zajedno sa potraživanjem kao što su pravo preferencijalnog plaćanja, hipoteka, zalog, prava iz ugovora sa garantima, prava na interes, ugovorna kazna, itd. Ipak, strana koja prenosi pravo može preneti predmet zaloge primaocu samo ukoliko zalogodavac pristaje na to. U drugačijem slučaju, predmet zaloge ostaje u posedu strane koja prenosi prava radi održavanja i u ime primaoca (član 437., paragraf 1.i 2.). S obzirom na posebna pravila o ugovoru o faktoringu Nacrt predviđa da se pomoćna prava prenose faktoru (pravo preferencijalnog plaćanja, prava o zalogu, prava na interes, ugovorna kazna, itd.) zajedno sa prenosom potraživanja i na način i u obimu predviđenim ugovorom o faktoringu (član 4., paragraf 5.).

SUKSECIJA KREDITA

U Albaniji, član 21. Zakona ’O faktoringu’ uređuje pravila za sukcesivni prenos novca faktoru ili predmetu u korist koga se vrši prenos. Konkretno, ovaj član određuje da:

’1. Kada isporučilac plaća faktoru novac sa računa klijenta na osnovu ugovora o faktoringu, u skladu sa ovim zakonom:

a) odredbe člana 3[5] i 20[6] ovog zakona, u skladu sa slovom ’b’ ovog člana, primenjivaće se za svaki i svaki dalji prenos dotičnog novca trećim stranama;

b) odredbe člana 17[7] i 20 ovog zakona primeniće se u odnosu na subjekte koji sukcesivno primaju dotični novac, isti kao u slučaju faktora.

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[3] „Službeni glasnik Republike Srbije“, 30. maj 2003., broj 57.

[4] „Službeni glasnik Republike Srbije“, 115/2005.

[5] Član 3. predviđa ugovor o faktoringu i prethodno je razjašnjen.

[6] Član 20. Zakona ’O faktoringu’ predviđa da:

’1. *Propust da se izvrši ili neredovno ili odloženo izvršenje ugovora za prodaju robe i/ili usluga, bez narušavanja prava dužnika, prema članu 19. ovog zakona, nećemu odmah dati pravo da zahteva da faktor vrati plaćeni iznos, čak iako dužnik ima pravo da zahteva da isporučilac vrati ovaj iznos.*

2. *Dužnik, koji uživa pravo da zahteva od isporučioca da vrati iznos plaćen faktoru za novac sa računa klijenta, imaće pravo da zahteva da faktor vrati dotični iznos kada faktor:*

a) *nije izvršio plaćanje u korist isporučioca za dotični novac; ili,*

b) *jeste izvršio plaćanje u korist isporučioca za dotični novac, a svestan je propusta o izvršenju ili neredovnom ili odloženom izvršenju ugovora za prodaju robe i/ili usluga od strane isporučioca.’*

[7] Član 17. navodi da ’Ja, dužnik, biću u obavezi da platim faktoru samo pod uslovom da on nije svestan prvenstva da drugi subjekat mora biti plaćen i pod uslovom da pismeno obaveštenje o prenosu novca:

a) je dostavljeno dužniku od strane isporučioca ili faktora, uz saglasnost isporučioca;

b) identifikuje, do moguće granice, novac sa računa klijenta prenešen u korist faktora kome dužnik mora platiti sredstva;

c) odnosi se na novac sa računa klijenta zarađen na osnovu ugovora o prodaji robe i/ili usluga zaključenog pre ili u vreme kada je obaveštenje dato.

2. Kada je obaveštenje propisno dostavljeno, dužnik vrši isplatu faktoru u skladu sa uslovima ugovora zaključenog između isporučioca i dužnika.’

2. Postojeći ili novi faktor dostaviće obaveštenje dužniku o sukcesivnom prenosu.'

Dakle, prethodna situacija tiče se slučaja kada se prenos novca sa računa klijenta vrši više od jednog puta u korist novih faktora.

Uprkos tome, član 2. Zakona 'O faktoringu' izričito navodi da ugovor o faktoringu može ograničiti ili zabraniti prodaju ili sukcesivne prenose novca sa računa klijenata.

U Bosni i Hercegovini, sukcesija u odnosu na ugovor o faktoringu zasnovana je na pravilima Zakona o obaveznim odnosima. Dakle, opšta pravila koja se primenjuju na obavezne odnose primenjuju se i na ugovor o faktoringu.

Hrvatski zakon nema jasne statutorne odredbe o sukcesiji kredita niti zabranu sukcesije u odnosu na ugovor o faktoringu. U tom slučaju, opšta pravila za dodelu prava primenjivaće se shodno tome.

Isto se može reći za Republiku Makedoniju gde odredbe o faktoringu i ugovorima o faktoringu nisu jasno definisane. Uprkos činjenici da ne postoji određeni zakon o faktoringu u Republici Makedoniji, ovo ne znači da ne postoji pravni okvir za ovu vrstu ugovornog odnosa – faktoring. U odnosu na sukcesiju u ugovoru o faktoringu, opšta pravila o obaveznim odnosima se takođe primenjuju.

Kao što je to ranije napomenuto, zakon Crne Gore ne definiše, ne opisuje i ne reguliše faktoring. U ovom slučaju, opšta pravila o obaveznim odnosima se primenjuju prilikom sukcesije u odnosu na ugovor o faktoringu.

U pravnom sistemu Srbije ne postoji uredba o pitanju sukcesije kredita u ugovoru o faktoringu. Opšta pravila sukcesije kredita se još mogu primenjivati.

REGISTAR FAKTORINGA

U Albaniji, prenos novca koji se nalazi na računu klijenta putem ugovora o faktoringu, sve promene ili dodaci i okončanje ugovora o faktoringu unose se u registar zaloga[8]. Registar zaloga funkcioniše i uređen je Zakonom broj 8537. od 18. oktobra 1999. godine 'O zalogu' sa izmenama, kao i podređenim pravnim aktima donešenim radi unapređenja i shodno ovom zakonu.

Obrazac prijave za registraciju prenosa novca sa računa klijenta putem ugovora o faktoringu sadrži:

a) podatke o identifikaciji faktora, isporučioca i dužnika;
b) identifikaciju svake garancije zajma koju reguliše ugovor o faktoringu;
c) potpis lica koje podnosi molbu za registraciju ugovora o faktoringu i prenos novca na računu klijenta[9].

Gore navedeni podaci se unose u registar po podnošenju molbe za registraciju i imaju prvenstvo nad zahtevima trećih strana[10]. Faktor, isporučilac ili dužnik mogu zahtevati da se u registar unese beleška o nekoj parnici koja se vodi o ugovoru o faktoringu. Beleška sadrži podatke o identifikaciji raspisa za molbu za legalna prava i njen kratak opis. Na isti način, odustajanje od raspisa za molbu za legalna prava ili druge odluke relevantne za nju takođe mogu biti registrovane[11].

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[8] Član 23. Zakona broj 9630 od 30. oktobra 2006. godine 'O faktoringu' sa izmenama.

[9] Član 24. Zakona broj 9630 od 30. oktobra 2006. godine 'O faktoringu' sa izmenama.

[10] Član 25. Zakona broj 9630 od 30. oktobra 2006. godine 'O faktoringu' sa izmenama.

[11] Član 26. Zakona broj 9630 od 30. oktobra 2006. godine 'O faktoringu' sa izmenama.

Unos u registre zaloga ima dejstvo na treće strane. Pretpostavlja se da treće strane imaju saznanje o postojanju prenosa unetih u registar. Podaci uneti u registar se ne koriste radi dokazivanja vlasništva, osim ukoliko nije drugačije navedeno, ili da bi se dokazalo neko drugo pravo u odnosu na prenos novca sa računa klijenta putem ugovora o faktoringu, ili kao dokaz o punovažnosti pravnog poslovanja[12].

Zbog toga što u Bosni i Hercegovini ne postoji određena odredba o ugovoru o faktoringu, ne postoji ni registar faktoringa. Isto se može reći za Hrvatsku, Makedoniju, Crnu Goru i Srbiju.

OSTALA PITANJA KOJA SU RELEVANTNA ZA FAKTORING

U Albaniji poslovanje u oblasti faktoringa podleže nadzoru od strane albanske banke. Dakle, prema članu 28. Zakona 'O faktoringu', poslovanje u oblasti faktoringa, kao što je to određeno članom 2. ovog zakona, koje vrše subjekti predviđeni članom 10. kao što je to određeno ovim zakonom. Ove subjekte nadzire i reguliše banka Albanije u skladu sa odredbama Zakon 'O bankama Republike Albanije' i podređeni zakonski akti propisani shodno tom zakonu u tu svrhu.

Na isti način, Zakon 'O faktoringu' određeno uređuje fiskalna pitanja koja okružuju faktoring. Radi poreza na dodatnu vrednost faktoring se smatra finansijskom uslugom[13].

Član 31. Zakona 'O faktoringu' takođe posebno reguliše stečaj, reorganizaciju ili likvidaciju faktora i dužnika. Dakle, prema ovom članu, u postupku stečaja, reorganizacije ili likvidacije primenjuju se odredbe delotvornog zakonodavstva na ispitivanje faktora u sudu. Ovaj postupak je regulisan Zakonom 'O stečaju' iz 2002. godine.

Tamo gde dužnik pokreće postupak stečaja, reorganizacije ili likvidacije, njegova obaveza da isplati faktoru novac sa računa klijenta:

a) smatra se od strane suda da je nepokrivena obaveza;
b) smatra se od strane suda da je pokrivena obaveza pod uslovom da je pokrivena jednim od osiguranja;
c) nastavlja da bude podložna istim pravima i obavezama kao što je utvrđeno u članovima 16. i 17. zakona.

U Bosni i Hercegovini ne postoji određena uredba u odnosu na ugovor o faktoringu i iz tog razloga ne postoji neki poseban sistem analize poslovanja u oblasti faktoringa.

U praksi Hrvatske već dugo se vodi rasprava o tome da li je bankama omogućeno da vrše poslovanja u oblasti faktoringa na hrvatskom tržištu. Ova neizvesnost je okončana novim Bankarskim aktom. Sada je izričito omogućeno bankama da vrše poslovanja u oblasti faktoringa (član 6.2.) što podleže prethodnom odobrenju hrvatske Nacionalne banke.

Faktoring u Hrvatskoj se napominje u sledećim uredbama: Zakonik o obaveznim odnosima (Službeni glasnik 35/05, 41/08) u okviru dodeljivanja prava, Zakon o bankama (Službeni glasnik 84/02, 141/06) gde je određeno da je bankama omogućeno da se bave poslovanjem u oblasti faktoringa, Uputstva o primeni i postupku prenosa novca sa stranim zemljama (Službeni glasnik 136/05, 176/04, 885, 18/06, 24/06 i 132/07)gde se priznaje da strana banka može vršiti operacije faktoringa u Republici Hrvatskoj. Pored toga, hrvatski nacionalni program za pristupanje Evropskoj uniji određuje faktoring kao jednu vrstu finansijskih usluga.

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[12] Član 26. Zakona broj 9630 od 30. oktobra 2006. godine 'O faktoringu' sa izmenama.

[13] Član 30. Zakona broj 9630 od 30. oktobra 2006. godine 'O faktoringu' sa izmenama.

Faktoring se napominje u sledećim zakonima u Republici Makedoniji:

- Zakon o bankama[14];
- Zakon o sprečavanju pranja novca i drugih prihoda od kriminala i finansiranja terorizma[15];
- Zakon o deviznom poslovanju[16];
- Zakon o ustanovljavanju makedonske banke za unapređenje razvoja[17];
- Zakon o preduzećima[18];
- Zakon o ugovornom zalogu[19] i
- Zakon o obaveznim odnosima Republike Makedonije[20].

Može se zaključiti da uredbe koje se odnose na faktoring i ugovori o faktoringu u Republici Makedoniji nisu jasno definisane, a to ne omogućuje zainteresovanim subjektima (prodavcima, kupcima i finansijskim institucijama) da u potpunosti iskoriste prednosti ovog relativno novog poslovanja. Možda bi se mogle ponuditi neke poreske olakšice za ovo poslovanje tako da ono postane privlačnije za zainteresovane subjekte.

U Crnoj Gori, kada je ovo pitanje u praksi i potrebno je da se primeni faktoring, treba navesti da zbog nedostatka pravnih uredbi o ovom ugovoru faktoring je ponuđen tržištu samo u dve od jedanaest postojećih i operativnih komercijalnih banaka[21]. Ovo je aktivnost koju može nadzirati centralna banka zajedno s drugim stvarima koje mogu biti objekt nadzora.

Srbija nema određene informacije u odnosu na gore navedena pitanja.

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[14] Vidi: Službeni glasnik Republike Makedonije 67/2007 i 90/2009.

[15] Vidi: Službeni glasnik Republike Makedonije 4/2008.

[16] Vidi: Službeni glasnik Republike Makedonije 34/2001, 49/2001, 103/2001, 51/2003 i 81/2008.

[17] Vidi: Službeni glasnik Republike Makedonije 24/98, 6/2000 i 87/2008.

[18] Vidi: Službeni glasnik Republike Makedonije 28/2004, 84/2005, 25/2007 i 87/2008.

[19] Vidi: Službeni glasnik Republike Makedonije 05/2003, 4/2005 i 87/2007.

[20] Vidi: Službeni glasnik Republike Makedonije 18/2001, 78/2001, 04/2002, 59/2002, 05/2003, 84/2008, 81/2009 i 161/2009.

[21] U 2009. godini, prema Centralnoj banci Crne Gore, faktoring poslovanje je iznosilo 78,000 evra u periodu januar-septembar 2009 – Bilten Centralne banke Crne Gore, oktobar 2009. godine, pristup na dan 12. februara 2010
http:/www.cb-mn.org/slike_ i _fajlovi/fajlovi/fajlovi_publikacije/biltencbcg/2009/bilten_cbcg1009.pdf

VII

EU CONSUMER CONTRACT LAW

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Introduction

CHRISTA JESSEL-HOLST AND GALE GALEV

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

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

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

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

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

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

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

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

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

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

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

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

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

16 July, 2010

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

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

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

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

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

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

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

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

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

II. Legislative techniques of transposition

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

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

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

III. Use of minimum harmonization

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

IV. Other extensions

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

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

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

V. Possible infringements of EC law

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

VI. Court practice

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

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

VII. Summary

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

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

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

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

B. BOSNIA AND HERZEGOVINA – LEGISLATIVE TECHNIQUES

(Zlatan Meškić)

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

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

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

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

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

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

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

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

[10] OG BA No. 17/02.

[11] OG BA No. 25/06.

II. Legislative techniques of transposition

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

III. Use of minimum harmonization

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

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

IV. Other extensions

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

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

V. Possible infringements of EC law

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

[12] OG BA No. 88/07.

[13] OG BA No. 91/06.

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

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

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

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

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

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

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

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

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

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

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

[18] See the index above.

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

VI. Court practice

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

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

VII. Summary

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

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

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

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

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

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

C. CROATIA – LEGISLATIVE TECHNIQUES

(Emilia Čikara)

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

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

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

II. *Legislative techniques of transposition*

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

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

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

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

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

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

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

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

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

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

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

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

III. Use of minimum harmonization

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

IV. Other extensions

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

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

V. Possible infringements of EU law

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

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

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

VI. Court practice

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

VII. Summary

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

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

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

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

D. MACEDONIA – LEGISLATIVE TECHNIQUES

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

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

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

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

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

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

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

II. Legislative techniques of transposition

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

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

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

III. Use of minimum harmonization

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

IV. Other extensions

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

V. Possible infringements of EC law

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

VI. Court practice

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

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

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

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

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

VII. Summary

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

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

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

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

E. MONTENEGRO – LEGISLATIVE TECHNIQUES

(Zvezdan Čađenović)

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

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

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

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

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

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

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

II. Legislative techniques of transposition

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

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

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

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

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

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

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

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

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

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

III. Use of minimum harmonization

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

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

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

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

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

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

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

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

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

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

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

IV. Other extensions

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

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

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

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

V. Possible infringements of EC law

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

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

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

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

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

VI. Court practice

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

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

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

VII. Summary

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Legislative techniques of transposition.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Use of minimum harmonization.

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

IV. Other extensions.

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

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[61] OJ RS No. 83/2008.

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

V. Possible infringements of EC law.

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

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

VI. Court practice.

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

VII. Summary.

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

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

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

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

Part 2: TRANSPOSITION OF THE INDIVIDUAL DIRECTIVES[62]

A. DOORSTEP SELLING DIRECTIVE (85/577)

Coordinators: *Emilia Čikara, Zlatan Meškić*

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

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

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

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

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

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

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

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

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

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

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

II. Scope

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

1. Persons covered under the Directive

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

a. Consumer

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

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

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

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

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

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

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

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

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

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

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

b. Trader

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

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

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

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

2. Situations falling within the scope of the Directive

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

a. General application

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

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

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

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

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

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

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

aa. Expanding the list of doorstep situations

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

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

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

bb. Goods and services

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

cc. Offers and/or unilateral legal acts

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

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

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

ee. Visits requested by the Consumer

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

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

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

b. Exemptions provided for in the Doorstep Selling Directive

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

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

bb. Art. 3 para. 2

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

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

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

c. Burden of proof

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

III. Consumer protection instruments

1. Information requirements

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[104] 70.000 lek = aprx. 600 €.

2. Right of withdrawal

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

a. Length of withdrawal period

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

b. Start of the withdrawal period

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

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

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

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

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

c. Postal Rule / Dispatching Rule

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

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

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

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

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

d. Formal requirements

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

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

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

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

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

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

e. Effects of withdrawal

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. Summary

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

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

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

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

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

B. UNFAIR CONTRACT TERMS DIRECTIVE (93/13)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Model of the Unfair Contract Terms Directive

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Scope of application

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

a. B2C, B2B and P2P contracts

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

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

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

b. Definition of consumer

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

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

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

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

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

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

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

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

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

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

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

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

c. Definition of seller or supplier

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

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

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

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

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

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

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

d. Public sector undertakings

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

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

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

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

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

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

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

2. Exclusion of specific contracts

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

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

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

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

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

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

b. Real property contracts

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

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

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

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

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

3. Exclusion of specific contractual terms

a. Contractual terms based on mandatory provisions

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

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

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

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

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

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

b. Individually negotiated terms

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

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

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

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

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

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

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

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

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

1. Concept of the Unfair Contract Terms Directive

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Transposition of the Annex in the Participating States

a. Legal nature of the Annex

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

b. Transposition of the Annex in the Participating States

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Legal consequences of unfairness

a. Concept of the Unfair Contract Terms Directive

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

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

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

aa. Non-binding nature of unfair terms

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

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

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

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

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

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

b. Transposition in the Participating States

aa. Absolute nullity

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

bb. Relative nullity

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

cc. Unclear legal situation

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

dd. Alteration, amendment and adjustments of terms and contracts

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

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

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

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

ff. Consequences for the contract as a whole

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

c. Compensation and/or punitive damages

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

V. Requirement of transparency according to Art. 5

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

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

1. Drafting of terms in plain and intelligible language

a. Requirements of the Unfair Contract Terms Directive

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

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

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

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

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

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

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

2. Consequences of lack of transparency

a. Requirements of the Unfair Contract Terms Directive

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

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

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

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

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

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

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

aa. Non-incorporation of terms which lack transparency

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

bb. Assessment of transparency within a content review

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

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

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

cc. Unclear legal situations

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

3. Conclusions

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

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

1. Overview

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

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

2. Administrative control of unfair terms

a. The role of public bodies in the Participating States

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

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

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

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

b. Investigatory powers of public bodies

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

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

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

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

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

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

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

c. Negotiation and guidelines

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

d. Power of public bodies to issue orders

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

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

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

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

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

3. Judicial review of unfair terms

a. Types of actions in the Participating States

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

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

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

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

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

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

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

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

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

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

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

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

b. Standing to apply for an injunction

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

c. Effects of collective actions: Relativity of res judicata

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

4. Conclusions

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

VII. Practical impact of the Unfair Contract Terms Directive

1. Impact on the level of consumer protection

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

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

2. Additional burdens or costs for traders

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

3. Particular difficulties with transposing the Unfair Contract Terms Directive

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

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

C. DISTANCE SELLING DIRECTIVE (97/7)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Scope of application

1. Consumer

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

a. Legislative techniques

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

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

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

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

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

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

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

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

b. Content of the definitions

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

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

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

[208] See supra fn. 17.

aa. Inclusion of certain legal persons

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

Overview: Inclusion of legal persons

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

bb. Clarification of 'mixed' purpose cases

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

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

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

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

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

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

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

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

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

Overview: ‘mixed’ purpose transactions as consumer contract

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

cc. Extension to certain professionals

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

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

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

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

Overview: extension to certain professionals

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

dd. Examples for variations in wording

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

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

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

2. Supplier

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

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

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

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

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

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

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

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

3. Contracts falling within the scope of the Directive

a. Definition of "distance contract"

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

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

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

b. Definition of "means of distance communication"

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Consumer protection instruments

1. Information duties

a. Pre-contractual information

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

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

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

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

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

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

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

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

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

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

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

bb. Additional pre-contractual information obligations

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

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

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

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

b. Written Confirmation, Art. 5

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

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

aa. Formal requirements

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

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

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

bb. Time of the confirmation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

c. Sanctions for breach of information duties

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

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

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

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

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

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

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

bb. Injunctions

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

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

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

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

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

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

cc. Right of competitors to claim for damages

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

dd. Fines under criminal or administrative law

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

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

ee. Other private law consequences

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

2. Right of withdrawal

a. Exceptions to the right of withdrawal

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

c. Withdrawal period

aa. Length of period

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

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

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

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

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

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

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

bb. Start of period

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

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

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

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

The issue is not regulated in Albania and Serbia.

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

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

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

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

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

cc. Postal rule / dispatching rule

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

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

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

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

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

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

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

d. Effects of withdrawal

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

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

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

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

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

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

e. Cancellation of credit agreement

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

3. Performance

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

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

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

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

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

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

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

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

Article 7(2) has been transposed as stated in the Directive in Albania (Point 20 of the Decision of the Council of Ministers No. 64 of 21.01.2009). In Bosnia and Herzegovina there are stringent provision related to the duration of the period in which the refund should be done, namely the stated period is 15 days (Article 49 (2) CPA). The laws of Croatia, Macedonia and Montenegro have expended the options for the consumers in case when the trader does not have the ordered goods available and so informs the consumer. Namely, the consumer is given an option to decide if he should keep the contract valid, or withdraw from it. If the consumer decides to cancel the contract, the trader is obliged to make the refund as soon as possible and not later than 30 days. In Macedonia this is regulated by Art. 99 (2 and 3) CPA. The laws of Croatia (Art.52 (2 and 3) CPA) and Montenegro (Art.46(2) CPA) expend even further explicitly stating that the trader will be liable for payment of interest. There are no corresponding provisions of LoO and CPA of 2005 of Serbia.

c. Use of option granted in Art. 7(3) of the Distance Selling Directive

The granted option is used in the consumer protection legislation only in Albania (Point 21 of the Decision of the Council of Ministers No. 64 of 21.01.2009). In Bosnia and Herzegovina, Croatia, Macedonia, Montenegro and Serbia, although not provided in the consumer protection legislation per se, the option can be exercised in practice by application of the general contract law principles on facultative obligations and impossibility for performance.

4. Payment by card

By Art.8 of the Directive, Member States should ensure that appropriate measures exist to allow a consumer:

- to request cancellation of a payment where fraudulent use has been made of his payment card in connection with distance contracts covered by this Directive,
- in the event of fraudulent use, to be recredited with the sums paid or have them returned.

Payment per Card	Participating States
As in the Directive	AL
Not transposed	MN, Ser
Variations	BA, CRO
Transposition not entirely clear	

This requirement has been transposed as in the Directive in the Albanian law (Art 37 (6) CPA). There are variations in the transposition in Bosnia and Herzegovina where pursuant to Art. 48 (3) the consumer has the right of return of overall funding in cash or payment card, while the right to request cancellation of a payment where fraudulent use has been made of his payment card in connection with distance contracts is omitted. In Croatia, by Art.53 CPA the injured consumer is entitled to request payment cancellation to be recredited, but in addition the sum is increased by interest on arrears at the rate of the trader's bank for three months

time deposits for the whole period beginning with the date of payment. The same rule (cancellation and recredit with interest due) exist in Macedonia (Art. 101 CPA), where the paid amount is increased with the default interest rate.

This provision of the Directive is not transposed in the legislation in Montenegro and Serbia[276].

5. Inertia selling

Article 9 of Directive 97/7, as amended by Directive 2005/29, obliges the member states to "take the measures necessary to exempt the consumer from the provision of any consideration in cases of unsolicited supply, the absence of a response not constituting consent, given the prohibition of inertia selling laid down in Directive 2005/29". The inertia selling prohibition exists in all countries, except in Serbia, with the difference that it is treated either under the distance selling contracts (Albania, Bosnia and Herzegovina, Croatia and Macedonia) or as unfair commercial practice (Montenegro) or out of business premises sales (Serbia)[277].

a. Prohibition of the supply of goods or services to a consumer without their being ordered

Inertia Selling (Art. 9, 1st indent)	Participating States
As in the Directive	AL, BA, CRO, MAC, MN
Not transposed	
Variations	SER

The prohibition of the supply of goods or services to a consumer without their being ordered by the consumer beforehand, where such supply involves a demand for payment is transposed as in Art. 9, 1st indent of the Directive in the legislation of Albania (Art. Art 38 (1) CPA), Bosnia and Herzegovina (Art. 50 (1) CPA)[278], Macedonia (Art.102, para.1 CPA), and Montenegro (Art. 67(3) point 5 CPA) where there is slight variation of the wording used but the meaning of the Directive is maintained. Croatia (Art. 54 (1) CPA) also follows the Directive but goes even one step further as Art. 54 (2) provides that such products will be consid-

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[276] Under Chapter II, Section 4 of Draft Proposal which deals with the payment modalities, if payment is made by the consumer or in the name or on behalf of the consumer through the bank or the post, it shall be deemed effected on the date on which the bank or the post accepted the proper payment order.

[277] The rule on inertia selling contained in the Draft proposal prohibits to supply goods or services to the consumer without their being ordered by the consumer beforehand, where such supply involves a demand for payment. The absence of a response from the consumer following such an unsolicited supply shall not constitute consent. No claims against the consumer may be grounded on a delivery of unsolicited goods and services. The consumer is entitled to consider the supply of unsolicited goods and services an unconditional promotional gift. If the unsolicited goods reach the consumer by mistake, and if the consumer knew about the mistake or could have known about it had he observed the relevant standard of care, then the consumer must notify the trader of the mistake within the reasonable time, or ship the goods back at the expense of the trader. The performance is not to be qualified as unsolicited if, instead of the performance which was ordered by the consumer, the trader offers the performance that is equivalent in quality and price, and if it is drawn to the consumer's attention that he is not obliged to accept it and that he does not have to pay for sending the good back to the trader.

[278] Art. 28 (1) BDLO 2010 additionally provides that no obligation may arise from the supply of goods or services to a consumer without being ordered. The supplier may only request the return of goods (Art. 28 (2)). The consumer can return the goods by himself or notify the business person to pick up the goods at his own expense within reasonable time.

ered gifts. In Serbia, by Art.28, CPA of 2005 it is provided that (1) offering products or services to a consumer outside business premises of the supplier (using catalogue, sample or model presentation, displaying the product in order to impart information about its characteristics) as well as (2) placing an offer at the address of the consumer (by electronic means or in other ways), shall be permitted only if the consumer gave his consent beforehand – that is if the consumer gave the go-ahead for the offer to be placed.

b. Exemption of the consumer from the provision of any consideration in cases of unsolicited supply; absence of a response shall not constitute consent

The consumer shall not be required to any consideration about the product received via unsolicited supply and an absence of his response shall not constitute consent, as required in Art. 9, 2nd indent of the Directive, by the legislation of Albania (Art 38 (2) CPA) and Bosnia and Herzegovina (Art. 50 (2) CPA that even authorizes the consumer to keep and maintain in his/her possession the unsolicited product or service). The laws of Macedonia and Croatia maintain the aim of the Directive; however the manner of regulation varies insofar as they stipulate that a provision in a trader's general terms of contract or in his offer sent without a previous order placed by the consumer, according to which the absence of a reply would constitute consent, shall be null and void (Art. 54 (3) CPA of Croatia and Art.102 (2) CPA of Macedonia). Montenegro did not transpose the said provision per se; however, the effects of the provision of the Directive could be observed by the general rules of the contract law (Law on Obligations, Art. 37 (1, 2)).

6. Restrictions on the use of certain means of distance communication

Art. 10 of Directive 97/7 states that the use of automatic calling machines and fax machines requires prior consent from the consumer. All member states have transposed this provision. In Albania (Art.39 CPA) prior consent from the consumer is needed for the supplier to use telephone, fax and electronic mail. Similarly, in Bosnia and Herzegovina (Art. 51 CPA), without the prior consent of the consumer, the trader may not use individual means of distance communication (telephone, fax machines, e-mail etc.). In Croatia there is a variation increasing the level of protection, by regulating the manner of the use of the means. Namely, according to Art.42 (1) CPA "the use of automated calling systems without human intervention (automatic calling machines), electronic mail and fax machines for the conclusion of contracts shall require the consumer's prior consent". The use of other means of distance communication with the purpose of concluding a contract may only be allowed if the consumer does not explicitly object (Art. 42 (2) CPA). The use of the means of distance communication in the mentioned situations shall not be charged to the consumer (Art. 42 (3) CPA). Art. 10 of the Directive has been fully transposed in the Macedonian Law on Consumer Protection (Art. 89) and the Montenegrin Consumer Protection law (Article 38 (1, 2)). In Serbia there are no rules for this matter[279].

[279] Under the Draft Proposal, the use of telephone marketing, automated calling systems without human intervention (automatic calling machines), facsimile machines (fax) or electronic mail for the purposes of direct marketing is allowed solely in respect of the consumer who has given his prior consent. Other means of distance communication that allow individual communications may be used only if there is no clear objection from the consumer. If the consumer explicitly agrees to the use of telephone marketing, automated calling systems without human intervention (automatic calling machines), facsimile machines (fax), or his electronic contact details for electronic mail, he shall be informed on the commercial nature of the communication in clear and unambiguous manner, as soon as the communication commences.

IV. Use of options provided in the Directive

1. Option of member states to allow the supplier to provide the consumer with goods or services of equivalent quality and price

Article 7(3) of Directive 97/7 contains an option for the member states to stipulate that the supplier can provide the consumer with goods of equivalent quality and price, if this possibility was provided before the conclusion of the contract, or in the contract.

Option transposed	AL
Option not transposed	
No express transposition, but general contract law with similar effect	BA, CRO, MAC, MN, SER
Only for goods, not for services	
Information must be given in writing	
Possibility must be provided prior to the conclusion of the contract	

In Albania, this option exists under Point 21 of the Decision of the Council of Ministers No. 64 of 21.01.2009. In Bosnia and Herzegovina, there is no corresponding provision to this option in the CPA, but only in the general contract law provisions of the BLO. In Croatia, reference to this option could be found in Art. 52 CPA which deals with the timely performance of the contract, where under para. 2 the possibility is given to the consumer to choose whether he or she will rescind the contract or give the trader a “reasonable additional period of time for compliance with the contract”. The right of replacement is regulated in Croatian general contract law, i.e. in the Civil Obligations Act. The issue is regulated in the same manner in Macedonia (the possibility for extension of the time of performance exists in Art. 99(2) CPA; other issues covered by general contract law) and in Montenegro (the possibility for extension of the time of performance exists in Art. 46(2) CPA; other issues covered by general contract law). In Serbia in general the issues of the modification of the performance are regulated by the Law of Obligations[280].

2. Option of member states to place burden of proof on the supplier

Art. 11(3)(a) of the Directive enables the member states to stipulate that the burden of proof concerning the existence of prior information, written confirmation, compliance with time-limits or consumer consent can be placed on the supplier.

Use of Option	Participating States
Yes	AL, CRO, MAC, MN (partly)
No	BA, SER

In Albania this is provided by Point 23 of the Decision of the Council of Ministers No. 64 of 21.01.2009, in Croatia it is stipulated in Art. 55 CPA and in Macedonia by Art.105 CPA. The option is partially transposed in Montenegro and it is done only concerning the existence

[280] Under the Draft Proposal, the performance is not to be qualified as unsolicited if, instead of the performance which was ordered by the consumer, the trader offers the performance that is equivalent in quality and price, and if it is drawn to the consumer’s attention that he is not obliged to accept it nor does he have to pay for its sending back to the trader.

of compliance with time-limits, as by Art. Article 5(3) CPA in case of any disputes about the consumer's eligibility to exercise the rights pertaining to meeting of a deadline to exercise the right, it shall be deemed that the consumer is eligible in this respect. The option does not exist under the laws of Bosnia and Herzegovina[281] and Serbia[282]

3. Option of member states to provide for voluntary supervision by self-regulatory bodies

Art. 11(4) of Directive 97/7 grants the member states the option to provide for voluntary supervision by self-regulatory bodies.

Use of Option	Participating States
Yes	CRO, MAC
No	AL, BA, MN, SER

Such option is provided only in Croatia and Macedonia. The Croatian Art. 141 CPA is wider than the Directive as it prescribes not only the possibility of a voluntary control of the traders' conduct by certain independent organisations, but also gives certain bodies and organisations the possibility to initiative proceedings before these independent organizations against those members of such organisations who act contrary to provisions on consumer protection. In Macedonia this option is not explicitly transposed. However, by Art.103 CPA, any person having justified interest may request from the court to order to a particular trader or operator of the means of distant communication to terminate the business practice which is contrary to the provisions laid down for distance contracts. By this, the self-regulatory bodies are entitled for such actions.

4. Option of member states to ban the marketing of certain goods or services, particularly medicinal products, within their territory by means of distance contracts

Art. 14, sent. 2 of Directive 97/7 provides the option to ban the marketing of certain goods or services, particularly medicinal products, within their territory by means of distance contracts.

Use of Option	Participating States
Yes	CRO, MAC,
No	AL, BA, SER
Transposition not entirely clear	MN

This option is provided and extended under the consumer protection legislation of Croatia and Macedonia. Art. 41 of the CPA of Croatia regulates the prohibition of conclusion of

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[281] According to Art. 146 (5) BDLO the burden of proof regarding the start of the withdrawal period is on the business person.

[282] The rule applicable at the moment is contrary to the requirement of the Directive. Namely, there is a general procedural rule that a party claiming to have a right, or that the conditions for execution of a certain tight are fulfilled, has to prove her claims (Art. 223 (2) Civil Procedure Act of 2004). However, under Chapter II, Section 2 of Draft Proposal dealing with the general information duties of the trader, the burden of proof concerning the fulfilment of the information duties rests with the trader.

contracts through distance communication means in respect of the sale of drugs, medicine and veterinary–medicine products, explosives, tobacco products, weapons and other products, the distance selling prohibition of which is regulated by special regulations. By Art.88 CPA, it is not allowed to conclude contracts on the sale of medicines, medical and veterinary products, and explosives using the means of distant communication[283].

In Montenegro there is no option to market medicinal products by distance contracts as the Law on Medicines[284] stipulates that retail sales of medicines is only performed in a pharmacies.

[283] It should be noted that in Macedonia the trade of medicinal and veterinary products as well as explosives is regulated by separate laws.

[284] Art. 69 para. 1 of the Law on Medicines (OG RMN No. 80/04 and 18/08).

D. CONSUMER SALES DIRECTIVE (99/44)

Coordinator(s): *Zlatan Meškić* and *Neda Zdraveva/Jadranka Dabović-Anastasovska/Nenad Gavrilović*

I. Member state legislation prior to the adoption of the Consumer Sales Directive

Prior to transposition of the Directive 99/44 the national laws of the participating states contained provisions within their Law of Obligations/Civil Code which regulate the sale of goods, applicable to all types of contracts and not specifically related to consumer contracts. All of the participating states at least partly transposed the provisions of the Directive 99/44 in their consumer protection regulations, while only some of them additionally or mainly transposed the Directive in their generally applicable Law of Obligations (Macedonia, Croatia and Montenegro).

In the successor states of former Yugoslavia a common Law of Obligations[285] was valid and contained elaborate rules on seller's liability for conformity of the goods with the sales contract (Arts. 478-500 LoO), on conformity of the provided services with the services contract (Arts. 614-621 LoO), and on commercial guarantees of seller and producer for the proper functioning of technical goods (Arts. 501-507 LoO). This Law has been replaced by new Acts in Croatia[286], Montenegro[287] and Macedonia[288].

In Albania the valid Civil Code of 1994 contains generally applicable rules on sale of goods[289], while the Consumer Protection Act of 2003[290] was the first Act in Albania to determine certain aspects of consumer sales; the latter was replaced by the new Consumers Protection Act[291] in 2008. A similar development happened in Bosnia and Herzegovina, which by enacting the Consumer Protection Act in 2002[292] got its first consumer specific provisions within chapter II on the "Sale of products and provision of services", which were replaced by the new Consumer Protection Act of 2006[293], chapter III of which contains slightly changed provisions under the same title. The Serbian Consumer Protection Act of 2005[294] contains certain provisions that seem relevant for this set of issues. Still, provisions of the Serbian Consumer Protection Act may be better understood as an attempt to restate the exist-

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[285] Yugoslav Law of Obligations, *OG SRFY* No. 29/78, 39/85, 46/85, 45/89, 57/89; Civil Obligation Act, *OG RH* No. 53/91, 73/91, 111/93, 3/94, 107/95, 7/96, 91/96, 112/99, 88/01; *OG FRY* No. 31/93, 31/93, 22/99, 23/99, 35/99, 44/99. Since the split of Yugoslavia this Act by virtue of succession remained applicable in two slightly different versions of each entity of Bosnia and Herzegovina, namely the Law of Obligations of the Republic of Srpska (*OG of the Republic of Srpska*, No. 17/93, 57/98, 39/03, 74/04) and the Law of Obligations of the Federation of Bosnia and Herzegovina (*OG of the Republic of Bosnia and Herzegovina*, No. 2/92, 13/93, 13/94 and *OG of the Federation of Bosnia and Herzegovina*, No. 29/03). Since provisions relevant for this analysis do not differ, in order to ensure more clarity this text will only refer to "Bosnia-Herzegovina's Law of Obligations".

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

[287] Law on Obligations, *OG RMN* No. 47/08.

[288] Law on Obligations, *OG RMac* No. 18/2001.

[289] Civil Code, *OG RAl* No. 11/94.

[290] Consumer Protection Act, *OG RAl* No. 84/03.

[291] Part VI, Chapter I (Art. 34-35) of the Consumer Protection Act, *OG RAl* No. 61/08.

[292] Consumer Protection Act, *OG BA* No. 17/02.

[293] Consumer Protection Act, *OG BA* No. 25/06.

[294] Consumer Protection Act, *OG RS* No. 79/05.

ing provisions of the Law of Obligations, than as an attempt to transpose the Consumer Sales Directive.

Croatia, Montenegro and Macedonia transposed the Directive 99/44 by amending their Law of Obligations as well as introducing consumer specific provisions on sale of goods into their Consumer Protection Act. Transposition of the Directive 99/44 into the new Croatian Civil Obligation Act from 2005[295] was also used to widen the application of some of its rules to all onerous contracts (Art. 400 et seq. COA)[296] However, as a central act for consumer protection the Croatian Consumer Protection Act[297] contains Art. 5 on trader's obligations on fulfilment of consumer contracts. Para. (1) of this provision prescribes that the trader shall fulfil a consumer contract in accordance with the provisions of the Consumer Protection Act and the Civil Obligations Act. Furthermore, in accordance with para. (2), in case of material defects of the product relations between consumers and traders shall be regulated by the relevant provisions of the Civil Obligation Act.

In Montenegro, apart from the already described Yugoslav law of Obligations, special rules existed within the Federal Yugoslav Law on Trade[298] and afterwards within the Federal Yugoslav Law on Consumer Protection[299]. Finally, Directive 99/44 has been transposed in the Montenegrin Law on Consumer Protection of 2007[300] and the new Montenegrin Law on Obligations of 2008, which are now being applied in parallel. The Macedonian Law on Consumer Protection of 2000[301] only contained rules on liability for deficient products. These rules were replaced in 2004[302] by the valid Macedonian Law on Consumer Protection which transposed provisions set by the Directive on protection of consumers in cases of non-conformity of the products with their specification as well as by the Law of Obligations of 2001, which was last amended in 2008.

II. Scope of application

1. General scope

Provisions of the Acts on Obligations/Civil Code of the participating states, including those relating to the liability for conformity to the contract, apply to B2B, B2C and P2P transactions. Furthermore, they contain separate provisions on the supplier's liability for conformity of the rendered services to the services contract.

Transposition of the Directive 99/44 in the Croatian Civil Obligations Act also resulted in the creation of some separate rules which are only applicable to consumer transactions. The consumer protection regulations of the participating states apply only to B2C transactions. Attention must be called to the fact that in accordance with the Serbian Consumer Protection Act the notion of consumer is expanded to include legal persons acting outside their

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[295] Civil Obligations Act, *OG RH* No. 35/05.

[296] S. Petrić, "Odgovornost za materijalne nedostatke stvari prema novom Zakonu o obveznim odnosima" (Liability for Material Defects According to the new Law on Obligations), *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, Vol. 27, 1/2006, 87– 128.

[297] Consumer Protection Act, *OG RH* No. 79/07, 125/07, 79/09, 89/09, 133/09.

[298] Federal Law on Trade, *OG FRY* No. 46/90, 32/93, 50/93, 41/94, 29/96.

[299] Federal Law on Consumer Protection, *OG FRY* No. 37/02.

[300] Law on Consumer Protection, *OG RMN*, No. 26/07.

[301] Law on Consumer Protection, *OG RMac* No. 63/00.

[302] Law on Consumer Protection, *OG RMac* No. 38/04.

trade, business, craft or profession. However, the Serbian legislator is currently preparing the Draft of the Proposal for the new act on consumer protection (Draft Proposal),[303] which is intended to apply to B2C transactions and to cover traders' liability for both conformity of the goods to the sales contract, and conformity of the services to the services contract.

2. Definition of 'consumer'

The participating states, except for Serbia, limit the notion of consumer to "natural persons". Under Art. 2 (1) of the Serbian Consumer Protection Act of 2005, consumer is any natural person who purchases products or services for their own needs or for the needs of their household. Due to para. (2), consumer is also a company, enterprise, other legal entity or entrepreneur, when they are purchasing products or services for their own needs. This means that the notion of consumer under the Serbian Consumer Protection Act of 2005 is unacceptably broad, as it includes legal persons acting outside their trade, business, craft or profession. Under Chapter I of the Serbian Draft Proposal, the consumer is defined as any natural person who is acting mainly for purposes which are outside his trade, business, craft or profession. Art. 1 (3) of the Bosnian Consumer Protection Act contains the same definition as the Art. 2 (1) of the Serbian Consumer Protection Act, but requires the criteria of consumer's "personal needs *and* the needs of his household". This definition is very restricted in comparison to the definition of consumer in the Directive 99/44. Instead of the "acting for purposes which are not related to his trade, business or profession", which is used in the definition of consumer in the Directive, the Bosnian Consumer Protection Act limits the acting of a consumer to the purchase, acquisition or use of a service or product, and reduces it additionally to the purpose of his "personal needs and the needs of his household", which due to the conjunction "and" should be understood cumulatively.[304]

In Albania consumer is any natural person, who is acting for purposes not related to trade, business or exercise of his profession. In the meaning of this law, the non-profit organizations are also considered as consumers.[305] The Macedonian law on Consumer Protection defines the consumer as "any natural person who purchases products or uses services for direct personal consumption, for purposes that are not intended for carrying out his trades, business or profession".[306] Although different in wording, the definition covers all aspects of the definition provided in the Directive. According to the Montenegrin Law on Consumer Protection consumer is a natural person who buys, orders, accepts, uses goods or services, including public services, for non-business, namely non-professional purposes, or to whom the offer for a product or service is targeted. This Law also determines the term "group of consumers" defined as a group set up by the consumers with the purpose that members of the group acquire ownership rights over particular products with the aid of that group.

Croatia is the only participating state that with regards to the sale of goods determined a consumer definition in its Civil Obligations Act. In Croatia the definition of 'consumer' can

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[303] Draft of the Proposal for the new Act on Consumer Protection (Draft Proposal), prepared by the Ministry of Trade and Services of Republic of Serbia.

[304] Art. 15 of the Draft Law of Obligations of Bosnia and Herzegovina defines a consumer as "every subject who concludes a legal act for purposes which are outside his trade or profession". This definition is wider not only than the one in the Consumer Protection Act but also than the definition of the Directive 99/44, because it seems to generally include legal persons. On the other hand, it refers to the conclusion of a legal act and thereby excludes pre-contractual situations, contrary to the Directive 99/44.

[305] Art. 3 (6) of the Consumer Protection Act, *OG RAl* No. 61/08.

[306] Art. 4 line 1 of the Law on Consumer Protection, *OG RMAC* No. 38/04.

be derived from the specific Civil Obligation Act provision regarding the sale of consumer goods, which defines consumer contracts. Art. 402 (3) of the Croatian Civil Obligation Act defines consumer contracts as contracts entered into by a natural person as the buyer, outside his economic and professional activity, with the natural or legal person as the seller, within the framework of his economic or professional activity (consumer contracts). By its content the definition corresponds to the definition of consumer as regulated in Art. 1(2)(a) of the Directive 99/44.

3. Definition of 'seller'/'trader'

Only Croatian Law refers to the term 'seller' and derives it with regards to consumer sales from the second part of the definition of consumer contracts as regulated in Art. 402 (3) of the Civil Obligations Act, where there is a reference to "the natural or legal person as the seller", who acts "within the framework of his economic or professional activity". Beside slight alteration in the wording, this definition corresponds to the definition of seller as regulated in Art. 1(2)(c) of the Directive 99/44.

The transposition laws of the other participating states use the term "trader". In accordance with Art. 3 (14) of the Albanian Consumer Protection Act, "trader" means any natural or legal person who is acting for purposes relating to his economic activity, trade, business, craft or profession and anyone acting in the name or on behalf of a trader. The trader is defined in Art. 1 (5) of the Consumer Protection Act of Bosnia and Herzegovina as "any person who is, directly or as an intermediator, selling products or providing services to the consumer". As well as in case of the notion of the consumer, the definition is narrowed to "selling products and providing services", which reduces the scope of application of the Consumer Protection Act in general. Art. 14 of the Draft Law of Obligations of Bosnia and Herzegovina refers to the "business person", defining him as a "natural or a legal subject who is during the conclusion of the legal act acting in the performance[307] of his trade or profession"[308]. This definition excludes pre-contractual situations from its scope of application. Under Art. 2. (3) of the Serbian Consumer Protection Act, trader is a company, enterprise, other legal entity or entrepreneur, when they are selling products or providing services to a consumer.[309] The Macedonian Law on Consumer Protection defines trader as "any legal or natural person who, in the course of carrying out his activity, directly satisfies the needs of the citizens, for products and services".[310]

According to the Montenegrin Consumer Protection Law trader is "a person who sells goods or provides services to consumers". This definition implies legal or natural persons and indirectly suggests that the contract does not have to be concluded in the course of his trade, business or profession. Furthermore, transposition of consumer provisions in Montenegrin Law relies on provisions of Montenegrin Law on Internal Trade, where a cross reference to this legal act would expand the scope of application of the term trader[311].

[307] The "action in the performance" is an unsuccessful formulation in Bosnian as well.

[308] Art. 15 of the Draft Law of Obligations of Bosnia and Herzegovina of 2006 contained the same provision, but referred to the "entrepreneur".

[309] Chapter I of the Serbian Draft Proposal for the new act on consumer protection defines trader as any natural or legal person who, in contracts covered by this Law, is acting for purposes relating to his trade, business, craft or profession, and anyone acting in the name of or on behalf of a trader.

[310] A similar definition is provided by Art.2 of the Law on Trade, *OG RMac* No. 16/04, 128/06, 63/07, 88/08, 159/08, 20/09 and 105/09.

[311] Art. 6 of the Law on Internal Trade, *OG RMN* No. 49/08.

4. Definition of 'consumer goods'

None of the consumer provisions of the participating states contains a definition of consumer goods which corresponds to Art. 1 (2) b of the Directive 99/44. The current situation would be changed with the adoption of the Serbian Draft Proposal for the new act on consumer protection, which defines goods as any tangible movable item, with the exception of: (a) goods sold by way of execution or otherwise by authority of law; (b) water and gas where they are not put up for sale in a limited volume or set quantity; and (c) electricity.

Consumer goods, including goods used in the context of providing a service, shall in accordance with Art. 3 (7) and Art 29 (1) of the Albanian Consumer Protection Act mean any movable item which is intend for consumers or likely to be used by consumers, under reasonably foreseeable conditions, to be used by consumers even if not intend for them, and is supplied or made available, whether for consideration or not, in the course of an economic activity, whether new, used or reconditioned.

In Bosnia and Herzegovina the consumer is defined as a person "who purchases, acquires or uses products or services", while goods pursuant to Art. 1 (9) of the Consumer Protection Act include "products and immovable property". Consequently, products could be understood as comprising only movables, what would lead to a reduction of the scope of application of the whole Consumer Protection Act. Nevertheless, even Chapters of the Consumer Protection Act of Bosnia and Herzegovina which are explicitly limited to "products and services" in their title, contain provisions regarding "goods and services". Terms "goods and services" and "products and services" are used as synonyms on several occasions[312]. Chapter III on sale of products refers only to products, while Chapter VI regarding "guaranties for products" contrary to its title refers to goods. It is doubtable whether the use of a particular term "goods" or "products" in the provisions of the Consumer Protection Act of Bosnia and Herzegovina is based on the will of the legislator to exclude immovables from the scope of application of the provision using the term "products".

The rules of the Croatian Civil Obligations Act on seller's liability for material defects are applicable on sale contracts and all the other onerous contracts. This is why the Croatian legislator considered that there is no need for explicit transposition of the Directive´s definition of consumer goods, since the same provisions are applicable not only on consumer goods but on all the other objects of sale (e.g. services and real estates). According to the Civil Obligation Act provision, objects of sale can be things, rights and property.

The Montenegrin Consumer Protection Law defines only "goods" as a general term. These are defined as "tangible things that may be placed on the market, including also the facilities that may be used in accordance with this Law". A separate term "consumer goods" is not defined, albeit it was proposed in the initial draft, but was somehow left out during a long period of final drafting. There is also no reduction to "movable" goods, what suggests the inclusion of immovables.

The Macedonian Law on Consumer Protection does not define 'consumer goods'. The Law contains a definition of 'product' that reads: "Product" is any object regardless of the level of its processing, intended to be offered to consumers"[313]. Art. 165 (b) of the Macedo-

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[312] See the example of Art. 49 of the Consumer Protection Act regarding distance selling contracts. Art. 49 (1) defines the obligation of the trader to deliver the „product or service" within 15 days from the consumers order. The next paragraph, however, defines the consequences of the non-delivery of „goods or services".

[313] Art. 4 5th indent of the Law on Consumer Protection, *OG RMac* No. 38/04.

nian Law on Obligations, for the meaning of that Law, defines "product" as a movable item, as well as an independent item built-in any movable or immovable item, including electricity and other sorts of energy. Consequently, the existing definition represents a significant variation from the definition provided in the Directive.

The specific exclusions listed in Art. 1(2)(b) of the Directive 99/44 regarding goods sold by way of execution or otherwise by authority of law and water and gas where they are not put up for sale in a limited volume or set quantity are not transposed in any of the participating states. However, Art. 409 of the Croatian Civil Obligations Act regulates that a liability for material defects shall be excluded as regards a mandatory public sale. Furthermore, a general provision on "thing" regulates that a thing must be in circulation and the contract of sale of a thing *extra commercium* shall be void and that special rules shall apply to the sale of a thing with limited circulation (Art. 380 (1) and (2) of the Croatian Civil Obligations Act).

a. Exclusion of goods sold at public auction from the meaning of "consumer goods" (Art. 1 para. (3)).

None of the participating states has explicitly excluded "second-hand goods sold at public auction where consumers have the opportunity of attending the sale in person" from the definition of "consumer goods".

In Macedonia notion on goods sold on public auctions is related to the obligations of seller for price indication where by the law it is stipulated that the seller is not obliged to abide by the indicated retail prices and selling conditions, in cases of public and auction sale, sale of artistic works and antiquities, or to the products purchased in the course of offering certain services. Goods sold on public auctions are excluded from the application of the provisions related to the distance sales contracts as well. It is to be concluded that the goods sold on public auctions are to be considered as excluded from the consumer goods in accordance with Macedonian law.

The Montenegrin provisions on selling goods during compulsory public sale, regulated by Law on Obligations[314] are also of importance to this subject matter. Namely, in contrast to the general rule of conformity, an owner whose goods are sold at a compulsory public sale would not be held liable for defects of the same. Still, this provision does not cover the situation of voluntary sale on auctions.

5. Definition of 'sale'

The participating states provide a definition of sale only in their generally applicable Law of Obligations. With almost the same wording Art. 376 (1) of the Croatian Civil Obligation Act, Art. 454 of the Law of Obligations of Bosnia and Herzegovina and of Serbia, Art. 705 of the Civil Code of Albania and Art. 442 (1) of the Macedonian Law on Obligations provide that by the sales contract the seller is obliged to deliver to the buyer the item that he is selling to the buyer so that the buyer acquires the right of ownership, while the buyer is obliged to pay to the seller the price.

None of the participating states explicitly transposed Art. 1 (4) of the Directive 99/44. However, in Croatia this provision finds its equivalent in Art. 357 (1) of the Civil Obligation Act. This provision regulates that each contracting party is liable for material defects in its performance. This implies not only the seller but also the contractor by contract for work. In Bosnia and Herzegovina the liability for material defects is regulated in two consecutive Articles with almost the same wording (Arts. 18 and 19 CPA), one of them related to products

[314] Art. 495 of the Law on Obligations, *OG RMN* No. 47/08.

in the sale contracts and the other to provision of services. Additionally, in Bosnia and Herzegovina and in Serbia, Art. 600 of their respective Law of Obligations states that by a contract for the supply of services the supplier assumes the obligation to perform a particular job, such as to manufacture or repair an object, or execute some physical or intellectual work and the like, while the purchaser of the services assumes the obligation to pay him monetary consideration in return. The Montenegrin Consumer Protection Law uses "circulation to consumers" as term for the sale of goods or provision of services to the consumers as the end users, and provision of the samples of goods. In addition, the already given notion of trader and further cases of expansion under the Montenegrin Law on Internal Trade raise effects that these additional transactions would be covered in practice as well.

III. Consumer protection instruments

1. Conformity with the contract

a. "Conformity with the contract" requirement in general (Art. 2)

aa. Requirement to deliver conforming goods

Albania literally transposed Art. 2 (1) of the Directive 99/44, stating that the seller must deliver goods to consumers which are in conformity with the contract of sale.[315] According to Art. 15 of the Serbian Consumer Protection Act, the vendor or service provider shall be under obligation to provide to the consumer a product or service of the quality that is prescribed or specified in the contract.

In the other participating states, the requirement to deliver conforming goods arises out of trader's liability for material defects (Bosnia and Herzegovina[316], Croatia[317]) or a general provision on performance of the obligation as agreed (Macedonia[318], Montenegro[319]).

bb. Presumption of conformity

Albania is the only participating state which in its Consumer Protection Act positively defines criteria for the presumption of conformity.[320] The Acts on Obligations of all the other participating states contain a list of cases when material defects exist[321] (Bosnia and Herzegovina, Croatia, Macedonia, Montenegro and Serbia), contrary to the model of Art. 2 (2) of the Directive 99/44, which defines criteria for conformity of the goods with the contract. The abovementioned provisions are not framed as legal presumptions.

The Macedonian Law on Consumer Protection additionally defines when it is to be considered that a product has a deficiency and when conformity it is to be presumed. By Art.42

[315] Art 29 (2) of the Consumer Protection Act, *OG RAl* No. 61/08.

[316] Art. 18 of the Consumer Protection Act, *OG BA* No. 25/06; See also Arts. 478 and 456 of the Law of Obligations of the Federation of Bosnia and Herzegovina and the Republic of Srpska, *OG SFRY* No. 29/78, 39/85, 46/85, 45/89, 57/89, *OG of the Republic of Bosnia and Herzegovina*, 2/29, 13/93, 13/94 *OG of the Federation of Bosnia and Herzegovina*, No. 29/03, *OG of the Republic of Srpska*, No. 17/93, 57/98, 39/03, 74/04.

[317] Arts. 357 and 400 of the Civil Obligations Act, *OG RH* No. 35/05, 41/08.

[318] Arts. 10 and 11 of the Law on Obligations, *OG RMac* No. 18/01.

[319] Art. 12 of the Law on Consumer Protection, *OG RMN* No. 26/07.

[320] Art. 29 (3) of the Consumer Protection Act, *OG RAl* No. 61/08.

[321] Art. 467 of the Law on Obligations, *OG RMac* No 18/01.; Art. 401 of the Civil Obligations Act, *OG RH* No. 35/05, 41/08; Art. 479 of the Law of Obligations of Bosnia and Herzegovina and Serbia, *OG SFRY* No. 29/78, 39/85, 46/85, 45/89, 57/89; Art. 487 of the Law on Obligations, *OG RMN* No. 47/08.

(1) of the Macedonian Law on Consumer Protection, the product has deficiency when it does not meet the general obligation of safety and does not provide the safety which a person is entitled to expect, taking all circumstances into account, such as: on the basis of the product presentation; the use for which it is reasonably expected that the product will be used; the time when the product was placed on the market; and when it does not meet the general obligation of conformity or the contractual obligations.

cc. Criteria for presuming conformity (Art. 2 para. (2) lit. (a)-(d) generally)

In the successor states of former Yugoslavia the criteria for material defects set in Art. 479 of the Yugoslav Law of Obligations remained the same in Bosnia and Herzegovina, Serbia and Macedonia[322], while Croatia[323] and Montenegro[324] have amended it using exactly the same formulation.

According to Art. 479 of the Yugoslav Law of Obligations (still valid in Bosnia and Herzegovina and Serbia[325], now Art. 467 of the Macedonian Law on Obligations) a material defects exist: 1) if a thing lacks the qualities required for its regular use or circulation; 2) if a thing lacks the qualities required for the specific purpose the buyer intends to use it for, and where it was known or should have been known to the seller; 3) if a thing lacks qualities and characteristics which were agreed or stipulated expressly or by implication; 4) where the seller has delivered a thing not equal to the sample or model, unless the sample or model have been shown for information only. As a comparison of Art. 479 Yugoslav Law of Obligations with Art. 2 (2) of the Directive 99/44 shows, these provisions slightly differ: Art. 479 (4) Yugoslav Law of Obligations excludes samples shown for information only, which are not excluded by Art. 2 (2) (a) of the Directive 99/44; Art. 2 (2) (b) of the Directive only includes specific purposes of goods the consumer and seller agreed on, while Art. 479 (2) of the Yugoslav Law of Obligations additionally provides protection in cases when the seller should have known about the

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322 Art. 467 of the Law on Obligations, *OG RMac* No. 18/01.

323 Art. 401 of the Civil Obligations Act, *OG RH* No. 35/05, 41/08.

324 Art. 487 of the Law on Obligations, *OG RMN* No. 47/08.

325 Under the Serbian Draft Proposal for the new act on consumer protection, the delivered goods shall be presumed to be in conformity with the contract if they satisfy the following conditions: (a) they comply with the description given by the trader and possess the qualities of the goods which the trader has presented to the consumer as a sample or model; (b) they are fit for any particular purpose for which the consumer requires them and which was known or must have been known to the trader at the time of the conclusion of the contract; (c) they are fit for the purposes for which goods of the same type are normally used; or (d) they show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the trader, the producer or his representative, particularly in advertising or on labelling.

Under the Serbian Draft Proposal, there is a lack of conformity of the rendered service with the contract if: (1) the service contradicts the information the trader has given when advertising the service, or otherwise before the conclusion of the contract; on the contents of the service, or on his performance, or on other circumstances relating to the quality or use of the service; (2) the service contradicts the information the trader has given during the provision of the service, if such information may be deemed to have had an effect on the consumer's decisions; (3) the service is not fit for a particular purpose for which the consumer required it, and which he has known or which must have been known to the trader at the time of the conclusion of the contract; (4) the service is not fit for the purposes for which services of the same type are normally required; or (5) the service does not correspond to reasonable expectations, given the nature of the services and taking into account any public statements of the trader on the specific characteristics of the service, particularly in advertising.

specific purpose the buyer intends to use the good for; finally, the Yugoslav Law of Obligations does not provide protection in cases described in Art. 2 (2) (d) of the Directive 99/44.[326]

In accordance with Art. 401 (1) of the Croatian Civil Obligations Act and Art. 487 (1) of the Montenegrin Law of Obligations which have the same wording, a defect shall exist: 1) if a thing lacks the qualities required for its regular use or circulation; 2) if a thing lacks the qualities required for the specific purpose the buyer intends to use it for, and where it was known or should have been known to the seller; 3) if a thing lacks qualities and characteristics which were agreed or stipulated expressly or by implication; 4) where the seller has delivered a thing not equal to the sample or model, unless the sample or model have been shown for information only; 5) if the thing lacks qualities otherwise inherent to other things of the same kind and which the buyer could have reasonably expected in accordance with the nature of the thing, taking into consideration public statements of the seller, the manufacturer and their representatives on the qualities or characteristics of the thing (particularly in advertising or on labelling etc.); 6) if the thing has been badly assembled provided that the service of assembly is included in the performance of the contract of sale; 7) if bad assembly is a result of deficiencies in the instructions for assembly. Although the criteria from Art 2(2) of the Directive 99/44 on the one hand and from Art. 401 (1) of the Croatian Civil Obligations Act and Art. 487 of the Montenegrin Law on Obligations on the other hand correspond in general, there are some differences. For instance, under Art 2(2) (b) of the Directive 99/44 consumer goods are presumed to be in conformity with the contract if they are fit for any particular purpose for which the consumer requires them and which "he made known to the seller" at the time of conclusion of the contract and "which the seller has accepted". Art. 401 (1) point 2) of the Croatian Civil Obligations Act and Art. 487 (1) point 2) of the Montenegrin Law on Obligations offer a higher level of protection by prescribing that the specific purpose "was known or should have been known to the seller". Finally, there is a provision in Art. 5 (3) of the Croatian Consumer Protection Act which regulates that the "nonconformity of products or services, where necessary, shall be proven through expert opinion from an authorised institution or by a certified court expert, with the costs of expertise to be covered by the consumer or the trader, depending on the result of expertise". Montenegro has also through Consumer Protection Law determined additional factors for conformity like exact measure or quantity of goods, suitable packaging material in accordance with the type and properties of the goods, prescribed or agreed quality, and if the quality was not prescribed or agreed – usual quality of goods and services, way of determining or calculating price etc.[327]

In accordance with Art. 29 (3) of the Albanian Consumer Protection Act, as the only provision of the participating states which positively defines criteria for conformity, consumer goods are presumed to be in conformity with the contract if they: 1) comply with the description given by the seller and possess the qualities of the goods which the seller has held out to the consumer as a sample or model; 2) are fit for any particular purpose for which the consumer requires them and which he made known to the seller at the time of conclusion of

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[326] Art. 536 of the Draft Law of Obligations of Bosnia and Herzegovina of 2010, which mostly corresponds to the existing Art. 479 of the Law of Obligations of Bosnia and Herzegovina, transposed Art. 2 (2) of the Directive 99/44 in its para. 4. Thus, a material defect exists when the thing lacks qualities which consumers can expect due to the public statements of the seller or manufacturer, particularly in advertising or on labelling, unless the statement was not known nor should have been known to the seller, it was properly changed in the moment of the conclusion of the contract or could not have influenced the decision to conclude the contract.

[327] Arts. 12 and 16 of the Law on Consumer Protection, *OG RMN* No. 26/07.

the contract and which the seller has accepted; 3) are fit for the purposes for which goods of the same type are normally used; 4) show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling.

dd. Time at which conformity is assessed

In the successor states of former Yugoslavia the provisions of Yugoslav Law of Obligations, with regard to the time at which conformity is assessed, are still valid. Art. 478 of the Law of Obligations of Bosnia and Herzegovina and of Serbia, Art. 400 (1) of the Croatian Civil Obligations Act, Art. 486 of the Montenegrin Law on Obligations and Art. 466 of the Macedonian Law on Obligations provide that the seller shall be liable for material defects of a thing at the moment of the transfer of risk to the buyer. The moment of the transfer of the risk is determined by Art. 456 of the Law of Obligations of Bosnia and Herzegovina and of Serbia, Art. 444 of the Macedonian Law on Obligations, Art. 378 (1) of the Croatian Civil Obligations Act and Art. 464 of the Montenegrin Law on Obligations, as the moment of delivery of the item, and is thus in conformity with Art. 2 (1) of the Directive 99/44.[328] Albania did not transpose this provision in its Consumer Protection Act.

b. Public statements and exclusions (Art. 2 para. (2) lit. (d) and Art. 2 para. (4))

Under Art. 480 (3) of the Law of Obligations of Bosnia and Herzegovina[329] and of Serbia[330], as well as Art. 467 (3) of the Macedonian Law on Obligations a seller shall be responsible for defects which could have been noticed easily by the buyer, if the former declared that the goods were free of all defects or that they had specific proprieties or characteristics. These provisions are amended in the Art. 487 (1) point 5 and (2) of the Montenegrin Law on Obligations and Art. 401 (1) point 5 and Art. 401 (2) of the Croatian Civil Obligations Act, where Art. 2 (2) lit. d and Art. 2 (4) of the Directive 99/44 were literally transposed. The only exception is that Art. 2 (4) of the Directive 99/44 regulates that the seller shall not be bound by public statements if he shows that he was not, and “could not reasonably have been, aware of the statement in question”, while Art. 401 (2) of the Croatian Civil Obligations Act and Art. 487 (2) of the Montenegrin Law on Obligations uses the term “should not have been aware of such statements”.

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[328] According to Art. 513 (3) of the Draft Law of Obligations of Bosnia and Herzegovina of 2010, the provisions of this Article, which correspond to Art. 456 BLO, regarding the moment of the transfer of the risk may not be changed to the detriment of the consumer.

[329] As described above, Art. 536 (4) of the Draft Law of Obligations of Bosnia and Herzegovina would transpose the Art. 2 (2) d and Art. 2 (4) of the Directive 99/44.

[330] Under the Serbian Draft Proposal for the new act on consumer protection, the trader shall not be bound by public statements if he shows that one of the following situations existed: (a) he was not, and could not reasonably have been, aware of the statement in question; (b) by the time of conclusion of the contract the statement had been corrected; (c) the decision to buy the goods could not have been influenced by the statement.

Furthermore, under the Draft Proposal, the provided service is not in conformity to the contract, if it contradicts the information given when marketing the service, or otherwise before the conclusion of the contract, by a person other than the trader at a previous level of the supply chain, or on behalf of the trader. However, the trader shall not be liable for lack of conformity, if the information has been clearly corrected in good time, or if he neither knew nor should have known of the information given.

The Macedonian Law on Consumer Protection in Art 42 (2), 4th indent, specifically refers to public statements as one of the criteria by which the conformity is to be assessed, however it does not include the exceptions provided in Art.2(4) of the Directive. Albania did not transpose Art. 2 (2) lit. d and Art 2 (4) in its Consumer Protection Act.

c. Exclusion of matters of which consumer is aware (Art. 2 para. (3))

Art. 29 (5) of the Albanian Consumer Protection Act literally transposed Art. 2 (3) of the Directive 99/44, stating that it shall be deemed that no lack of conformity exists for the purposes of this article if, at the time the contract was concluded, the consumer was aware, or could not reasonably be unaware of, the lack of conformity, or if the lack of conformity has its origin in materials supplied by the consumer. In all the other participating states, the rules of the Yugoslav Law of Obligations of 1978 still apply[331], where a seller shall not be responsible for defects if they were known to the buyer at the moment of entering into contract or if it was impossible for them to remain unknown to him.[332] Defects shall be considered not to have remained unknown to a buyer if they could have been easily noticed by usual examination of the goods by a diligent person as a buyer, having average knowledge and experience characteristic for a person of the same professional and trade line.[333] However, a seller shall be responsible for defects, which could have been noticed easily by the buyer, if the former declared that the goods were free of all defects or that they had specific proprieties or characteristics.[334]

Consequently, with the exception of some terminological differences, laws of the participating states contain a provision which corresponds to Art 2 (3) of the Directive 99/44.

d. Provision on goods to be installed (Art. 2 para. (5))

Art. 2 (5) Directive 99/44 is transposed in Art. 401 (6) and (7) of the Croatian Civil Obligations Act and Art. 487 (6) and (7) of the Montenegrin Law on Obligations. The only difference which Croatia and Montenegro created when transposing this provision concerns the used terms "thing" instead of "consumer goods" and "buyer" instead of "consumer". This is however adequate since these provisions on seller's liability for material defects are applicable to all sale contracts. Art. 2 (5) of the Directive 99/44 is literally transposed in Art. 29 (4) of the Albanian Consumer Protection Act.

Bosnia and Herzegovina, Macedonia and Serbia did not transpose this provision on goods to be installed. Art. 56 of the Serbian Consumer Protection Act only prescribes that technical instructions, instructions for use and declaration must be in writing and in the lan-

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[331] Art. 468 of the Macedonian Law on Obligations; Art. 480 of the Law of Obligations of Bosnia and Herzegovina and of Serbia; Art. 488 of the Montenegrin Law on Obligations; Art. 402 of the Croatian Civil Obligations Act.

[332] In the former Yugoslav states, except for Croatia who has amended the following restriction, this provision only excludes the liability of the seller for defects the buyer was aware of or could not have been unaware of, in cases when a thing lacks the qualities required for its regular use or circulation or if a thing lacks qualities and characteristics which were agreed or stipulated expressly or by implication.

[333] In accordance with Art. 402 (3) of the Croatia Civil Obligations Act this provision referring to „average knowledge and experience" does not apply to B2C contracts.

[334] Under the Serbian Draft Proposal for the new act on consumer protection, there shall be no lack of conformity if, at the time the contract was concluded, the consumer was aware, or should reasonably have been aware of, the lack of conformity; or if the lack of conformity has its origin in materials supplied by the consumer. The trader shall be liable for the lack of conformity which could have been easily noticed by the consumer, if the trader declared that the goods are in conformity with the contract.

guage that is in official use in the Republic of Serbia. The Macedonian Law on Consumer Protection determines the obligation of the seller to provide to the consumer the prescribed documents and the documents prepared by the producer for the purpose of easier and safe use of the product (declaration, guarantee, technical manual, manual for assembly, manual for use, list of authorised services etc.), as defined in Art. 21 of this Law, truthful, clear, visible and readable, written in Macedonian language and Cyrillic letters, which does not exclude the possibility to additionally use other languages in the same time and signs easily readable for the consumer. Art 2 (5) of the Directive 99/44 is transposed in the Serbian Draft Proposal for the new act on consumer protection and the Draft Law of Obligations of Bosnia and Herzegovina.

2. Consumers' rights in cases of non-conformity

a. Consumers' rights in cases of non-conformity in general (Art.3)

Art. 3 of the Directive provides the remedies which are to be available to a consumer where there is a lack of conformity in the goods. The national legislation of all participating countries foresees remedies for the cases of non-conformity.

Under the Albanian law, in case of a lack of conformity, the consumer shall be entitled to have the goods brought into conformity free of charge by repair or replacement, or to have an appropriate reduction made in the price or the contract rescinded with regard to those goods (Art. 31(3) Consumer Protection Law)[335].

Under Art. 18 of the Bosnian CPA[336], a consumer has the right to repair, replacement and rescission, without the reduction to cases of non-minor lacks of conformity.

In Croatia the consumers' rights are transposed in Art. 410 of the COA[337], and also regulated in Art. 5 (2) CPA[338], which regulates the trader´s obligations when fulfilling consumer contracts. In Montenegro, the consumer's choice is between repair and replacement; however, where these are impossible, or cannot be provided within a reasonable time or without significant inconvenience to a consumer, it is possible to ask for price reduction or (in case of non-minor lacks of conformity) rescission of the contract.

In Macedonia, the issue is regulated both by the Law on Obligations[339] and the Law on Consumer Protection (Art. 43)[340]. According to the Law on Obligations of Macedonia, in general the buyer (as the rules are related to all sales contracts), in cases of deficiencies of the purchased goods has the right to: 1) request the seller to remove the deficiency or to deliver him another product without deficiency (performance of the contract); 2) to request decrease of the price; 3) to withdraw from the contract. In any of these cases the buyer has the right of compensation of damages. By the CPA (Art.43), the consumer to whom the product with deficiency has been sold has the right to request, according to his own choice: 1) free of charge removal of the defects of the product or reimbursement of the expenses for removal of the defect; 2) proportional reduction of the retail price; 3) replacement of the product with an appropriate product with the same trademark, type, industrial design or designation of origin and geographical designation of the product; 4) replacement of the product with an appropri-

[335] Consumer Protection Act (CPA) of 17.04.2008 OG No. 61/08..

[336] Consumer Protection Act of Bosnia and Herzegovina, *OG BA No. 25/06.*

[337] Civil Obligation Act (COA), OG RH No. 35/05, 41/08.

[338] Consumer Protection Act , *OG RH* No. 79/07, 125/07, 79/09, 89/09, 133/09.

[339] Law on Obligations (LoO), *OG RMac No 18/01; 4/02; 5/03; 84/08; 81/09 and 161/09.*

[340] Law on Consumer Protection (LCP), *OG RMac No. 38/04, 77/07 and 103/08.*

ate product with a different trade mark, type, industrial design, or designation of origin and geographical designation of the product, with appropriate reduction or increase of the retail price; and 5) cancellation of the contract, return of the paid amount and compensation of the suffered damages. This request may be placed by the consumer, upon his own choice, to the competent inspection body or to the trader or the distributor, in the place where the product was purchased or in the place of the consumer's residence. In case when the consumer purchased foodstuffs with deficiency, the trader is obliged to make a replacement with products of adequate quality or to return the paid amount to the consumer, provided that the defects are discovered within the specified expiry date until which the product may be used.

Under Art. 34 of the Serbian CPA[341], the consumer has a right to file a complaint in case of non-conformity and following such complaint is entitled to remedies.

aa. Implementation of the remedies

The remedies provided in the Directive (Art. 3) have been transposed in the national legislation of the studied countries, in the Law on Consumer protection or Laws on Obligation, or both; with specific variations.

bb. Consumer choice between remedies

Under the Albanian Consumer Protection Act the consumer is entitled to: 1) repair, 2) replacement, 3) appropriate reduction in price and 4) have the contract rescinded.

In Bosnia and Herzegovina, Art. 18 CPA provides a free choice between the remedies, without the possibility of price reduction. The provisions of the BLO[342], which are not restricted to B2C contracts, require the buyer to ask for fulfilment first (repair or replacement), and in cases a seller has had a reasonable time to effect repair or replacement, they give the right to price reduction or rescission.

Art. 410 of the Croatian COA leaves the consumer the choice between invoking the following remedies: 1) request that the defect be eliminated by the seller; or 2) request from the seller delivery of another thing without defects; or 3) request a price reduction; or 4) declare the contract rescinded. Additionally, by the COA in each of the foregoing cases, the buyer shall be entitled to the repair of damage in accordance with the general rules on liability for damage, including the damage caused by such defect to his other property. The rules provided in 412 (1) and Art. 413 COA lead to the conclusion that a buyer can primarily and alternatively use first three remedies and the right to rescind the contract only when he fails with his claim for regular performance, with certain exceptions in Art. 412 (2, 3) COA. The fact that the consumer has a choice between invoking the remedies is however confirmed in Art. 5 (2) CPA, which regulates that pursuant to the provisions of the COA relating to responsibility for material defects of the product, the trader is liable, "in accordance with the consumer's choice", to remove defects on the product, deliver another product without defects, lower the

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[341] Consumer Protection Act of 2005, *OG RS No. 79/05.*

[342] Since the split of Yugoslavia the federal Law on Obligations by virtue of succession remained applicable in two slightly different versions applicable in each entity of Bosnia and Herzegovina, as the Law of Obligations of the Republic of Srpska and the Law of Obligations of the Federation of Bosnia and Herzegovina. Since the provisions relevant for this analysis do not differ, in order to ensure more clarity this text will only refer to "Bosnia-Herzegovina's Law of Obligations (BLO); OG SFRY No. 29/78, 39/85, 46/85, 45/89, 57/89 and the OG of the Republic of Srpska No. 17/93, 57/98, 39/03, 74/04, the OG of the Republic of Bosnia and Herzegovina 2/29, 13/93, 13/94 and the OG of the Federation of Bosnia and Herzegovina No. 29/03.

price or return the amount paid for the product and fulfil other obligations prescribed by these provisions.

In Macedonia, the Law on Obligations and the LCP set forth different rules as regards to the 'consumers' choice between the remedies. By the Law on Obligations (Articles 476-488) the party to the contract (not necessarily a consumer as it regulates all contracts) has the right first to request the contract to be performed (removal of the deficiency or delivery of another good without deficiency). If the contract is not performed in the additional period set for performance the buyer has the right to withdraw from the contract. The law does not specify when the buyer could request decrease of the price. The Law of Obligations specifies that the buyer could uphold the contract even if there are grounds for its termination; so it is to be considered that this is the case when decrease of the price it is to be requested. The protection afforded by the LCP, on the other hand, leaves free choice between the remedies to the consumer. The Law, however, provides a formal requirement for the exercise of these rights: by Art.45, para. 1, in order to exercise his/her rights the consumer is obliged to enclose a fiscal receipt for the product or a clearly visible and readable written receipt, and for the products having guarantee periods, also the guarantee certificate or any other document replacing the guarantee. In Montenegro, in accordance with Art. 25 LCP[343], the consumer has a free choice among all four remedies. This is opposite to the solutions provided in the general sale legislation, as there a hierarchy (that is: maintaining the contract) is an initial choice that has to be followed (Art. 497 and 498 of LoO)[344]. The situation is similar in Serbia, where the consumer shall be entitled to file a complaint with regard to the product or service for which a guarantee is issued, in respect of the flaws which arise within six months after the date of obtaining such product or service. Under Art. 35 CPA, if such complaint has been filed because of a flaw in the product, the consumer shall be entitled to: 1) have the product he has purchased replaced by a new product, namely by a product of suitable brand (model, type), or 2) have the amount paid for such product refunded to him, in the amount of the retail price of such product on the day of refund, or 3) have the flaws in the product remedied. If such complaint has been filed because of a flaw in the service, the consumer shall be entitled to: 1) have the flaws remedied, or 2) a refund of the amount that was paid, or to 3) reduction of price in proportion to the flaw in the service that was provided. If he suffers damage that was caused by the flawed product or failure to provide a service or provision of service with a flaw, the consumer may request compensation. The consumer may exercise the aforementioned rights provided the flaw was not caused by his own fault. The Law of Obligations sets a hierarchy of the available remedies (Art. 488-490 i.e. Art. 618 - 620) by which first the consumer has to ask for performance of the contract and if the seller/service provider fails to do so, to ask for a cancellation of the contract.

b. The "disproportionality" criterion (Art. 3 para. (3))

Art. 3(3) of the Directive 99/44 apply a proportionality element to consider whether a particular remedy is available.

The Albanian legislation (Art 31 (4) CPA) affords to the consumer to require the seller to repair the goods or he may require the seller to replace them, in either case free of charge, unless this is impossible or disproportionate. A remedy shall be deemed to be disproportionate if it imposes costs on the seller which, in comparison with the alternative remedy, are un-

[343] OG RMN No. 26/07.

[344] Law on Obligations of Montenegro, OG RMN No. 47/08.

reasonable, taking into account: i) the value the goods would have if there were no lack of conformity, ii) the significance of the lack of conformity, and iii) whether the alternative remedy could be completed without significant inconvenience to the consumer. The law sets that the repair or replacement should be completed within a reasonable time and without any significant inconvenience to the consumer, taking account of the nature of the goods and the purpose for which the consumer required the goods.

The disproportionality criterion, as set in Art. 3 (3) of the Directive 99/44 is not transposed in the legislation of Bosnia and Herzegovina, neither in CPA nor in BLO. However, the proportionality principle is a general principle arising out of the principles of good faith and fair dealing stated in Art. 12 BLO, which generally gives the possibility of interpretation of Article 18 CPA or 488 BLO in the light of the provisions of Art. 3 (3) of the Directive 99/44. The situation is similar in Croatia. The COA provision on seller's liability for material defects don't foresee a proportionality element to consider whether a particular remedy is available. However, the same result can be achieved through interpretation of rules on material defects in accordance with the principle of good faith and fair dealing. In accordance with Art. 4 COA "in creating obligations and exercising the rights and obligations resulting from such obligations, parties shall act in accordance with good faith and fair dealing". The same principle of good faith and fair dealing, as foreseen in the Macedonian Law on Obligation is to be applied when the proportionality criterion is to be considered. In Montenegro there is no transposition of proportionality test, which corresponds to the result of arranging the remedies without a hierarchical order[345].

In the moment there is no transposition of the proportionality test in the Serbian legislation. Under the Draft Proposal, where the services do not conform to the contract, the consumer is entitled to: (a) have the lack of conformity remedied by performance in compliance with the original mandate, (b) have the price reduced, and (c) have the contract rescinded. The consumer is entitled to choose among these options. If the trader disregards the consumer's request to remedy the lack of conformity by performance in compliance with the original mandate, the consumer is entitled to obtain the same performance elsewhere, at the trader's expense. The trader is obliged to reimburse the costs of the performance obtained elsewhere without delay. In all other aspects, the provisions of the prospective Serbian consumer protection act relating to liability of the trader for the lack of conformity of delivered goods to the contract of sales, shall apply accordingly to liability of the trader for the lack of conformity of provided services to the services contract.

aa. Impossibility

The rules on impossibility as set in the Directive 99/44 are not transposed in the Consumer Protection Act of Albania. In relevant cases the general rules of the Civil Code shall apply.

In Croatia, regarding the impossibility, the rules from Art. 269 and 270 COA are applicable. According to these rules "performance must be possible" for a contractual obligation to arise. This is also in accordance with Art. 8 (2) of the Directive 99/44, which regulates that more stringent provisions, compatible with the Treaty in the field covered by this Directive may be adopted or maintained in force, to ensure a higher level of consumer protection.

[345] It is interesting to observe that regular practice of the courts in cases on nonconformity under the Law on Obligations was that if repair is impossible, or is not justified, the seller is obliged to provide the buyer with another thing with no defects, in other words the buyer can ask for other thing, if the defect cannot be repaired or its repair is economically unjustified.

Art. 18 of the CPA of Bosnia and Herzegovina makes no reference to impossibility of fulfilment. According to Art. 490(2) BLO a buyer may rescind a contract even without allowing for a subsequent time limit, which is in all other cases necessary, if the seller, after having been notified of the defects, informed the buyer of his intention not to perform the contract or if the circumstances of the particular case render it obvious that the seller will not be able to perform the contract even within the subsequent time limit.

In Macedonia, in case of impossibility the general rules on impossibility of performance, as defined by the Law on Obligations (Art. 126 – 127), are applied.

Considering the fact that in Montenegro a consumer has a free choice among all four remedies initially, none of them is restricted on the basis of impossibility.

It is interesting that in case that the consumer opts for repairing or replacement, and the trader accepts the objection (call for a remedy), subordinate application of the Law on Obligations would invoke application of "reasonable" time for fulfilling the contract (bringing the goods in conformity). At this moment the general sale legislation stipulates that when circumstances of the specific case indicate without doubt that the seller will not be able to fulfil the contract even in the subsequent time limit, the contract can be rescinded.

In Serbia there is no per se implantation of the rules on impossibility. It is to be noted that under the Draft Proposal, where the trader has proved that remedying the lack of conformity by repair or replacement is unlawful, impossible or would cause the trader a disproportionate effort, the consumer may choose to have the price reduced or the contract rescinded. A trader's effort is disproportionate if it imposes costs on him which, in comparison with the price reduction or the rescission of the contract, are excessive, taking into account the value of the goods if there was no lack of conformity and the significance of the lack of conformity.

c. "Free of charge" (Art. 3 para. (4))

In Art 31 (4, b) of the Albanian CPA the term 'free of charge' in item 3 and 4 refer to the necessary costs incurred to bring the goods into conformity, particularly the cost of postage, labour and materials.

Under Art. 410 (4) COA of Croatia "the costs of removing the defect and delivery of another thing without defect shall be borne by the seller".

In Bosnia and Herzegovina the "free of charge" requirement is not transposed in the national legislation.

The Macedonian Law on Obligations does not specify explicitly that the repair or replacement are "free of charge" for the buyer in the general rules on liability for material deficiencies. It states however, that the repair or replacement is an obligation of the seller which is to be understood that it is to be carried out at his cost. In addition, Art. 493 (within the chapter on guarantee for proper functioning of the good) makes clear that the trader i.e. the manufacturer is obliged at his own expense to expedite the good to the place where it should be repaired or replaced, as well as to return to the buyer the repaired i.e. the replaced good. During the period of repairing/replacing the seller bears the risk of damages or destruction of the product. In the LCP (Art.43, para.1, 1st indent) it is clearly stated that the consumer is entitled to free of charge repair or replacement of the good with deficiencies. Art. 45, para 4 LCP provides that delivery of products more spacious then 1m3 or heavier than ten kilos in case of repair, estimation, replacement or return to the consumer, shall be carried out by the trader free of charge. In case of non-fulfilment of this obligation and in cases where in the place of consumer's residence there is no trader or producer, the delivery and return of the product may be carried out by the consumer himself. In that case the trader is obliged to compensate the necessary expenses related to the delivery and return of the products. Similarly, Art.22,

para 5 LCP stipulates that the expenses for the material, spare parts, labour, transfer and transport of the product that arise while removing the deficiencies or replacing the product with a new product based on the guarantee, shall rest on the guarantor.

In Montenegro, the remedy to the consumer in cases of non-conformity has to be provided free of charge, and the seller has to bear the cost of postage, labour and materials, as well as other relevant costs. The Consumer Protection Law does not formulate the condition "free of charge", but the Law on Obligation does. Still, the latter does not contain a definition of the term "free of charge", but just stipulates that the costs of bringing the goods in conformity (repair or replacement) are born by seller[346] . There are no doubts that in practice this would imply all related costs – e.g. like those in the Directive.

In Serbia, the CPA of 2005 does not have explicit rule on the costs for the repair or replacement. The same goes for the LoO. In addition, under Art. 497 LoO, termination of contracts due to a defect in goods shall have the effect of termination of contracts due to non-performance of one of the parties. A buyer shall owe to a seller compensation for benefits from the goods he held for some time, even if he is unable to return the goods or a part of the goods, and the contract was terminated[347].

d. Time limits on seller's liability

aa. Two-year time period

Art. 5(1) of the Directive 99/44 specifies that a seller is liable for a lack of conformity which arises within two years of delivery.

Art. 30 (1), of the Consumer Protection Act of Albania stipulates that the seller shall be held liable where the lack of conformity becomes apparent within two years as from delivery of the goods.

The Bosnian Law of Obligations traditionally differentiates between visible and latent defects. On the same line, Art. 18 (2) CPA implemented Art. 5 (1) of the Directive by setting a period of eight days for the use of remedies provided in Art. 18 (1) CPA in case of visible defects, and two years from the delivery in case of a latent defect. According to the BLO, the remedies given in Art. 488 BLO may be used within the period of six months in case of latent defects.

In Croatia, Art. 5 (1) of the Directive 99/44 is transposed in Art. 404 (2) COA, which regulates that the seller shall not be liable for defects arising after the expiry of two years since the thing was delivered, or six months in respect to a commercial contract. However, Art. 404 (4) COA foresees that this time limit may be extended by contract. Furthermore, Art. 407 COA regulates that a buyer shall not lose the right to invoke a defect even where failing to perform his obligation of inspecting a thing without delay or notifying the seller of the existence of a defect within a set period of time, as well as where such defect appeared two years, or six months in case of a commercial contract after the thing has been delivered, if the

[346] Art. 496 para 4 LoO.

[347] Under the Draft Proposal, the consumer shall be entitled to have the lack of conformity remedied free of any cost. In addition to his right to have the lack of conformity remedied by repair or replacement, or to have the price reduced, or to have the contract rescinded; the consumer shall be entitled to claim damages for any loss resulting from the lack of conformity, under the general rules on liability for damages. Under the Draft Proposal, in respect of the commercial guarantees, the trader or the producer shall bear the costs of transporting the goods with a view to repairing or replacing them, as well as the costs of sending the repaired or replaced goods back to the consumer. The trader or the producer shall bear the risk of loss or damage to the goods during the abovementioned time.

seller was aware or could not have been unaware of such defect. There is also a two–year limitation (prescription) period in Art. 422 (1) COA beyond which all rights of a buyer expire.[348]

In the Macedonian legislation there is no exact transposition of the "two-year time period" rule. By Art.488 of the Law on Obligations, the buyer, who timely notified the seller on the existence of the deficiency (non-conformity) loses his/her rights within one year, counted from the day when the notification has been sent, unless by fraud of the seller the buyer has been deterred from exercising his/her rights. A buyer that notified the seller timely may after the expiry of this deadline, state request for reduction of the price or compensation of damage as objection to the sellers' claim for price payment, given the buyer has not made the payment yet. By Art. 46 LCP, the consumer is entitled to place the requests regarding his/her rights in case of non-conformity if the defects of the product have been discovered within the guarantee period, or within the period when the product may be used, determined by the producer. For the products without determined guarantee periods, the consumer is entitled to place to the producer the requests, if they are discovered within six months from the delivery of the product, unless longer periods are stipulated by a contract or other law. The requests may not be placed in relation to products whose defects had been discovered after the expiration date, or after the period within which the product can be used. The time periods, provided by this Article, start to run from the day when the product has been delivered to the consumer, and if that day cannot be determined, from the day of production. It shall be obligatory to specify expiry dates for the products whose usage features may deteriorate after a certain period (non-durable products) and which may present danger for the life and health or the property of the consumer and the environment and nature (foodstuffs, perfume-cosmetic products, medicines, chemical products for satisfying the needs of the population etc.). The time periods for use shall start running from the day of production.

In Montenegro also, there is not exact transposition of the two years period. Instead, the general rule is that rights are available provided the consumer files the complaint immediately after becoming aware of the non-conformity (flaw) of the product and not later than six months after taking over the product. In the case of wrong price the final date is three days from the day of paying the invoice, while for public services the price deadline is eight days (Art. 23 (1, 3, 4) CPL). On the top of this, the Law on Obligations further regulates this subject and stipulates that the rights of a buyer (notifying a seller in due time of the existence of a defect) shall be forfeited after the expiration of a year, counting from the day of communicating the notification to the seller. This period can be expanded only in a case that the buyer was prevented from using its rights because of seller's deceit (Art. 508 (1) LoO).

In Serbia, under Art. 34 CPA, a consumer shall be entitled to file a complaint for nonconformity, within six months after the date of acquiring the product or service for which a guarantee is issued. The authorized person shall decide on the complaint the same day the complaint was filed, and not later than eight days from the day the complaint was filed.

[348] Art. 422 (1) COA: "The rights of a buyer who has notified a seller of the existence of a defect in due time shall extinguish after two years, counting from the day the notice was sent to the seller, unless the seller deceived the buyer into failing to exercise his rights." But there is an exception regulated in Art. 422 (2) COA: "(2) However, a buyer who has notified a seller of the existence of a defect in due time may after the expiry of this term, if he has not paid the price, request that the price be reduced or that he be compensated for damage, as objection against the seller's request to be paid the price." The County Court in Varaždin, Gž. 1074/08–2 from 4. August 2008 decided that "the buyer is exceptionally entitled even after expiration of the two years period and if he hasn't paid the price, to request the reduction of agreed price or to request damages because of material defects, as objection against the seller's request to be paid the price (…)".

The time-limits prescribed by the Serbian LoO are unacceptably short from the perspective of the Consumer Sales Directive, especially bearing in mind the difference that is made between the visible and invisible flaws. A seller shall not be responsible for defects appearing six months after delivery of the goods, unless a longer time limit has been stipulated. When the defective goods are repaired, replaced, or partially replaced, then the time-limits begin to run from the delivery of the repaired or replaced or partially replaced goods. Buyer's notification about a defect in goods shall include a detailed description of the defect and an invitation addressed to the seller to inspect the object. Should notification about the defect, otherwise sent to the seller by the buyer on time by registered mail, telegram or in some other reliable way, be late or should it entirely fail to reach the seller, the buyer shall be considered to have fulfilled his duty to notify the seller. It is to be expected that the situation will improve after the enactment of the new Consumer Protection Act. Under the Draft Proposal, the trader shall be liable for the lack of conformity if the lack of conformity becomes apparent within two years as from the time the risk passed to the consumer. A longer time limit may be stipulated. In case of minor repair, the guarantee period shall be prolonged for the time the consumer was prevented from using the goods. In case of thorough repair or replacement, the guarantee period shall begin to run anew from the time the consumer or a third party other than the carrier and indicated by the consumer has acquired the material possession of the replaced goods.

bb Option: reduced period for second-hand goods

The option to reduce the set "two–year time period", provided by Art. 7(1) of the Directive is not transposed in the legislation of Albania, Bosnia and Herzegovina, Macedonia, Montenegro and Serbia.

In Croatia, Art. 404 (3) COA prescribes that "where used things are sold the contractual parties may agree a time limit of one year, or shorter in respect of commercial contracts". Again, Art. 404 (4) COA foresees that this time limit may be extended by contract.

PS using option in Art. 7(1)	PS not using option in Art. 7(1)
CRO	AL, BA, MAC, MN, SER

cc. Option: duty to notify lack of conformity within 2 months

Art. 5 para.(2) of the Directive grants member states the option to provide that a consumer must notify a seller of a lack of conformity within a period of two months from the date on which the consumer detected this.

This option is not transposed in the legislation of Albania.

In Bosnia and Herzegovina this is transposed in Art. 19 (3) CPA.

In Croatia it is transposed in Art. 403 (4) COA, according to which in case of consumer contracts, a buyer who deals as a consumer shall not be bound to inspect or have a thing inspected, but shall notify the seller of any visible defects within the period of two months from the day when he discovered the defect, and no later than within two years from the transfer of risk to the consumer. Similar provision which concerns all the other sale contracts is regulated in Art. 404 COA. Under this provision, when it becomes apparent after the buyer receives a thing that the thing has a defect that could not have been discovered by usual inspection when the delivery was taken, the buyer shall, under threat of losing the right, notify the seller thereof within the period of two months, not including the day when the defect was discovered, or without delay in respect of a commercial contract.

The duty to notify lack of conformity is differently regulated in the Macedonian legislation. The buyer is obliged to notify the seller of the noted deficiencies as soon as possible but not later than eight days. If the inspection is carried out in presence of both parties the notification should be done immediately (Art.469, par 1 and 2 LoO). In case the deficiencies were hidden the buyer should notify the seller within eight days from the day of when he/she becomes aware of the deficiency, but not later than six months form the day of the receipt of the product (Art.470 LoO). The regulation of this issue is similar in Montenegro. The period for notification starts immediately after becoming aware of the non-conformity (flaw) of the product and lasts not more than six months after taking over the product. It is sufficient to send a written statement[349] to this effect before this period expires. As indicated earlier, in case of wrong price the final date is three days from the day of paying the invoice, while for public services the price deadline is eight days following the receipt of the invoice[350].

Under Art. 481-485 of the Serbian LoO, a buyer shall be bound to inspect the goods in usual way, or to have them inspected as soon as possible under regular course of events, and to notify the seller of any visible defects, within the eight day time-limit, and in case of commercial contracts – without delay. Otherwise, the buyer shall lose his rights related to the visible defects. After the examination of goods in the presence of both parties, the buyer shall immediately report to the seller his remarks regarding visible defects. Otherwise, the buyer shall lose his rights related to the visible defects. In case of concealed defects (defects which could not be discovered by usual examination), the buyer is obliged to inform the seller of their existence within eight days from discovery, otherwise, the buyer shall lose his rights in relation to the concealed defects.

PS using option re notification	PS not using option re notification
BA, CRO MN, MAC, SER (with variation)	AL

dd. Recital option: suspension of two-year period

The option for suspension of the two–year period was not transposed in the legislation of Albania and of Bosnia and Herzegovina.

By the Laws of Obligation in Croatia (Art. 405 COA), Macedonia (Art. 471 LoO) Montenegro (Art. 491 LoO) and Serbia (Art. 483 LoO), when due to a deficiency there has been a repair of the good, delivery of another product (replacement), replacement of parts etc, the prescribed deadlines for notification start from the day of the delivery of the repaired good, the delivery of the other good, or the carried out replace of parts. In addition to this rule in the Macedonian LCP (Art.48, para 3 and 4) in case of removal of the deficiency of the product, the guarantee period shall be extended for the period in which the product was not used. This period shall be calculated from the day of the request of the consumer for removing the defect. In case of removal of the defect by replacement of the good which is assembled or which is a component part of the product that has a determined guarantee period, the guarantee period for the new good which is assembled or is component part of the good shall start running from the day when the good was delivered to the consumer.

[349] Art. 492 para 2 LoO.

[350] Art. 26 para 1, 3 and 4 LCP.

ee. Presumption of non-conformity during first 6 months

The presumption from Art. 5(3) of the Directive 99/44 is transposed in the Albanian Consumer Protection Act where Art. 30 (2) provides that unless otherwise proved, any lack of conformity that becomes apparent, within a period of six months from delivering of the goods, shall be presumed as it existed at the time of delivering, unless this presumption is incompatible with the nature of the goods or the nature of the lack of conformity. In the legislation of Bosnia and Herzegovina, Art. 5 (3) Directive 99/44 is not transposed[351].

In Croatia by Art. 400 (3) COA it is to be presumed that a defect arising within six months following the transfer of risk existed at the time of transfer of risk unless the seller provides evidence to the contrary or this arises from the nature of the thing or the nature of the defect.

By Art.470 of the Macedonian LoO, in case of hidden flows (deficiencies that could not have been noted in regular inspection during the delivery of the good), the buyer is obliged to notify the seller within eight days of the detection of the deficiency, given that this is within the first 6 months following the purchase of the good, unless longer period is agreed by the parties. The period does not depend on the nature of the good or the nature of the lack of conformity. It could be concluded that this rule is implemented in the Macedonian legislation.

Montenegro generally conforms to the requirement set in Art. 5(3) of the Directive 99/44. Here, the period to exercise remedies cannot be later than six months after taking over the product (delivery of the product). But Montenegro does not mention the restriction formulated in Art. 5(3) of the Directive that the presumption does not apply where this would be incompatible with the nature of the goods or the nature of the lack of conformity.

Under Art. 34 of the Serbian CPA of 2005, a consumer shall be entitled to file a complaint with regard to the product or service for which a guarantee is issued, in case of the flaws arising within six months after the date of acquiring such product or service. The Serbian LoO (Art. 481-485) provides time limits for notification of the seller and putting forward requests as provided by the law i.e. in case of detectable flaws within a period of 8 days and 6 months, unless otherwise agreed for concealed defects[352]

e. No rescission for 'minor' lack of conformity (Art. 3 para. (6))

The consumer shall not be entitled to have the contract reclined in case of minor lack of conformity in Albania (Art. 31 (7) CPA), Croatia (Art. 410 (3) COA), Macedonia (Art. 466(3) LoO and Art. 22(2) LCP), Montenegro (Art. 486 (3) LoO), Serbia and Bosnia and Herzegovina (Art. 478 and 620 LoO).

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[351] In Bosnia and Herzegovina this presumption is only transposed in the Art. 539 of the BDLO 2010.

[352] In Serbia, under Draft Proposal, the trader shall be liable to the consumer for any lack of conformity which exists at the time the risk passes to the consumer. The trader shall be liable to the consumer for any lack of conformity which occurs after the risk passes to the consumer, if the causes of the lack of conformity existed before the risk was passed. Unless otherwise proved, any lack of conformity which becomes apparent within six months of the time when the risk passed to the consumer, shall be presumed to have existed at that time unless this presumption is incompatible with the nature of the goods and the **nature of the lack of conformity**. Furthermore, under Draft Proposal, the risk of accidental loss of or damage to the goods shall pass to the consumer when he or a third party, other than the carrier and indicated by the consumer, has acquired the material possession of the goods. The risk shall not pass to the consumer if he has rescinded the contract due to lack of conformity in the goods delivered, or if he has requested replacement of the goods. If the consumer or a third party, other than the carrier and indicated by the consumer, has failed to take reasonable steps to acquire the material possession of the goods, the risk shall pass to the consumer at the time of delivery as agreed by the parties or, in case the parties have not agreed on the date of delivery, thirty days after the day of the conclusion of the contract.

The CPA of Bosnia and Herzegovina does not exclude rescission in case the lack of conformity is "minor" and therefore provides a higher level of consumer protection.

f. Rescission and period-of-use allowance

Recital 15 states that member states may provide that where a consumer is entitled to a reimbursement of the purchase price, a deduction may be made to take account of the use the consumer has had of the goods since delivery to him.

This option does not exist in the Albanian CPA. However, the Civil Code in Art. 742 contains a general obligation of the seller and buyer to return back what they have received during the performance of the contract, by stating: "*In case of dissolution of the contract, the seller must return the price paid and pay the buyer the expenses and payments required by law. The buyer must give back the thing if it is not lost or destroyed as result of its defects*", while Art. 744 specifically address the issue of deduction. In the first sentence it is emphasized that the seller must return back to the buyer the paid price even if the value of the thing is reduced or if the thing is damaged. In the second sentence, a criteria for deduction is set „*If the reduced value or damage come as the result of an action of the buyer, the above amount must be reduced by the profit the buyer has made, except as provided for in Article 640*"[353].

In Bosnia and Herzegovina, the existence of this option is drawn from the analysis of the effects of the termination of the contract. Namely, according to Art. 419 BLO the termination of a contract due to a defect of a thing shall have the same effect as the termination of bilateral contracts due to non-performance". The effects of termination due to non-performance are provided by Art. 132 (4) BLO which states that "each party owes the other party compensation for the benefits that it enjoyed in the meantime from whatever it is obliged to return or compensate". The same is the case in in Croatia (Art. 419 (1) in conjunction with Art. 368 COA), Macedonia (Art. 121 with conjunction to Art. 485 LoO), Montenegro (Art. 127(4) in conjunction with Art. 505 LoO), Serbia (Art. 497 LoO)

g. Calculation of price reduction

The Albanian law provides that the consumer may require an appropriate reduction of the price or have the contract rescinded if the consumer is entitled to neither repair nor replacement, or the seller has not completed the repair or replacement.

In Bosnia and Herzegovina, according to Art. 498 of BLO the price shall be reduced in accordance with the proportion of the value of a thing without defect to the value of the thing with a defect at the time the contract was entered into. According to this approach, the price will be reduced by the same ratio as the value of the goods as delivered is in relation to the value they would have had if they had been in conformity with the contract. The same principle is applied in Croatia (Art. 420 COA) where additionally to this amount the seller is obliged to pay interest for the time period from the moment of paying until refunding.[354]

A similar provision exists in the Macedonian Law on Obligations (Art. 486) which is in a way supplemented by Art.49 LCP, which provides rules to be applied in cases where there has been a change in the price from the time of the purchase to the time of the request. Namely, in cases of an increase in the price of the product the revision of the price shall be made, taking into account the price of the product at the time of placing the request, and in case if the price of the product has decreased in the meantime, then the price of the product at the time of the purchase shall be taken into consideration. Also, by the Montenegrin Law on Ob-

[353] Art. 640 of Albanian Civil Code provides for the compensation of damage.

[354] Supreme Court of the Republic of Croatia (VSRH) Rev 2458/90 from 13. February 1991.

ligation price reduction shall be effected according to a ratio between the value of goods without defects, and the value of the goods with defects, at the time of entering into contract. In Serbia, this is regulated both by the CPA and the LoO. The provisions of the LoO (Articles 498 and 621) are the same as in Bosnia and Herzegovina, Croatia, Macedonia and Montenegro, while under Art. 35 CPA, this should be the amount of the retail price of such product on the day of refund; and in case of services, a refund of the amount that was paid, or a reduction of price in proportion to the flaw in the service that was provided. There is no specific norm of CPA relating to the calculation of price reduction – as opposed to the refund of the retail price of the product.

3. Guarantees

The provisions on guarantees in Art. 6 of the Directive require that guarantees must be legally binding, that certain information is provided, and that guarantees remain binding even where the rules in this article have not been complied with.

By the Albanian legislation (Art 32 CPA) any contractual guarantee statement will not deprive the consumer from the rights that he is entitled to under Articles 30, 31 and 32 CPA. The Law provides several rules related to the guarantee such as that: the seller is obliged to fill in the guarantee statement and to give it to the consumer; the guarantee statement shall be given to the consumer in Albanian language, written in plain and intelligible language, as well as containing necessary data - name of goods and services, name and address of the guarantor, time limit and the territorial scope of the guarantee.

In Bosnia and Herzegovina, the CPA regulates "guarantees for products or services" in its Articles 25-27 without a direct reference to the content of the provisions of Art. 6 of Directive 99/44. Namely, under Art. 25 CPA the seller is obliged for material defects of the goods that exist at the time of delivery, regardless of his awareness of this fact. The following Articles 26 and 27 provide for consumer protection for "technically complex products", enabling a guarantee period of three years for home appliances and five years for other technically complex products and setting rules regarding the repair of such products, spare parts and licensed service. The BLO contains rules on guarantees for "technical goods", stating in Art. 501 (2) that "these rules shall not withstand the application of rules relating to the liability of the seller for defects of a thing". However, the BLO does not provide that the guarantee does not affect those rules, as prescribed in Art. 6 (2) Directive 99/44. The other provisions of Art. 6 of Directive 99/44 were also not implemented in the BLO. Articles 501 – 507 regulate the right of the consumer to a "free of charge" repair of a defect product, right to restitution, price reduction, replacement and termination of the contract during the guarantee period.

Art. 5 (5) of the Croatian CPA stipulates that if the trader or producer gives the warranty for the correctness of the product sold he is liable to fulfil the obligations prescribed by the COA on warranty for correctness of the product sold, as well as liabilities taken by the warranty. The requirement from Art. 6 of the Directive 99/44 have been correctly transposed in Art. 423 COA. The binding nature of a voluntary guarantee follows from Art. 423 (1) and (2) COA.[355]

[355] Art. 423 (1) COA: "If a manufacturer warrants the quality of a thing for a specified period of time, starting from its delivery to the buyer, the buyer may, if the thing is not of adequate quality or fitness, request from both the seller and the manufacturer that the thing be repaired within a reasonable period or, if he fails to do so, to deliver him a fit thing instead." Art. 423 (2) COA: "If a seller warrants the quality of a thing for a specified period of time, starting from its delivery to the buyer, the buyer may, if the thing is not of adequate quality or fitness, request from the seller that the thing be repaired within a reasonable period or, if he fails to do so, to deliver him a fit thing instead."

According to Art. 423 (3) COA a “warranty shall be binding under the conditions under which it has been given, regardless of the form in which it has been given (paper form, verbal statement, accompanying advertising, etc.), but the buyer shall be entitled to request that the warranty be given in a paper form or on another permanent medium, accessible to him”. The provisions on warranty shall not withstand the application of rules relating to the liability of the seller for defects of a thing (Art. 423 (4) COA). The warranty shall contain the buyer’s rights arising from it and it shall stipulate clearly that the warranty does not affect other rights belonging to the buyer as per other legal grounds (Art. 423 (5) COA). Under Art. 423 (6) COA “the warranty shall contain details required by the buyer to be able to exercise his rights, especially warranty period, regional scope of the warranty and the name and address of the person who issued the warranty”. And finally, Art. 423 (7) COA regulates that the failure to perform the obligations referred to in Art. 423 (5) and (6) COA shall not have effect on the validity of warranty. The option prescribed in Art. 6 (4) of the Directive 99/44 has not been exercised.

In Macedonia, the existing provisions on the guarantee are very similar to those set by the Directive. The Law on Obligations regulates, in general, the issue for guarantees for proper functioning of so called technical goods, setting rules when the seller guarantees, what are the deadlines, what are the rights of the buyer (Art.489 – 495). In regard to the deadlines, the Law on Obligations specifies that the minimal period of guarantee is one year and the maximum period for repair of goods with deficiencies is 45 days. The Law on Consumer Protection, in Art.22, regulates in detail the issue of the guarantees. The trader shall be obliged, in accordance with the technical regulations specifying the products for which the producer, importer, or representative of the foreign company must issue a guarantee for quality or for the proper functioning of the product, a document for the manner of use of the product, to provide servicing for maintenance and repair and for supply of spare parts within the guarantee period. The trader is obliged at least within five years from the day of production of the product but not less than two years from the date of expiry of the product guarantee, to provide spare parts. In agreement with the consumer the product can be serviced the most three times within the guarantee period and if the product has not be fixed, the consumer has right to ask the trader to replace the product with another properly functioning product of the same kind and or to return the amount paid for the purchased product. As in the Law on Obligations (Art. 466 (3)), the consumer does not have the right to request a replacement of the product or refund of the paid amount if the deficiency that is serviced is minimal or does not affect the quality and performances of the basic function of the product. In regard to the provision of Art.6 (1) of the Directive, the LCP provides that the producer is obliged to abide by the obligations from the guarantee certificate. As to the requirements on the content and the effect of the guarantee defined in Art.6 (2) of the Directive, the LCP provides that the guarantee should include: firm or business name and head office of the guarantor; data about the product identifying the product; statement about the guarantee and guarantee terms; duration period of the guarantee; period in which the trader is obliged to act upon the request of the guarantee user and to remove the defects and deficiencies of the product; firm or business name and head office of the trade company or other legal or natural person which has retailed the product, date of selling, seal and signature of the authorised officer and statement that the consumer is entitled to the legal rights deriving from the national legislation regulating the sale of products, and that such rights shall not be affected by the guarantee. In regard to the requirement of Art.6 (3) and Art.6 (4) of the Directive, by the LCP it is provided that all the documentation related to the function of the product should be written clearly and readably, in Macedonian language and Cyrillic letters, which does not exclude the possibility to additionally use other languages in the same time, as well as signs easily understandable for the consumer. By Art.489 (5) of the

Law on Obligations, non-performance of the obligations related to the guarantee does not affect the validity of the guarantee which is in line with the Art.6 (5) of the Directive.

Provisions on the guarantee as provided by the Directive, generally have been implemented in Montenegro in very similar format. However, Montenegrin Consumer Protection Law also went beyond some of the requirements of the Directive especially in informative content of the guarantee as it has expanded the list (e.g. data for identification of the product and data about the purchase; date of delivery of the product to the consumer; rights of the consumer by virtue of the guarantee; other data in accordance with law as well as the statements from the advertising material). The requirement to include a reference to the consumer's legal rights is missing just on first sight, but interpretation of Art. 20, para 1, point 11) refers to the case of so called „technical goods" and Art. 509 para 3 of Law on Obligations contains a provision identical to the Directive. On the part of the requirement that guarantees must be legally binding, Consumer Protection Law contains same provision, albeit with different wording (Art. 19 (2)). Same law defines guarantee certificate as a document that accompanies the goods and contains the data prescribed by law which makes clear that it must be in writing, whether being mandatory or voluntary (Art. 19(1); to this extent Art. 82 of Consumer Protection Law is of importance as well. Language in official use in Montenegro is a must, while other forms of durable medium are not given as option. Furthermore, consumer shall have the rights that arise from the guarantee regardless whether the trader has delivered a guarantee certificate in writing, in which case the burden of proof that the guarantee was delivered is on trader (Art. 19(3)). In respect of the remedies under a guarantee, the hierarchy of consumer's remedies (Art. 21 LCP in conjunction with Art. 510 LoO) corresponds to that of the Directive. Maintenance of the contract is first option (repair of the goods), and only then when repair is not effected within reasonable time rescission of the contract is an option. However, consumer cannot exercise his rights if the non-conformity in product was caused by fault of the consumer or if it was remedied by a non-authorised person (Art. 22(2) LCP).

The guarantees are regulated by the CPA and the Law of Obligations in Serbia as well. Namely, Art. 21 CPA refers to the law of contracts in respect of the commercial guarantees ("Issuer of the guarantee shall be under obligation to provide servicing of the product to the consumer, in accordance with the law or the contract."). Under the LoO (Art. 501 et seq,) should a seller of the technical goods hand to a buyer a written guarantee issued by the producer for proper functioning within a specified period, counting from the moment of the delivery of the goods to the buyer, the buyer may, should the good fail to function properly, demand both from the seller and the producer to repair the goods within a reasonable time limit or, short of this, to replace it with the one which functions properly. These rules are, without prejudice to the liability of seller, for non-conformity of goods. The buyer may demand either from the seller or from the producer to repair or to replace the technical goods within the warranty period, regardless of the moment the defective functioning appears. He shall be entitled to compensation for the fact that he was not able to use the goods from the moment of demanding repair or replacement to their effecting. Should a seller fail to repair or replace the goods within a reasonable time limit, the buyer may rescind the contract or reduce the price and request damages. Buyer's rights in relation to producer expire one year after the day of his demand that the seller makes repair or replacement of the goods.

4. The Right of redress

By the Albanian CPA the duration of the legal guarantee would be extended automatically after the repair to cover the future re-emergence of the same defect. In this case, the consumer shall be entitled to claim for replacement instead of another repair (Art 31 (5) CPA). The period of time for complaint and repair is added to the period of guaranty (Art 31 (8) CPA).

In Bosnia and Herzegovina, Croatia, Macedonia, Montenegro and Serbia the requirements of Art. 4 of the Directive 99/44 are fulfilled under the provisions of the Laws of Obligation for contractual and non-contractual liability for damages.

5. Mandatory nature of the provisions

The Albanian Consumer Protection Law (Art. 31(1, 2)) provides that the seller is obliged to accept complaints for goods in every place where his activity is exercised or represented, unless when another person is authorized to repair goods. The seller shall immediately or within three working days decide on the acceptation of the complaint. The non-conformity with the provisions on contractual conformity is deemed as administrative violation and penalized by fine up to 100 000 Leke (approx. 730 EUR)[356].

Art. 7 (1) of the Directive 99/44 is implemented in very similar format in the Acts on Obligations in Bosnia and Herzegovina (Art. 486(2) BLO), Croatia (Art. 408 (2) COA), Macedonia (Art. 474 LoO) and Serbia (Art. 489 LoO) which stipulate that a provision of the contract on limiting or excluding liability for defects of things shall be void if the seller was aware of the defect and failed to notify the buyer thereof, and also where the seller imposed such a provision by making use of his monopolistic position, or with regard to a consumer contract. Provisions in this regard exist in the consumer protection acts of these countries as well. Namely, the specific legislation on the consumer protection provides that the consumer cannot waive, nor be deprived of the conferred rights (Art. 2 of the CPA of Bosnia and Herzegovina, Art 6 (1) of the Croatian CPA, Art. 65 of the Macedonian LCP and the draft Proposal in Serbia). The Montenegrin LCP provides, within the general clause enshrined under "general principles to exercise consumer rights" (Art. 5(1)), that a consumer may not waive the right set out in this Law, so any contract term excluding or restricting a consumer's rights would be null and void.

Art. 7 (2) of the Directive 99/44 concerning conflict of laws will be dealt with in Part 3 C (Private International Law in Consumer Contracts).

IV. Use of the minimum harmonisation clause (Art.8 para. (2))

1. Higher level of protection for consumers

When observing the provision of Art. 8 of the Directive and the national legislation of the observed states it could be concluded that all of them relied on it in order to provide a higher level of protection for consumers, either in their acts for consumer protection or in the conjunction of those acts with the acts on obligations.

a. Scope of application

The extensions of the scope protection afforded by the national legation could be seen in different aspects. The Albanian Consumers Protection Law (Art. 33) provides also after-sales obligations: "Producers and sellers must ensure spare parts necessary for maintenance and repair of products within the period of guarantee, whether legal or contractual". In Bosnia and Herzegovina, the CPA may allow the interpretation that immovables fall under the scope of application of its rules regarding material defects while the BLO provides a higher level of consumer protection regarding its scope of application, since it applies to B2C, B2B and P2P contracts. In addition the fact that the limited definition of "consumer goods" in Art.

[356] See Art. 57/2b CPA.

1(2)(b) of the Directive 99/44 has not been transposed, leads to the result that the relevant provisions will be applicable also to all the other objects of sale (e.g. services and real estates). The same counts for Croatia, Macedonia, Montenegro and Serbia as well. Further, in Croatia there is no explicit exclusion of specific exclusion listed in Art. 1(2)(b) of the Directive 99/44, namely regarding water and gas where they are not put up for sale in a limited volume or set quantity, while in Montenegro the Consumer Protection Law beside definition of "consumer" includes definition of consumer group.

aa. Liability of the producer

In Albania the liability of the producer is drawn from the provision of Art. 33 CPA which stipulates that the Producers and sellers must ensure spare parts necessary for maintenance and repair of products within the period of guarantee, whether legal or contractual.

The Legislation in Bosnia (Art. 26 and 27 of CPA, Art. 501-507 BLO), Croatia (Art 401(3) and Art. 423-424 COA) and Macedonia (Art. 489-490 LoO and Art.22 LCP) confers rights to the consumers against the sellers and producers in regard to warranty (issued as warranty list).

In Montenegro, under Consumer Protection Law, only the trader is liable for non-conformity of the goods, unless otherwise prescribed by law or consumer contract, while in respect of guarantee, the general rule of Consumer Protection Law is that "guarantee issuer" can be producer, distributor, or trader where the same will be obliged to, in accordance with law and technical regulations (mandatory guarantees), meet the obligations set forth under the guarantee. The situation is the same in Serbia (Art. 501 et seq. LoO, Art. 21 CPA).

b. Conformity requirement

Regarding the conformity requirement of the directive it is to be concluded that all of the countries have transposed it with specific variation.

The Consumer Protection Law of Albania (Art 29 (3)) provides definition of product conformity.

In Bosnia and Herzegovina, Art. 479 (4) BLO excludes samples shown for information only (which are not excluded by Art. 2 (2) (a) Directive 99/44), while Art. 479 (2) BLO additionally provides protection in cases when the seller should have known about the specific purpose the buyer intends to use the good for (Art. 2 (2) (b) of the Directive 99/44 only includes specific purposes of goods the consumer and seller agreed on). The CPA did not transpose the reduction to non-minor lack of conformity.

The Croatian Legislation gives higher level of protection to consumer by regulating in Art. 401 (1) point 2) COA that a defect shall exist if a thing lacks the qualities required for the specific purpose the buyer intends to use it for, and where it "was known or should have been known to the seller". Further protection is granted through transposition of the Directive´s provision on goods to be installed (Art. 2 (5) of the Directive 99/44) in the list of criteria in Art. 401 (5) and (6) COA.

In Macedonia a certain extension could be found by setting an obligation for the trader to sell or provide to the consumer products or services of such quality and quantity that is fully in compliance with the established technical requirements and regulations, with the prescribed standards, norms and conditions laid down in the contract, stated requirements, as well as information given by the trader regarding the product or service (Art.36 LCP) and the rights for replacement of foodstuff. In addition, the rule existing in the Law on Obligations that the seller shall be liable for the deficiencies that were obvious but the seller claimed that there are no deficiencies, represents higher level of protection. The obligation set for the trader to provide the consumer with certain documentation (manuals, instructions etc) as well as

rules on the content of the guarantee certificate, and the rules on their form (requirements on the manner they should be written and the language) present a certain extension.

The Montenegrin Consumer Protection Law, together with requirements found in the general sale legislation, added additional factors for the conformity requirement, such as: exact measure or quantity of goods; suitable packaging material in accordance with the type and properties of the goods; prescribed or agreed quality, and if the quality was not prescribed or agreed – usual quality of goods and services; way of determining or calculating price. Also, the trader must hand over to the consumer the prescribed documents (certificate, technical manual, user manual, etc.), as well as the documents provided by the producer, in accordance with technical and other regulations. In relation to what has been said previously, in case of a technical manual, it should be noticed that requirement of the Consumer Protection Law (Article 82 of the CPL) is that documents of the products must be written in the language in official use in Montenegro, which if not done might give rise to interpretation of non-conformity. The latter is especially true in case of installation manuals and incorrect installation resulting from this.

To the consumer rights belongs also a rule that trader shall be responsible for defects, which could have been noticed easily by the buyer, if the former declared that the goods were free of all defects or that they had specific properties or characteristics (Art. 488 (3) LoO).

The Serbian CPA does not contain the definition of conformity, while Art. 479 LoO defines the material flaw in the goods (and not the conformity of the goods to the contract) and in any case, the LoO does not take into account public statements[357].

c. Remedies

The national legislation of the studies countries provides for the same remedies as the Directive.

In Albania the consumer may choose between repair, replacement, appropriate reduction in price or to have the contract rescinded.

Article 18 of the CPA of Bosnia and Herzegovina provides a free choice of the consumer between the remedies.

In Croatia the COA provisions establish certain hierarchy of remedies, however, the CPA as *lex specialis* regulates that the consumer has a choice between invoking the remedies pursuant to the provisions of the COA relating to responsibility for material defects of the product. The COA goes again beyond the provision of the Directive 99/44 by regulating the possibility to claim damages under general rules on liability for damage including the damage caused by material defect to his other property (Art. 410 (2) COA). The situation is the same in Macedonia and Serbia[358].

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[357] The draft Proposal offers a higher degree of protection to a consumer, as it prescribes that the goods shall be in conformity to the contract if they are fit for any particular purpose for which the consumer requires them and which was known or must have been known to the trader at the time of contract formation. This rule is a bit broader then the Directive's requirement that the goods are fit for any particular purpose for which the consumer requires them and which he made known to the seller at the time of contract formation and which the seller has accepted. In addition, Draft Proposal contains the rule on incorrect installation of the goods.

[358] Draft Proposal gives the consumer full freedom to choose among the remedies. The consumer is entitled to request the trader to remedy the lack of conformity by either repair or replacement, according to the consumer's choice. If the trader disregards consumer's request to remedy the lack of conformity by either repair or replacement, according to the consumer's choice, the consumer is entitled to obtain the repair or to purchase the same good elsewhere, at the trader's expense. The trader is obliged to reimburse the costs of the repair or replacement purchases elsewhere without delay.

In Montenegro all four remedies are available at the own choice of the consumer and immediately as non-conformity arises. The consumer is entitled to claim damages as well, and in addition (and independently from the previous)

d. Time limits

In Albania the seller shall be held liable where the lack of conformity becomes apparent within two years as from delivery of the goods.

In Bosnia and Herzegovina the consumer has the right to invoke a defect within six month from the delivery, except where the seller was aware or could not have been unaware of such defect, when this right is doesn't elapse after 6 months.

In Croatia the two–year period has been implemented (Art. 404 (2) COA) and the starting point for the general limitation period (prescription) is the moment of notification of the non–conformity to the seller (Art. 422 (1) COA). However, the buyer doesn't lose the right to invoke a defect even where such defect appeared two years after the thing has been delivered, if the seller was aware or could not have been unaware of such defect (Art. 407 COA). COA suspends the two–year period whilst the goods are being repaired or replaced (Art. 405 COA).

By specifying the time limits for provision of the notification and the limits for repair and/or replacement of goods as an obligation of the trader the Macedonian legislation in certain way provides higher level of protection of the consumers.

In Montenegro, the general rule is that rights are available provided consumer files the complaint immediately after becoming aware of the non-conformity (flaw) of the product and not later than six months after taking over the product. Law on Obligations further regulates this subject and stipulates that rights of a buyer that notifies a seller in due time of the existence of a defect shall be forfeited after the expiration of a year, counting from the day of communicating the notification to the seller. This period can be expanded only in a case that the buyer was prevented from using its rights because of seller's deceit. In relation to suspension of time limits in case of repair, replacement, and the like the Law on Obligations (Art. 491) stipulates that subject time limits shall begin to run from the moment of delivery of the repaired goods, of delivery of other goods, of replacement of spare parts, and the like.

Similarly, in Serbia the CPA prescribes the time limit of six month from the day of purchase. The LoO contains a very short time limit of eight days from the discovery for the buyer to notify the seller on the discovered flaws; if not used the right is lost. If the buyer timely notifies the seller of the existing flaws in goods, his rights shall expire one year after the notification, except when the seller deceived the buyer into not using these rights[359].

e. Guarantees

The national legislation in respect of the guarantees in the participating states is approximated with the Directive and in certain cases goes beyond its requirements. The Croatian COA (Art. 425) provides for extension of the guarantee period for the duration of the repair i.e. its renewal in case of replacement or a major repair. The same situation exists in the Macedonian Law on Obligations (Art. 491), where in addition the guarantee period is set to a minimum of one year (Art. 490). The extension/renewal principle of the guarantee period ex-

[359] Draft Proposal sets down the two years' time limit starting from the passing of risk; and it does not prescribe that the consumer must inform the seller of the lack of conformity within a period of two months from the date on which he detected such lack of conformity in order to benefit from his rights.

ists also in Montenegro (Art. 511(2)) where in addition the consumer shall have the rights that arise from the guarantee regardless whether the trader has delivered a guarantee certificate in writing, in which case the burden of proof that the guarantee was delivered is on the trader (Art. 19 (3) LCP); the consumer shall be entitled to compensation of damage for the period during which he could not use the goods from the moment of demanding repair or replacement to their effecting; should, due to improper functioning the good be replaced or thoroughly repaired, the warranty period shall begin to run anew from the day of replacement, or restoring the repaired object (Art. 510(2) LoO).

Under Art. 483 of the Serbian LoO, should, due to a defect, goods be repaired, other goods delivered, parts replaced, and the like, the time limits shall begin to run from the moment of delivery of the repaired goods, of delivery of other goods, of replacement of spare parts, and the like[360].

V. General comments on adequacy of implementation of the Directive

1. Difficulties encountered during the transposition process

The analysis shows the following situation:

• The Albanian legislator has made a copy and paste transposition of the Directive, leaving out some provisions.

• In Bosnia and Herzegovina the main implementation of the Directive was planned for the reform of the Law of Obligation that has yet to be conducted. As described above, the CPA only partly implemented the provisions from the Directive 99/44, relying on the protection provided by the BLO. A reform of the already existing provisions of the BLO would be much easier than providing a whole new set of rules in the CPA. With the adoption of the BDLO 2010 most of the problems that occurred during the transposition process would be solved.

• In Croatia there were no specific difficulties when transposing the Directive 99/44 into COA. The main challenge was how to combine the already existing rules on sale with the specific rules introduced by the Directive 99/44. [361]

• The Macedonian legislator encountered difficulties in making the difference between labiality for products with deficiencies and liability for damages from defective products i.e. the transposition of the Directive 99/44 and Directive 85/374/EEC, as amended by Directive 1999/34/EC in the Law on Consumer protection, as both types of liabilities are regulated in the same chapter of the Law without clear distinction between the two types of liability. The Law on Consumer Protection does not follow the rule established by the Law on Obligations on the hierarchy of the remedies, and it does not include the proportionality test existing in the Directive.

• In Montenegro the legislator failed to transpose the proportionality test, which corresponds to the result of arranging the remedies without a hierarchical order.

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[360] Under Draft Proposal, in case of minor repair, the guarantee period shall be prolonged for the time the consumer was prevented from using the goods. In case of thorough repair or replacement, the guarantee period shall begin to run anew from the time the consumer or a third party other than the carrier and indicated by the consumer has acquired the material possession of the replaced goods.

[361] *Petrić Silvija,* Odgovornost za materijalne nedostatke stvari prema novom Zakonu o obveznim odnosima (Liability for Material Defects According to the new Law on Obligations), in Zbornik PFR, V. 27, Nr. 1, 2006, pp. 98.

• The Serbian legislator drafted completely new provisions and placed them in a separate consumer protection act; however, the relation between the provisions of the civil codification and the provisions of the separate consumer protection act need to be defined[362].

2. Gaps in the Directive

Analysing the Directive itself revealed that the Directive 99/44 left a number of question unanswered and any amendments thereof should regulate:

• Definition of 'goods', in particular status of software and other digital products in regard to definition;
• Clarification of the proportionality criterion in the Directive;
• The legal effects of exercising the right to rescind the contract;
• The inspection of the goods;
• The time periods for notification on visible and invisible deficiencies accordingly;
• The guarantee for provision of spare parts and services after the sale (both within the guarantee period and beyond) should be specified as well;
• The conditions under which the consumer may exercise the remedies;
• The subsidiary liability of producer;
• The question of mandatory producer guarantee.

VI. Summary

Prior to transposition of the Directive 99/44 the national laws of the participating states contained provisions within their Law of Obligations/Civil Code which regulate the sale of goods, applicable to all types of contracts and not specifically related to consumer contracts. All of the participating states at least partly transposed the provisions of the Directive 99/44 in their consumer protection regulations, while only some of them additionally or mainly transposed the Directive in their generally applicable Law of Obligations (Macedonia, Croatia and Montenegro). Provisions of the Acts on Obligations of the participating states, including those relating to the liability for conformity to the contract, apply to B2B, B2C and P2P transactions. Furthermore, they contain separate provisions on the supplier's liability for conformity of the rendered services to the services contract. The transposition of the Directive 99/44 in the Croatian Civil Obligations Act also resulted in the creation of some separate rules which are only applicable to consumer transactions. None of the provisions of the participating states contains a definition of consumer goods which corresponds to Art. 1 (2) b of the Directive 99/44. The participating states provide a definition of sale only within their generally applicable Law of Obligations, providing with almost the same wording that by the sales contract the seller is obliged to deliver to the buyer the item that he is selling to the buyer so that the buyer acquires the right of ownership, while the buyer is obliged to pay to the seller the price. Albania and Serbia transposed Art. 2 (1) of the Directive 99/44 stating that the seller must deliver goods to the consumer which are in conformity with the contract of sale. In the other participating states, the requirement to deliver conforming goods arises out of the trader's liability for material defects (Bosnia and Herzegovina, Croatia) or a general provision on performance of the obligation as agreed (Macedonia, Montenegro). Albania is the only of the participating states which in its Consumer Protection Act positively defines criteria for the presumption of conformity of delivered goods with the contract. The Acts on

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[362] Draft Proposal contains the following norm: "In case of conflict of this Law with other laws, this Law [meaning: the prospective CPA] takes priority."

Obligations of all the other participating states contain a list of cases when material defects exist and these are not framed as legal presumptions (Bosnia and Herzegovina, Croatia, Macedonia, Montenegro and Serbia), contrary to the model of Art. 2 (2) of the Directive 99/44, which defines criteria for conformity of the goods with the contract. Albania literally transposed Art. 2 (3) of the Directive 99/44 in its Consumer Protection Act, stating that it shall be deemed no lack of conformity for the purposes of this article if, at the time the contract was concluded, the consumer was aware, or could not reasonably be unaware of, the lack of conformity, or if the lack of conformity has its origin in materials supplied by the consumer. In all the other participating states, unchanged rules with a common origin in the Yugoslav Law of Obligations of 1978 still apply, where a seller shall not be responsible for defects if they were known to the buyer at the moment of entering into contract or if it was impossible for them to remain unknown to him. The national legislation of all participating countries foresees remedies that are available to the consumers where there is a lack of conformity in the goods, as provided in Art. 3 of the Directive 99/44. They could be found in the Law on Consumer protection or Laws on Obligation, or both; with specific variations. As for the consumers' choice between the remedies, the national legislation in the field of consumer protection provides free choice between the remedies, with or without imposing formal conditions for its exercise in all countries except in Montenegro where there is clear hierarchical order. The laws on obligation in Bosnia and Herzegovina, Croatia, Serbia, and Macedonia, however, when regulating the remedies, which inter alia apply to all transactions, sets forth order by which they could be exercised. When considering the availability of particular remedy Art. 3(3) of the Directive 99/44 requires proportionality element to be considered. This provision is transposed to the letter of the Directive only in the legislation of Albania. However, the principle of good faith and fair dealing on which the obligations are to be based as provided in the laws of Bosnia and Herzegovina, Croatia, Serbia, Macedonia and Montenegro made lead to interpretation of the ruled on liability for non-conformity in the same meaning as those of the Directive 99/44. In the studied countries there is not similar pattern when it comes to the transposition of the rules on impossibility as set in as set in the Art.3 para. (3) Directive 99/44. There is no transposition in the Albanian legislation, while in Bosnia and Herzegovina, Croatia, Serbia, Macedonia and Montenegro by application of the rules of impossibility for performance, the same results as set in the Directive 99/44 could be achieved. National rules within the meaning "Free of charge" as set in Art.3 para. (4) of Directive 99/44, with some differences in wording exist in all studied countries' legislation. Art. 5(1) of the Directive 99/44 specifies that a seller is liable for a lack of conformity which arises within two years of delivery. The national legislation of the studied countries differs. In Albania, Bosnia and Herzegovina and Croatia the time limit is two years, while in Macedonia and Montenegro is set to one year. In Serbia this period is six months. It is to be noted that the national legislation of Bosnia and Herzegovina, Croatia, Serbia, Macedonia and Montenegro differentiates between visible and invisible flaws and sets different limits within the period of liability when the consumer may revoke remedies depending on the nature of the flaw. The option to reduce the set "two–year time period", provided by Art. 7(1) of Directive 99/44 is transposed only in the legislation of Croatia. The option to provide that a consumer must notify a seller of a lack of conformity within a period of two months from the date on which the consumer detected this as provided for by Art. 5 para.(2) of Directive 99/44 was not used only by Albania. The option for suspension of the two–year period was not transposed in the legislation of Albania and of Bosnia and Herzegovina. The option for suspension of the two–year period was not transposed in the legislation of Albania and of Bosnia and Herzegovina. All countries except for Bosnia and Herzegovina generally comply with the

rules on presumption of non-conformity on the first six months from Art. 5(3) of the Directive 99/44. The consumer shall not be entitled to have the contract reclined in case of minor lack of conformity as set in Art. 3 para. (6) of Directive 99/44 in all countries except for Bosnia and Herzegovina. The statement from Recital 15 that it may be provided that where a consumer is entitled to a reimbursement of the purchase price, a deduction may be made to take account of the use the consumer has had of the goods since delivery to him could be found in the rules of the effects of the termination of the contract provided by the general contract law of the countries. The studies countries although with some variation in general comply with the requirement of Art. 6 Directive 99/44. The requirements of Art. 4 of the Directive 99/44 are transposed in the consumer legislation of Albania, while in Bosnia and Herzegovina, Croatia, Serbia, Macedonia and Montenegro the issue is regulated under the provisions of the Laws of Obligation for contractual and non-contractual liability for damages. Art. 7 (1) of the Directive 99/44 is transposed within it meaning in all of the counties. The national legislation of all studied countries relied on the provision of Art. 8 of the Directive in order to provide a higher level of protection for consumers, either in their acts for consumer protection or in the conjunction of those acts with the acts on obligations.

Part 3:
THE FUTURE OF THE CONSUMER CONTRACT LAW IN THE EUROPEAN UNION AND PARTICIPATING STATES

A. OVERVIEW OF THE COMMISSION PROPOSAL FOR A "DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON CONSUMER RIGHTS"

By *Emilia Čikara*

I. Introduction

On 8 October 2008, the Commission published its proposal for a "Directive of the European Parliament and of the Council on consumer rights".[363] This horizontal directive, which is based on full targeted harmonization should change and unite the content of Directive 85/577, Directive 93/13, Directive 97/7 and Directive 99/44 and repeal these directives at the same time. The Proposal is justified in the explanatory memorandum by the fact that the minimum harmonization principle has led to a fragmented regulatory framework across the EU, "which causes significant compliance cost for business wishing to trade cross-border" on the one hand and results in a low level of consumer confidence in cross-border shopping on the other.[364] The proposed Directive shall apply to sales and service contracts concluded between the trader and the consumer,[365] while financial services contracts are excluded, except for certain off-premises contracts, certain unfair contract terms and certain general provisions.[366]

II. Structure

The Proposal is divided in seven Chapters. Chapter I provides common definitions of "consumer", "trader", "sales contract" and 17 other definitions (Art. 2). It also regulates the principle of full harmonisation (Art. 4). Chapter II concerns the pre-contractual information duties in all sales and service contracts between a consumer and a trader. Specific information duties and right of withdrawal for distance and off-premises contracts are regulated in Chapter III (Art. 8). For off-premises contracts there is a standard withdrawal form set out in Annex I (B) of Proposal which must be included in the traders´ order form. Chapter IV contains provisions that were prescribed by Directive 99/44 and Chapter V provisions that were regulated in Directive **93/13**. Chapter V is accompanied with Annex II, which contains the so

[363] COM(2008) 614 final.

[364] *Ibid.,* 2.

[365] Art. 3 of the Proposal

[366] Art. 3 (2) of the Proposal

called "black list" of unfair contract terms, and with Annex III, which regulates contract terms which are presumed to be unfair. Chapter VI contains *inter alia* provisions on transposition of the Directive and Chapter VII final provisions.

III. Targeted Full Harmonization

Pursuant to Art. 4 of the Proposal member states may not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection. Although the Proposal states that the horizontal Directive is based on full targeted harmonization,[367] the review of the Proposal demonstrates targeting of almost all measures for full harmonization.[368] Unlike previous consumer protection directives, which were based on minimum harmonization principle and allowed member states adopting or maintaining more favourable provisions to protect consumers in the field which they covered, the new Directive prohibits alterations in transposition.

IV. Definitions

Many of the common definitions regulated in Chapter I of the Proposal have been changed and broadened in order to cover a wide range of transactions. For instance, definitions of "sales contract",[369] "service contract",[370] and "distance contract" cover the majority of all consumer transactions.[371] Art. 2 (6) of the Proposal introduces a new and simplified definition for „distance contract" as any sales or service contract where the trader, for the conclusion of the contract, makes exclusive use of one or more means of distance communication. According to Art. 2 (8) of the Proposal an "off-premises contract" is any sales or service contract concluded away from business premises with the simultaneous physical presence of the trader and the consumer or any sales or service contract for which an offer was made by the consumer in the same circumstances. Off-premises contract exists even if the sales or service contract were concluded on business premises but negotiated away from business premises,[372] and the business premises include also market stalls and fair stands where the trader carries on his activity on a regular or temporary basis.[373] Art. 2 (18) of the Proposal replaces the term "guarantee" as used in the Directive 99/44 with the term "commercial guarantee". However, the definition remained similar, except for removal of one part of definition, namely "given without extra charge". This new formulation leads to the inclusion of guarantees which can be purchased ("extended warranties"). The notion of "consumer" has been changed and includes purposes which are outside his "craft" as well as the usual "trade,

[367] COM(2008) 614 final*,* 4, 5.

[368] A general exception to the full harmonization is contained in Art. 3 (1) of the Proposal, which defines the scope of application, namely business to consumer sales and service contracts. Departure from this general rule is allowed in some other provisions which refer to member states law, for instance in Art. 6 (2) of the Proposal according to which the consequences of any breach of general information requirements (Art. 5) shall be determined in accordance with the applicable national law.

[369] Art. 2 (3) of the Proposal.

[370] Art. 2 (5) of the Proposal.

[371] C. Twigg–Flesner, D. Metcalfe, "The proposed Consumer Rights Directive – less haste, more thought?", *European Review of Contract Law* 2009, *http://ssrn.com/abstract=1345783*, last visited 19.2.2010, 2.

[372] Art. 2 (8) of the Proposal.

[373] Art. 2 (9) of the Proposal.

business or profession" in the current consumer protection directives.[374] The Proposal uses the term "trader" and replaces all different terms used in current directives, such as "supplier", "seller", "trader" and "seller or supplier". "Trader" is defined as a natural or legal person who is "acting for purposes relating to his trade, business, craft or profession", with the added reference to "anyone acting in the name of or on behalf of a trader".[375]

V. Information duties

Consumer information is dealt with in Chapter II (Art. 5 to 7 of the Proposal). Art. 5 (1) of the Proposal prescribes the general information requirements for the trader, except if they are already apparent from the context. This information concerns e.g. the main characteristics of the product, address and the identity of the trader, price and arrangements for payment, delivery, performance etc., and once provided they become part of the contract.[376] Art. 7 of the Proposal regulates specific information requirements for intermediaries. Alongside the general information duties in Chapter II, Chapter III regulates in its Art. 9 certain special information requirements for distance and off-premises contracts, like information on arrangements for payment, delivery and performance, on conditions and procedures for exercising the right of withdrawal, on address of the place of business of the trader to which the consumer can address complaints etc. With respect to off-premises contracts, this information shall be given in the order form (Art. 10 of the Proposal) while with respect to distance contracts, it shall be given or made available to the consumer prior to the conclusion of the contract (Art. 11 of the Proposal).

VI. Right of withdrawal

Art. 12 to 19 of the Proposal regulate the right of withdrawal for distance and off-premises contracts. Unlike the seven day period prescribed in the current directives, the withdrawal period is extended to fourteen days. With respect to off-premises contracts the withdrawal period begins once the consumer has signed the order form or, in appropriate circumstances, has received a copy thereof on another durable medium, and for distance contracts it begins once the consumer has acquired the material possession of the goods, or in case of provision of services from the day of the conclusion of the contract.[377] However, if the trader has not provided the consumer with the information on the right of withdrawal, the withdrawal period expires three months after the trader has fully performed his other contractual obligations.[378] When exercising his right of withdrawal the consumer should "inform the trader of his decision to withdraw on a durable medium", either in his own words, or using the standard withdrawal form as set out in Annex I (B).[379] No other formal requirements can be added to the standard withdrawal form. With regard to distance contracts concluded on the Internet, the trader may in addition allow the consumer to electronically fill in and submit the standard withdrawal form on the trader's website in which case the trader shall communicate to the consumer an acknowledgement of receipt of such a withdrawal. The exercise of the

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[374] Art. 2 (1) of the Proposal.

[375] Art. 2 (2) of the Proposal.

[376] Art. 5 (3) of the Proposal.

[377] Art. 12 (2) of the Proposal.

[378] Art. 13 of the Proposal.

[379] Art. 14 of the Proposal.

right of withdrawal shall have the effect of terminating the obligations of the parties.[380] Upon withdrawal, the trader must reimburse any payment received from the consumer within thirty days, but may wait until the consumer returns the goods.[381] In case of withdrawal the consumer is obliged to return goods to the trader within fourteen days from the day on which he communicated his withdrawal, unless the trader offers to collect them. The consumer can only be charged for the direct cost of returning the goods and can only be liable for any diminished value of the goods resulting from the handling other than what is necessary to ascertain the nature and functioning of the goods. If the trader has not properly informed the consumer on his right to withdrawal, the consumer shall not be liable at all. The consumer shall bear no cost for services performed, in full or in part, during the withdrawal period where the contract was subject to a right of withdrawal.[382] A number of exceptions from the right of withdrawal are regulated in Art. 19 of the Proposal and can be divided into exceptions regarding distance contracts (Art. 19 (1))[383] and exceptions regarding off-premises contracts (Art. 19 (2)). Art. 20 of the Proposal excludes the application of whole Chapter III with respect to certain distance and off-premises contracts.

VII. Sales contracts

Chapter IV regulates other consumer rights specific to sales contracts and encompasses, with important modifications, the provisions contained in Directive 99/44. While most significant provisions on conformity, on sellers' strict liability for non-conformity, on criteria for the assessment of non-conformity, on remedies and on commercial guarantees have been taken over, certain new provisions have been introduced.[384] According to Art. 21 of the Proposal this Chapter applies to sales contracts, whereby in case of mixed-purpose contracts for goods and services, this Chapter only applies to the goods. It also applies to contracts for the supply of goods to be manufactured or produced. However, it does not apply to spare parts replaced by the trader when remedying the lack of conformity of the goods by repair under Art. 26 of the Proposal. Also, member states may decide not to apply provisions of this Chapter to the sale of second-hand goods at public auctions. The Proposal introduces new provisions on delivery and the passing of risk in Articles 22 and 23. The trader delivers goods by transferring the material possession to the consumer or to a third party other than the carrier and indicated by the consumer, within maximum thirty days from the conclusion of the contract.[385] Where the trader fails to fulfil his obligations to deliver, the consumer is entitled to a refund of any sums paid within seven days from the delivery date.[386] According to Art. 23 (1) of the Proposal "the risk of loss of or damage to the goods shall pass to the consumer when he or a third party, other than the carrier and indicated by the consumer has acquired material possession of the goods". If the consumer or a third party, other than the carrier and indicated by the consumer has failed to take reasonable steps in taking the material possession of

[380] Art. 15 of the Proposal.

[381] Art. 16 of the Proposal.

[382] Art. 17 of the Proposal.

[383] E.g. according to Art.19 (1) lit. a) of the Proposal where service provision commences during the withdrawal period with the consumer's consent, no right of withdrawal exists.

[384] H.-W. Micklitz, N. Reich, "Crónica de una muerte anunciada: The Commission proposal for a „directive on consumer rights"", *Common Market Law Review,* 46/2009, 501.

[385] Art. 22 (1) of the Proposal.

[386] Art. 22 (2) of the Proposal.

the goods, the risk shall pass to the consumer at the time of delivery as agreed by the parties.[387] Another novelty represents the different approach of the Proposal with regard to the consumer's remedies in case of a lack of conformity. Although the list of remedies remains essentially the same and includes repair or replacement, reduction in price and rescission, Art. 26 (2) of Proposal gives the "trader" the right to choose between repair and replacement. The consumer may choose remedies only under the limited conditions in Art. 26 (3) and (4) of the Proposal.[388] If the trader has proved that remedying the lack of conformity by repair or replacement is unlawful, impossible or disproportionate, the consumer may choose between price reduction and rescission of contract.[389] However, the consumer may only rescind the contract if the lack of conformity is not minor. Unlike Directive 99/44, the Proposal expressly regulates in its Art. 27 (2) that the consumer may claim damages for any loss not remedied in accordance with Art. 26 on the other remedies. An important change concerns time limits, where new Art. 28 (4) of the Proposal imposes a duty of the consumer to notify the trader of the lack of conformity within two months of detection.

VIII. Contract terms

Chapter V of the Proposal incorporates the provisions contained in Directive **93/13**.[390] According to Art. 30 (1) of the Proposal, Chapter V applies to contract terms drafted in advance by the trader or a third party, which the consumer agreed to without having the possibility of influencing their content, especially standard form contracts. If the consumer had the possibility of influencing some of the terms, Chapter V still applies to other contract terms which form part of the contract.[391] Art. 31 of the Proposal introduces new transparency requirements, under which contract terms must *inter alia* be "made available to the consumer in a manner which gives him a real opportunity of becoming acquainted with them before the conclusion of the contract".[392] Also, the trader needs consent of the consumer regarding any payment in addition to the remuneration foreseen for the trader's main contractual obligation. If the trader uses default options by requiring the consumer to reject in order to avoid the additional payment, the consumer is entitled to reimbursement of this payment.[393] Exclusions previously contained in Art. 4 (2) of the Directive 93/13 are now regulated in Art. 32 (3) of the Proposal, which excludes the main subject matter of the contract and the adequacy of the remuneration from the control of fairness. Under Art. 37 of the Proposal the consumer will not be bound by contract terms which are unfair, whereby contract terms, as set out in the „black list" in Annex II, are considered unfair in all circumstances (Art. 34) and contract terms, as set out in the „grey list" in Annex III, are considered unfair, unless the trader has proved that such contract terms are fair (Art. 35). The list in Annex III of the Proposal is very similar to the list in the Annex to the Directive 93/13. However, there are few minor changes and several of the terms previously presumed to be unfair entered the "black-list" in Annex II of the Proposal.

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[387] Art. 23 (2) of the Proposal.

[388] Art. 3 (5) of the Directive 99/44 has been replaced with Art. 26 (4) of the Proposal, according to which the consumer may resort to any remedy available under para. 1, where one of the special situations exists, e.g. when the trader has failed to remedy the lack of conformity within a reasonable time.

[389] Art. 26 (3) of the Proposal.

[390] Arts. 30 to 39 of the Proposal.

[391] Art. 30 (2) of the Proposal.

[392] Art. 31 (2) of the Proposal.

[393] Art. 31 (3) of the Proposal.

IX. Conclusions

The Commission Proposal for a Directive on consumer rights represents an important piece of legislation, which tries to develop a coherent set of rules in European consumer contract law. The introduction of unified common definitions, rules on information duties and of central regulation of right of withdrawal for distance and off-premises contracts should affect the current regulatory fragmentation in this field and thus contribute to legal certainty of consumers. However, with the exception of these improvements and certain additional rules, the Proposal largely replicates the content of the current consumer protection directives. The major difference represents the shift from the minimum to full harmonisation principle. The application of this principle will mean the achievement of comparably higher level of consumer protection on the one hand, and the reduction of the existing level of consumer protection in individual states on the other. While full harmonization is suitable for provisions on withdrawal and on specific information duties, it is not appropriate for provisions on remedies in sales contracts and provisions on black and grey list of unfair contract terms. In conclusion, although the Proposal should be improved and revised by the European legislator, it undoubtedly represents a good starting point for a discussion on the future of coherent European consumer contract law.[394]

[394] This discussion was recently continued by publication of Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses, COM(2010) published on 1 July 2010. The purpose of this Green Paper is to set out the options on how to strengthen the EU internal market by making progress in the area of European Contract Law, and launch a public consultation to gather orientations and views from relevant stakeholders. To this purpose the Commission has set up an Expert Group to study the feasibility of a user-friendly instrument of European Contract Law and which will assist the Commission in selecting certain parts of the Draft Common Frame of Reference (DCFR) which are directly or indirectly related to contract law. This instrument could range from non-binding to binding, depending on offered options, where Option 1. ends with mere publication of the results of the Expert Group, Option 2. foresees the adoption of an official „toolbox" for the EU legislator, Option 3. is based on attachment of the instrument of European Contract Law to a Commission Recommendation addressed to the Member States and Option 4. foresees adoption of a Regulation setting up an optional instrument of European Contract Law in each Member State. Furthermore, Option 5. recommends the adoption of Directive on European Contract Law, which would harmonize national contract law on the basis of minimum common standards. On the contrary Option 6. foresees the adoption of Regulation establishing a European Contract Law, while Option 7. suggests the adoption of Regulation establishing a European Civil Code. Depending on the results of the consultation, that will run form 1.7.2010 to 31.1.2011 the Commission could propose further action by 2012.

B. TRANSPOSITION OF PROPOSED DIRECTIVE ON CONSUMER RIGHTS INTO THE NATIONAL LAWS OF THE PARTICIPATING STATES

By *Zvezdan Čađenović, Emilia Čikara, Jadranka Dabović-Anastasovska, Nada Dollani, Nenad Gavrilović, Marija Karanikić-Mirić, Zlatan Meškić* and *Neda Zdraveva*

I. Common Issues Regarding Transposition of Proposed Directive on Consumer Rights

There are numerous practical problems which could arise from the process of implementation of a proposed Directive into national laws both of member as well of participating states. Full harmonization will complicate the integration of Directives provisions into their general system of contract law. When transposing the current consumer protection directives many of the participating states used the minimal clause in order to enhance the level of consumer protection. As a consequence of the full harmonisation principle on which the proposed Directive is based, these countries will now be forced to lower their national level of consumer protection in certain aspects fully harmonized by the proposed Directive. At the end of the day this could lead to a paradox result, where the provisions of the national general contract law of a given country would be more favourable then the special consumer protection rules. For instance, when transposing information requirements from the proposed Directive, the national legislator will not be able to introduce, or uphold any additional information requirements for the trader with regards to a sale or service contract concluded with a consumer. Another important problem concerns the legislative technique, which is to be applied when transposing this horizontal directive. Although the participating states are not required to copy and paste the Directive, it will most probably be implemented verbatim in order to avoid unnecessary errors and omissions. Finally, the participating states will have to answer the question of major importance, namely how and where to implement the proposed Directive: within the existing national civil codes or consumer codes.[395] For some of the participating states the transposition of the proposed Directive could even represent a motive for the reform of their national civil law.

II. Transposition of Proposed Directive on Consumer Rights into the National Laws of the Participating States

1. Transposition of Proposed Directive on Consumer Rights into Albanian Law

The Albanian legislator by adopting a separate Act on Consumer Protection has already made the choice to leave consumer rights outside of the Civil Code. This approach might have been dictated by several reasons. One of the main reasons might have been the pressure of time. Being under the obligation of the Stabilization and Association Agreement to approximate and harmonize the legislation with the European *acquis* and aiming to ensure a

[395] H. Schulte–Nölke, "The transposition of European consumer directives into the national laws of the EU–Member States", *Tijdschrift voor Consumentenrecht en handelspraktijken*, 4/2009, 133.

policy of active consumer protection within a short time[396], without any doubt the Albanian legislator would have chosen the shortest and easiest way to approach consumer issues. On the other side, adopting a separate and single act is a model offered also by many Member States, and seems therefore an acceptable approach to address the issues of consumer protection while fulfilling European standards, which seems to be the main concern of the government and the legislator, as well. In addition, considering that the European consumer law is an ongoing process, amending a single and separate Act seems more appropriate and reasonable than amending the Civil Code.

Concerning the transposition of the proposed Directive, which requires horizontal full harmonization, it is quite predictable that the Albanian legislator will amend the existing Consumer Protection Act from 2008. The principle of maximum harmonization will facilitate enough the drafting work of the responsible Ministries, as they will adopt verbatim the transposition approach. But one could also come to the conclusion that the transposition of this proposed Directive will present the best opportunity to adopt the "big solution" of transposing the consumer rights into the Civil Code. This opportunity can even be used as a justification to revise and improve the systematization and harmonization of the whole Civil Code, by avoiding systematic inconsistencies and incoherencies faced so far. Another argument in favour of transposing the proposal Directive into the Civil Code is that there already exists such an experience in Albania. For example, the Directive **85/374 on** product liability is transposed in the Civil Code[397] since its adoption in 1994, the same holds true for the right to withdrawal in doorstep situation[398] or some unfair terms[399], which in fact are applicable to every party in a contract. This "big solution" would in any case require a very strong will from all interested parties.

However, the more probable approach seems to be the amendment of the Consumer Protection Act. The occasion still represents the opportunity to at least reach an internal harmonization of specific norms on consumer contracts with the general law of contracts provided by Civil Code, in order to make the Consumer Protection Act effective and applicable.

2. Transposition of Proposed Directive on Consumer Rights into Bosnian Law

In Bosnia and Herzegovina a horizontal consumer protection directive with a maximum harmonization approach could most probably only be transposed within a separate consumer protection act. The most important reasons are political in nature, considering that in a field of law which changes so rapidly as the European Consumer Protection Law, a directive which unifies most of the provisions of this field may not be transposed in an act where the political will for its adoption lacks for more than a decade. Namely, the Draft Law of Obligations of Bosnia and Herzegovina of 2006, which transposed not less than thirteen Consumer Directives, and the Draft Law of Obligations of 2010, which is adopted by the Council of

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[396] Stabilization and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part signed on 12 June 2006, entered into force on 1 April 2009, in its Art. 6, 5-th intend reads: "During the fifth year after the date of entry into force of this Agreement, the Stabilisation and Association Council shall evaluate the progress made by Albania, and shall decide whether this progress has been sufficient for the passage into the second stage in order to achieve full Association. …", http://ec.europa.eu/enlargement/pdf/albania/st08164.06_en.pdf, last visited 30 April 2010.

[397] Art. 628 et seq., Albanian Civil Code, *OG RAl* No.11/94.

[398] Article 672, Albanian Civil Code.

[399] Article 686, Albanian Civil Code.

Ministers as a Proposal for a Law of Obligations and transposed seven Consumer Directives, both failed to pass the legislative procedure because the political representatives of the entities could not agree on whether Bosnia and Herzegovina needs a Law of Obligations on the entity or state level. The Consumer Protection Act which was enacted on state level in 2002[400] and replaced by a new Consumer Protection Act in 2006[401] did not experience any problems of this kind. Hereby, only the question of politically possible transposition is answered. When searching for the best way of transposition, it must be taken into consideration that the Consumer Protection Act, although first adopted eight years ago, did not gain almost any importance in practice. The long tradition of provisions on obligations exclusively contained in the Law of Obligations prevails against the applicability of the Consumer Protections Act as *lex specialis* in case of consumer contracts. In accordance with Art. 1 (2) of the Consumer Protection Act in case of doubt or collision of provisions of this Act and another legal source as the Law of Obligations, the one which provides "higher level of consumer protection" shall apply. It is doubtful whether such provision would be in accordance with the maximum harmonization approach of the horizontal directive. Consequently, only a "copy and paste" transposition into a separate legal act seems possible, but would neither contribute to a closer connection between Law of Obligations and Consumer Protection, which is of great importance for the development of this field of law in general, nor to greater application in practice.

3. Transposition of Proposed Directive on Consumer Rights into Croatian Law

The answer to the question of where to transpose the proposed Directive on consumer rights is very complex and depends on more than one factor. At the beginning of the process of approximation of national contract law with the *acquis,* the Croatian legislator tried to preserve the traditional system and values of the Civil Obligations Act (COA) from frequent amendments by adopting a special and separate Consumer Protection Act (CPA). Most of the consumer protection directives, *inter alia* Directives 85/577, 93/13, and 97/7, were transposed in the CPA. Only if otherwise provided in CPA as *lex specialis,* the obligation-law relationships between the consumer and the trader shall be subject to the provisions of the COA as *lex generalis*.[402] After adopting a new COA in 2005, the Croatian legislator decided to use the transposition of three consumer protection directives, namely of Directives 85/374, 90/314 and 99/44 for the modernization of the existing provisions of the COA.[403] Finally, when implementing Directive 2008/48, the Croatian legislator decided to adopt a separate Consumer Credit Act[404] as *lex specialissima* in relation to CPA. The described legal situation complicates the prediction on possible ways of the transposition of the proposed Directive on consumer rights. Undertaking of the Croatian legislator would not only depend on questions of substantive but also on questions of political and practical nature. For instance, the transposition of a directive depends also on time period in which the preparing ministries have to meet the transposition duty. Since the consumer law is considered to be specific private law in relation to the general civil law, one can presume that the transposition will be made within the CPA. The main problem would be the transposition of the proposed Directive with regard to provisions of Directive 99/44, some of which were transposed supererogatory (über-

[400] Consumer Protection Act, *OG BA*, No. 17/02.

[401] Consumer Protection Act, *OG BA* No. 25/06.

[402] Art. 2 (2) of the Consumer Protection Act, OG RH No. 79/07, 125/07, 79/09, 89/09, 133/09.

[403] Civil Obligation Act, OG RH No. 35/05, 41/08.

[404] Consumer Credit Act, OG RH No. 75/09.

schießend) into the COA in order to cover not only B2C, but also B2B and C2C sales contracts. Since the Proposal is restricted to "business-to-consumer" contractual relationships, this way of transposition will not be possible. Finally, although the transposition of the proposed Directive should represent an opportunity to bring consumer law closer to general contract law, it seems that the transposition within the separate consumer code, e.g. Croatian Consumer Protection Act is more compatible with the objective of the proposed directive.

4. Transposition of Proposed Directive on Consumer Rights into Macedonian Law

The Macedonian Law on Obligations[405], adopted in 2001 on the basis of the fundamental principles of the Law on Obligations of SFR Yugoslavia, is legislative act that in a way serves as a Code of the obligation relations. The legislator within the Law on Obligations adopted traditional system and method of regulation of the obligation relations, so as the specificities of the consumer relations were regulated by a separate Law on Consumer Protection[406] as *lex specialis*[407].

The amendments made on the Law on Obligations in 2008 were made *inter alia* to provide for relevant transposition of Directive 85/374, Directive 93/13, Directive 99/34 and Directive 99/44. The Law on Consumer Protection as described in Part I of this Compendium is in general approximated to the existing directives in the field of consumer protection.

The National Program of Adoption of the *Acquis Communautaire*[408] provides, for the second half of 2010, amendments of the Law on Consumer protection, so as it full approximation with Directive 2005/29/EC and Directive 98/27/EC. By adoption of Law on distance marketing of consumer financial services transposition of the Directive 2002/65/EC in the national legislation is foreseen. Amendments of the relevant legislation in field of food safety is also planned, The NPAA also sets as one of the short term priorities adoption of Law on Market Surveillance, that should provide legal framework for establishment of Coordinative Body that shall monitor the fulfilment of the legal requirements for provision of high standards of *inter allia* consumer protection.

Although the relevant programs and plans for the adoption of the *Acquis Communitaire* do not foresee any other legislative activities in the field of consumer protection, eventual adoption of the Proposed Directive on Consumer Rights shall affect the national legislation due to the standing obligation of the country to approximate its legislation with the one of the European Union. However, how this process will be delivered is a question that will need serious consideration. Following the existing approach to regulate the specific issues on the consumer protection by *lex specialis,* it is to be expected that the main method of transposition will be by amendments of the Law on Consumer Protection or eventually adoption of new law. Nonetheless, it should be expected that it will be examined how the (Proposed) Directive on Consumer Rights affects in general the contractual relations so as to consider amendments to the Law on Obligations.

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[405] Law on Obligations, *OG RM* No. 18/2001, 4/2002, 5/2003, 84/2008, 81/2009 and 161/2009.

[406] Law on Consumer Protection, *OG RM* No. 38/2004, 77/2007 and 103/2008.

[407] By Art. 2, para. 2 of the Law on Consumer Protection, on the contractual and other obligation relations of the trade of goods and services the provisions of the Law on Obligations shall be applied, unless otherwise specified by the Law on Consumer Protection.

[408] National Program for the Adoption of the Acquis Communautaire, Revision 2009, chapter 3.28; http://www.sep.gov.mk/content/Dokumenti/EN/00%20NATIONAL%20PROGRAMME%20FOR%20ADOPTION%20OF%20THE%20ACQUIS%20COMMUNAUTAIRE%202009.pdf

5. Transposition of Proposed Directive on Consumer Rights into Montenegrin Law

Montenegro stays faithful to the approach that most of consumer protection directives should be transposed in a separate consumer protection piece of law, while some of them will be transposed with other general or sector specific legislation. This is the manner in which in year 2011 a large intervention will be launched and, instead of mere amendments, a whole new text of CPL is planned to be prepared and adopted.

In relation to the Proposed Directive on Consumer Rights, general opinion in Montenegro is that such a horizontal instrument can offer the possibility to tackle important consumer rights and secure their consistency, while at the same time can contribute to simplification of certain rules and raise awareness of consumers on their rights. However, in parallel, the impression is that being maximum harmonization tailored it can limit practical value that consumer are enjoying under old *acquis* regime and reduce the level of protection in situations where participating states were free to set stricter rules.

Among other things, in practice this means that it is still to be observed how the relation between consumer protection legislation and general contractual law will look like when the Proposed Directive on Consumer Rights becomes part of Montenegrin obligation stipulated by Title VI "Approximation of Laws, Law Enforcement and Competition Rules", and Art. 72 of the SAA. This among the others refers to concerns how to evade situation where the provisions of the Montenegrin general contract law would be more favourable to consumers then the special consumer protection rules, as the former beside B2B, C2C and P2P contracts is applicable also to B2C.

In any case Montenegro as a country that has already submitted official Responses to the Questionnaire for the preparation of the Opinion to the application on membership, is awaiting its candidate status, and harmonization of legislation in a priority area such as consumer protection will be challenging but is a must and achievable.

6. Transposition of Proposed Directive on Consumer Rights into Serbian Law

The existing Serbian Consumer Protection Act of 2005 contains some feeble attempts to transpose a number of consumer directives.[409]

It would be fair to say that the Consumer Protection Act of 2005 only touches upon these areas, which in no way suggests that it is in compliance with the relevant directives. As regards the civil law aspects of Consumer Protection Act of 2005, it only roughly indicates the main principles of the Acquis.

There are no indications of any intentions to amend the Law on Obligations of the Republic of Serbia,[410] in order to transpose any of the European Consumer Protection Directives.[411]

The ideas of reforming the Law of Obligations, as presented in the Report of the Government Commission (2009), are predominantly inspired by the *Skica za zakonik o obligacijama i ugovorima* (a 1969 Draft written by Professor Mihailo Konstantinović, founder of the

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[409] Consumer Protection Act, *OG RS* No. 79/2005.

[410] Law on Obligations of the Republic of Serbia, OG SFRY No. 29/78, 39/85, 45/89 and 57/89, OG FRY No. 31/93, 31/93, 22/99, 23/99, 35/99, 44/99.

[411] *Cf*. Report of Serbian Civil Law Drafting Commission (2007): Vlada Republike Srbije. Komisija za izradu Građanskog zakonika, Rad na izradi Građanskog zakonika. Izveštaj Komisije sa otvorenim pitanjima, Pravni život, Tom III, 11/2007, 5–407. Report of Serbian Civil Law Drafting Commission in respect of reform of the Law of Obligations (2009): Komisija za izradu Građanskog zakonika, *Prednacrt. Građanski zakonik Republike Srbije. Druga knjiga. Obligacioni odnosi*, Vlada Republike Srbije, Beograd 2009, 1-451.

Belgrade school of Civil Law), on which the existing Law of Obligations heavily relies. Namely, in the year 1978 the Legislator left out some of the proposals of *Skica*, and the Government Commission considers revisiting these proposals. Also, the Commission reflects on introducing certain changes based on national jurisprudence and on comparative perspective, *i.e.* the well-settled concepts of other European legal systems. However, there are no traces in the works of the Commission, of taking into account Consumer directives.

However, attention must be called to the fact that, at the time of this writing (June 2010), the Serbian Ministry of Trade and Services, as the line ministry for the area of consumer protection, finds itself at the final stages of drafting a proposal for the new Consumer Protection Act, which should enter the parliamentary procedure during the autumn 2010, and which aims to fully transpose the consumer Acquis. It is more than obvious that the Proposal for a Directive on consumer rights[412] was taken into consideration in the course of drafting the Proposal for the new Consumer Protection Act.

[412] *Commission Proposal for a Directive on consumer rights*, COM (2008) 614/3.

C. PRIVATE INTERNATIONAL LAW IN CONSUMER CONTRACTS

By *Zlatan Meškić*

Consumer protection in Private International Law of the European Union is mainly based on Art. 6 of the Rome I Regulation[413], Arts. 15-17 of the Brussels I Regulation[414] and the provisions on conflict of laws of the new generation of Consumer Directives[415]. On the one hand the inter-coordinated Rome I and Brussels I ensure consumer protection by providing jurisdiction of the courts of the member state in which the consumer is domiciled, irrespective of the fact whether the consumer is claimant or defendant, which then apply domestic law.[416] In order to provide cross-border protection for consumers, Art. 15 Brussels I and Art. 6 Rome I contain a common minimum requirement, that the professional directs his activities to the state of the consumer's domicile/habitual residence and the contract falls within the scope of such activities. On the other hand, the provisions on conflict of laws of consumer directives aim to secure the applicability of national provisions which transpose the directives when there is a „close connection" with the territory of (one or more) member states and the consumer contract contains a choice of law clause in favour of a non-member state. Since these provisions try to guarantee the level of consumer protection provided by the directives against the assumed lower level of protection in the non-member states, their transposition in the laws of the states participating in this project will make sense when the participating state becomes a member of the EU. Their obligation to transpose provisions on conflict of laws of the consumer directives also depends on the future of the "horizontal directive". In the "Directive of the European Parliament and of the Council on consumer rights"[417] there are no private international law provisions included and the new directive with the concept of "maximum harmonization" shall according to its Art. 47 repeal the four directives, which were subject of this analysis. This would solve the ongoing discussion on the hierarchy of laws between the transposed provisions on conflict of laws of the directives and the Rome I. At present, according to Art. 23 Rome I the

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[413] Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), *OJ L 177/6*, 04/07/2008, *p. 6-16*.

[414] Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ L 012*, 16/01/2001, *p. 1 –23*.

[415] Art. 6 (2) of the Council Directive 93/13/EEC of 5. April 1993 on unfair terms in consumer contracts, *OJ L 095*, 21/04/1993*, p. 29 –34*; Art 12 (2) of the Directive 97/7/EC of the European Parliament and of the Council of 20. May 1997 on the protection of consumers in respect of distance, *OJ L 144*, 04/06/1997, *p. 19 –27*, as amended by Directive 2002/65/EC, Directive 2005/29/EC and Directive 2007/64/EC; Art. 7 (2) of the Directive 1999/44/EC of the European Parliament and of the Council of 25. May 1999 on certain aspects of the sale of consumer goods and associated guarantees, *OJ L 171*, 07/07/1999, *p. 12 –16*.

[416] This statement is true in cases where the concept of "domicile" used by the Brussels I Regulation overlaps with the less demanding concept of "habitual residence" used in the Rome I Regulation. See M. Stanivuković, "Ugovori sa potrošačima sa inostranim elementom – merodavno pravo i nadležnost", *Zbornik radova Dvadeset godina Zakona o Međunarodnom privatnom pravu*, Pravni fakultet Univerziteta u Nišu, Niš 2004, 251.

[417] COM(2008) 614 final.

provisions on conflict of laws of the directives have priority over the provisions of the Rome I.[418]

Rome I and Brussels I do not need to be transposed, since they will become directly applicable as soon as the participating states become members of the EU. However, their application is already possible in these states. Brussels I may only establish jurisdiction of the courts of EU member states, otherwise it would violate Public International Law by interfering into third states sovereign rights.[419] Nevertheless, in cases when the defendant is domiciled in a member state, according to the *Owusu*[420] judgment, Brussels I applies even when the facts of the case are connected with only one member state and one or more non-member state(s). Consequently, according to Art. 16 of Brussels I, the consumer with the citizenship of one of the states participating in this analysis may start proceedings before the courts of the member state in which he is domiciled.[421] A *prorogatio fori* departing from the jurisdiction determined by Art. 16 of Brussels I may only be concluded *post litem natam*. In these cases pursuant to Art. 6 (1) Rome I, the law of the country of the consumer's habitual residence would apply, regardless of the fact whether it lies within the territory of a member or a non-member state of the EU. When having a habitual residence in one of the member states, according to Art. 6 (2) Rome I a choice of law clause in favour of one of the states participating in this analysis would only apply to the extent that it provides a higher level of consumer protection than the "internal" mandatory provisions of the country of the consumer's habitual residence. When the contract does not fall under the scope of application of Art. 6 Rome I, according to Art. 3 (3) and (4) Rome I in case when all elements of the situation lie within one (member) state, its "internal" mandatory rules apply regardless of a choice of law clause in favour of a law of another (member or non member) state[422]. The new development stated in the ECJ judgment *Ingmar* additionally suggests that some national consumer protection provisions which transpose the consumer directives may be regarded as "international" mandatory rules and apply regardless of the applicable law determined by Rome I.[423] The consumer protection provisions of most of the states participating in this project are explicit-

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[418] Such hierarchy has been sharply criticized in the legal science, because the private international law provisions of the directives only aim to secure the application of consumer law of one of the member states, without determining the applicable law. Additionally, most of the member states transposed these provisions differently and thereby endangered the legal certainty created by the Rome I Convention; See E. Jayme, "Zum Stand des IPR in Europa", *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)*, 1996, 65.

[419] S. Leible, "Internationales Vertragsrecht, die Arbeiten an einer Rom I-Verordnung und der Europäische Vertragsgerichtsstand", *IPRax*, 2006, 370.

[420] See ECJ, 1 March 2005, C-281/02 –*Andrew Owusu v N.B. Jackson, trading as 'Villa Holidays Bal-Inn Villas', Mammee Bay Resorts Ltd, Mammee Bay Club Ltd, The Enchanted Garden Resorts & Spa Ltd, Consulting Services Ltd, Town & Country Resorts Ltd* [2005] ECR I-01383, para. (26); This decision was brought on the scope of application of the Brussels Convention (Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters) which is replaced by Brussels I.

[421] K. Sajko, *Međunarodno privatno pravo*, Narodne novine, Zagreb 2009, 412.

[422] The formulation of Art. 3 (4) Rome I suggests that in harmonised areas of the Contract law of the EU, like the Consumer contract law, these provisions act like national mandatory rules of the state (in this case the EU) and are incorporated in the contract regardless of the choice of law. This provision aimed to replace the private international law provisions of the consumer protection directives.

[423] ECJ, 9 November 2001, C-381/98 – *Ingmar GB Ltd and Eaton Leonard Technologies Inc.* [2000] ECR I-09305; See Z. Meškić, "Kolizione norme za zaštitu potrošača u direktivama Evropske zajednice i Uredbi Rim I – novi izazov za ZRSZ, Zbornik Pravnog fakulteta Sveučilišta u Rijeci", 2/2009, 1017.

ly declared as (at least) "internal" mandatory rules.[424] Articles 6 (2) Rome I and 3 (3) and (4) Rome I only secure the application of mandatory provisions of EU member states.

The participating states have already put a lot of effort to reform their Private International Law Codifications, which for the most part are three decades old or older and contain no consumer protection provisions[425]. One of the most important motives for reform was to bring their private international law provisions in accordance with the EU Law described above. Macedonia is still the only one of the participating states who is able to present a result of its reform process, namely the Macedonian Private International Law Code of 2007.[426] Art. 25 of the Macedonian Private International Law Code regulates consumer contracts and mostly corresponds to Art. 5 of the Rome Convention[427], because the Rome I Regulation was not adopted at the time of its making. In other participating states revision is still in process and will therefore not be further discussed[428]. Bosnia and Herzegovina is the only state which does not consider a revision of its Private International Law Code because it might result in the adoption of two different Private International Law Codes, enacted on the entity level, and thereby cause additional conflicts of laws.

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[424] Art. 5 (1) of the Montenegrin Law on Consumer Protection, *OG RMN* No. 26/07; Art. 4 of the Croatian Consumer Protection Act, *OG RH* No. 79/07, 125/07, 79/09, 89/09, 133/09; Art. 2 of the Consumer Protection Act of Bosnia and Herzegovina, *OG BA* No. 17/02.

[425] Albanian Law on enjoyment of civil rights by foreigners and application of foreign law, *OG RAl* No. 3920/64; Most of the successor states of former Yugoslavia still apply an almost unchanged version of the Yugoslav Private International Law Code, namely the Act on Resolving Conflicts of Laws with Legal Provisions of other Countries in Certain Relations, *OJ SFRY* No. 43/82 and 72/82.

[426] Private International Law Code of the Republic of Macedonia, *OG RMac* No. 87; German translation by Ch. Jessel-Holst, IPRax 2008, 158.

[427] Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980, *OJ L 266*, 09/10/1980, *p. 1 –19*.

[428] For example in Croatia already in 2001 a group of professors created "Theses for the Private International Law" which should be used as a basis for the Draft of a new Private International Law of Croatia (see K. Sajko, H. Sikirić, V. Bouček, D. Babić, N. Tepeš, *Teze za Zakon o Međunarodnom privatnom pravu*, Izvori hrvatskog i europskog međunarodnog privatnog prava, Informator, Zagreb 2001, 255-340); See E. Čikara, *Gegenwart und Zukunft der Verbraucherkreditverträge in der EU und in Kroatien*, LIT Verlag, Wien (*et al.*) 2010.

Part 4:
LIST OF ABBREVIATIONS AND BIBLIOGRAPHY

Annex A: LIST OF ABBREVIATIONS

Art(s)	article(s)
Al	Albania
BA	Bosnia and Herzegovina
BDLO	Draft Law of Obligations of Bosnia and Herzegovina
BLO	Bosnia-Herzegovina's Law of Obligations
B2B	Business to Business
B2C	Business to Consumer
cca.	circa (approximately; about)
CIA	Credit Institutions Act
COA	Civil Obligations Act (of Croatia)
CPA	Consumer Protection Act/Consumer Protection Law
CPL	Consumer Protection Law
CRO	Croatia
DLO	Draft Law of Obligations (of Bosnia and Herzegovina)
EC	European Communities
ECJ	Court of Justice of the European Communities, renamed by the Lisbon Treaty into Court of Justice of the European Union
ECR	European Court Reports
ECU	European Currency Unit
ed.	editor(s)
e.g.	exempli gratia (for example)
et al.	et alia (and other)
etc.	et cetera (and so forth)
et. seq.	et sequentes (and the following one/ones)
EU	European Union
EUR	Euro
FN	Footnote
FRY	Federative Republic of Yugoslavia

GTZ	Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH
HRK	Croatian Kuna
IA	International Agreements
i.e.	id est (that is)
infra	below
IPRax	Praxis des Internationalen Privat- und Verfahrensrechts
LCP	Law on Consumer Protection
lit.	litera (letter)
LoO	Law of obligations
Mac	Macedonia
MFI`s	Micro Finance Institutions
MN	Montenegro
NGO`s	Nongovernmental organizations
No.	number
OJ	Official Journal
OG	Official Gazette
p./pp.	page(s)
para(s)	paragraph(s)
P2P	Public to Private
ref.	reference
RAl	Republic of Albania
RH	Republic of Croatia
RMac	Republic of Macedonia
RMN	Republic of Montenegro
RS	Republic of Serbia
SAA	Stabilization and Association Agreement
SER	Serbia
SEE	South East Europe
SFRY	Socialistic Federative Republic of Yugoslavia
supra	above
v.	versus
Vol.	Volume
VSRH	Supreme Court of the Republic of Croatia
VTSRH	High Commercial Court of the Republic of Croatia

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4. National Courts Practice by Countries:

Albania:

There is not any court practice regarding consumers and CPA in Albania. The courts are more inclined to use general contract law in resolving the disputes, rather than CPA.

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Macedonia:

There is no data on court decisions on the basis of the Law on Consumer Protection either at the Supreme Court or at the Administrative Court, based on the existing Consumer Protection Act. At the Supreme Court the civil disputes that could be classified as consumer disputes, the courts apply Law of Obligations and sector specific legislation.

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Serbia:

There are no court decisions based on the existing Consumer Protection Act. In most of the cases that could be classified as consumer disputes, the courts apply Law of Obligations and sector specific legislation.

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VII

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Uvod
CHRISTA JESSEL-HOLST I GALE GALEV

Radnu grupu 7 Foruma za građansko pravo Jugoistočne Evrope koja se bavi potrošačkim pravom EU u Albaniji, Bosni i Hercegovini, Hrvatskoj, Makedoniji, Crnoj Gori i Srbiji čine sledeći članovi: Prof. Gale Galev (Skoplje), Dr. Nada Dollani (Tirana) and Dr. Christa Jessel-Holst (Hamburg).

Područje i struktura planiranog rada definisani su na pripremnom sastanku koji je održan u Skoplju. Tu je odlučeno da se ispitivanje ograniči na samo četiri direktive i da se generalno sledi struktura Zbornika evropskog potrošačkog prava koju je priredio prof. Schulte-Nölke[1].

Od samog početka je bilo jasno da će krajnji uspeh zavisiti od pravog izbora nacionalnih izvestioca. Za izbor su uglavnom korišćena dva kriterijuma, i to: a) prethodno izvrsno poznavanje oblasti evropskog potrošačkog prava i b) savršeno vladanje engleskim jezikom, jer je planirano da svi prilozi budu izvorno pisani na engleskom kao jedinom zajedničkom jeziku članova grupe.

Na tim osnovama su izabrani sledeći nacionalni izvestioci: Nada Dollani (Albanija), Zlatan Meškić (Bosna i Hercegovina), Emilia Čikara (Hrvatska), Neda Zdraveva, Jadranka Dabović Anastasovska, Nenad Gavrilović (Makedonija), Zvezdan Čadjenović (Crna Gora), Marija Karanikić Mirić (Srbija).

U 1. delu, ovaj tim daje prikaz zakonodavnih tehnika u pojedinačnim državama učesnicama koji su pripremili odgovarajući nacionalni izvestioci. Drugi deo prikazuje transponovanje pojedinih direktiva u ovih šest zemalja. Zbog ograničenog prostora, nažalost, nije bilo moguće da se objave odgovarajući nacionalni izveštaji. Umesto njih, ova publikacija sadrži uporednu analizu četiri direktive koja je, pak, bazirana na nacionalnim izveštajima i može se smatrati njihovom sintezom. Ovakav pristup ima i jednu veliku prednost jer čitalac pred sobom ima uporedni prikaz koji jasno pokazuje sličnosti i razlike u načinu na koji su četiri direktive transponovane u državama učesnicama. Isto tako, on je nacionalnim izvestiocima omogućio da rade ne samo na svom domaćem pravu, već i na ostalih pet pravnih sistema.

Nacionalni izvestioci su pozvani na radionicu koja je održana 31.01.2010. godine u Tirani, koja se pokazala ne samo kao veoma ugodna, već i kao izuzetno uspešna. U Tirani su međusobno raspodeljeni zadaci, i to na sledeći način: Direktiva o prodaji van poslovnih prostorija – koordinatori Emilia Čikara i Zlatan Meškić; Direktiva o nepravičnim ugovornim odredbama - Marija Karanikić Mirić i Zvezdan Čadjenović; Direktiva o prodaji na daljinu - Nada Dollani i Neda Zdraveva/Jadranka Dabović Anastasovska/Nenad Gavrilović; Direktiva o prodaji robe široke potrošnje - Zlatan Meškić i Neda Zdraveva/Jadranka Dabović Anastasov-

[1] H. Schulte-Nölke u saradnji sa Ch. Twigg-Flesner, M. Ebers (eds), EC Consumer Law Compendium – Comparative Analysis, Universität Bielefeld, februar 2008. godine. Za ažuriranu verziju iz januara 2010. videti: http://www.eu-consumer-law.org/index_en.cfm.

ska/Nenad Gavrilović. Takođe je odlučeno da se uključi i 3. deo o budućnost potrošačkog obligacionog prava u Evropskoj uniji i zemljama učesnicama , koji prikazuje Predlog Komisije za Direktivu o potrošačkim pravima i otvara pitanje implementacije u nacionalne zakone zemalja Zapadnog Balkana. Ovaj deo se završava prikazom međunarodnog privatnog prava u potrošačkim ugovorima.

Nacionalni izvestioci su se maksimalno potrudili da nađu objavljene odluke sudova u svojim zemljama koje se tiču potrošačkih ugovora, ali se za dobijeni rezultat može reći samo da je razočaravajući: u tri zemlje (Albanija, Makedonija i Srbija) nije nađen ni jedan jedini predmet; a rezultati za Bosnu i Hercegovinu, Hrvatsku i Crnu Goru su tek nešto bolji (za bliže informacije videti 4. deo, Dodatak B 4).

Četvrti deo, između ostalog, nudi spisak Izvora prava Evropske Unije, uključujući nedavno objavljenu Zelenu knjigu Komisije o opcionim politikama na putu ka Evropskom obligacionom pravu za potrošače i privredne subjekte, kao i prikaz sudske prakse Suda pravde iz Luksemburga u vezi ove četiri direktive

Treba pomenuti da je saradnja među članovima tima bila značajno olakšana korišćenjem *google* grupa gde je tim registrovan kao „*Civil Forum Consumer*". Na ovaj način internet je korišćen ne samo za diskusije (i prikazivanje fotografija sa radionice), već i za prikupljanje sveobuhvatne zbirke zakona koji su relevantni za potrošačke ugovore u ovih šest zemalja učesnica i koji su tako stavljeni na raspolaganje svima, na lokalnom i/ili engleskom jeziku.

Posebna zahvalnost pripada prof. Tatjani Josipović (Zagreb) koja je, i pored toga što je član radnih grupa 4 i 5, svojim vrednim savetima pomogla rad radne grupe 7.

Prevod svih priloga na srpski jezik je organizovao GTZ Beograd.

16. 07.2010. godine

1. deo:
PRIKAZ „ZAKONODAVNIH TEHNIKA“ U ZEMLJAMA UČESNICAMA

A. ALBANIJA – ZAKONODAVNE TEHNIKE *(Nada Dollani)*

Direktiva	**Transponovana u**	**Datum transponovanja**
Direktiva 85/577	Zakon o zaštiti potrošača (ZZP) iz 2008. g. Odluka Saveta ministara br. 63/2009	17.04.2008. 21.01.2009.
Direktiva 90/314	ZZP iz 2008. g. Odluka Saveta ministara br.65/2009	17. 04.2008. 21.01.2009.
Direktiva 93/13	ZZP iz 2008. g.	17 04.2008.
Direktiva 94/47 (od 23.02 2011: Direktiva 2008/122/EZ)	ZZP iz 2008. g. Odluka Saveta ministara br.833/2009	17 04.2008. 08.07.2009.
Direktiva 97/7	ZZP iz 2008. g. Odluka Saveta ministara br.64/2009	17.04.2008. 21.01.2009.
Direktiva 98/6	ZZP iz 2008. g.	17.04.2008.
Direktiva 98/27 (kodifikovana verzija: Direktiva 2009/22/EZ	ZZP iz 2008. g.	17.04.2008.
Direktiva 99/44	ZZP iz 2008.g.	17.04.2008.
Direktiva 87/102/EEZ (od 12.05.2010: Direktiva 2008/48/EZ)	ZZP iz 2008.g. Odluka Banke Albanije br. 5/2009	17.04.2008. 11.02.2009.
Direktiva 85/374	ZZP iz 2008.g. Građanski zakonik	17.04.2008. 29.07.1994.
Direktiva 86/653	nije transponovana	-
Direktiva 99/34	ZZP iz 2008.g. Građanski zakonik	17.04.2008. 29.07.1994.
Direktiva 99/93	Zakon o elektronskom potpisu	25.02.2008.
Direktiva 2000/35	nije transponovana	-
Direktiva 2000/31	Zakon o elektronskoj trgovini	11.05.2009.
Direktiva 84/450	ZZP iz 2008.g.	17.04.2008.
Direktiva 2002/65	Odluka Saveta ministara br.64/2009	21.01.2009.
Direktiva 2005/29	ZZP iz 2008. g.	17.04.2008.
Direktiva 87/357	nije transponovana	-
Direktiva 97/5	nije transponovana	-

Direktiva 98/26	nije transponovana	-
Direktiva 2000/46	nije transponovana	-
Direktiva 2001/95	Zakon o opštoj bezbednosti, materijalnim zahtevima i proceni usklađenosti neprehrambenih proizvoda br. 9779/2007	16.07.2007.
Direktiva 2002/22	Zakon o elektronskim komunikacijama br. 9918/2008	19.05.2008.
Direktiva 2002/58	Zakon o elektronskim komunikacijama br. 9918/2008	19.05.2008.

I. Stanje zaštite potrošača na planu Direktiva 99/44 (prodaja robe široke potrošnje), 93/13 (nepravične odredbe), 97/7 (ugovori na daljinu) i 85/577 (prodaja van poslovnih prostorija) pre transponovanja u nacionalno pravo

Pre transponovanja Direktiva u domaći pravni sistem, u albanskom pravu su od 1977. godine, postojale neke osnovne opšte norme u vezi zaštite potrošača. Te norme su bile definisane Zakonom o zaštiti potrošača, br. 8192 od 06.02.1997. Ovaj zakon je uređivao oblast bezbednosti potrošača i zaštite njihovog zdravlja i ekonomskih interesa. Pošto nikad nije zaživeo, i nije preuzeo gotovo nijednu od Direktiva, ovaj zakon je stavljen van snage donošenjem drugog, opet neefikasnog Zakona o zaštiti potrošača, br. 9135 od 11.09.2003. Zakon iz 2003. godine je načinio izvestan pokušaj usklađivanja sa pravnom tekovinom EU u oblasti zaštite potrošača, ali opet, i ovaj zakon su gotovo u potpunosti ignorisali kako potrošači, tako i nadležni državni organi i sudovi. Zakon o zaštiti potrošača, donet 2003. godine, pokrivao je širok spektar pitanja koja se tiču bezbednosti potrošača, potrošačkih ugovora i kontrole zaštite potrošača. Delovi II i III uređivali su posebne aspekte bezbednosti i obaveštavanja potrošača, pakovanja i obeležavanja, i obmanjujućeg oglašavanja. Delovi IV i V su se bavili posebnim aspektima pojedinih potrošačkih ugovora uključujući nepravične ugovorne odredbe i saobraznost sa ugovorom, prodaju na daljinu, prodaju potrošačke robe, ugovore o vremenski podeljenom korišćenju nekretnina, prodaju van poslovnih prostorija i elektronsko poslovanje. Delovi VI i VII su se bavili državnim institucijama nadležnim za zaštitu potrošača i posebnim pitanjima u vezi organizacija potrošača. Međutim, potrošački *acquis* nikad nije bio u potpunosti transponovan u nacionalno pravo. Isto tako, albanski Građanski zakonik, bez obzira na činjenicu što on ne sadrži nikakve izričite odredbe o određivanju i zaštiti potrošača, štiti potrošače jednako kao bilo koja druga lica. Što se tiče formulacija Građanskog zakonika, neke od odredbi Direktive 93/13 “transponovane” su članovima 686, 687, 688. Ovi članovi se odnose na opšte i nepravične ugovorne odredbe, a član 688 sadrži pravilo *contra proferentem*. Građanski zakonik, međutim, proširuje svoje važenje na sva fizička i pravna lica, tako da zaštita nije ograničena na potrošače. Takođe se može reći da pravo na jednostrano otkazivanje ugovora iz Direktive 85/577 predviđa i Građanski zakonik u svom članu 672. Isto tako, i Direktivu 85/374 u vezi sa odgovornošću za proizvode sa nedostatkom Građanski zakonik transponuje u članu 628 *et seq*.

Shodno Sporazumu o stabilizaciji i pridruživanju između Evropskih zajednica i njihovih država članica i Republike Albanije, potpisanog 12.06.2006[2], po članu 76; shodno Nacionalnom akcionom planu za sprovođenje Sporazuma o stabilizaciji i pridruživanju koji je donela albanska Vlada (Odluka Saveta ministara br. 463 od 05.07.2006); i shodno Odluci Saveta ministara o usvajanju međusektorske strategije za zaštitu potrošača i nadzor nad tržištem

[2] SSP je potvrđen Zakonom br. 9590 od 27.07.2006, Sl.list RAl br. 87/06.

za period 2007–2013, br. 797 od 14.11.2007., Albanija je obavezna da osigura, poštuje i štiti prava potrošača, i iz te obaveze je proisteklo donošenje Zakona o zaštiti potrošača, br. 9902 od 17.04.2008. godine.

II. Zakonodavne tehnike transponovanja

Albanija je preuzela sve četiri Direktive putem usvajanja različitih transpozicionih zakona. Zakonodavni akti korišćeni za sprovođenje Direktiva uključivali su ili zakone koje usvaja albanski parlament i kojima se utvrđuju norme usklađene sa Direktivom 99/44, Direktivom 93/13, Direktivom 97/7 i Direktivom 85/577, ili odluke Saveta ministara koje usvaja albanska vlada i kojima se dopunjava implementacija Direktiva, kao što je slučaj sa Direktivom 97/7 i Direktivom 85/577, čije je dalje transponovanje dopunjeno Odlukom Saveta ministara o ugovorima na daljinu, br. 64/2009 i Odlukom Saveta ministara o ugovorima izvan poslovnih prostorija, br. 63/2009 .

Albanski Zakon o zaštiti potrošača iz 2008. godine nastoji da štiti interese potrošača na tržištu, kao i da definiše norme i uspostavi relevantne institucije, radi zaštite prava potrošača. Zakon je struktuiran u 10 delova. I deo sadrži opšte odredbe o predmetu, području primene, značenju pojedinih pojmova, i potrošačkim pravima; II deo definiše određene zahteve u vezi bezbednosti potrošača; III deo je posvećen obavezama u pogledu obaveštavanja potrošača, obeležavanja, isticanja cena, izdavanja računa, pakovanja i jezika, i na taj način transponuje odredbe iz Direktive 98/6; IV deo se bavi nepoštenom trgovinskom praksom i oglašavanjem, implementirajući Direktivu 2005/29 i 84/450; V deo sadrži norme o nepravičnim ugovornim odredbama i saobraznosti sa ugovorom, i na taj način transponuje Direktivu 93/13 o nepravičnim ugovornim odredbama i Direktivu 99/44 o prodaji robe široke potrošnje; VI deo reguliše ugovore sklopljene van poslovnih prostorija kao i ugovore na daljinu, i na taj način transponuje Direktive 85/577 i 97/7; VII deo se odnosi na posebne ugovore, kao što su ugovori za snabdevanje vodom, energijom i pružanje telekomunikacionih usluga, ugovori o vremenski podeljenom korišćenju nekretnina, ugovori o potrošačkim kreditima i ugovori o putnim paket aranžmanima, i na taj način transponuje Direktive 94/47, 87/102 i 90/314; VIII deo se bavi institucijama za zaštitu potrošača, i time ugrađuje odredbe Direktive 98/27; IX deo pokriva administrativne prestupe i administrativne kazne, i konačno X deo sadrži prelazne i završne odredbe.

Albanski zakonski akti ne sadrže bilo kakva izričita upućivanja u pogledu sprovođenja određene direktive, ali pri tom faktički transponuju odredbe relevantnih direktiva. Može se reći da je albanski zakonodavac sledio pristup doslovnog prepisivanja.

III. Primena minimalne harmonizacije

Prilikom transponovanja direktiva, Albanija je na više mesta primenila minimalne klauzule o harmonizaciji. Tako, Zakon o zaštiti potrošača prilikom transponovanja Direktive 85/577 o prodaji van poslovnih prostorija i Direktive 97/7 o prodaji na daljinu predviđa da potrošač ima pravo na raskid ugovora bez objašnjenja u roku od 14 kalendarskih dana, umesto minimalnog roka od sedam radnih dana koji je predviđen u obe Direktive za korišćenje ovog prava.

IV. Ostala proširenja

Prema Zakonu o zaštiti potrošača pojam potrošač je širi u odnosu na način na koji je definisan u obe Direktive, utoliko što se i neprofitne organizacije smatraju potrošačima.

Odluka Saveta ministara ugovorima na daljinu, br. 64/2009., proširuje važenje i na finansijske usluge. Isto tako, Zakon o opštoj bezbednosti, materijalnim zahtevima i proceni usklađenosti neprehrambenih proizvoda, br. 9779 od 16.07.2007., na koji Zakon o zaštiti potrošača upućuje u vezi određivanja pojma proizvođač, sadrži nešto šire značenje pojma proizvođač u odnosu na definiciju datu u Direktivi 99/44.

V. Moguća kršenja prava EZ

U albanskom zakonodavstvu nisu ugrađene sve odredbe Direktiva. Nekoliko odredbi uopšte nije preneto. Pošto albanski zakonodavac koristi tehniku doslovnog prepisivanja, na nekim mestima su izostavljeni delovi rečenica Direktiva, kao u slučaju člana 3, stav 2, alineja 2 Direktive 97/7 o prodaji na daljinu. Osim toga, sprovođenje preuzetih odredbi za sada nailazi na poteškoće, između ostalog i zbog izvesnih nedoslednosti u unutrašnjoj harmonizaciji.

VI. Sudska praksa

Postoji značajan nedostatak sudske prakse. Sudovi radije primenjuju odredbe Građanskog zakonika i potrošače štite jednako kao bilo koja druga lica, ignorišući postojanje posebnih odredbi o zaštiti potrošača. Drugi razlog za neprimenjivanje zakonodavstva koje uređuje zaštitu potrošača nalazi se u sistemskoj nedoslednosti, jer ni jedna odredba Zakona o zaštiti potrošača ne reguliše prioritet normi u slučaju sukoba ili pravila "bolje zaštite".

Međutim, osim kroz redovne sudske postupke, potrošač može da ostvari pristup pravdi i kroz instrumente za alternativno rešavanje sporova i kroz upravni postupak.[3] Komisija za zaštitu potrošača[4] je već donela tri odluke, od kojih se dve odnose na nepoštenu trgovinsku praksu i obmanjujuće oglašavanje, a treća na zaštitu potrošača u predmetu kršenja člana 40 ZZP u vezi računa za pružanje telekomunikacionih usluga[5].

VII. Rezime

Usaglašavanje zakonodavstva sa *acquis communautaire* u oblasti zaštite potrošača počelo je potpisivanjem Sporazuma o stabilizaciji i pridruživanju između Republike Albanije, s jedne strane, i Evropskih zajednica i njihovih država članica, s druge strane (SSP), 12.06.2001. godine. Prvi Zakon o zaštiti potrošača donet je 2003. godine i njime je preuzeta većina evropskih direktiva u vezi zaštite potrošača. Kako je bilo neophodno dalje transponovanje i poboljšanje, 2008. godine je donet nov Zakon o zaštiti potrošača. Ovim Zakonom o zaštiti potrošača sprovode se Direktive 98/6, 2005/29, 84/450, 99/44, 93/13, 85/577, 97/7, 94/47, 87/102, 90/314, 98/27. Ugrađivanjem ovih Direktiva u nacionalno pravo, nivo zaštite potrošača je značajno poboljšan korišćenjem principa minimalne harmonizacije u brojnim prilikama. Međutim, trgovci, a čak i sudovi, u praksi retko poštuju posebna pravila za zaštitu potrošača, tako da nivo zaštite prava potrošača još uvek nije zadovoljavajući.

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[3] Član 56 ZZP, Sl. list RAl br. 61/08.

[4] Ovu Komisiju je 27.07.2009. godine osnovalo Ministarstvo privrede, trgovine i energetike.

[5] Komisija za zaštitu potrošača je koristila sankcije predviđene čl. 57 u svojoj Odluci br. 2 iz aprila 2010, http://www.mete.gov.al/doc/20100407113914_vendimi_nr_2_-_date_01_prill_2010_kmk.pdf, poslednji put posećen 30.04.2010.

B. BOSNA I HERCEGOVINA – ZAKONODAVNE TEHNIKE

(Zlatan Meškić)

Direktiva	**Transponovana u**	**Datum transponovanja**
Direktiva 85/577	Zakon o zaštiti potrošača (ZZP) (takođe u nacrtu Zakona o obligacionim odnosima iz 2006., izostavljeno u nacrtu Zakona o obligacionim odnosima iz 2010)	12.04.2006.
Direktiva 90/314	ZZP (takođe u nacrtu Zakona o obligacionim odnosima iz 2006., izostavljeno u nacrtu Zakona o obligacionim odnosima iz 2010)	12.04.2006.
Direktiva 93/13	ZZP (takođe u nacrtu Zakona o obligacionim odnosima iz 2006. i 2010.)	12.04.2006.
Direktiva 94/47 (od 23.02.2011: Direktiva 2008./122/EZ)	ZZP (takođe u nacrtu Zakona o obligacionim odnosima iz 2006., izostavljeno u nacrtu Zakona o obligacionim odnosima iz 2010)	12.04.2006.
Direktiva 97/7	ZZP (takođe u nacrtu Zakona o obligacionim odnosima iz 2006., delimično transponovano u nacrtu Zakona o obligacionim odnosima iz 2010.)	12.04.2006.
Direktiva 98/6	ZZP	12.04.2006.
Direktiva 98/27 (kodifikovana verzija: Direktiva 2009/22/EZ)	ZZP	12.04.2006.
Direktiva 99/44	ZZP (takođe u nacrtu Zakona o obligacionim odnosima iz 2006. i 2010.)	12.04.2006.
Direktiva 87/102/EEZ (od 12.05.2010: Direktiva 2008./48/EZ)	ZZP (takođe u nacrtu Zakona o obligacionim odnosima iz 2006., izostavljeno u nacrtu Zakona o obligacionim odnosima iz 2010)	12.4.2006.
Direktiva 85/374	nije transponovana (samo u nacrtu Zakona o obligacionim odnosima iz 2006. i 2010)	-
Direktiva 86/653	nije transponovana (samo u nacrtu Zakona o obligacionim odnosima iz 2006. i 2010.)	-
Direktiva 99/34	nije transponovana (samo u nacrtu Zakona o obligacionim odnosima iz 2006. i 2010.)	-
Direktiva 99/93	Zakon o elektronskom potpisu	14.5.2007.
Direktiva 2000/35	nije transponovana (samo u nacrtu Zakona o obligacionim odnosima iz 2006. i 2010.)	-
Direktiva 2000/31	Zakon o elektronskom pravnom i poslovnom prometu (takođe delimično u nacrtu Zakona o obligacionim odnosima iz 2006. i 2010.)	29.10.2007.

Direktiva 84/450	ZZP (takođe u nacrtu Zakona o obligacionim odnosima iz 2006. i 2010.)	12.4.2006
Direktiva 2002/65	nije transponovana	-
Direktiva 2005/29	nije transponovana	-
Direktiva 87/357	Zakon o opštoj bezbednosti proizvoda iz 2009. (kojim se zamenjuje Zakon o opštoj bezbednosti proizvoda od 09.09.2004.) Izmene i dopune Zakona o nadzoru nad tržištem u Bosni i Hercegovini od 09.09.2004.	15.12.2009. 15.12.2009.
Direktiva 97/5	nije transponovana (samo u nacrtu Zakona o obligacionim odnosima iz 2006., izostavljeno u nacrtu Zakona o obligacionim odnosima iz 2010)	-
Direktiva 98/26	nije transponovana	-
Direktiva 2000/46	nije transponovana	-
Direktiva 2001/95	Zakon o opštoj bezbednosti proizvoda iz 2009. (kojim se zamenjuje Zakon o opštoj bezbednosti proizvoda od 09.09.2004.)	15.12.2009.
Direktiva 2002/22	nije transponovana	-
Direktiva 2002/58	nije transponovana	-

I. *Stanje zaštite potrošača na planu Direktiva 99/44 (prodaja robe široke potrošnje), 93/13 (nepravične odredbe), 97/7 (ugovori na daljinu) i 85/577 (van poslovnih prostorija) pre transponovanja u nacionalno pravo*

Pre preuzimanja Direktiva u pogledu zaštite potrošača, pravni sistem Bosne i Hercegovine nije sadržao nikakve odredbe čija bi primena bila ograničena na potrošače. Međutim, neke odredbe jugoslovenskog Zakona o obligacionim odnosima iz 1978. godine[6] pružale su visok nivo zaštite, naročito u slučajevima ugovora o prodaji potrošačke robe i odgovornosti proizvođača za štetu od proizvoda sa nedostatkom. Posle podele Jugoslavije, ovaj zakon se na osnovu sukcesije i dalje primenjivao, u dve nešto različite verzije, u oba entiteta Bosne i Hercegovine, i to kao Zakon o obligacionim odnosima Republike Srpske[7] i Zakon o obligacionim odnosima Federacije Bosne i Hercegovine[8]. Kako se odredbe koje su relevantne za ovu analizu ne razlikuju, a u cilju što veće jasnoće, ovaj tekst će govoriti samo o „Zakonu o obligacionim odnosima Bosne i Hercegovine (BZOO)"[9]. Prvi Zakon o zaštiti potrošača Bosne i Hercegovine donet je u 2002 godine[10]; zbog izostanka njegove primene u praksi, 2006. godine on je zamenjen važećim Zakonom o zaštiti potrošača[11].

[6] *Sl.list SFRJ* br. 29/78, 39/85, 46/85, 45/89, 57/89.

[7] *Sl.list SFRJ* br. 29/78, 39/85, 46/85, 45/89, 57/89 i *Sl.glasnik Republike Srpske*, br. 17/93, 57/98, 39/03, 74/04.

[8] *Sl.list SFRJ* br. 29/78, 39/85, 46/85, 45/89, 57/89, *Sl.list Republike Bosne i Hercegovine*, br. 2/92, 13/93, 13/94 i *Sl.glasnik Federacije Bosne i Herzegovine*, br. 29/03.

[9] Čini se da je ovaj naziv odgovarajući, s obzirom na tekući proces ponovnog objedinjavanja Zakona o obligacionim odnosima na državnom nivou. Poslednji pokušaj usvajanja jedinstvenog Zakona o obligacionim odnosima Bosne i Hercegovine počeo je 08.01.2010. godine. Međutim, nacrt Zakona o obligacionim odnosima iz 2010. godine nije uspeo da prođe kroz skupštinsku procedure u februaru 2010. godine.

[10] *Sl.glasnik BiH* br. 17/02.

[11] *Sl.glasnik BiH* br. 25/06.

II. Zakonodavne tehnike transponovanja

Bosna i Hercegovina je ugradila većinu Direktiva, uključujući ovde relevantne četiri Direktive, u svoj Zakon o zaštiti potrošača koji je stupio na snagu 04.12.2006. Osim toga su doneti pojedinačni transpozicioni zakoni koji se odnose na posebne pravne oblasti, kao što su, na primer, Zakon o elektronskom pravnom i poslovnom prometu[12], Zakon o elektronskom potpisu[13] i Zakon o opštoj bezbednosti proizvoda[14].

III. Primena minimalne harmonizacije

Prilikom transponovanja Direktiva vezanih za zaštitu potrošača, Bosna i Hercegovina je primenjivala minimalnu harmonizaciju na više mesta. Rok za raskid ugovora u okviru prodaje van poslovnih prostorija i prodaje na daljinu produžen je na 15 dana, dok Direktive predviđaju rok od samo sedam dana (Direktiva 85/577 i 97/7). Osim toga, bosanski Zakon o zaštiti potrošača sadrži „crnu listu" klauzula koje se uvek smatraju nepravičnim (nepravičnim po sebi), za razliku od Direktive koja koristi listu klauzula koje se mogu smatrati nepravičnim (član 3., stav (3), Direktive 93/13).

U skladu sa Zakonom o zaštiti potrošača, potrošači mogu da zahtevaju nadoknadu i vraćanje plaćenog iznosa novca bez obaveze da prethodno zahtevaju od prodavca da robu popravi ili zameni, kako je predviđeno u članu 3. 5) Direktive 99/44. Za razliku od Direktive 99/44, pravo potrošača na raskid ugovora postoji čak i onda kad je nesaobraznost neznatna (član 3.6) Direktive 99/44).

IV. Ostala proširenja

Zakon o zaštiti potrošača uređuje prodaju usluga, koje nisu pokrivene Direktivom 99/44, po modelu prodaje robe u skladu sa tom Direktivom. Oblast primene odredbi kojima se transponuje Direktiva 85/577 dodatno uključuje ugovore zaključene kao rezultat neočekivanog pristupa trgovca potrošaču u sredstvima javnog prevoza ili na bilo kom drugom javnom mestu.

Dalja proširenja oblasti primene odredbi o zaštiti potrošača rezultat su netransponovanja odredbi koje uređuju granice oblasti primene relevantnih Direktiva, kao što su član 3.2) Direktive 85/577, član 3.2) Direktive 97/7 i član 4. Direktive 93/13.

V. Moguća kršenja prava EZ

1. Najznačajnije moguće kršenje prava EU tiče se određivanja pojma potrošač. U skladu sa Zakonom o zaštiti potrošača, potrošač je svako fizičko lice koje kupuje, stiče ili koristi proizvode ili usluge za svoje lične potrebe i za potrebe svog domaćinstva. Ova definicija je dvostruko uža u odnosu na uobičajeno određenje pojma potrošač u Direktivama. Umesto opšteg pojma „delovati" koji se koristi u definiciji potrošača u Direktivama, bosanski Zakon o zaštiti potrošača ograničava delovanje potrošača na kupovinu, sticanje ili korišćenje proizvoda ili usluga. Još je značajnije sužavanje na „svoje lične potrebe i potrebe svog domaćinstva", što se zbog veznika „i" treba shvatiti kumulativno, dok negativno formulisana definicija u Direktivi, uključuje sve svrhe koje nisu u vezi s potrošačevom poslovnom delatnošću ili profesijom.

Isto važi i za pojam trgovac, koji se u Zakonu o zaštiti potrošača definiše kao svako lice koje direktno ili kao posrednik među drugim licima prodaje proizvode ili pruža usluge po-

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[12] *Sl.glasnik BiH* br. 88/07.

[13] *Sl.glasnik BiH* br. 91/06.

[14] *Sl.glasnik BiH* br. 102/09, kojim se zamenjuje prethodni Zakon o opštoj bezbednosti proizvoda, *Sl.glasnik* br. 45/04.

trošaču. S obzirom da su obe definicije uže od odgovarajućih definicija u Direktivama, u skladu sa Zakonom o zaštiti potrošača postoji slobodan prostor između pojma potrošača i pojma trgovaca. U Direktivama koje se tiču zaštite potrošača ovi termini su komplementarni, te stoga svako ono lice koje nije potrošač jeste trgovac, i *vice versa*. Ograničavanje ovih termina neminovno smanjuje nivo zaštite potrošača, suprotno Direktivama.

2. Član 1.2) Direktive o prodaji van poslovnih prostorija nije prenet u Zakon o zaštiti potrošača. Što se tiče ugovora sklopljenih van poslovnih prostorija, Zakon o zaštiti potrošača predviđa rok za raskid od 15 dana od dana zaključenja ugovora, bez odlaganja početka roka za raskid u slučaju kada trgovac nije obavestio potrošača o njegovom pravu raskida, što je eksplicitno predviđeno u Direktivi[15]. U skladu sa članom 41.2) Zakona o zaštiti potrošača, potrošač je obavezan da plati troškove vraćanja proizvoda, za šta se može smatrati da je saglasno sa članom 5. i 7. Direktiva u vezi prodaje izvan poslovnih prostorija.[16]

3. Analiza nepravičnosti prema odredbama člana 95. Zakona o zaštiti potrošača važi za sve ugovorne odredbe koje potrošač nije „lično" ugovarao. Upotreba ovog termina vodi ka drugačijem domašaju važenja klauzule pravičnosti, od one koju daje termin „individualno ugovoren".

4. Što se tiče Direktive 97/7 manja je mogućnost kršenja prava EU s obzirom da je ona transponovana primenom tehnike „prepisivanja".

5. Najsloženija je pravna situacija u pogledu transponovanja Direktive 99/44. Član 3.2) i član 5.1) i 2) Direktive 99/44 su direktno uneti u Zakon o zaštiti potrošača, s izuzetkom što potrošač nema pravo da od prodavca zahteva srazmerno smanjenje cene. Što se tiče netransponovanog člana 2.1) - 3) Direktive, može se smatrati da on već postoji u Zakonu o obligacionim odnosima (1978), dok odredbe člana 2.4) i 5) nisu uključene u pozitivni zakon. Osim toga, nije transponovana pretpostavka u vezi nesaobraznosti koja je postala vidljiva u roku od 6 meseci od isporuke, predviđena u članu 5.3) Direktive.

6. Konačno, treba naglasiti da bi usvajanjem Nacrta Zakona o obligacionim odnosima Bosne i Hercegovine 2006 (BNZOO 2006)[17] najvećim delom bila izbegnuta napred navedena moguća kršenja prava EU. BNZOO iz 2006. godine bi transponovao 14 direktiva iz oblasti zaštite potrošača.[18] Međutim, kako za sada izgleda nije izvesno da li postoji politička volja za donošenje jedinstvenog Zakona o obligacionim odnosima na državnom nivou. Poslednji pokušaj je počeo 08.01.2010. godine, kada je Vlada usvojila nov Nacrt Zakona o obligacionim odnosima (BNZOO 2010) i uputila ga Parlamentarnoj skupštini. Nažalost, nacrt nije uspeo da prođe kroz skupštinsku procedure u februaru 2010. godine S obzirom da je neuspeh poslednje dve verzije Nacrta Zakona o obligacionim odnosima da prođu kroz skupštinsku proceduru, čiji su najznačajniji razlozi i oni političe prirode[19], bio izazvan uključivanjem velikog broja potro-

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[15] Videti u Presudi ESP od 13.12.2001. godine, u predmetu C-481/99 - *Georg Heininger i Helga Heininger protiv Bayerische Hypound Vereinsbank AG* [2001] ECR I-09945.

[16] Videti ESP, 22.04.1999, u predmetu C-423/97 –*Travel Vac SL protiv Manuel José Antelm Sanchi* [1999] ECR I-02195; Presuda ESP od 25.11. 2005, u predmetu C-229/04 - *Crailsheimer Volksbank AG protiv Klaus Conrads, Frank Schulzke i Petra Schulzke-Lösche, Joachim Nitschke* [2005] ECR I-9273.

[17] Videti B. Morait, A. Bikić, *Objašnjenja uz Nacrt Zakona o obligacionim odnosima*, u sradnji sa GTZ, Sarajevo 2006.

[18] Videti fusnotu iznad.

[19] Politički predstavnici Republike Srpske tvrde da Ustav Bosne i Hercegovine ne predviđa nadležnost za usvajanje Zakona o obligacionim odnosima na državnom nivou. Savet ministara se poziva na član 1.4) Ustava kao pravni osnov, navodeći da će sloboda kretanja robe, lica, usluga i kapitala biti obezbeđena u Bosni i Hercegovini, i da je neće ometati ni Bosna i Hercegovina niti entiteti.

šačkih odredbi u nacrt, teško je predvideti koje će odredbe ostati u konačnoj verziji Zakona o obligacionim odnosima kao i da li će nov Zakon o obligacionim odnosima biti usvojen na državnom ili na nivou entiteta. Izgledi za dugo očekivano donošenje bi ipak mogli da budu dobri, jer su mnoge od odredbi koje se odnose na posebne vrste potrošačkih ugovora, kao što su ugovori o prodaji van poslovnih prostorija ili ugovori o vremenski podeljenom korišćenju nekretnina izostavljene iz poslednjeg Nacrta i da usvajanje novog Zakona o obligacionim odnosima predstavlja jedan od prioriteta „Evropskog partnerstva sa Bosnom i Hercegovinom."

VI. Sudska praksa

Nedavni slučajevi nepravičnih odredbi u opštim uslovima ugovora o potrošačkim kreditima bili su prvi slučajevi koji su podigli nivo svesti o ZZP u Bosni i Hercegovini. Međutim, pokrenut je samo postupak za upravni prestup pred nadležnim sudom od strane Savezne uprave za inspekcijske poslove i ombudsmana za zaštitu potrošača. Osnovne činjenice iz 192 odnosna predmeta[20] bile su da su privatne banke donele jednostranu odluku i značajno podigle plivajuću kamatnu stopu za potrošačke kredite usled ekonomskih faktora vezanih za recesiju. U raspoloživim predmetima se ni u ugovorima o potrošačkim kreditima niti u tipskim uslovima zaključenim s potrošačima ne navode faktori koji bi mogli da opravdaju tako značajnu promenu stope, te su sudovi konstatovali kršenje člana 54. i člana 57. 2) ZZP, koji definišu obavezan sadržaj ugovora o potrošačkom kreditu. Nadležni sudovi su doneli odluku kojom se utvrđuju upravni prestupi od 750-2,000 evra, ali još nije poznato da li ima kolektivnih ili pojedinačnih parničnih postupaka pokrenutih na osnovu ovih odluka.[21]

Žalosno je što je čak i Ustavni sud Bosne i Hercegovine prilikom odlučivanja o potrošačkim ugovorima, koje je priznao kao takve, ignorisao postojanje Zakona o zaštiti potrošača i oslanjao se samo na BZOO.[22] Ovo je svakako jedan od argumenata u prilog ugrađivanja odredbi o zaštiti potrošača u budući Zakon o obligacionim odnosima.

VII. Rezime

Bosna i Hercegovina je transponovala većinu Direktiva iz oblasti zaštite potrošača u svom prvom Zakonu o zaštiti potrošača iz 2002. godine, koji je zbog izostanka primene u praksi 2006. godine zamenjen sada važećim Zakonom o zaštiti potrošača (ZZP). Kroz ZZP je preuzeto 10 direktiva iz oblasti zaštite potrošača, delimično ili u celosti, a još 4 su transponovane putem posebnih transpozicionih zakona, uključujući Zakon o elektronskom pravnom i poslovnom prometu, Zakon o elektronskom potpisu i Zakon o opštoj bezbednosti proizvoda. Transpozicioni zakoni su koristili klauzulu minimalne harmonizacije na više mesta kako bi obezbedili viši nivo zaštite, uglavnom proširujući oblast njihove primene ili određujući duže rokove za raskid. Novim Zakonom o obligacionim odnosima Bosne i Hercegovine, koji još nije usvojen, planirano je transponovanje najmanje još pet Direktiva iz oblasti zaštite potrošača kao i revizija nekih odredbi ZZP. Uvođenje odredbi o zaštiti potrošača u Zakon o obligacionim odnosima dodatno će rešiti problem ignorisanja ZZP-a u praksi.

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[20] Izveštaj Savezne uprave za inspekcijske poslove, 22.6.2009.

[21] U raspoloživim predmetima nadležni sud nije preispitivao pravičnost standardnih odredbi već je samo ukazao na nedostajuće informacije koje su banke bile obavezne da pruže shodno odredbama ZZP o potrošačkim kreditima.

[22] Ustavni sud Bosne i Hercegovine, AP-1385/06, 26.06.2007, *Sl.glasnik BiH* br. 60/05.

C. HRVATSKA – ZAKONODAVNE TEHNIKE *(Emilia Čikara)*

Direktiva	**Transponovana u**	**Datum transponovanja**
Direktiva 85/577	Zakon o zaštiti potrošača	10.6.2003.
Direktiva 90/314	Zakon o obveznim odnosima (takođe relevantan Zakon o pružanju usluga u turizmu)	17.3.2005.
Direktiva 93/13	Zakon o zaštiti potrošača	10.6.2003.
Direktiva 94/47 (od 23. 2. 2011: Direktiva 2008./122)	Zakon o zaštiti potrošača	10.6.2003.
Direktiva 97/7	Zakon o zaštiti potrošača	10.6.2003.
Direktiva 98/6	Zakon o zaštiti potrošača	10.6.2003.
Direktiva 98/27 (kodifikovana verzija: Direktiva 2009/22)	Zakon o zaštiti potrošača	30.7.2007.
Direktiva 99/44	Zakon o obveznim odnosima Zakon o zaštiti potrošača	17.3.2005. 10.6.2003.
Direktiva 87/102 (od 12. 5. 2010: Direktiva 2008/48)	Zakon o zaštiti potrošača Zakon o potrošačkom kreditiranju	10.6.2003. 1.1.2010.
Direktiva 85/374	Zakon o obveznim odnosima	17.3.2005. 9.4.2008.
Direktiva 86/653	Zakon o obveznim odnosima	17.3.2005. 9.4.2008.
Direktiva 99/34	Zakon o obveznim odnosima	17.3.2005.
Direktiva 99/93	Zakon o elektroničkom potpisu	30.1.2002.
Direktiva 2000/35	Zakon o obveznim odnosima	17.3.2005.
Direktiva 2000/31	Zakon o elektroničkoj trgovini	15.10.2003.
Direktiva 84/450	Zakon o zaštiti potrošača	10.6.2003.
Direktiva 2002/65	Zakon o zaštiti potrošača	30.7.2007.
Direktiva 2005/29	Zakon o zaštiti potrošača	30.7.2007.
Direktiva 87/357	Zakon o općoj sigurnosti proizvoda	9.3.2009.
Direktiva 97/5	Zakon o deviznom poslovanju	10.6.2003.
Direktiva 98/26	Zakon o konačnosti namire u platnim sustavima i sustavima za namiru financijskih instrumenata	13.10.2008.
Direktiva 2000/46	Zakon o institucijama za elektronički novac Zakon o kreditnim institucijama	13.10.2008. 13.10.2008.
Direktiva 2001/95	Zakon o općoj sigurnosti proizvoda (takođe relevantan Zakon o Državnom inspektoratu i Zakon o pravu na pristup informacijama)	7.10.2003.
Direktiva 2002/22	Zakon o elektroničkim komunikacijama	26.6.2008.
Direktiva 2002/58	Zakon o elektroničkim komunikacijama	26.6.2008.

I. Stanje zaštite potrošača na planu Direktiva 99/44 (prodaja robe široke potrošnje), 93/13 (nepravične odredbe), 97/7 (ugovori na daljinu) i 85/577 (van poslovnih prostorija) pre transponovanja u nacionalno pravo

Pre transponovanja evropskih direktiva u vezi zaštite potrošača, Hrvatska nije imala nijedan poseban zakon za zaštitu potrošača i zato su se primenjivale samo opšte norme, koje su potrošače štitile jednako kao i bilo koja druga lica. Ove norme su, međutim, obezbeđivale ve-

oma visok nivo zaštite, na primer, kroz odredbe Zakona o obveznim odnosima (ZOO)[23] koje su uređivale ugovore uopšte i ugovore o prodaji robe. ZOO je sadržao i neke odredbe koje se tiču odgovornosti za proizvode s nedostatkom čak i pre transponovanja Direktive 85/374/EEZ.[24] Potrošači su bili i indirektno zaštićeni preko nekolicine odredbi drugih zakona, kao npr. preko odredbi starog Zakona o trgovini,[25] Zakona o telekomunikacijama,[26] Zakona o Državnom inspektoratu[27] itd. Usaglašavanje postojećeg hrvatskog zakonodavstva sa *acquis communautaire* u ovoj oblasti počelo je kao posledica obaveza propisanih u članu 69. i 74. Sporazuma o stabilizaciji i pridruživanju potpisanog između Republike Hrvatske i Evropskih zajednica i njihovih država članica[28] (SSP) 29.10.2001. godine. Zakon o zaštiti potrošača[29] (ZZP) je prvi put usvojen 2003. godine i zatim je 2007. godine zamenjen danas važećim Zakonom o zaštiti potrošača.[30]

II. Zakonodavne tehnike transponovanja

U tekstu ZZP iz 2003. godine ugrađena je većina direktiva u vezi zaštite potrošača. Potreba za preuzimanjem novih direktiva i za daljim poboljšanjem postojećih propisa dovela je do donošenja novog ZZP, koji je usvojen 2007. godine.[31] Dok ZZP iz 2007. godine preuzima Direktive 98/6, 87/102, 93/13, 97/7, 85/577, 94/47, 98/27, 2002/65 i 2005/29, Direktive 90/314 i 99/44 su implementirane novim Zakonom o obveznim odnosima[32] koji je donet 2005. godine. Za transponovanje nove Direktive o ugovorima o potrošačkom kreditu (Direktiva 2008/48), međutim, zakonodavac je doneo poseban Zakon o potrošačkom kreditiranju[33] u junu 2009. godine.

III. Primena minimalne harmonizacije

Prilikom transponovanja evropskih direktiva u vezi zaštite potrošača Hrvatska je na više mesta primenjivala minimalnu klauzulu. Tako je rok za otkaz od 7 radnih dana, propisan u Direktivi 85/577 i Direktivi 97/7, u ZZP duži i iznosi 14 radnih dana. Isto važi za ugovore o vremenski podeljenom korišćenju nekretnina, gde ZZP predviđa rok za otkaz od 14 radnih dana, dok Direktiva zahteva samo 10 dana. ZZP prevazilazi neke zahteve iz Direktiva u vezi

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[23] Zakon o obveznim odnosima, *NN* br. 53/91, 73/91, 111/93, 3/94, 107/95, 7/96, 91/96, 112/99, 88/01. Jugoslavenski Zakon o obveznim odnosima (*Sl.list SFRJ* br. 29/78, 39/85, 46/85, 45/89, 57/89) preuzet je kao hrvatski nacionalni zakon putem Zakona o preuzimanju Zakona o obveznim odnosima, *NN* br. 53/91.

[24] T. Josipović, "Das Konsumentenschutzgesetz – Beginn der Europäisierung des kroatischen Vertragsrechts", in S. Grundmann, M. Schauer (ed.), *The Architecture of European Codes and Contract Law*, Kluwer Law International, Alphen aan den Rijn (et al.) 2006, 129 etc.

[25] Zakon o trgovini, *NN* br. 11/96, 30/99, 75/99, 76/99, 62/01, 109/01.

[26] Zakon o telekomunikacijama, *NN* br. 79/99, 128/99, 68/01, 109/01.

[27] Zakon o Državnom inspektoratu, *NN* br. 76/99.

[28] Sporazum o stabilizaciji i pridruživanju između Republike Hrvatske i Evropskih zajednica i njihovih država članica, *NN MU* br. 14/01.

[29] Zakon o zaštiti potrošača, *NN* br. 96/03.

[30] Zakon o zaštiti potrošača, *NN* br. 79/07, 125/07, 79/09, 89/09, 133/09.

[31] E. Čikara, "Die Angleichung des Verbraucherschutzrechts in der Europäischen Gemeinschaften: Unter besonderer Berücksichtigung des Verbraucherschutzrechtes in der Republik Kroatien", *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, Vol. 28, 2/2007., 1082.

[32] Zakon o obveznim odnosima, *NN* br. 35/05, 41/08.

[33] Zakon o potrošačkom kreditiranju, *NN* br. 75/09.

zaštite potrošača i u pogledu obaveza obaveštavanja. Na primer ZZP propisuje strože odredbe nego Direktiva 97/7, određujući da kod ugovora sklopljenih na daljinu potvrda prethodne obavijesti u pisanom obliku mora sadržavati sve podatke koje sadrži i prethodna obavijest. Isto tako, član 41. ZZP propisuje viši nivo zaštite potrošača nego Direktiva 97/7 zabranom sklapanja ugovora o prodaji lekova, medicinskih i veterinarskih proizvoda sredstvima daljinske komunikacije. Osim toga, propisujući odgovornost organizatora putovanja za svu štetu koju prouzroči putniku neispunjenjem, delimičnim ispunjenjem ili neurednim ispunjenjem obaveza po principu objektivne odgovornosti, član 888 ZOO potrošačima pruža dalekosežniju zaštitu nego član 5. Direktive 90/314. Hrvatski zakonodavac je primenio minimalnu harmonizaciju i prilikom transponovanja Direktive 99/44. Odredbe ZOO o materijalnim nedostacima važe i za ugovore o prodaji robe i za sve druge naplatne ugovore.

IV. Ostala proširenja

Hrvatska je povisila nivo zaštite potrošača usvajanjem šireg određenja pojma potrošač nego što to traže Direktive u drugim *leges specialissimae*. Tako je, na primer, do poslednjih izmena i dopuna iz 2009. godine[34], član 304 Zakona o kreditnim institucijama**t**[35] (ZKI) definisao potrošača kao fizičko lice koje je klijent kreditne institucije. Prema originalnoj verziji člana 304 ZKI potrošač je bio takođe i fizička osoba koja deluje u području svoje poslovne delatnosti, što je bilo suprotno pojmu potrošača po članu 3stavak 1. alineja 4 ZZP. Ova nedoslednost je otklonjena izmenama i dopunama ZKI iz 2009. godine, po kojima je potrošač svaka fizička osoba koja je klijent kreditne institucije, a koja deluje izvan područja svoje gospodarske delatnosti ili slobodnog zanimanja.

Osim toga, odredbe ZZP kojima se preuzima Direktiva o prodaji van poslovnih prostorija primenjuju se i na ugovore čije je sklapanje ponudio potrošač u vreme izleta koji je organizovao trgovac izvan njegovih poslovnih prostorija, u vreme posete trgovca domu potrošača, domu drugog potrošača, ili radnom mestu potrošača. Isto tako, Hrvatska nije transponovala mogućnost predviđenu u članu 3stavak 1. Direktive 85/577 po kojoj odredbe o ugovorima sklopljenim van poslovnih prostorija ne važe za ugovore za koje plaćanje koje treba da izvrši potrošač prelazi određeni iznos.

V. Moguća kršenja prava EU

Bliže informacije o mogućim kršenjima prava EU date su u 2. delu koji govori o transponovanju pojedinih direktiva (izveštaji o prodaji van poslovnih prostorija u Delu 2.A., nepravičnim ugovornimodredbama u Delu 2.B., prodaji na daljinu u Delu 2.C., i prodaji robe široke potrošnje u Delu 2.D.).

VI. Sudska praksa

Značajno nedostaje sudska praksa bazirana na odredbama ZZP. Sudovi pre primenjuju, npr. odredbe ZOO i štite potrošača jednako kao bilo koje drugo lice, istovremeno ignorišući postojanje posebnih odredbi o zaštiti potrošača. Koliko je poznato, postoji tek mali broj presuda koje se odnose na odredbe ZZP o potrošačkom zajmu[36] i na odredbe ZOO o prodaji ro-

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[34] *NN* br. 153/09.

[35] Zakon o kreditnim institucijama, *NN* br. 117/08, 74/09, 153/09.

[36] Županijski sud u Varaždinu, Gž. 1052/08–2 od 12.06.2008.

be.[37] Međutim, osim kroz redovne sudske postupke, potrošač može da ostvari pristup pravdi i putem instrumenata alternativnog rešavanja sporova i putem upravnog postupka.[38]

VII. Rezime

Usaglašavanje postojećeg hrvatskog zakonodavstva sa acquis communautaire u oblasti zaštite potrošača počelo je potpisivanjem Sporazuma o stabilizaciji i pridruživanju između Republike Hrvatske i Evropskih zajednica i njihovih država članica 29.10.2001. godine. Prvi Zakon o zaštiti potrošača donet je 2003. godine i on je transponovao većinu evropskih direktiva koje se tiču zaštite potrošača. Zbog neophodnosti daljeg transponovanja i poboljšanja, u 2007. godini je donet nov Zakon o zaštiti potrošača (ZZP). ZZP implementira Direktive 98/6, 87/102, 93/13, 97/7, 85/577, 94/47, 98/27, 2002/65 i 2005/29, dok su Direktive 90/314 i 99/44 transponovane unutar hrvatskog novog Zakona o obveznim odnosima iz 2005. godine. Prilikom transponovanja ovih direktiva u nacionalni pravni sistem, hrvatski zakonodavac je značajno povećao nivo zaštite potrošača učestalim primenjivanjem minimalne klauzule. Međutim, zbog ignorisanja postojanja posebnih pravila za zaštitu potrošača u praksi (od strane trgovaca, s jedne strane, i sudova i potrošača, s druge strane) nivo zaštite potrošačkih prava još uvek nije zadovoljavajući.

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[37] Županijski sud u Varaždinu, Gž. 1074/08–2 od 04.08.2008.

[38] Videti Deo V. ZZP-a pod naslovom "Zaštita potrošačkih prava", koji je podeljen na Glavu I. Izvansudsko rješavanje potrošačkih sporova i Glavu II.Zaštita kolektivnih interesa potrošača. Prvi slučaj zaštite potrošačkih prava na osnovu ZZP bio je predmet "Ponikve" u vezi pružanja javnih usluga, videti Odluku Agencije za zaštitu tržišnog natjecanja, UP/I 030-02/2004-01/66, *NN* br. 135/05.

D. MAKEDONIJA – ZAKONODAVNE TEHNIKE

(Neda Zdraveva, Jadranka Dabović-Anastasovska, Nenad Gavrilović)

Direktiva	**Transponovana u**	**Datum transponovanja**
Direktiva 85/577	Zakon o zaštiti potrošača	29.07.2000. delimično, 30.06.2004. potpuno
Direktiva 90/314	Zakon o turističkoj delatnosti	30.09.2006.
Direktiva 93/13	Zakon o zaštiti potrošača	29.07.2000.delimično, 30.06.2004. potpuno
Direktiva 94/47 (od 23.02. 2011: Direktiva 2008/122/EZ)	Zakon o zaštiti potrošača	30.06.2004.
Direktiva 97/7	Zakon o zaštiti potrošača	29.07.2000. delimično, 30.06.2004.potpuno
Direktiva 98/6	Zakon o zaštiti potrošača	29.07.2000. delimično, 30.06.2004. potpuno
Direktiva 98/27 (kodifikovana verzija: Direktiva 2009/22/EZ)	Zakon o zaštiti potrošača	29.07.2000.delimično, 30.06.2004. potpuno
Direktiva 99/44	Zakon o zaštiti potrošača	30.06.2004.
	Zakon o izmenama i dopunama Zakona o obligacionim odnosima	11.07.2008.
Direktiva 87/102/EEZ (od 12.05. 2010: Direktiva 2008/48/EZ)	Zakon o zaštiti potrošača u vezi Ugovora o korišćenju potrošačkih kredita;	30.04.2007.
	Pravilnik kojim se propisuje oblik i sadržaj zahteva za dobijanje dozvole za davanje potrošačkih kredita i oblik i sadržaj dozvole za davanje potrošačkih kredita;	06.08.2007.
	Pravilnik o obliku i sadržini Registra davalaca potrošačkih zajmova koji su dobili dozvolu Ministarstva privrede za davanje zajmova i o Registru posrednika u potrošačkim zajmovima koji su dobili dozvolu za odobravanje zajmova od Ministarstva privrede;	06.08.2007.
	Pravilnik kojim se propisuje oblik, sadržina i način pisanja izveštaja koji izdavaoci potrošačkih zajmova podnose Ministarstvu privrede, o broju zaključenih ugovora o zajmu i o dogovorenoj godišnjoj stopi ukupnih troškova;	06.08.2007.
	Pravilnik o raspoloživoj tehničkoj opremi, odnosno o tehničkim uslovima koje treba da ispunjavaju davaoci potrošačkih kredita	30.08.2007.
Direktiva 85/374	Zakon o zaštiti potrošača	30.06.2004.
Direktiva 86/653	Zakon o izmenama i dopunama Zakona o obligacionim odnosima	11.07.2008.

Direktiva 99/34	Zakon o izmenama i dopunama Zakona o obligacionim odnosima	11.07.2008.
Direktiva 99/93	Zakon o elektronskim podacima i elektronskom potpisu	31.03.2002.
Direktiva 2000/35	Zakon o izmenama i dopunama Zakona o obligacionim odnosima	11.07.2008.
Direktiva 2000/31	Zakon o izmenama i dopunama Zakona o elektronskim podacima i elektronskom potpisu	04.08.2008.
Direktiva 84/450	Zakon o zaštiti potrošača	29.07.2000. delimično, 30.06.2004. potpuno
Direktiva 02/65	Zakon o zaštiti ličnih podataka	01.02.2005.
Direktiva 05/29	Biće transponovana u Zakonu o izmenama i dopunama Zakona o zaštiti potrošača	Planirano najkasnije do 01.11.2010.
Direktiva 87/357	Zakon o zaštiti potrošača	29.07.2000. delimično, 30.06.2004. potpuno
Direktiva 97/5	Zakon o brzom transponovanju novca Zakon o deviznom poslovanju	03.12.2003. 30.06.2003.
Direktiva 98/26	Zakon o platnom prometu	20.09.2007.
Direktiva 2000/46	Zakon o izdavaocima elektronskog novca	30.12.2007.
Direktiva 01/95	Zakon o zaštiti potrošača	29.07.2000. delimično, 30.06.2004. potpuno
Direktiva 02/22	Zakon o elektronskim komunikacijama	31.03.2005.
Direktiva 02/58	Zakon o zaštiti ličnih podataka	01.02.2005.

I. Stanje zaštite potrošača na planu Direktiva 99/44 (prodaja robe široke potrošnje), 93/13 (nepravične odredbe), 97/7 (ugovori na daljinu) i 85/577 (van poslovnih prostorija) pre transponovanja u nacionalno pravo

U MAKEDONIJI je veliki deo zakonodavstva o zaštiti potrošača bio sadržan u Zakonu o zaštiti potrošača iz 2000, i njegovim izmenama i dopunama iz 2002. godine. Dalji pomak je napravljen donošenjem novog Zakona o zaštiti potrošača u 2004. godini, i njegovih izmena i dopuna u 2007. i zatim 2008. godini.[39] Značajne norme su se mogle naći i u Zakonu o obligacionim odnosima (načelo zaštite potrošača, načelo poštenog poslovanja, jednakost strana i opšta pravila ugovaranja, garancije za proizvode i odgovornost za bezbednost proizvoda).

Postojeće zakonodavstvo se bavilo većinom pitanja pokrivenih Direktivama. Pitanje nepoštenih pravila je uopšteno pokrivao Zakon o obligacionim odnosima, ali ne u istoj meri kao Direktiva. Zakon o obligacionim odnosima ima nekoliko odredbi u vezi saobraznosti proizvoda koji se isporučuju po ugovorima o prodaji, kao i sa njima povezanih garancija.

U skladu sa Sporazumom o stabilizaciji i pridruživanju između Evropskih zajednica i njihovih država članica i Republike Makedonije, potpisanim aprila 2001. godine, zemlja je obavezna da usaglasi svoje zakonodavstvo i prakse u oblasti zaštite potrošača.

II. Zakonodavne tehnike transponovanja

Zakonodavni akt koji pokriva većinu normi u vezi zaštite potrošača u Makedoniji je Zakon o zaštiti potrošača. U tom pogledu Zakon o zaštiti potrošača deluje kao *lex specialis* u

[39] *Sl.list RM* br. 38/2004, 77/2007 i 103/2008.

ovoj oblasti, dok su opšte odredbe o ugovaranju i odgovornostima koje proističu iz ugovora regulisane Zakonom o obligacionim odnosima. Umesto za izmene i dopune ovog zakona, zakonodavac se 2004. godine opredelio za donošenje novog Zakona o zaštiti potrošača u kome su Direktive implementirane u potpunosti. Osim toga, posebne odredbe u vezi prava potrošača u finansijskim stvarima sadržane su u posebnom Zakonu o zaštiti potrošača u pogledu ugovora o korišćenju potrošačkih kredita i u podzakonskim aktima donetim na osnovu ovog Zakona.

III. Primena minimalne harmonizacije

Makedonsko zakonodavstvo je, generalno gledano, koristilo minimalnu harmonizaciju na više mesta prilikom usaglašavanja nacionalnog zakonodavstva sa potrošačkim *aquisem*. Tako su uz ostale norme propisane Direktivom u zakon uključene i dodatne norme za ono što se trebalo smatrati nepravičnom klauzulom. U nekim slučajevima propisani rokovi su produženi (kao što je slučaj s rokom za otkazivanje ugovora sklopljenih van poslovnih prostorija koji ovde iznosi 8 radnih dana). Isto važi za rok za otkazivanje ugovora u vezi proizvoda s nedostatkom. Većina strožih odredbi predviđena je u vezi obaveza obaveštavanja i sadržaja pojedinih dokumenata koji se uručuju potrošaču (na primer, pisano obaveštenje u slučaju ugovora na daljinu, obavezan sadržaj garancije za proizvode, itd.). ZZP zabranjuje sklapanje ugovora na daljinu za prodaju lekova, medicinskih i veterinarskih proizvoda, kao i eksploziva, čime ide dalje od zahteva odgovarajuće Direktive. Osim toga Zakon predviđa mogućnost da se zahteva zamena prehrambenih proizvoda, što je više od prava predviđenih za potrošače po Direktivi 99/44.

IV. Ostala proširenja

Većina proširenja se može naći u normama vezanim za odgovornost za proizvode s nedostatkom.

V. Moguća kršenja prava EZ

Formalno gledano, pošto Makedonija nije država članica ne možemo da govorimo o kršenjima prava EZ. Međutim, treba reći da neke od odredbi Direktiva nisu implementirane u nacionalnom zakonodavstvu. Ma kako da je malo u odnosu na ceo opseg Direktiva, odsustvo određenih normi u nacionalnom zakonodavstvu mogao bi da ima negativan uticaj. Pošto se očekuju izmene i dopune Zakona o zaštiti potrošača, može se smatrati da će ova situacija biti prevaziđena.

VI. Sudska praksa

Nema podataka o sudskoj praksi u oblasti zaštite potrošača. Upravni sud je nadležan za predmete u kojima se osporavaju odluke relevantnog Inspektorata[40], kojima se trgovci kažnjavaju za pojedina kršenja svojih obaveza (prekršaji). U skladu sa Zakonom, Inspektorati su obavezni da pre pokretanja prekršajnog postupka ponude postupak vansudskog poravnanja, odnosno postupak mirenja. U nekim predmetima može da se primeni i medijacija.

[40] U skladu sa članom 130 Zakona o zaštiti potrošača, nadzor nad primenom Zakona vrši Ministarstvo privrede. Inspekcijski nadzor nad primenom odredbi Zakona sprovodi Državni tržišni inspektorat, Inspektorat za hranu i Odeljenje za veterinarsku državnu sanitarnu i zdravstvenu inspekciju i Državni inspektorat za zaštitu životne sredine, u skladu sa svojim nadležnostima i postupcima određenim zakonom.

Građanski sudovi nisu po sebi nadležni za zaštitu potrošača. Prema Zakonu o zaštiti potrošača potrošač može da traži odštetu za nastalu štetu, kao i da se ugovor proglasi nevažećim kada za to postoji osnov. Ovakvi postupci se onda vode u skladu sa Zakonom o obligacionim odnosima[41] i zakonima koji uređuju sudske postupke[42]. Nema podataka o broju i sadržaju ovakvih predmeta.

U toku su aktivnosti Organizacije za zaštitu potrošača koja u saradnji sa nadležnim državnim telima radi na izgradnji sistema nadzora nad radom relevantnih državnih organa u oblasti zaštite potrošača, tako da se može očekivati da će i na ovom planu biti uspostavljena odgovarajuća politika.

VII. Rezime

Usaglašavanje makedonskog zakonodavstva u oblasti zaštite potrošača je formalno počelo u okviru Sporazuma o stabilizaciji i pridruživanju između Evropskih zajednica i njihovih država članica i Republike Makedonije, potpisanog u aprilu 2001. godine, kojim se zemlja obavezala da usaglasi svoje zakonodavstvo i praksu u oblasti zaštite potrošača. Međutim, i pre toga je zakonodavstvo kojim se reguliše zaštita potrošača sadržano u Zakonu o zaštiti potrošača iz 2000. godine, i potom u njegovim izmenama i dopunama iz 2002. godine u određenoj meri bilo usaglašeno sa normama zaštite potrošača iz *acquis communautaire*. Naredni pomak je načinjen donošenjem novog Zakona o zaštiti potrošača u 2004. godini, i njegovih izmena i dopuna u 2007. i zatim 2008. godini. Određene važne norme se nalaze i u Zakonu o obligacionim odnosima (načelo zaštite potrošača, načelo poštenog poslovanja, jednakost strana i opšta pravila ugovaranja, garancije za proizvode i odgovornost za bezbednost proizvoda), koji je takođe bio izmenjen i dopunjen 2008. godine, da bi bolje zadovoljio zahteve zaštite potrošača.

Potrebne su dalje aktivnosti, koje su već u toku, kako bi se posebni zakoni u vezi zaštite potrošača poboljšali tako da se obezbedi puno usaglašavanje makedonskog zakonodavstva sa *acquis communautaire.*

[41] Zakon o obligacionim odnosima, *Sl.list RM* br.18/2001; 4/2002; 5/2003; 84/2008.; 81/2009. i 161/2009.

[42] Zakon o sudovima, *Sl.list RM* br.58/2006; 62/2006 i 35/2008*;* Zakon o parničnom postupku, *Sl.list RM* br. 79/2005; 110/2008. i 83/2009.

E. CRNA GORA – ZAKONODAVNE TEHNIKE *(Zvezdan Čađenović)*

Direktiva	Transponovana u	Datum transponovanja
Direktiva 85/577	Zakon o zaštiti potrošača Zakon o unutrašnjoj trgovini Uredba o uslovima za organizovanje javne i aukcijske prodaje robe	16.05.2007. 07.08.2008. 15.01.2010.
Direktiva 90/314	Zakon o obligacionim odnosima Zakon o turizmu	07.08.2008. 25.06.2002. (sa izmenama i dopunama)
Direktiva 93/13	Zakon o zaštiti potrošača	16. 05. 2007.
Direktiva 94/47 (od 23.02.2011: Direktiva 2008/122/EZ)	Zakon o zaštiti potrošača	16.05.2007.
Direktiva 97/7	Zakon o zaštiti potrošača Zakon o obligacionim odnosima	16.05.2007. 07.08.2008.
Direktiva 98/6	Zakon o zaštiti potrošača	16.05.2007.
Direktiva 98/27 (kodifikovana verzija: Direktiva 2009/22/EZ)	Zakon o zaštiti potrošača	16.05.2007.
Direktiva 99/44	Zakon o zaštiti potrošača Zakon o obligacionim odnosima	16.05.2007. 07.08.2008.
Direktiva 87/102/EEZ (od 12 05. 2010: Direktiva 2008/48/EZ)	Zakon o zaštiti potrošača Zakon o obligacionim odnosima Zakon o bankama Odluke Centralne banke CG	16. 05.2007. 07.08.2008. 11.03.2008.
Direktiva 85/374	Zakon o zaštiti potrošača Zakon o obligacionim odnosima	16.05.2007. 07.08.2008.
Direktiva 86/653	Zakon o obligacionim odnosima	07.08.2008.
Direktiva 99/34	Zakon o obligacionim odnosima	07.08.2008.
Direktiva 99/93	Zakon o elektronskom potpisu	1.10.2003. (sa izmenama i dopunama)
Direktiva 2000/35	Zakon o obligacionim odnosima	07.08.2008.
Direktiva 2000/31	Zakon o elektronskoj trgovini	29. 12.2004.
Direktiva 84/450	Zakon o zaštiti potrošača	16.05.2007.
Direktiva 02/65	Zakon o zaštiti potrošača	16.05.2007.
Direktiva 05/29	Zakon o zaštiti potrošača	16.05.2007.
Direktiva 87/357	Zakon o opštoj bezbjednosti proizvoda	11.08.2008.
Direktiva 97/5	Zakon o tekućim i kapitalnim poslovima sa inostranstvom	28.07.2005.
Direktiva 98/26	Zakon o tekućim i kapitalnim poslovima sa inostranstvom Zakon o platnom prometu u zemlji Zakon o hartijama od vrednosti	28.07.2005. 13.10.2008. 27.12.2000. (sa izmenama i dopunama)

Direktiva 2000/46	Zakon o platnom prometu u zemlji Odluke Centralne banke CG Zakon o instrumentima elektronskog novca	13.10.2008. Treba da se donese
Direktiva 01/95	Zakon o opštoj bezbjednosti proizvoda	11.08.2008.
Direktiva 02/22	Zakon o elektronskim komunikacijama	27.08.2008.
Direktiva 02/58	Zakon o elektronskim komunikacijama	27.08.2008.

I. Stanje zaštite potrošača na planu Direktiva 99/44 (prodaja robe široke potrošnje), 93/13 (nepravične odredbe), 97/7 (ugovori na daljinu) i 85/577 (van poslovnih prostorija) pre transponovanja u nacionalno pravo

Pre transponovanja četiri direktive, situacija je bila značajno drugačija u odnosu na sadašnju. Detaljnije norme u oblasti ovde razmatrana četiri akta *acquis*-a postojala su samo u pogledu direktive u vezi prodaje. Osim putem opšte primene bivšeg saveznog Zakona o zaštiti potrošača[43], ova oblast je uglavnom bila uređena opštim obligacionim pravom (Zakon o obligacionim odnosima[44]).

Ne može se reći isto i za ostale tri direktive, jer nisu postojale posebne norme, bar ne u značajnijoj meri.

Što se tiče nepravičnih odredbi, nekada je bivši savezni Zakon o trgovini, u poglavlju "Zaštita potrošača" sadržao odredbu o kontroli standardnih ugovora (i njihovih odredbi) i o nadležnostima državnih organa u pogledu odredbi kojima se narušava jednak položaj ugovornih strana[45]. Posle toga, savezni Zakon o zaštiti potrošača posvećuje dva člana pravilu transparentnosti[46] i pravilu da će se odredbe u tipskim ugovorima tumačiti u korist potrošač[47]. Paralelno s tim, opet se primenjivao opšti zakon o obligacijama, i mada nije sadržao norme kakve se mogu naći u Direktivi u vezi nepravičnih ugovornih odredbi, on je ipak imao svojevrstan pristup s čitavim nizom odredbi koje treba da se smatraju nepravičnim, i koje postoje čak i danas paralelno sa čisto potrošačkim zakonodavstvom.

Što se tiče prodaje van poslovnih prostorija, savezni Zakon o zaštiti potrošača iz 2002. godine sadržao je samo jedan član[48] koji se bavio ovim predmetom. Naime, on je posvetio tri stava prodaji van poslovnih prostorija i prodaji na daljinu, i dao potrošačima rok od 7 dana za odustajanje od obaveze, bez troškova i objašnjenja. Rok za odustajanje za robu računao se od dana prijema robe, a za usluge od dana zaključenja ugovora i, konačno, potrošač je bio dužan da plati troškove vraćanja robe.

II. Zakonodavne tehnike transponovanja

Situacija se danas značajno razlikuje. Crna Gora je podnela svoj zahtev za članstvo u EU 15.12.2008. godine i u skladu sa čl. 72. Sporazuma o stabilizaciji i pridruživanju između Evropskih zajednica i njenih država članica i Republike Crne Gore (SSP)[49] dužna je da obez-

[43] Zakon o zaštiti potrošača, *Sl.list SRJ* br. 37/02.

[44] Zakon o obligacionim odnosima, *Sl.list SFRJ br*. 29/78, 39/85, 57/89 i Sl.list FRJ br.31/93.

[45] Čl. 39. Zakona o trgovini, *Sl.list SRJ* br. 32/93, 50/93, 41/94, 29/96.

[46] Čl. 18. Zakona o zaštiti potrošača, *Sl.list SRJ* br. 37/02.

[47] Čl. 19. Zakona o zaštiti potrošača, *Sl.list SRJ* br. 37/02

[48] Čl. 21. Zakona o zaštiti potrošača, *Sl.list SRJ* br. 37/02

[49] Sporazum o stabilizaciji i pridruživanju između Evropskih zajednica i država članica, s jedne strane, i Republike Crne Gore, s druge strane, *Sl.list RCG,* br. 07/07

bedi da njeni važeći zakoni, kao i buduće zakonodavstvo, budu postepeno usaglašeni sa pravnom tekovinom Zajednice.

Tako je crnogorski Zakon o zaštiti potrošača[50] iz maja 2007. godine predstavljao veliki pomak u odnosu na ranije savezne zakone i pokušaje usklađivanja sa potrošačkim pravom EU[51]. Paralelno je došlo i do promena opšteg zakona o obligacijama. Crna Gora je usvojila svoj Zakon o obligacionim odnosima 2008. godine[52] u koji je, kao što će se videti u daljem tekstu, ugrađen ceo niz relevantnih odredbi Direktive u vezi prodaje koje se primenjuju paralelno[53] sa posebnim odredbama kojima se reguliše zaštita potrošača.

Od ostalih zakona, takođe treba pomenuti Zakon o unutrašnjoj trgovini[54] kojim se uređuje unutrašnja trgovina, uslovi i oblici vršenja trgovine. Osim što daje definiciju trgovca, proširivanjem ovog pojma, i definiše prodajne prostorije itd., on sadrži i značajne odredbe o distancionoj trgovini i trgovini izvan poslovnih prostorija.

III. Primena minimalne harmonizacije

Crna Gora je primenila jedan vidljiv broj klauzula minimalne harmonizacije, mada ne i sve ((npr. član 3.2) Direktive 85/577 daje državama članicama mogućnost da izuzmu ugovore čija vrednost nije veća od 60 ECU iz oblasti primene svog nacionalnog transpozicionog zakona, gde je Crna Gora za limit odredila tačno 60 EUR). S druge strane, po istoj Direktivi, Crna Gora se opredelila da potrošač ima pravo na otkaz ugovora u roku od sedam radnih dana, umesto samo sedam dana. Osim toga, predvidela je dodatne norme u slučaju odustajanja, koje su potpuno iste kao odredba čl. 6.4) Direktive 97/7 koja predviđa automatski prestanak i glavnog i kreditnog ugovora.

U slučaju Direktive 97/7 i čl. 6.4), crnogorski zakon ide dalje od Direktive jer je povoljniji za potrošače, oslobađajući ih ne samo od kazne prilikom raskida kreditnog ugovora, već i od obaveze naknade za štetu u vidu troškova, kamata, kazni ili sličnih troškova.

Crna Gora je kroz Zakon o zaštiti potrošača, zajedno sa zahtevima koji se nalaze u opštem zakonodavstvu o prodaji, predvidela dodatne vrste faktora zahteva saobraznosti od onih koji su predviđeni u Direktivi 99/44, kao što su: proizvodi u tačnoj meri i količini; pogodan materijal za pakovanje u skladu sa vrstom i svojstvima robe; propisan, odnosno ugovoren kvalitet, a ako kvalitet nije propisan, odnosno ugovoren – uobičajen kvalitet; način određivanja i obračuna cene, itd.

Konačno, na primer, veoma je značajan i način na koji je Crna Gora prišla klauzulama iz Dodatka Direktivi 93/13. Naime, odredbe iz 1. Dodatka se uvek smatraju nepravičnim (crna lista) dok je 2. Dodatak (izuzeci u odnosu na klauzule koje koriste pružaoci finansijskih usluga) transponovan samo u slučaju koji je određen pod br. 2 d. Oba pristupa obezbeđuju viši nivo zaštite potrošača (stavljanje odredbi na crnu listu, i netransponovanje 2. Dodatka).

IV. Ostala proširenja

Prilikom transponovanja čl. 1. Direktive 85/577 i određivanja situacija koje potpadaju pod njen domašaj, Crna Gora se opredelila da ih proširi, obuhvativši i javna mesta. Ova od-

[50] Zakon o zaštiti potrošača, *Sl.list RCG* br. 26/07

[51] Nacrt zakona je pripremljen uz podršku projekta PLAC ("Centar za politiku i pravne savete") koji finansira EU, a implementira konzorcijum na čelu sa GTZ International Service.

[52] Zakon o obligacionim odnosima, *Sl.list RCG* br. 47/08

[53] Čl. 6. Zakona o zaštiti potrošača predviđa da ukoliko nije drugačije predviđeno, na obligacione odnose će se primenjivati odredbe Zakona o obligacionim odnosima.

[54] Zakon o unutrašnjoj trgovini, *Sl.list RCG* br.49/08

redba izgleda obuhvata čitav niz mesta kao što su ulice, trgovi, parkovi, plaže, marine, restorani/kafići/diskoteke, železničke stanice, aerodromske zgrade, unutrašnji objekti lučkog saobraćaja, škole, itd. U pogledu tereta dokazivanja koji bi mogao da poveća nivo zaštite potrošača, a koji čak nije ni predmet odredbi Direktive, Crna Gora je upotrebila opštu normu vezanu za postojanje poštovanja rokova.

Crna Gora je transponovala odredbe Direktive 85/577 za izuzimanje određenih vrsta ugovora navedenih u čl. 3 stav 2). U tom kontekstu, za isporuku prehrambenih proizvoda, pića ili druge robe namenjene tekućoj upotrebi u domaćinstvu, Zakon o zaštiti potrošača ne zahteva da robu isporučuje "redovan dostavljač".[55]

Prilikom transponovanja čl. 5, 2. rečenice Direktive 93/13, pravilo *contra proferentem* se primenjuje ne samo na klauzule koje nisu napisane jednostavnim jezikom ("jasnim"), već i na nerazumljive klauzule ("razumljive potrošaču"), što predstavlja prednost u odnosu na Direktivu jer se može posmatrati kao sredstvo za postizanje višeg nivoa zaštite potrošača.

Pravila za implementiranje Direktive 99/44 se protežu izvan područja predviđenog u Direktivi. Tako se odredbe Zakona o zaštiti potrošača, osim na robu, primenjuju i na usluge, što je suprotno definiciji iz člana 1.2)(b) Direktive 99/44. Osim toga, pravila saobraznosti, kao i pravila obavezne garancije otvorena su ne samo za potrošače, već i za pravna lica, što znači za svako lice koje je strana u ugovoru. Ovo je posledica toga što su ove norme transponovane opštim obligacionim pravom, naime Zakonom o obligacionim odnosima.

V. Moguća kršenja prava EZ

Crna Gora nije ugradila čl. 1. stav 3) i 4) Direktive 85/577 koji nastoji da objasni da potrošač mora da ima mogućnost odustajanja od ponude date van poslovnih prostorija, bez obzira na to da li je ponuda bila obavezujuća ili neobavezujuća.

Na to što, slično nekolicini država članica EU, Crna Gora ne pominje reči "blagovremeno" ili njihovu varijaciju, prilikom transponovanja čl. 4.1), 5.1) i 7.2) Direktive 97/7 može se gledati kao na manje odstupanje od normi *acquis*-a. Ako se ima na umu da je svrha izostavljenih reči da se potrošaču obezbedi dovoljno vremena da razmisli o informaciji (npr. pre zaključivanja ugovora), može se ustvrditi da bi ovo izostavljanje moglo da suzi delotvornu zaštitu potrošača u praksi.

No, na isključivanje prava potrošača na odustajanje (ako nije drugačije dogovoreno) u pogledu određenih ugovora u situacijama prodaje van poslovnih prostorija, koje su iste kao one koje se nalaze u čl. 6. Direktive 97/7, ne bi trebalo gledati kao na manje odstupanje od prava EZ, jer se time može značajno smanjiti nivo zaštite potrošača.

Transponovanje člana 5, 2. rečenica Direktive 93/13 deluje problematično jer Direktiva traži da tumačenje bude ne samo "povoljno" za potrošača, već da bude "najpovoljnije" za potrošača.

VI. Sudska praksa

U Crnoj Gori još uvek nema vidljive sudske prakse koja bi se temeljila na odredbama Zakona o zaštiti potrošača[56]. Kao i u drugim zemljama učesnicama trenutno jedine odluke koje se mogu naći su one koje proističu iz sudske prakse koja se temelji na Zakonu o obligacionim odnosima.

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[55] Čl. 54. tačka (3) Zakona o zaštiti potrošača, *Sl.list RCG* br. 26/07

[56] U toku su postupci koji se tiču potrošačkih prava, ali se oni temelje na posebnim sektorskim zakonima. Najznačajniji predmet u Crnoj Gori je jedan predmet koji se tiče načina izračunavanja cene za električnu energiju koji je trenutno privukao pažnju javnosti.

S druge strane, Crna Gora je utrla put za razvoj značajnog modela vansudskog rešavanja sporova. U tom smislu, za manje od godinu i po njenog formalnog postojanja[57], zabeležena su četiri predmeta, a peti je u toku. Dva od ovih predmeta se vode kao rešena putem protokola o sporazumnom rešenju spora od strane Arbitražnog odbora za vansudsko rešavanje potrošačkih sporova.

Konačno, osim kroz redovne sudske i vansudske postupke, potrošač može da ostvari pristup pravdi i kroz upravni postupak.

VII. Rezime

Proces integracije u EU je svakako bio glavni pokretač harmonizacije nacionalnog zakonodavstva sa potrošačkim pravom EU. Naime, zaštita potrošača je jedna od prioritetnih oblasti harmonizacije kako je predviđeno u Naslovu VI "Usklađivanje propisa, primena prava i pravila konkurencije", član 72. u vezi člana 78. SSP.

U tom smislu, crnogorski Zakon o zaštiti potrošača donet sredinom 2007. godine predstavlja veliki korak napred u usklađivanju sa potrošačkim pravom EU. Dok su Direktive 85/577, 97/7, 93/13 transponovane pomenutim zakonom, Direktiva 99/44 je uglavnom transponovana novim crnogorskim Zakonom o obligacionim odnosima. Shodno tome, u crnogorskom Zakonu o zaštiti potrošača može se primetiti da je primenjen vidljiv broj klauzula minimalne harmonizacije, uz istovremeno opredeljivanje za proširivanje nekih normi čak izvan opsega predviđenog odnosnim Direktivama.

Iako još nema vidljive sudske prakse na temelju odredbi Zakona o zaštiti potrošača, trenutno se efikasno implementira veoma značajan model vansudskog rešavanja sporova.

Konačno, dalja harmonizacija je obavezna, i zato je Vlada CG za nju pripremila temeljne planove za 2010-2011. godinu; harmonizacija će takođe biti i predmet tehničke pomoći u okviru programske pomoći IPA 2009. (Projekat "Pristupanje unutrašnjem tržištu"[58]).

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[57] Dvadeset članova Arbitražnog odbora je izabrano i imenovano u decembru 2008. godine na mandat od 4 godine. Pošto je još uvek mlado, ovom telu bi pre svega koristilo jačanje svesti o njegovim razvijajućim aktivnostima, da bi ono moglo da se još više unapredi i da se u potpunosti iskoriste odredbe Zakona o zaštiti potrošača i Pravilnik o Arbitražnom odboru za rešavanje potrošačkih sporova, *Sl.list RCG,* br. 28/08.

[58] Implementira Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH.

F. SRBIJA – ZAKONODAVNA TEHNIKA *(Marija Karanikić Mirić)*

N.B. *Činjenica što pojedini zakoni u određenoj meri uređuju navedene oblasti ne znači da su ti zakoni u skladu sa datim direktivama.*

Direktiva	**Transponovana u**	**Datum transponovanja**
Direktiva 85/577	nije transponovana	-
Direktiva 90/314	nije transponovana [Određene norme u: 1) Zakonu o obligacionim odnosima (ZOO); 2) Zakonu o turizmu]	- [30.03.1978. (izmene i dopune 1985, 1989, 1993)] 13.05.2009.
Direktiva 93/13	Zakon o zaštiti potrošača (ZZP) (u ograničenoj meri) [Takođe relevantan: ZOO]	16.09.2005. [30.03.1978. (izmene i dopune 1985, 1989, 1993)]
Direktiva 94/47 (od 23.02.2011: Direktiva 2008/122/EZ)	ZZP	16.09.2005.
Direktiva 97/7	ZZP (u ograničenoj meri)	16.09.2005.
Direktiva 98/6	ZZP	16.09.2005.
Direktiva 98/27 (kodifikovana verzija: Direktiva 2009/22/EZ)	ZZP (samo dotiče pitanja nadzora nad tržištem i potrošačkih organizacija)	16.09.2005.
Direktiva 99/44	ZZP (u ograničenoj meri) [Takođe relevantan: ZOO]	16.09.2005. [30.03.1978.]
Direktiva 87/102/EEZ (od 12. 05. 2010: Direktiva 2008/48/EZ)	ZZP (u ograničenoj meri)	16.09.2005.
Direktiva 85/374	Zakon o odgovornosti proizvođača stvari sa nedostatkom	14.11.2005.
Direktiva 86/653	nije transponovana [Određene norme o trgovinskim zastupnicima: ZOO, čl. 790 *et seq.*]	- [30.03.1978.]
Direktiva 99/34	nije transponovana	-
Direktiva 99/93	Zakon o elektronskom potpisu Zakon o elektronskoj trgovini	21.12.2004. 29.5.2009.
Direktiva 2000/35	nije transponovana [Određena pravila o docnji: ZOO, čl. 277-279]	- [30.03.1978.]
Direktiva 2000/31	Zakon o elektronskoj trgovini; ZZP	29.5.2009. 16.09.2005.
Direktiva 84/450	ZZP (u ograničenoj meri)	16.09.2005.
Direktiva 2002/65	nije transponovana	-
Direktiva 2005/29	ZZP (u ograničenoj meri)	16.09.2005.
Direktiva 87/357	Zakon o opštoj bezbednosti proizvoda	29.5.2009.
Direktiva 97/5	nije transponovana [Neke norme o prekograničnim prenosima kreditnih sredstava u Zakonu o deviznom poslovanju]	- [14.7.2006.]

Direktiva 98/26	nije transponovana	-
Direktiva 2000/46	nije transponovana	-
Direktiva 2001/95	Zakon o opštoj bezbednosti proizvoda	29.5.2009.
Direktiva 2002/22	Zakon o telekomunikacijama; ZZP (u ograničenoj meri)	24.4.2003 (izmene i dopune 2006). 16.09.2005.
Direktiva 2002/58	Zakon o telekomunikacijama; Zakon o zaštiti podataka o ličnosti	24.4.2003. 23.10.2008.

I. *Zaštita potrošača pre usklađivanja srpskog prava sa direktivama 99/44 (o prodaji robe široke potrošnje), 93/13 (o nepravičnim odredbama u potrošačkim ugovorima), 97/7 (o ugovorima na daljinu) i 85/577 (o ugovorima zaključenim van poslovnih prostorija)*

Prvi okvirni (savezni) Zakon o zaštiti potrošača usvojen je 2002. godine.[59] Taj zakon zamenjen je važećim Zakonom o zaštiti potrošača Republike Srbije iz 2005. godine.[60]

U periodu pre 2002. godine u Srbiji nije bilo posebnog zakona kojim se uređuju pitanja zaštite potrošača. Na ugovorne odnose trgovaca i potrošača primenjivala su se opšta pravila ugovornog prava, koja su garantovala kupcima solidan nivo zaštite. Pored toga, u Zakonu o obligacionim odnosima iz 1978. godine nalazile su se (i još se nalaze) određena pravila o vanugovornoj odgovornosti proizvođača za štetu od stvari sa nedostatkom.

Nakon dva neuspela pokušaja da se važeći Zakon o zaštiti potrošača (ZZP) izmeni i dopuni, napuštena je ideja o njegovom poboljšanju i započet rad na nacrtu novog zakona, koji bi trebalo da uredi kako javnopravne, tako privatnopravne aspekte zaštite potrošača i da uskladi domaće pravo sa potrošačkim pravom Evropske unije.

II. *Zakonodavna tehnika usklađivanja domaćeg prava sa pravom EU*

ZZP iz 2005. godine koncipiran je tako da služi kao okvirni zakon u oblasti zaštite potrošača. Tim zakonom uređuje se zaštita ekonomskih interesa potrošača i, u određenom obimu, zaštita njihovog zdravlja i bezbednosti, i to na sasvim uopšten i površan način. Zakonodavac nije ni pokušao da uredi brojna pitanja koja su uređena evropskim potrošačkim direktivima.

Srbija od 2002. godine ima okvirni zakon u oblasti zaštite potrošača. Ipak, zakonodavna tehnika i dalje je segmentirana. Brojna pitanja koja se tiču prava i interesa potrošača uređena su drugim zakonima. Pored toga, Zakon o zaštiti potrošača iz 2005. nije se ni dotakao nekih osnovnih pitanja u oblasti zaštite potrošača.

ZZP iz 2005. godine sadrži 81 član. Ti članovi organizovani su u deset poglavlja, koja se odnose na: 1. osnovna prava potrošača; 2. zaštitu života, zdravlja i sigurnosti potrošača (uključujući norme o sigurnosti proizvoda i ambalaži, zaštiti maloletnih lica, obaveštenjima o kvalitetu vode i vazduha, genetski modifikovanim proizvodima); 3. zaštitu ekonomskih interesa potrošača (uključujući norme o ceni i isticanju cene, materijalu za pakovanje, izdavanju računa, garantnom listu, isporuci proizvoda, kupovini na daljinu, potrošačkom kreditu, kupovini na rate, rasprodaji proizvoda, prodaji proizvoda sa nedostatkom, reklamacijama); 4. posebne oblike zaštite potrošača u oblasti usluga (obaveze davaoca usluga, cene usluga, pro-

[59] Zakon o zaštiti potrošača, Službeni list SRJ br. 37/02.

[60] Zakon o zaštiti potrošača, Sl.list RS br. 79/2005, 16.09.2005.

izvodi i usluge od opšteg interesa, usluge u turizmu, vremenski podeljeno korišćenje nepokretnosti); 5. tipske ugovore; 6. informisanje i obrazovanje potrošača; 7. naknadu štete (uključujući norme o teretu dokazivanja, sudskoj zaštiti i vansudskom poravnanju); 8. nacionalni program i subjekte zaštite (uključujući norme o Nacionalnom programu zaštite potrošača, nadležnosti resornog ministarstva, Savetu za zaštitu potrošača, zaštiti potrošača u lokalnoj samoupravi, organizacijama potrošača i finansiranju njihovih aktivnosti); 9. nadzor nad tržištem; i 10. kaznene odredbe.

Važeći Zakon o zaštiti potrošača svedoči o neuspelom pokušaju zakonodavca da u srpsko pravo transponuje nekoliko potrošačkih direktiva: 93/13/EEZ o nepravičnim odredbama u potrošačkim ugovorima; 97/7/EZ o ugovorima na daljinu; 98/6/EZ o isticanju cena; 99/44/EZ o prodaji robe široke potrošnje i pratećim garancijama; 87/102/EEZ o potrošačkim kreditima; 84/450/EEZ o obmanjujućem oglašavanju; i 94/47/EZ o vremenski podeljenom korišćenju nepokretnosti. ZZP sadrži samo jedan član (član 27) koji se odnosi na elektronsku trgovinu.

Činjenica što ZZP u određenom obimu uređuju navedene oblasti ne znači da je taj zakon u skladu sa pobrojanim direktivama. Kada je reč o ugovornom potrošačkom pravu, ZZP samo u grubim crtama skicira neke osnovne principe evropskog ugovornog potrošačkog prava.

Zakon o odgovornosti proizvođača stvari sa nedostatkom (ZOPSN) iz 2005. godine predstavlja poseban pokušaj zakonodavca da u srpsko pravo transponuje Direktivu 85/374/EEZ o odgovornosti za štetu od proizvoda s nedostatkom.[61] ZOPSN je u velikoj meri usklađen sa Direktivom 85/374. Međutim, tu postoje određeni nedostaci. Na primer, ZOPSN izričito isključuje osnovne poljoprivredne proizvode (proizvode iz zemljišta, stočarstva i ribarstva) iz pojma proizvoda; zakonom propisano merilo za utvrđivanje kada jedan proizvod ima nedostatak razlikuju se od merila koje propisuje Direktiva; pojam uvoznih proizvoda ograničen je na proizvode namenjene prodaji, pa se zakonska pravila o odgovornosti proizvođača ne primenjuju na uvozne proizvode uvezene u svrhu davanja u zakup, lizing ili drugog stavljanja u promet.

Ne postoji namera da se izmenama i dopunama Zakona o obligacionim odnosima u srpsko pravo transponuju direktive koje spadaju u oblast potrošačkog ugovornog prava.[62] Vlada Republike Srbije formirala je 2006. godine Komisiju za izradu Građanskog zakonika.[63] Sudeći po dosadašnjim izveštajima te Komisije, ne postoji namera da se odredbama buduće građanske kodifikacije posebno urede potrošački ugovori.[64]

Ideje o načinu na koji bi trebalo poboljšati Zakon o obligacionim odnosima uglavnom su inspirisane *Skicom za zakonik o obligacijama i ugovorima*. Reč je o nacrtu zakona koji je napisao, i 1969. godine objavio, profesor Mihailo Konstantinović, osnivač Beogradske škole građanskog prava. Jugoslovenski Zakon o obligacionim odnosima rađen je po ugledu na Skicu. Vladina komisija razmatra usvajanje upravo onih pravila iz Skice koja je 1978. godine izostavio jugoslovenski zakonodavac. Pored toga, Komisija razmatra prihvatanje određenih re-

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[61] Zakon o odgovornosti proizvođača stvari sa nedostatkom, Sl. glasnik RS br. 101/05 od 14.11.2005.

[62] Vlada Republike Srbije. Komisija za izradu Građanskog zakonika, Rad na izradi Građanskog zakonika. Izveštaj Komisije sa otvorenim pitanjima, Pravni život, Tom III, 11/2007, 5–407. Komisija za izradu Građanskog zakonika, Prednacrt. Građanski zakonik Republike Srbije. Druga knjiga. Obligacioni odnosi, Vlada Republike Srbije, Beograd 2009, 1-451.

[63] Odluka o obrazovanju posebne Komisije radi kodifikacije građanskog prava i izrade Građanskog zakonika, Službeni glasnik RS 104/06, 110/06 i 85/09.

[64] Komisija za izradu Građanskog zakonika, *Prednacrt. Građanski zakonik Republike Srbije. Druga knjiga. Obligacioni odnosi*, Vlada Republike Srbije, Beograd 2009, 1-451.

šenja domaće sudske prakse i uporednog prava. Međutim, u izveštajima Komisije nema traga o uzimanju potrošačkih direktiva u obzir.

Ministarstvo trgovine i usluga Republike Srbije, kao resorno ministarstvo u oblasti zaštite potrošača, izradilo je novi Nacrt zakona o zaštiti potrošača (NZZP), koji je objavljen u junu mesecu 2010. godine i o kojem se vodi javna rasprava.[65] Taj nacrt trebalo bi da uđe u zakonodavnu proceduru u jesen 2010. godine.

NZZP predstavlja pokušaj da se u srpsko pravo transponuju brojni propisi EU u oblasti zaštite potrošača. Tu spadaju direktive 98/6/EC o isticanju cena; 85/577/EEC o prodaji van poslovnih prostorija; 97/7/EC o prodaji na daljinu; 2000/31/EC o elektronskoj trgovini; 93/13/EEC o nepravičnim ugovornim odredbama; 99/44/EC o prodaji robe široke potrošnje i pratećim garancijama; 2002/22/EC o univerzalnim uslugama u oblasti telekomunikacija; 2003/54/EC o električnoj energiji; 2003/55/EC o prirodnom gasu; 90/314/EEC o putnim aranžmanima; 2008/122/EC o vremenski podeljenom korišćenju nepokretnosti; 2008/48/EC o potrošačkim kreditima; 2002/65/EC o prodaji finansijskih usluga na daljinu; 2008/52/EC o medijaciji u građanskim i privrednim stvarima; 98/27/EC o sudskim zabranama; 2005/29/EC o nepoštenom poslovanju; Uredba 861/2007 o postupku u sporovima male vrednosti; i preporuke 98/257/EC i 2001/310/EC o načelima vansudskog rešavanja potrošačkih sporova.

Pored toga, prilikom izrade NZZP u obzir je uzet Predlog Direktive o pravima potrošača,[66] kao i pojedina rešenja uporednog prava.

Kao pravni osnov za usklađivanje srpskog ugovornog potrošačkog prava sa pravom Evropske unije može navesti član 78 Zakona o potvrđivanju Sporazuma o stabilizaciji i pridruživanju između evropskih zajednica i njihovih država članica, sa jedne strane, i Republike Srbije, sa druge strane, u kojem stoji:[67]

"Ugovorne strane će sarađivati kako bi usaglasile standarde zaštite potrošača u Srbiji sa standardima u Zajednici. Delotvorna zaštita potrošača je nužna kako bi se obezbedilo valjano funkcionisanje tržišne ekonomije i ta zaštita će zavisiti od razvoja administrativne infrastrukture radi obezbeđivanja nadzora nad tržištem i sprovođenja zakona u ovoj oblasti."

Ova saradnja obuhvata, između ostalog, obavezu Republike Srbije da nacionalne propise u oblasti zaštite potrošača uskladi sa odgovarajućim propisima Evropske unije.

III. Pozivanje na pravilo o minimalnoj harmonizaciji

Veoma je teško oceniti srpski ZZP iz 2005. godine iz ove perspektive, budući da taj zakon uopšte ne uređuje većinu pitanja koja su u Evropskoj uniji uređena pravilima materijalnog potrošačkog prava. Reč je o neuspelom pokušaju zakonodavca da u srpsko pravo transponuje nekoliko potrošačkih direktiva. ZZP sadrži malobrojna pravila o: garanciji, potrošačkom kreditu, ugovorima zaključenim na daljinu, dužnosti trgovca da obavesti potrošača o nekim pojedinostima, vremenski podeljenom korišćenju nepokretnosti, sudskim zabranama. Međutim, ta pravila su veoma uopštena i sasvim grubo skiciraju pojedine osnovne ideje *Acquis Communautaire* u oblasti potrošačkog ugovornog prava.

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[65] Nacrt zakona o zaštiti potrošača, Ministarstvo trgovine i usluga Republike Srbije, http://www.mtu.gov.rs/cms/?page_id=362, preuzeto 25.06.2010.

[66] Proposal for a Directive of the European Parliament and of the Council on consumer rights, COM(2008) 614/3.

[67] Čl. 78, Zakon o potvrđivanju Sporazuma o stabilizaciji i pridruživanju između Evropskih zajednica i njihovih država članica, sa jedne strane, i Republike Srbije, sa druge strane, Sl. glasnik RS 83/08.

IV. Ostala proširenja

Prema članu 2, stav 2 ZZP, pojam potrošača proširen je tako da obuhvati i privredna društva, preduzeća, druga pravna lica i preduzetnike, kada kupuju proizvode ili koriste usluge za sopstvene potrebe, to jest kada postupaju izvan svoje profesije, delatnosti ili zanata.

ZZP garantuje određeni stepen zaštite potrošača prilikom zaključenja i izvršavanja potrošačkih ugovora. U tom pogledu, ZZP se odnosi kako na prodaju robe, tako na pružanje usluga.

V. Moguća kršenja komunitarnog prava

Zakonodavac nije ni pokušao da Zakonom o zaštiti potrošača iz 2005. godine u srpsko pravo transponuje Direktivu 85/577/EEZ o ugovorima zaključenim van poslovnih prostorija.

Zakon o zaštiti potrošača predstavlja pokušaj da se u srpsko pravo preuzmu pravila iz nekoliko potrošačkih direktiva, među kojima su direktive 93/13/EEZ o nepravičnim odredbama u potrošačkim ugovorima; 97/7/EZ o ugovorima na daljinu; i 99/44/EZ o prodaji robe široke potrošnje i pratećim garancijama. Posebni izveštaji o preuzimanju svake od pomenutih direktiva sadrže podatke o nedostacima njihovog transponovanja u srpsko pravo.

VI. Sudska praksa

Nema sudskih odluka na osnovu postojećeg Zakona o zaštiti potrošača. U većini predmeta koji bi se mogli klasifikovati kao potrošački sporovi, sudovi primenjuju Zakon o obligacionim odnosima i posebne sektorske zakone.

VII. Rezime

Prvi okvirni (savezni) Zakon o zaštiti potrošača usvojen je 2002. godine. Taj zakon zamenjen je važećim Zakonom o zaštiti potrošača Republike Srbije iz 2005. godine. Nakon dva neuspela pokušaja da se ovaj potonji propis izmeni i dopuni, napuštena je ideja o njegovom poboljšanju i započet rad na nacrtu novog zakona, koji bi trebalo da uredi kako javnopravne, tako privatnopravne aspekte zaštite potrošača i da uskladi domaće pravo sa potrošačkim pravom Evropske unije. Ne postoji namera da se direktive koje spadaju u oblast potrošačkog ugovornog prava transponuju u srpsko pravo izmenama i dopunama srpskog Zakona o obligacionim odnosima.

ZZP iz 2005. godine koncipiran je tako da služi kao okvirni zakon u oblasti zaštite potrošača. Tim zakonom uređuje se zaštita ekonomskih interesa potrošača i, u određenom obimu, zaštita njihovog zdravlja i bezbednosti, i to na sasvim uopšten i površan način. Zakonodavac nije ni pokušao da uredi brojna pitanja koja su uređena evropskim potrošačkim direktivama.

Važeći Zakon o zaštiti potrošača svedoči o neuspelom pokušaju zakonodavca da u srpsko pravo transponuje nekoliko potrošačkih direktiva: 93/13/EEZ; 97/7/EZ; 98/6/EZ; 99/44/EZ; 87/102/EEZ; 84/450/EEZ; i 94/47/EZ. Činjenica što ZZP u određenom obimu uređuju navedene oblasti ne znači da je taj zakon u skladu sa pobrojanim direktivama. Kada je reč o ugovornom potrošačkom pravu, ZZP samo u grubim crtama skicira neke osnovne principe evropskog ugovornog potrošačkog prava.

Ministarstvo trgovine i usluga Republike Srbije, kao resorno ministarstvo u oblasti zaštite potrošača, izradilo je novi Nacrt zakona o zaštiti potrošača (NZZP), koji je objavljen u junu mesecu 2010. godine i o kojem se vodi javna rasprava. Taj nacrt trebalo bi da uđe u zakonodavnu proceduru u jesen 2010. godine. NZZP predstavlja pokušaj da se u srpsko pravo transponuju brojni propisi EU u oblasti zaštite potrošača.

2. deo: TRANSPONOVANJE POJEDINIH DIREKTIVA[68]

A. DIREKTIVA O PRODAJI VAN POSLOVNIH PROSTORIJA (85/577)

Kordinatori: *Emilia Čikara, Zlatan Meškić*

I. Zakonodavstvo u državama članicama pre transponovanja Direktive o prodaji van poslovnih prostorija

Pre transponovanja Direktive 85/577 u njihove relevantne Zakone o zaštiti potrošača države učesnice nisu imale koherentno zakonodavstvo koje se odnosi na zaštitu potrošača u slučaju prodaje van poslovnih prostorija. U nekim zemljama je nivo ovakve zaštite bio vrlo nizak (npr. Hrvatska, Srbija, Crna Gora i Albanija) a u drugim ona nije ni postojala (npr. Bosna i Hercegovina, Makedonija). Tako, na primer, prodaja od vrata do vrata se pominjala u čl. 16. starog hrvatskog Zakona o trgovini[69] koji je propisivao da ugovore o prodaji na vratima stana mogu da sklapaju samo pravne osobe koje su registrovane za pružanje takve delatnosti. Jugoslovenski savezni Zakon o zaštiti potrošača[70] predviđa u članu 21.[71], isto kao i albanski Građanski zakonik u članu 672., 2. alineja[72], pravo na odustajanje. Dakle, u većini zemalja učesnica primenjivane su samo opšte odredbe koje se tiču ugovora i ugovorne odgovornosti.

Transponovanje Direktive 85/577 je u većini zemalja bilo praćeno usvajanjem novih zakona. Hrvatska je po prvi put regulisala prodaju van poslovnih prostorija u posebnom poglavlju Zakona o zaštiti potrošača iz 2003. godine,[73] koje je potom bilo poboljšano izmenama i dopunama, da bi sada ovu oblast regulisao novi Zakon o zaštiti potrošača iz 2007. godine.[74] Isti slučaj je bio u Bosni i Hercegovini, gde je Direktiva 85/577 bila prvo transponovana u posebno poglavlje Zakona o zaštiti potrošača iz 2002. godine,[75] a potom je kasnije usvojen nov

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[68] Sledeće izlaganje je bazirano na šest nacionalnih izveštaja koje su pripremili Nada Dollani (Albanija), Zlatan Meškić (Bosna i Hercegovina), Emilia Čikara (Hrvatska), Jadranka Dabović-Anastasovska, Nenad Gavrilović, Neda Zdraveva (Makedonija), Zvezdan Čadjenović (Crna Gora) i Marija Karanikić Mirić (Srbija). Zbog ograničenog prostora, ovi nacionalni izveštaji ne mogu da se ovde objave u celosti.

[69] Zakon o trgovini, *NN* br. 11/96, 30/99, 75/99, 76/99, 62/01, 109/01.

[70] Savezni Zakon o zaštiti potrošača, *Sl.list SRJ* br. 37/02.

[71] Posvetio je tri stava prodaji van poslovnih prostorija (i na daljinu) i predvideo rok od 7 dana za poništavanje posledica stupanja u ugovorni odnos, bez troškova i objašnjenja; rok za vraćanje robe se računao od dana njenog prijema, a za usluge od dana zaključenja ugovora, i konačno, potrošač je bio dužan da plati troškove vraćanja robe.

[72] Ovaj član reguliše pravo na odustajanje od ugovora sklopljenog na radnom mestu ili u domu jedne od strana, u toku putovanja ili u okolnostima koje nisu uobičajene za sklapanje ugovora, u roku od sedam dana od njegovog zaključenja. Videti Građanski zakonik, *Sl.list RAl* br. 11/1994.

[73] Glava 6 (čl. 29–34) "Ugovori sklopljeni izvan poslovnih prostorija trgovca", *NN* br. 96/03.

[74] Glava VI (čl. 30–35) Zakon o zaštiti potrošača, *NN* br. 79/07, 125/07, 79/09, 89/09, 133/09.

[75] Glava XI (čl. 48-49) Zakon o zaštiti potrošača, *Sl.glasnik BiH* br. 17/02.

Zakon o zaštiti potrošača 2006. godine.[76] Isti scenario se ponovio i u albanskom zakonu, gde je Direktiva bila prvo transponovana u posebno poglavlje Zakona o zaštiti potrošača iz 2003. godine,[77] koga je zamenio nov Zakon o zaštiti potrošača[78] donet 2008. godine. U Makedoniji je ugovore zaključene van poslovnih prostorija regulisao Zakon o zaštiti potrošača iz 2000. godine[79], a zatim su propisi poboljšani u novom Zakonu o zaštiti potrošača koji je donet 2004. godine[80]. Crnogorski Zakon o zaštiti potrošača iz 2007[81] sadrži posebno poglavlje koje transponuje Direktivu 85/77, dok u srpskom zakonu nema odgovarajućeg transponovanja.[82] Međutim, srpski zakonodavac trenutno radi na nacrtu predloga za novi zakon o zaštiti potrošača (Nacrt predloga),[83] kojim se Direktiva 85/577 transponuje u Poglavlju III o ugovorima na daljinu i ugovorima sklopljenim van poslovnih prostorija.

II. Područje primene

U sledećem tekstu će biti dat kratak prikaz transponovanja u nacionalno pravo država učesnica člana 1. i 3. Direktive 85/577 (opšte područje primene i izuzeci), kao i člana 2. Direktive (lično područje primene). Neke od država članica, kao npr. Hrvatska, sledile su istu strukturu kakvu ima Direktiva, i prvo propisivale opšte područje primene odredbi u vezi sa prodajom van poslovnih prostorija (čl. 30. hrvatskog Zakona o zaštiti potrošača), a zatim posebno regulisale izuzetke u drugoj odredbi (čl. 31. hrvatskog Zakona o zaštiti potrošača).

1. Lica pokrivena Direktivom

U svom članu 1 (1) Direktiva 85/577 određuje da se primenjuje na "ugovore prema kojima trgovac isporučuje robu ili pruža usluge potrošaču". Zakoni koji regulišu zaštitu potrošača u većini država učesnica sadrže opštu definiciju "potrošača" i "trgovca" datu u opštim odredbama koje definišu lično područje primene za ceo zakon (npr. čl. 1 (3) i (5) bosansko-hercegovačkog Zakona o zaštiti potrošača i čl. 3 (1) hrvatskog Zakona o zaštiti potrošača).

a. Potrošač

Dok čl. 2. Direktive 85/577 definiše "potrošača" kao "fizičko lice koje (…) deluje u svrhu za koju se može smatrati da je van njegove delatnosti ili profesije, čl. 3. (1) alineja 4. hrvatskog Zakona o zaštiti potrošača definiše potrošača kao svaku fizičku osobu „koja sklapa pravni posao ili djeluje na tržištu u svrhe koje nisu namijenjene njegovoj poslovnoj djelatnosti niti obavljanju djelatnosti slobodnog zanimanja". Bosansko-hercegovački Zakon o zaštiti potrošača u svom čl. 1.3) propisuje užu definiciju, po kojoj je "potrošač svako fizičko lice koje kupuje, stiče ili koristi proizvode ili usluge za svoje lične potrebe i za potrebe svog domaćinstva". Ograničavanjem delovanja potrošača na kupovinu, sticanje i korišćenje proizvoda i

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[76] Glava IX (čl. 39-41) Zakon o zaštiti potrošača, *Sl.glasnik BiH* br. 25/06.

[77] Zakon o zaštiti potrošača, *Sl.list RAl* br. 84/03.

[78] Deo VI, Glava I (čl. 34-35) Zakona o zaštiti potrošača, *Sl.list RAl* br. 61/08.

[79] Zakon o zaštiti potrošača, *Sl.list RM* br. 63/2000.

[80] Zakon o zaštiti potrošača, *Sl.list RM* br. 38/2004.

[81] Zakon o zaštiti potrošača, *Sl.list CG* br. 26/07.

[82] Čl. 25. srpskog Zakona o zaštiti potrošača (*Sl.list RS* br. 79/05), koji nosi naslov "Kupovina na osnovu uzorka i modela", samo poimence navodi ugovore zaključene van poslovnih prostorija prodavca. Međutim, ovaj član nastoji da potvrdi čl. 538 Zakona o obligacionim odnosima (Sl.list SFRJ br. 29/78), u vezi odgovornosti prodavca za nesaobraznost u slučaju prodaje na osnovu uzoraka i modela.

[83] Nacrt predloga za novi Zakon o zaštiti potrošača (Nacrt predloga), koji je izradilo Ministarstvo trgovine i usluga Republike Srbije.

usluga, i njegovim dodatnim sužavanjem na svrhu njegovih "ličnih potreba i potreba njegovog domaćinstva", kao uslova koji moraju biti kumulativno ispunjeni, područje primene ove definicije je vrlo ograničeno.[84] Slična ali ne ista definicija potrošača nalazi se u čl. 2.1) i 2) srpskog Zakona o zaštiti potrošača, koji ga definiše kao fizičko lice koje kupuje proizvode ili usluge za sopstvene potrebe ili za potrebe svog domaćinstva.[85] U izvesnoj meri šira definicija propisana je u čl. 1., alineja 8 crnogorskog Zakona o zaštiti potrošača, koji definiše potrošača kao fizičko lice koje kupuje, poručuje, prima, koristi robe ili usluge, uključujući i javne usluge, u neposlovne, odnosno neprofesionalne svrhe ili kome je upućena ponuda za robu ili uslugu. Druga sasvim uska definicija u poređenju sa čl. 2. Direktive 85/577 uneta je u čl. 4.1) makedonskog Zakona o zaštiti potrošača koja kaže da je potrošač svako fizičko ili pravno lice koje kupuje proizvode ili koristi usluge za neposrednu sopstvenu potrošnju za ciljeve koji nisu namenjeni vršenju njegovog zanimanja ili drugih poslovnih delatnosti. Veoma širok pojam potrošača nalazi se u čl. 3. (6) albanskog Zakona o zaštiti potrošača, koji "potrošača" definiše kao svako fizičko lice koje deluje u svrhe koje nisu povezane sa trgovinom, poslovanjem ili obavljanjem svoje profesije. U smislu ovog Zakona, i neprofitne organizacije se mogu smatrati potrošačima. Može se zaključiti da je lični element definisanja potrošača (fizičko lice) zajednički svim zakonima o zaštiti potrošača u zemljama učesnicama, ali se pri tom funkcionalni element (delovanje za svrhe za koje se može smatrati da su van njegove poslovne delatnosti ili profesije) značajno razlikuje.

b. Trgovac

Prema čl. 2. Direktive 85/577 "trgovac" označava fizičko ili pravno lice koje "u datom pravnom poslu, nastupa u okviru svoje privredne ili profesionalne delatnosti, kao i svako lice koje deluje u ime ili za račun trgovca". Države učesnice su transponovale ovu definiciju iz Direktive uz određene izmene. Član 3., stav 1., alineja 8. hrvatskog Zakona o zaštiti potrošača definiše "trgovca" kao bilo koju osobu „koja sklapa pravni posao ili djeluje na tržištu u okviru svoje poslovne djelatnosti ili u okviru obavljanja djelatnosti slobodnog zanimanja". Shodno čl. 3. stav 2., u smislu Glave VI hrvatskog Zakona o zaštiti potrošača, trgovcem se smatra i osoba koja nastupa u ime ili za račun trgovca. Ova definicija obuhvata fizička i pravna lica, a ova druga uključuju i pravna lica iz oblasti javnog prava i neprofitne organizacije. Druga široka definicija pojma "trgovac" propisana je u čl. 3 (14) albanskog Zakona o zaštiti potrošača, i ona označava svako fizičko ili pravno lice koje deluje za svrhe povezane sa svojom poslovnom delatnošću, strukom, zanimanjem, poslom, zanatom ili slobodnom profesijom i svakog ko deluje u ime i za račun trgovca. Bosansko-hercegovački Zakon o zaštiti potrošača definiše trgovca u čl. 1.5) kao "svako lice koje direktno ili kao posrednik među drugim licima prodaje proizvode ili pruža usluge potrošaču". Zbog ograničenja na "prodaju proizvoda i pružanja usluga" lično polje primene je vrlo suženo.[86] Po čl. 2.3) srpskog Zakona o zaštiti potro-

[84] Međutim, čl. 15 novog nacrta Zakona o obligacionim odnosima Bosne i Hercegovine iz 2010. godine definiše potrošača kao "svako fizičko lice koje zaključuje neki pravni posao u svrhu koja ne spada u njegovu privrednu ili samostalnu profesionalnu djelatnost". Ovo je u principu široka definicija, utoliko što uključuje pravna lica, a s druge strane isključuje predugovorne situacije, jer se odnosi samo na "zaključenje pravnih poslova".

[85] Srpski Nacrt predloga u Glavi I definiše potrošača kao fizičko lice koje u pravnim poslovima na koje se odnosi ovaj zakon, postupa pretežno izvan svoje poslovne delatnosti, profesije ili zanata.

[86] Čl. 14 novog nacrta Zakona o obligacionim odnosima Bosne i Hercegovine iz 2010. godine govori o privredniku ("business person"), koga definiše kao "fizičko ili pravno lice koje u vreme zaključivanja pravnog posla deluje u vršenju svoje privredne ili samostalne profesionalne delatnosti". S jedne strane "delovanje u vršenju" nije uspešna formulacija ni na bosanskom jeziku, a s druge, isto tako, ova definicija isključuje predugovorne situacije, suprotno direktivama za zaštitu potrošača.

šača, trgovac je privredno društvo, preduzeće, drugo pravno lice i preduzetnik, koji prodaje proizvode ili pruža usluge potrošaču.[87] Član 2., alineja 11 crnogorskog Zakona o zaštiti potrošača definiše "trgovca" kao lice koje prodaje robu ili pruža usluge potrošačima. U pogledu proširenja definicije iz Direktive i na one koji deluju u ime ili za račun trgovca, crnogorski Zakon o zaštiti trgovaca ne kaže ništa.[88] Po čl. 4.1), alineja 2 makedonskog Zakona o zaštiti potrošača trgovcem se smatra svako fizičko ili pravno lice koje u vršenju svoje delatnosti neposredno zadovoljava potrebe građana za proizvodima i uslugama. Pošto ova definicija ne uključuje zastupnike, primenjuju se opšte norme o zastupnicima regulisane u makedonskom Zakonu o obligacionim odnosima[89].

2. Situacije koje spadaju u područje primene Direktive

Područje primene *ratione materiae* regulisano je u čl. 1 (1) Direktive 85/577, i obuhvata "ugovore prema kojima trgovac isporučuje robu ili pruža usluge potrošaču i koji su zaključeni: tokom putovanja koje je organizovao trgovac van svog poslovnog prostora, ili tokom posete od strane trgovca (i) domu tog potrošača ili domu drugog potrošača, ili (ii) radnom mestu potrošača, ukoliko do posete nije došlo na izričit zahtev potrošača".

a. Opšta primena

Većina država učesnica je implementirala istu vrstu ugovora i situacija kao što su ove koje spadaju u područje primene Direktive 85/577. Međutim, ponegde se koriste nešto drugačije formulacije. Isto tako, postoje značajne razlike na području primene odredbi u vezi prodaje van poslovnih prostorija nekih država učesnica. Tako na primer, po crnogorskom zakonu ugovori zaključeni tokom putovanja nisu zaštićeni transpozicionim zakonom. Osim toga, makedonski Zakon o zaštiti potrošača isključuje ugovore za pružanje usluga iz područja primene odredbi u vezi prodaje van poslovnih prostorija.[90] S druge strane, u nekim slučajevima potrošačko zakonodavstvo država učesnica proširuje područje primene svojih odredbi u vezi prodaje van poslovnih prostorija, i time ide dalje od odredbi Direktive. Npr. odredbe u vezi prodaje van poslovnih prostorija hrvatskog Zakona o zaštiti potrošača primenjuju se i ako je potrošač ponudio zaključenje ugovora u predmetnim situacijama. Konačno, nacionalni sudovi u državama učesnicima, iako još nisu u državama članicama EU, bi osim Direktive, trebalo da poštuju i odluke ESP u predmetu *Travel VAC*, C-423/97 i *Crailsheimer Volksbank*, C-229/04.[91]

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[87] Srpski Nacrt predloga definiše trgovca kao pravno ili fizičko lice koje, u pravnim odnosima na koje se odnosi ovaj zakon, postupa u okviru svoje poslovne delatnosti, profesije ili zanata, kao i svako koje deluje u ime i za račun trgovca.

[88] Ipak, čl. 17.2) Zakona o unutrašnjoj trgovini (*Sl.list RCG* br. 49/08) koji reguliše "trgovinu van poslovnih prostorija", određuje da distancionu prodaju trgovac može obavljati neposredno ili preko lica kojima izdaje ovlašćenje za prodaju robe potrošačima. Čl. 17.3) dalje određuje da prodaju van poslovnih prostorija mogu obavljati trgovci registrovani za ovaj oblik trgovine, i ovaj Zakon dodatno obavezuje Ministarstvo privrede Crne Gore da donese podzakonska akta o vrstama robe i načinu za obavljanje trgovine van poslovnih prostorija.

[89] Zakon o obligacionim odnosima, *Sl.list RM* br. 18/2001

[90] Član 104. Zakona o zaštiti potrošača, *Sl.list RM* br. 38/2004

[91] Presuda ESP od 22.04.1999, u predmetu C-423/97 – *Travel Vac SL protiv Manuel José Antelm Sanchi* [1999] ECR I-02195; Presuda ESP od 25.11.2005., u predmetu C-229/04 - *Crailsheimer Volksbank eG protiv Klaus Conrads, Frank Schulzke and Petra Schulzke-Lösche, Joachim Nitschke* [2005] ECR I-9273.

aa. Proširenje spiska situacija prodaje van poslovnih prostorija

Dok su neke države učesnice proširile listu situacija u kojima su potrošači zaštićeni, druge su je suzile. Lista situacija prodaje van poslovnih prostorija data u čl. 30 (1) hrvatskog Zakona o zaštiti potrošača odgovara odredbama Direktive predviđajući primenu odredbi u vezi prodaje van poslovnih prostorija na "ugovore koji su sklopljeni u vrijeme izleta koji je organizirao trgovac izvan njegovih poslovnih prostorija, u vrijeme posjeta trgovca domu potrošača, domu drugog potrošača ili radnome mjestu potrošača". Član 39.1) bosansko-hercegovačkog Zakona o zaštiti potrošača transponuje čl. 1.1) Direktive 85/577 gotovo istim rečima, uz neznatnu razliku u odnosu na formulaciju iz Direktive koja glasi "tokom putovanja (izleta) koje je organizovao trgovac van svog poslovnog prostora", tako da u čl. 39.1) bosansko-hercegovačkog Zakona o zaštiti potrošača ona glasi: "u toku poslovnog puta trgovca van njegovih poslovnih prostorija". Međutim, značajno proširenje zaštite potrošača ostvaruje se kroz uključivanje "ugovora zaključenih kao rezultat neočekivanog pristupa trgovca potrošaču u sredstvima javnog prijevoza ili na bilo kom drugom javnom mjestu." Makedonski Zakon o zaštiti potrošača u svom čl. 104. obuhvata ugovore zaključene: u domu potrošača; u domu nekog drugog potrošača ili na radnom mestu potrošača, kada poseta trgovca nije bila organizovana na izričit poziv potrošača; za vreme putovanja ili ekskurzija organizovanih od strane trgovca ili u njegovo ime; i u prodajnim salonima, na sajmovima i izložbama, osim kada se ukupna cena proizvoda ili usluga naplaćuje na licu mesta, ili ako cena nadmašuje 2.500 EUR u denarskoj protiv-vrednosti. Poslednjom rečenicom se proširuje lista situacija prodaja van poslovnih prostorija iz Direktive. Član 34. (1) tačka a) i b) albanskog Zakona o zaštiti potrošača odgovara čl. 1 (1) Direktive 85/577 i uključuje ugovore zaključene u toku putovanja organizovanih od strane trgovca van njegovih poslovnih prostorija, ili tokom posete trgovca domu potrošača ili radnom mestu potrošača, kada takva poseta nije organizovana na izričit zahtev potrošača. Crnogorski Zakon o zaštiti potrošača proširuje listu situacija prodaje van poslovnih prostorija obuhvatanjem ugovora zaključenih na javnim mestima, odnosno mestima koja su svima dostupna kao što su ulice, trgovi, parkovi, plaže, marine i javne površine.[92] Iako srpski Zakon o zaštiti potrošača ne transponuje Direktivu 85/577, odredbe nacrta predloga za novi zakon o zaštiti potrošača uključuju ugovore zaključene van poslovnih prostorija uz istovremeno fizičko prisustvo trgovca i potrošača (a), kao i ugovore o prodaji robe ili pružanju usluga o čijem zaključenju su vođeni pregovori ili za čije zaključenje je potrošač učinio ponudu izvan poslovnih prostorija trgovca uz istovremeno fizičko prisustvo trgovca i potrošača (b).

bb. Roba i usluge

Neke države učesnice u svojim transpozicionim zakonima upućuju na robu i usluge bez njihovog daljeg objašnjenja. Na primer, čl. 39.1) bosansko-hercegovačkog Zakona o zaštiti potrošača bukvalno prenosi formulaciju iz čl. 1 (1) Direktive 85/577, koja navodi "ugovore po osnovu kojih trgovac prodaje robu ili usluge potrošaču". Srpski nacrt predloga za novi zakon o zaštiti potrošača govori o ugovorima o prodaji ili uslugama. Međutim, ima i nekih izuzetaka kao u čl. 30. (1) hrvatskog Zakona o zaštiti potrošača, koji ide dalje od nivoa zaštite potrošača iz Direktive time što propisuje da se "odredbe ove glave Zakona primjenjuju na ugovore". U nekim odredbama u vezi prodaje van poslovnih prostorija koristi se pojam "proizvod", koji se u čl. 3. (1) alineja 4. definiše kao svaka roba ili usluga, uključujući nekretni-

[92] Međutim, on ne pokriva posebne načine redovne prodaje na "drugim prodajnim mestima" (npr. štandovi, pokretne prodavnice, otvorene ili zatvorene tržnice, sajmove, izložbe, itd.) u skladu sa čl. 15 Zakona o unutrašnjoj trgovini (*Sl.list RCG* br. 49/08).

ne, prava i obveze. Isto tako, crnogorski Zakon o zaštiti potrošača, osim što govori o robi i uslugama, koristi i pojam "proizvod", koji se definiše kao "roba ili usluga koja može biti u prometu uključujući i javne usluge". Na sličan način albanski Zakon o zaštiti potrošača, koji govori samo o "ugovorima", daje i definicije "potrošačke robe" i "usluga" u svojim opštim odredbama. U skladu sa čl. 3. (7), "'potrošačka roba', u daljem tekstu: 'roba' (uključujući robu upotrebljenu u kontekstu pružanja usluga) znači svaku pokretnu ili nepokretnu stvar namenjenu potrošačima ili koju će verovatno koristiti potrošači, pod razumno predvidivim uslovima, koju će koristiti potrošači čak iako nije bila njima namenjena, a pruža se ili stavlja na raspolaganje, bilo sa ili bez naknade, u toku poslovne delatnosti, bilo kao nova, korišćena ili popravljena". "Usluga" je usluga određena za nuđenje potrošaču, na bilo koji od načina predviđenih albanskim Građanskim zakonikom.[93] Makedonski Zakon o zaštiti potrošača u svom čl. 104. govori samo o ugovorima o prodaji, i time moguće isključuje ugovore o pružanju usluga iz svog područja primene. Međutim, u nekim drugim relevantnim odredbama u vezi prodaje van poslovnih prostorija, on govori i o proizvodima i uslugama, kao što je slučaj i u čl. 105. Ovaj Zakon takođe definiše robu ili proizvode kao bilo koju robu ili predmet bez obzira na stepen njihove obrade, namenjen za ponuda potrošačima; a usluga je bilo koja delatnost koja je namenjena za ponudu potrošačima.

cc. Ponude i/ili jednostrani pravni akti

Stavovi 3) i 4) člana 1. Direktive 85/577 koji daju mogućnost potrošaču da odustane od ponude date u situaciji prodaje van prodajnih prostorija, bez obzira da li je ponuda obavezujuća ili ne, transponovani su gotovo doslovce u čl. 30 (2) hrvatskog Zakona o zaštiti potrošača. Isto važi za albanski Zakon o zaštiti potrošača, po kome se, shodno njegovom čl. 34. (1), odredbe u vezi prodaje van poslovnih prostorija primenjuju i na situacije kada je ponudu dao potrošač, bez obzira da li je potrošač vezan sopstvenom ponudom. Transpozicioni zakoni Bosne i Hercegovine, Crne Gore i Makedonije nemaju takve odredbe. Tako se primenjuju samo opšte norme o obavezujućem delovanju ponude predviđene u njihovim obligacionim zakonima.

dd. Ugovori o kojima je pregovarano u situaciji van poslovnih prostorija a koji su zaključeni kasnije

Nijedan od transpozicionih zakona ni u jednoj od država učesnica ne sadrži posebne odredbe o ugovorima o kojima je pregovarano u situaciji van poslovnih prostorija, a koji su zaključeni kasnije.

ee. Posete na zahtev potrošača

Što se tiče čl. 1. (2) Direktive 85/577 koji se bavi posetama na zahtev potrošača, u transpozicionim zakonima se mogu naći različite odredbe. Na primer, čl. 39.1) bosansko-hercegovačkog Zakona o zaštiti potrošača primenjuje se samo na netražene posete i on ne prenosi čl. 1.2) Direktive. Nivo zaštite potrošača je viši u hrvatskom Zakonu o zaštiti potrošača, koji ne prenosi čl. 1 (2) Direktive 85/577, ali ni ne implementira uslov iz čl. 1 (1) Direktive 85/577, da do posete nije došlo na izričit zahtev potrošača. U skladu sa čl. 106.1), alineja 1. makedonskog Zakona o zaštiti potrošača, ugovori zaključeni van poslovnih prostorija po prethodnoj poseti potrošača isključuju se iz oblasti primene. Međutim, norme u vezi prodaje van poslovnih prostorija se primenjuju ako se potrošač saglasio sa posetom koju mu je trgovac ponudio preko telefona. Član 48.3) crnogorskog Zakona o zaštiti potrošača ugrađuje ovu odredbu Direktive gotovo doslovce, predviđajući primenu zaštitnih odredbi na "poset trgovca na izričit

[93] Član 3. (13) Zakona o zaštiti potrošača, *Sl.list RAl* br. 61/08.

zahtjev potrošača, kada je ugovor zaključen za proizvod za koji potrošač nije znao ili nije mogao znati da se nalazi u ponudi trgovca u okviru njegove djelatnosti". Odredbe o prodaji van poslovnih prostorija albanskog Zakona o zaštiti potrošača ne primenjuju se na situacije kada je do posete došlo na zahtev potrošača, s izuzetkom ugovora za prodaju druge robe ili pružanje drugih usluga od onih zbog koje je potrošač tražio posetu trgovca, pod uslovom da onda kada je tražio posetu potrošač nije znao, ili razumno nije mogao da zna da prodaja te druge robe ili usluga čini sastavni deo trgovčevih poslovnih ili profesionalnih aktivnosti.

b. Izuzeci predviđeni u Direktivi u vezi prodaje van poslovnih prostorija

aa. čl. 3. stav 1. (Ugovori vrednosti ispod 60 ECU)

Hrvatski, makedonski i bosansko-hercegovački zakonodavac nisu preneli mogućnost datu u čl. 3.1) Direktive 85/577 po kome se odredbe o ugovorima sklopljenim van poslovnih prostorija ne primenjuju na ugovore vrednosti ispod 60 EKU. Crna Gora je upotrebila ovu mogućnost i odredila limit na tačno 60 evra. Član 34.1) albanskog Zakona o zaštiti potrošača određuje da se odredbe u vezi prodaje van poslovnih prostorija ne primenjuju na ugovore čija je vrednost manja od 7000 leka.

bb. član 3. stav 2.

Države učesnice nisu dosledno koristile mogućnost ograničavanja područja primene kako je određeno u čl. 3. (2) Direktive 85/577. Na primer, po hrvatskom transpozicionom zakonu situacije predviđene u čl. 3. (2) Direktive 85/577 izuzete su od zaštite.[94] Međutim, čl. 31. (2) hrvatskog Zakona o zaštiti potrošača propisuje primenu svojih odredbi u vezi prodaje van poslovnih prostorija na ugovore o prodaji proizvoda namenjenog njegovoj ugradnji u nekretninu, kao i na ugovore o građenju kojima je svrha popravak ili obnova nekretnine. Nasuprot tome, bosansko-hercegovački Zakon o zaštiti potrošača ne transponuje ovu odredbu Direktive. Crnogorski Zakon o zaštiti potrošača implementira ovu odredbu, s jednom razlikom u vezi isporuke prehrambenih proizvoda, pića ili druge robe namenjene tekućoj upotrebi u domaćinstvu, utoliko što čl. 54.3) ne propisuje da robu isporučuje "redovan dostavljač". Član 34., stav 2., tačka a) i b) albanskog Zakona o zaštiti potrošača izuzima samo ugovore o građenju, prodaji ili zakupu nepokretnosti i ugovore koji se tiču drugih prava na nepokretnostima, kao i ugovore o isporuci prehrambenih proizvoda, pića ili druge robe namijenjene tekućoj upotrebi u domaćinstvu koje isporučuju redovni dostavljači. Koristeći nešto drugačiju formulaciju, makedonski Zakon o zaštiti potrošača isključuje istu listu ugovora kao čl. 3.2) Direktive 85/577, ali dodaje kao još jedan izuzetak prodaju koja je rezultat prezentacije proizvoda pod uslovima utvrđenim zakonom koji nemaju komercijalni karakter, kao i za dobrotvorne – humanitarne ciljeve, ako cena ne nadmašuje 500 EUR u denarskoj protivvrednost. Srpski Nacrt predloga za novi zakon o zaštiti potrošača predviđa transponovanje samo dva izuzetka iz čl. 3.2) Direktive 85/577, naime ugovore koji se odnose na osiguranje i ugovore za isporuku hrane ili pića koje trgovac redovno dostavlja potrošačima u blizini svojih poslovnih prostorija. Međutim, on ide dalje od zahteva Direktive propisujući da se izuzimaju ugovori koji se odnose na finansijske usluge čija cena zavisi od promena na finansijskom tržištu koje su izvan kontrole trgovca, a mogu se dogoditi u vremenu u kome je potrošaču garantovano pravo na jednostrani raskid, ugovori o potrošačkim kreditima, ugovori zaključeni upotrebom automata za prodaju ili u poslovnim prostorijama koje su automatizovane, i ugovori zaključeni sa operaterima telekomunikacija upotrebom javnih telefonskih govornica.

[94] Član 31. (1) Zakona o zaštiti potrošača, *NN* br. 79/07, 125/07, 79/09, 89/09, 133/09.

c. Teret dokazivanja

Većina transpozicionih zakona država učesnica ne sadrži posebne odredbe o teretu dokazivanja u pogledu ugovora o prodaji zaključenih van poslovnih prostorija. Međutim, oni često propisuju opšte norme o teretu dokazivanja, kao čl. 5.3) crnogorskog Zakona o zaštiti potrošača po kome ako je sporno da li je potrošač ispunio uslov u vezi roka za ostvarivanje prava, smatraće se da je potrošač ispunio taj uslov. Srpski Nacrt predloga za novi zakon o zaštiti potrošača određuje opštu normu po kojoj na trgovcu leži teret dokazivanja da je izvršio opštu predugovornu obavezu obaveštavanja potrošača. Hrvatski Zakon o zaštiti potrošača sadrži samo jednu odredbu u vezi tereta dokazivanja, koja je data u poglavlju u vezi prodaje van poslovnih prostorija, naime čl. 32. (5) predviđa da je u slučaju spora trgovac dužan dokazati da je potrošaču na vreme predao obavest o pravu na raskid ugovora. Posebne norme posvećene teretu dokazivanja određene su i u čl. 41.3) i 4) bosansko-hercegovačkog Zakona o zaštiti potrošača. U skladu sa njegovim čl. 41.4) "teret dokazivanja bit će obaveza trgovca od momenta nastupanja roka za raskid ugovora".[95] Osim toga, u skladu sa čl. 40.3) "u slučaju spora trgovac je dužan dokazati da je potrošaču na vrijeme predao obavještenje iz ovog člana", odnosno obaveštenje o pravu na raskid ugovora".[96]

III. Instrumenti za zaštitu potrošača

1. Zahtevi vezani za obaveštavanje

Države učesnice, s izuzetkom Srbije, preuzele su obavezu trgovca po čl. 4. Direktive 85/577 da potrošačima daju pisano obaveštenje o njihovom pravu da raskinu ugovor. Član 32 (3) hrvatskog Zakona o zaštiti potrošača dodatno predviđa da ukoliko je obavest o pravu na raskid sastavni deo ugovora, tada mora da bude posebno istaknuta i napisana na isti način kao i ostale odredbe ugovora. Ova obavest mora biti uručena potrošaču najkasnije u trenutku sklapanja ugovora. Albanski zakon zahteva da se obaveštenje potrošaču daje u vidu posebnog dokumenta, koji sadrži samo obaveštenje i koji je odvojen je od eventualnih opštih uslova ugovora. Takvo obaveštenje mora da bude dato pre zaključivanja ugovora ili u vreme kada ponudu daje potrošač.[97] Čl. 50.1) crnogorskog Zakona o zaštiti potrošača predviđa da pisano obaveštenje treba da bude dato do zaključenja ugovora i da opciono može da bude dato i u elektronskoj formi. Poglavlje II, Deo 2 srpskog Nacrta predloga za novi zakon o zaštiti potrošača predviđa dužnost obaveštavanja potrošača pre zaključivanja ugovora o postojanju prava potrošača na jednostrani raskid ugovora, ili o nepostojanju takvog prava. U slučaju zaključenja ugovora, ovo obaveštenje treba da bude sastavni deo ugovora.

Transpozicioni zakoni država učesnica se razlikuju u pogledu sadržine potrebnog obaveštenja. Prema čl. 34. hrvatskog Zakona o zaštiti potrošača kao i čl. 40. bosansko-hercegovač-

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[95] Na taj način, u skladu sa čl. 41.1), s jedne strane, potrošač ima pravo da raskine ugovor u roku od 15 dana od dana zaključenja ugovora a, s druge strane, trgovac je obavezan dati potrošačima pisano obavještenje o njihovom pravu da raskinu ugovor u roku od 15 dana od dana zaključenja ugovora. Kao rezultat toga, rok za podnošenje obaveštenja i rok za raskid ugovora počinju u isto vreme, odnosno od momenta zaključenja ugovora. Stoga teret dokazivanja leži na trgovcu od momenta zaključenja ugovora.

[96] Teret dokazivanja je uspešnije rešen u čl. 146. stav 5) novog nacrta Zakona o obligacionim odnosima Bosne i Hercegovine iz 2010. godine, u okviru Poglavlju pod nazivom "Pravo opoziva i povrata kod potrošačkih ugovora". Ovaj član određuje da je "na privredniku teret dokazivanja na okolnost početka roka za opoziv".

[97] Odluka Saveta ministara o ugovorima zaključenim van poslovnih prostorija, br. 63. od 21.01.2009., *Sl.list RAl* br. 8/09 (tačka 3, a, b).

kog Zakona o zaštiti potrošača[98], obaveštenje treba da sadrži ime, odnosno tvrtku ili naziv trgovca, njegovu adresu, datum slanja obaveštenja, podatke potrebne radi identifikacije ugovora, posebno naznaku ugovornih strana i predmet ugovora i njegovu cijenu, kao i rok za raskid ugovora. Prema crnogorskom Zakonu o zaštiti potrošača, osim obaveštenja o pravu na jednostrani raskid, trgovac je obavezan da dostavi podatke o sebi, proizvodu koji je predmet ugovora i njegovoj cijeni, o datumu dostave potrošaču,[99] i drugim bitnim elementima ugovora. Albanski Zakon o zaštiti potrošača obavezuje trgovca da potrošaču da pisano obaveštenje, napisano na jasan i razumljiv način, o pravu potrošača na jednostrani raskid ugovora, zajedno sa drugim relevantnim informacijama,[100] uključujući ime i adresu lica protiv kojeg to pravo može da se primeni. Takvo obaveštenje treba da nosi datum i navede posebne podatke koji omogućuju identifikaciju ugovora. Sadržaj potrebnog obaveštenja je određen u čl. 107 makedonskog Zakona o zaštiti potrošača, koji predviđa da je u slučaju zaključenja ugovora trgovac dužan da obavesti potrošača u pisanoj formi o njegovom pravu na jednostrani raskid ugovora putem izjave, u roku koji ne može da bude kraći od sedam dana od dana sklapanja ugovora. Obaveštenje mora da sadrži podatke o adresi na koju može da se pošalje izjava o jednostranom raskidu ugovora.[101]

Srpski Nacrt predloga za novi zakon o zaštiti potrošača pravi razliku između trgovčeve opšte preudgovorne obaveze obaveštavanja, navodeći pojedinačna obaveštenja koja je trgovac dužan da da potrošaču pre zaključenja ugovora o prodaji robe ili pružanju usluga[102], uključujući posebne obaveze posrednika u pogledu obaveštavanja[103], i dodatna obaveštenja koja

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[98] Prema čl. 146.3) novog nacrta Zakona o obligacionim odnosima Bosne i Hercegovine rok za raskid počinje od kada privrednik da potrošaču obaveštenje sa "punom informacijom" o njegovom pravu na opoziv ugovora.

[99] Član 50.2) Zakona o zaštiti potrošača, *Sl.list CG* br. 26/07.

[100] Član 35.3) Zakona o zaštiti potrošača, *Sl.list RAl* br. 61/08.

[101] Dodatno uz čl. 105.3) makedonskog Zakona o zaštiti potrošača, u slučaju sklapanja ugovora van poslovnih prostorija, trgovac mora da se legitimiše pokazivanjem lične karte.

[102] Pre zaključenja ugovora o prodaji robe ili pružanju usluga, trgovac je dužan da potrošača obavesti o sledećim pojedinostima, ako te pojedinosti nisu očigledne iz konteksta: (1) osnovna obeležja robe ili usluga; (2) fizička adresa i podaci koji su od značaja za utvrđivanje identiteta trgovca, ka što je ime trgovca i, ako je potrebno, ime trgovca u čije ime on postupa (u slučaju javne aukcije, ove pojedinosti mogu da budu zamenjene fizičkom adresom i identitetom aukcionara); (3) cena koja uključuje porez; a ako je priroda proizvoda takva da se cena ne može razumno pretpostaviti, onda način na koji će se cena izračunati; kao i svi dodatni poštanski troškovi i troškovi transporta i isporuke po potrebi; ili, u slučaju da se pomenuti dodatni troškovi ne mogu razumno pretpostaviti, činjenica da se ovakvi troškovi mogu staviti potrošaču na teret; (4) način plaćanja, način i rok isporuke, izvršenja drugih ugovornih obaveza, kao i način na koji se postupa po pritužbama potrošača (5) postojanje prava potrošača na jednostrani raskid ugovora kao i nepostojanje takvog prava; (6) postojanje postprodajnog servisa i ugovorne garancije, i uslovi pod kojima potrošač ima pravo na njih; (7) vreme na koje je ugovor zaključen, ako je to prikladno; ili, ako je ugovor zaključen na neodređeno vreme, uslovi za prestanak ugovora; (8) minimalno trajanje ugovorne obaveze potrošača, po potrebi; (9) obaveza potrošača da položi depozit ili drugi vid obezbeđenja na zahtev trgovca, i uslovi pod kojima ova obaveza postoji. U slučaju da ugovor bude zaključen, obaveštenja o ovim pojedinostima predstavljaju njegov sastavni deo. Trgovac je dužan da obavezu obaveštavanja potrošača o ovim pojedinostima izvrši u skladu sa načelom savesnosti i poštenja.

[103] Pre zaključenja ugovora sa potrošačem, nalogoprimac ima obavezu da obavesti potrošača o tome da postupa u ime i za račun drugog potrošača; da ugovor ne zaključuju trgovac i potrošač, nego dva potrošača; i da se na takav ugovor ne mogu odnositi odredbe zakona čiji je cilj zaštita potrošača u ugovornom odnosu s trgovcem. Za nalogodavca koji ne ispuni ovu obavezu smatra se da je zaključio ugovor s potrošačem u vlastito ime. Ova odredba se ne primenjuje na javne aukcije.

trgovac treba da da u slučaju ugovora zaključenih van poslovnih prostorija. U skladu sa odredbama Poglavlja III Nacrta predloga, u slučaju ugovora zaključenih izvan poslovnih prostorija trgovac je dužan da pruži obaveštenja o sledećim pojedinostima, koje predstavljaju sastavni deo ugovora: 1) uslovi i postupak prema kojima se ostvaruje pravo na jednostrani raskid; 2) fizička adresa na kojoj trgovac posluje, ako je različita od adrese na kojoj je registrovan, a tamo gde je prikladno adresa trgovca u čije ime on postupa na koju potrošač može da uputi pritužbe; 3) postojanje kodeksa ponašanja koji obavezuju trgovca, i način na koji mu se može pristupiti; 4) cena upotrebe sredstava komunikacije na daljinu, ako se ne obračunava po osnovnoj tarifi; 5) da potrošač stupa u ugovorni odnos s trgovcem, i da u takvom ugovornom odnosu uživa zaštitu koja je potrošačima garantovana zakonom; 6) da pravo na jednostrani raskid ne važi ako je, uz izričitu saglasnost potrošača, trgovac započeo pružanje usluga pre isteka vremena u kome je dozvoljen jednostrani raskid; 7) mogućnost vansudskog rešavanja sporova tamo gde je to prikladno. Trgovac je dužan da potrošaču preda obrazac za raskid ugovora, kako bi mu olakšao korišćenje prava na jednostrani raskid.[104] Sadržinu obrasca za raskid ugovora će propisati Vlada Republike Srbije, na predlog ministarstva nadležnog za poslove zaštite potrošača, u roku od tri meseca od donošenja novog Zakona o zaštiti potrošača.

Što se tiče sankcija za kršenje obaveze obaveštavanja potrošača o njegovom pravu na jednostrani raskid, propisi o zaštiti potrošača država učesnica idu od ne predviđanja sankcija (Srbija i Bosna i Hercegovina) do vremenski neograničenog prava potrošača da raskine ugovor[105] i novčanih kazni do cca. 13700 EUR (Hrvatska). U Hrvatskoj nadležni inspektor će rešenjem narediti trgovcu otklanjanje utvrđene nepravilnosti određujući rok u kojem se ta nepravilnost mora ukloniti (čl. 143. (3) alineja 8. Zakona o zaštiti potrošača). Za kršenje navedene odredbe hrvatski zakon propisuje novčane kazne u iznosu od 5.000,00 do 100.000,00 kuna (cca. EUR 685 do 13700)[106] i predviđa mogućnost pokretanja postupka za zaštitu kolek-

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[104] Zajedno s obrascem, trgovac je dužan da potrošaču pruži obaveštenje o sledećim pojedinostima: 1) ime, fizička adresa i adresa elektronske pošte trgovca, na koju potrošač šalje obrazac za raskid ugovora; 2) izjavu da potrošač ima pravo na raskid, i da ugovor može raskinuti slanjem obrasca za raskid ugovora trgovcu, na trajnom nosaču zapisa u roku od četrnaest dana od kada je potrošač potpisao porudžbenicu (ovo se primenjuje na ugovore zaključene izvan poslovnih prostorija, a postoje posebne odredbe za ugovore na daljinu i ugovore o pružanju usluga); 3) kod ugovora na daljinu i ugovora zaključenih van poslovnih prostorija, izjavu kojom se potrošač obaveštava o načinu i roku za vraćanje primljene robe trgovcu; (4) izjavu da potrošač može da upotrebi standardni obrazac za raskid ugovora; 5) izjavu da se slanje primljene robe nazad trgovcu u roku u kome potrošač može jednostrano raskinuti ugovor, smatra kao blagovremena izjava o raskidu. U slučaju ugovora zaključenih izvan poslovnih prostorija, pomenuta obaveštenja moraju biti čitko napisana na porudžbenici, jednostavnim i razumljivim jezikom. Ugovor zaključen izvan poslovnih prostorija smatra se zaključenim kada potrošač potpiše porudžbenicu a u slučaju da porudžbenica nije u papirnom obliku, kada potrošač primi kopiju popunjene porudžbenice odštampanu na papiru ili, ako se potrošač s tim saglasio, kada potrošač primi kopiju porudžbenice na trajnom nosaču zapisa. Porudžbenica sadrži standardni obrazac za raskid ugovora.

[105] Član 34. Zakona o zaštiti potrošača, *NN* br. 79/07, 125/07, 79/09, 89/09, 133/09.

[106] Novčanom kaznom u iznosu od 10.000,00 do 100.000,00 kuna (cca. EUR 1370 do 13700) kaznit će se za prekršaj pravna osoba ako — potrošač najkasnije u trenutku zaključivanja ugovora ne dobije pisanu obavijest o njegovom pravu na otkazivanje ugovora zaključenog izvan poslovnih prostorija trgovca (čl. 144. (1) 22. alineja Zakona o zaštiti potrošača). Za isti prekršaj, fizičko lice će biti kažnjeno novčanom kaznom u iznosu 5.000,00 do 15.000,00 kuna (cca. EUR 685 do 13700) (čl. 144. (3) Zakona o zaštiti potrošača). Novčanom kaznom u iznosu od 15.000,00 do 100.000,00 kuna (cca. EUR 1370 do 13700) kaznit će se za prekršaj pravna osoba ako potrošaču ne preda ili preda nepotpunu obavijest o pravu na raskid ugovora (čl. 145. (1) 19. alineja Zakona o zaštiti potrošača). U skladu sa čl. 145. (3) Zakona o zaštiti potrošača, za isti prekršaj fizičko lice će biti kažnjeno novčanom kaznom u iznosu 5.000,00 do 15.000,00 kuna (cca. EUR 685 do 13700).

tivnih interesa potrošača protiv lica koje deluje suprotno pomenutim odredbama.[107] Crnogorski Zakon o zaštiti potrošača predviđa rok za primenu prava na jednostrano raskidanje ugovora od tri meseca od dana zaključenja ugovora, ukoliko obaveštenje nije dato, odnosno od 7 dana od ispunjenja ove obaveze ako obaveštenje nije dato odmah, već u roku od 3 meseca od dana zaključenja ugovora[108]. Ako trgovac ne ispuni ove odredbe, može da bude kažnjen novčanom kaznom, a, ukoliko je pravno lice, posebnom kaznom će biti kažnjeno i odgovorno lice[109]. Prema čl. 57. (2) albanskog Zakona o zaštiti potrošača, ukoliko se trgovac ne pridržava pomenutih odredbi u vezi obaveze obaveštavanja, Komisija za zaštitu potrošača može da mu odredi novčanu kaznu do 70.000 leka[110]. Makedonski zakon definiše novčane kazne za neispunjavanje zahteva u pogledu obaveštavanja, koje se određuju u prekršajnom postupku. Konkretno, novčanom kaznom u iznosu od 3.500,00 do 5.000,00 evra u denarskoj protiv-vrednosti kazniće se pravno lice, a u iznosu od 500 do 800 evra fizičko lice, koje zaključi ugovor a potrošaču ne pokaže svoju ličnu kartu.

Ni jedna od država učesnica ne predviđa ništavost ugovora kao sankciju u slučaju da trgovac potrošaču ne da potrebno obaveštenje. U svim državama učesnicama poništavanje ugovora i odšteta se mogu zahtevati u skladu sa opšte važećim odredbama njihovih Građanskih zakonika ili Zakona o obligacionim odnosima.

2. Pravo na odustanak

Zakon o zaštiti potrošača Bosne i Hercegovine govori o "raskidu ugovora" a čl. 172.1) Nacrta Zakona o obligacionim odnosima Bosne i Hercegovine iz 2006. godine[111] i čl. 146.1) Nacrta Zakona o obligacionim odnosima Bosne i Hercegovine iz 2010. godine u Poglavlju "Pravo opoziva i povrata u potrošačkim ugovorima" govori o pravu potrošača da opozove "izjavu volje upravljenu na zaključenje ugovora". Međutim, prema čl. 148.1) poslednjeg Nacrta Zakona o obligacionim odnosima iz 2010. godine (kao i čl. 174.1) Nacrta Zakona o obligacionim odnosima iz 2006. godine), kod primene prava na opoziv i povrat robe, primenjuju se (opšte) odredbe u vezi raskida ugovora. Shodno tome, zakonodavac Bosne i Hercegovine priznao je pravo na opoziv kao jedan od oblika prava na raskid ugovora.[112] Hrvatski Zakon o zaštiti potrošača takođe govori o 'raskidu' a ne 'povlačenju'.[113]

a. Trajanje roka za odustanak

U Albaniji, Bosni i Hercegovini i Hrvatskoj primena minimalne harmonizacije u pogledu trajanja roka za povlačenje garantuje viši nivo zaštite nego Direktiva 85/577. Prema čl. 35. (1) albanskog Zakona o zaštiti potrošača potrošač može da poništi posledice stupanja u ugo-

[107] Član 131. *et seq.* Zakona o zaštiti potrošača, *NN* br. 79/07, 125/07, 79/09, 89/09, 133/09.

[108] Član 51.2) i 3) Zakona o zaštiti potrošača, *Sl.list RCG* br. 26/07.

[109] Član 129.1) 16. alineja i 2) Zakona o zaštiti potrošača, *Sl.list RCG* br. 26/07.

[110] 70.000 leka = oko. 600 €.

[111] Nacrt Zakona o obligacionim odnosima iz 2006. godine nikad nije usvojen zbog nepostojanja volje političkih predstavnika Republike Srpske za donošenje Zakona o obligacionim odnosima na državnom nivou. Nije izvesno da li će biti više političke volje da se podrži nacrt Zakona o obligacionim odnosima iz 2010. godine.

[112] B. Morait, A. Bikić, *Objašnjenja uz Nacrt Zakona o obligacionim odnosima*, u saradnji sa GTZ-om, Sarajevo 2006, str. 30.

[113] Posebno u vezi ovog problema videti sledeće: S. Šarčević, E. Čikara, "European vs National Terminology in Croatian Legislation Transposing EU Directives", u S. Šarčević (ur.), *Legal Language in Action: Translation, Terminology, Drafting and Procedural Issues,* Globus, Zagreb 2009., str. 209.

vorni odnos u roku od četrnaest kalendarskih dana. Zakon o zaštiti potrošača Bosne i Hercegovine određuje u čl. 41.1) da potrošač ima pravo da ne prihvati posledice ugovora na način da pošalje pisano obaveštenje trgovcu u roku od 15 dana od dana zaključenja ugovora. U skladu sa čl. 33. (1) hrvatskog Zakona o zaštiti potrošača potrošač ima pravo, ne navodeći razloge za to, da jednostrano raskine ugovor sklopljen van poslovnih prostorija u roku od 14 dana od dana prijema pisane obavesti iz člana 32. Zakona o zaštiti potrošača. U Makedoniji rok za povlačenje ne može da bude kraći od 7 dana, a crnogorski Zakon o zaštiti potrošača predviđa isti rok ali eksplicitno govori o sedam radnih dana. Srpski zakon ne sadrži odredbe kojima se transponuje Direktiva o ugovorima sklopljenim van poslovnih prostorija. Srpski Nacrt predloga za novi zakon o zaštiti potrošača određuje rok od četrnaest dana za odustanak.

b. Početak roka za odustanak

Iako čl. 5. Direktive 85/577 kaže da potrošač ima pravo da poništi posledice stupanja u ugovorni odnos time što će poslati obaveštenje u roku koji ne može biti kraći od sedam dana od dana prijema obaveštenja o pravu na raskid, u Hrvatskoj rok za povlačenje počinje da teče od prijema pisane obavesti u vezi prava na raskid ugovora, odnosno najkasnije u trenutku sklapanja ugovora (čl. 33. (1) hrvatskog Zakona o zaštiti potrošača). Ako trgovac potrošaču ne da obaveštenje o njegovom pravu, pravo potrošača na raskid ugovora tada neće biti vremenski ograničeno (čl. 34. hrvatskog Zakona o zaštiti potrošača). Ova odredba je u skladu sa presudama ESP-a u predmetima *Heininger* i *Hamilton*.[114] Crnogorski Zakon o zaštiti potrošača takođe pomera vreme od kada počinje da teče rok za povlačenje u slučaju kada obaveštenje nije bilo dato, određujući u članu 51.2) i 3) da potrošač ima pravo da jednostrano raskine ugovor, u roku od tri mjeseca od dana zaključenja ugovora, ukoliko obaveštenje uopšte nije dato, odnosno u roku d 7 dana od dana kada trgovac ispuni ovu obavezu ukoliko obaveštenje nije bilo dato odmah već u roku od tri meseca od dana zaključenja ugovora. Međutim, ni gore pomenute odredbe crnogorskog Zakona o zaštiti potrošača, ni transpozicioni zakoni Albanije[115], Bosne i Hercegovine i Makedonije, koji ne pomeraju početak roka za povlačenje u slučaju kada obaveštenje nije bilo dato, nisu u skladu sa sudskom praksom ESP u predmetu *Heininger* i *Hamilton*. U Albaniji, Bosni i Hercegovini i Makedoniji rok za povlačenje počinje da teče od dana zaključenja ugovora, bez obzira na eventualno kršenje obaveze trgovca da dostavi pisano obaveštenje. Shodno tome, ovi zakoni krše čl. 5. (1) Direktive 85/577. U skladu sa čl. 40.1) Zakona o zaštiti potrošača Bosne i Hercegovine rok za davanje obaveštenja i rok za raskid ugovora počinju istovremeno, naime s trenutkom zaključenja ugovora, i kao rezultat toga pisano obaveštenje nije preduslov za početak roka za raskid.[116] Srpski zakon ne sadrži odredbe za koje bi se moglo smatrati da za cilj imaju transponovanje Direktive o prodaji van prodajnih prostorija. Srpski Nacrt predloga za novi zakon o zaštiti potrošača predviđa da rok od 14 dana u kome potrošač može jednostrano raskinuti ugovor počinje da teče od počet-

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[114] Presuda ESP od 13.12.2001. godine, u predmetu C–481/99 – *Georg Heininger i Helga Heininger protiv Bayerische HypoundVereinsbank AG* [2001] ECR I-09945; Presuda ESP od 10.04.2008., u predmetu C–412/06 –*Hamilton protiv Volksbank Filder eG* [2008.] ECR I-02383.

[115] U skladu sa čl. 35.1) i 2) albanskog Zakona o zaštiti potrošača, potrošač će obavestiti trgovca o svojoj odluci o odustajanju od ugovora pre isteka roka od 14 kalendarskih dana.

[116] Ova pravna greška bi bila ispravljena usvajanjem Nacrta zakona o obligacionim odnosima Bosne i Hercegovine iz 2010. godine, koji u svom čl. 146.3) određuje da rok za opoziv počinje da teče od dana kada je privrednik stavio na znanje potrošaču pouku kojom se potrošač "na potpun način obaveštava" o njegovom pravu na opoziv ugovora. Ova odredba Nacrta zakona o obligacionim odnosima iz 2010. godine, shodno čl. 146.1) primenjuje se uvek kada nacrt zakona o obligacionim odnosima iz 2010. godine ili "bilo koji drugi zakon" potrošaču daje pravo na opoziv ugovora, i zato pokriva i pravo potrošača na raskid ugovora u skladu sa čl. 40 Zakona o zaštiti potrošača Bosne i Hercegovine (*Sl.glasnik BiH* br. 17/02).

ka prvog sata prvoga dana a završava se istekom poslednjeg sata poslednjeg dana roka. Kod ugovora sklopljenih van poslovnih prostorija, rok za povlačenje počinje da teče kada potrošač potpiše porudžbenicu, a u slučaju da porudžbenica nije u papirnom obliku, kada potrošač primi kopiju popunjene porudžbenice odštampane na papiru ili na drugom trajnom nosaču zapisa. Ako trgovac ne obavesti potrošača blagovremeno o postojanju prava na jednostrani raskid ugovora, u skladu sa srpskim Predlogom za novi zakon o zaštiti potrošača, rok za raskid od četrnaest dana počinje da kada potrošač konačno primi ovo obaveštenje na trajnom nosaču zapisa. U tom slučaju potrošač može da raskine ugovor u svako doba, uključujući vreme koje prethodi prijemu zakasnelog obaveštenja o postojanju prava na jednostrani raskid. Rok u kome potrošač može raskinuti ugovor ne počinje da teče sve dok potrošač ne bude propisno obavešten o svome pravu na jednostrani raskid.

c. Norme u vezi slanja poštom/odašiljanja

Propisi o zaštiti potrošača u vezi prodaje van poslovnih prostorija Bosne i Hercegovine, Makedonije i Srbije ne sadrže odgovarajuće norme u vezi slanja poštom ili odašiljanja. Albanski propisi sadrže samo normu o odašiljanju bez određivanja sredstva takvog odašiljanja, koja glasi: "Potvrda o prijemu pošiljke predstavlja dovoljan dokaz ne samo o tome da je odgovarajuće obaveštenje dato, već i o datumu kada je ono dato".[117] Crnogorski Zakon o zaštiti potrošača predviđa da će se ugovor smatrati raskinutim danom prijema obavještenja o raskidu ugovora od strane trgovca.[118] Iz formulacija drugih članova crnogorskog Zakona o zaštiti potrošača koji regulišu dejstvo otkaza (čl. 53 u vezi poglavlja o distancionoj prodaji i čl. 44.1), koji pak indirektno upućuje na čl. 43) izgleda da bi za poštovanje vremenskog roka trebalo da bude dovoljno ako je obaveštenje poslato pre kraja takvog roka. Hrvatski Zakon o zaštiti potrošača predviđa u svom čl. 33. (3) da je ugovor raskinut u trenutku kada je trgovac primio obavest o raskidu. Ako je obavest o raskidu upućena unutar roka iz čl. 33. (1) hrvatskog Zakona o zaštiti potrošača, smatraće se da je ugovor raskinut na vreme. U skladu sa srpskim Predlogom za nov Zakon o zaštiti potrošača izjava o raskidu smatra se blagovremenom ako je poslata pre isteka roka za jednostrani raskid ugovora. Slanje robe koja je primljena po osnovu ugovora nazad trgovcu, u roku u kome potrošač može jednostrano raskinuti ugovor, smatra se kao blagovremena izjava o raskidu. Smatraće se da je potrošač primenio svoje pravo na raskid u času kada je izjava o raskidu poslata trgovcu.

d. Formalni zahtevi

Transpozicioni zakoni Bosne i Hercegovine,[119] Hrvatske[120] i Crne Gore propisuju da obaveštenje potrošača o odustanku (raskidu ili prestanku) treba da bude poslato trgovcu u pisanoj formi. Makedonski Zakon o zaštiti potrošača određuje da potrošač treba da pošalje izjavu o jednostranom raskidu na adresu koju je trgovac dao. U skladu sa albanskim transpozicionim propisima obaveštenje o raskidu ugovora koje daje potrošač treba da bude ne samo u pi-

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[117] Odluka Saveta ministara o ugovorima sklopljenim van poslovnih prostorija, br. 63. od 21.01.2009., *Sl.list RAl* br. 8/09, (tačka 5).

[118] Član 51.5) Zakona o zaštiti potrošača, *Sl.list RCG* br. 26/07.

[119] U skladu sa čl. 41.1) Zakona o zaštiti potrošača Bosne i Hercegovine (*Sl.glasnik BiH* br. 17/02) potrošač ima pravo da ne prihvati posledice ugovora u roku od 15 dana od zaključenja ugovora slanjem pisanog obaveštenja trgovcu. U skladu sa čl. 146. 1) novog Nacrta zakona o obligacionim odnosima Bosne i Hercegovine opoziv potrošača, za koji nije potrebno objašnjenje, treba da se izrazi na trajnom nosaču zapisa ili putem dokumenta. Vraćanje robe ima isto dejstvo kao opoziv.

[120] U skladu sa čl. 33. (2) hrvatskog Zakona o zaštiti potrošača (NN br. 79/07, 125/07, 79/09, 89/09, 133/09) ugovor se raskida pisanom obaviješću o raskidu.

sanoj formi već i datirano.[121] Potrošač treba da da obaveštenje u pisanoj formi i da na njega stavi datum, jer u suprotnom neće moći da dokaže svoje obaveštenje o odustanku. Ovo je norma koja je potrebna *ad probationem*. Srpski Predlog novog zakona o zaštiti potrošača sadrži dve odredbe koje regulišu formalne zahteve obaveštenja o raskidu. Ili će se vraćanje robe koja je primljena po ugovoru nazad trgovcu u roku u kome potrošač ima pravo na jednostrani raskid smatrati izjavom o jednostranom raskidu. Ili će potrošač obavestiti trgovca o svojoj odluci o jednostranom raskidu na trajnom nosaču zapisa, i to ili u vidu izjave upućene trgovcu koju je on samostalno sročio, ili upotrebom standardnog obrasca za raskid o kome je gore bilo reči.

e. Dejstvo odustanka

Transpozicioni zakoni država učesnica regulišu pitanje dejstva povlačenja na sveobuhvatan način. Član 35. (1) hrvatskog Zakona o zaštiti potrošača predviđa da je u slučaju raskida ugovora, potrošač dužan da vrati isporučen proizvod trgovcu o svom trošku. On ne odgovora za štetu koju je trgovac pretrpeo zbog raskida ugovora (videti čl. 35. (2) Zakona o zaštiti potrošača). Suprotno tome, "trgovac je dužan, najkasnije u roku od 30 dana od dana primitka pisane obavijesti o raskidu, vratiti potrošaču cjelokupan iznos koji je potrošač do tog trenutka platio na temelju ugovora, uvećan za zatezne kamate po kamatnoj stopi poslovne banke trgovca za oročene štedne uloge na tri mjeseca za cijelo razdoblje računajući od primitka pisane obavijesti o raskidu do isplate", čl. 35. (3) Zakona o zaštiti potrošača.

Crnogorski propisi o zaštiti potrošača određuju da će se norme koje uređuju dejstvo povlačenja propisane za ugovore sklopljene u distancionoj prodaji, shodno primenjivati na ugovore sklopljene van poslovnih prostorija. Tako, čl. 44.1) crnogorskog Zakona o zaštiti potrošača propisuje da je potrošač dužan vratiti trgovcu primljenu robu, u roku od 30 dana od dana upućivanja obavještenja; u tom slučaju potrošač nije dužan da plati naknadu štete (troškove, kamate, kaznu i sl.) zbog otkaza[122], izuzev direktnih troškova povraćaja robe[123]. S druge strane, u skladu sa čl. 44.2) Zakona o zaštiti potrošača, trgovac je dužan da, u roku od 30 dana od dana prijema pisanog obaveštenja o raskidu ugovora, vrati potrošaču novčani iznos sredstava koji je potrošač platio na osnovu ugovora. Posebna dejstva su u skladu sa čl. 45. Zakona o zaštiti potrošača propisana u slučaju kada treća strana deluje kao davalac kredita, naime ista onakva kakve se nalaze u Direktivi 97/7.

Član 35. (2) albanskog Zakona o zaštiti potrošača predviđa da će davanje obaveštenja o raskidu imati dejstvo oslobađanja potrošača od ugovornih obaveza.[124] Ako potrošač upotrebi pravo na odustanak, roba koja je predmet ugovora vraća se trgovcu u roku od 5 dana, počev od dana kada je potrošač obavestio trgovca o svojoj odluci o raskidu. Sve iznose koje je potrošač platio za robu ili usluge trgovac će nadoknaditi u roku od 15 dana, počev od istog dana. Ukoliko je cena robe ili usluga u potpunosti ili delimično pokrivena kreditom koji je dao trgovac, ili neka treća strana na osnovu ugovora između treće strane i dobavljača, ugovor o kreditu se poništava bez troškova i kazni, ukoliko potrošač primenjuje svoje pravo na jednostrani raskid ugovora.[125]

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[121] Odluka Saveta ministara o ugovorima sklopljenim van poslovnih prostorija, br. 63. od 21.01.2009., *Sl.list RAl* br. 8/09, (tačka 4).

[122] Član 51.3) Zakona o zaštiti potrošača, *Sl.list RCG* br. 26/07.

[123] Član 44.3) Zakona o zaštiti potrošača, *Sl.list RCG* br. 26/07.

[124] Član 35.2) Zakona o zaštiti potrošača, *Sl.list RAl* br. 61/08.

[125] Odluka Saveta ministara o ugovorima sklopljenim van poslovnih prostorija, br. 63. od 21.01.2009., *Sl.list RAl* br. 8/09, (tačka 6, 7).

U skladu sa makedonskim zakonom raskid ima opšte dejstvo prestanka ugovora kako je predviđeno u Zakonu o obligacionim odnosima. Zakon o zaštiti potrošača konkretno predviđa da je u slučaju prestanka ugovora potrošač dužan da vrati robu o svom trošku. Trgovac je dužan da potrošaču vrati pun iznos koji je potrošač platio po osnovu ugovora do trenutka prestanka. Pre isteka roka za raskid, trgovac nema pravo da od potrošača traži, posredno ili neposredno, bilo kakvo preuzimanje ili davanje usluga.

Dostavljanje obavještenja o raskidu shodno čl. 41.3) Zakona o zaštiti potrošača Bosne i Hercegovine ima za posledicu oslobađanje potrošača od bilo koje obaveze iz zaključenog ugovora, ili bilo kojih troškova osim troškova vraćanja proizvoda koji mu je isporučen. Kada potrošač iskoristi svoje pravo da raskine ugovor, trgovac je takođe dužan, u skladu sa čl. 41.5) Zakona o zaštiti potrošača, da izvrši vraćanje novca uplaćenog za proizvod bez odgađanja u roku od 15 dana od dana kada je primio obaveštenje o raskidu ugovora.[126]

Srpski zakon ne sadrži odredbe za koje bi se moglo smatrati da imaju za cilj transponovanje Direktive o prodaji van prodajnih prostorija. Srpski Predlog novog zakona o zaštiti potrošača predviđa da jednostranim raskidom ugovora prestaju obaveze ugovornih strana nastale zaključenjem ugovora na daljinu, odnosno ugovora zaključenog izvan poslovnih prostorija. Trgovac je dužan da potrošaču bez odlaganja vrati iznos koji je potrošač platio po osnovu ugovora, a najkasnije u roku od 30 dana od prijema izjave o jednostranom raskidu. Ako dođe u docnju s izvršenjem ove obaveze, trgovac je u obavezi da, pored zatezne kamate, plati 10 procenata dugovane sume za svakih 30 dana docnje. U slučaju jednostranog raskida ugovora na daljinu ili ugovora zaključenog izvan poslovnih prostorija od strane potrošača, automatski prestaju i svi povezani ugovori, bez troškova za potrošača. Isto važi za ugovore o kreditu koji su povezani sa potrošačkim ugovorima, nezavisno od toga da li je potrošaču kredit odobrio trgovac ili treće lice. Ako je kredit potrošaču odobrilo treće lice, trgovac je dužan da o raskidu ugovora na daljinu obavesti davaoca kredita. Davalac kredita je dužan da potrošaču bez odlaganja vrati iznos koji je potrošač platio za robu ili usluge do raskida, zajedno s kamatom, a najkasnije 30 dana od dana kada je obavešten o raskidu.

3. Drugi instrumenti za zaštitu potrošača u oblasti prodaje van poslovnih prostorija

Srpski zakon ne sadrži odredbe u vezi prodaje van poslovnih prostorija, dok Albanija, Bosna i Hercegovina i Makedonija pružaju zaštitu svojim gore opisanim propisima. U hrvatskom i crnogorskom pravu postoje dodatni propisi u njihovim zakonima o trgovini. Član 4. (1) hrvatskog Zakona o trgovini[127] određuje da trgovac mora da bude registrovan za prodaju i kupovinu robe i/ili pružanje usluga u trgovini.[128] Crnogorski zakon nalaže registrovanje trgovaca koji žele da obavljaju prodaju van poslovnih prostorija. Kako je gore naznačeno, čl. 31.4) Zakona o unutrašnjoj trgovini predstavlja pravni osnov po kome Ministarstvo privrede donosi podzakonska akta o vrsti robe i načinu vršenja prodaje van poslovnih prostorija, kojima se ova materije detaljnije uređuje.

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[126] U skladu sa čl. 148.1) Nacrta zakona o obligacionim odnosima Bosne i Hercegovine dejstva opoziva su ista kao dejstva prestanka ugovora, predviđena generalno važećim odredbama Nacrta zakona o obligacionim odnosima. Jedina razlika je što je privrednik u docnji ukoliko ne vrati uplaćen iznos novca u roku od 30 dana od izražavanja volje o raskidu.

[127] Zakon o trgovini, NN br. 87/08, 96/08, 116/08.

[128] Pravilnik o minimalnim tehničkim uvjetima za poslovne prostorije u kojima se obavlja trgovina i posredovanje u trgovini i uvjetima za prodaju robe izvan prostorija, *NN* br. 37/98, 73/02, 153/02, 12/06.

IV. Rezime

Pre transponovanja Direktive 85/577 u njihove relevantne Zakone o zaštiti potrošača Albanija, Bosna i Hercegovina, Hrvatska, Makedonija i Crna Gora nisu imale koherentno zakonodavstvo koje se odnosi na zaštitu potrošača u slučaju prodaje van poslovnih prostorija. Srbija ga još uvek nema, ali trenutno radi na njemu. Samo transponovanje je u svim zemljama učesnicama (s izuzetkom Srbije) prolazilo kroz isti scenario: Direktiva 85/577 je transponovana u zasebnom poglavlju posebnog Zakona o zaštiti potrošača odgovarajuće zemlje. Osim različitih odstupanja u formulacijama, prisutne su i neke krupne manjkavosti u transponovanju kao što je isključivanje ugovora zaključenih tokom izleta u crnogorskom Zakonu o zaštiti potrošača, i moguće izuzimanje ugovora za pružanje usluga prema makedonskom Zakonu o zaštiti potrošača. Još jedno značajno ograničenje nalazi se u definiciji potrošača u bosansko-hercegovačkom Zakonu o zaštiti potrošača koje ograničava delovanje potrošača na kupovinu, sticanje ili korišćenje proizvoda ili usluga za svoje lične potrebe "i" za potrebe svog domaćinstva. Sledeća manjkavost se tiče neuključivanja posrednika u pojam trgovac u srpskom, crnogorskom i makedonskom zakonu o zaštiti potrošača. Međutim, neke države učesnice su unapredile zaštitu potrošača uključivanjem i drugih situacija osim onih navedenih u čl. 3. Direktive 85/577, kao npr. uključivanjem ugovora zaključenih u sredstvima javnog prevoza ili na bilo kojim drugim javnim mestima (npr. Bosna i Hercegovina, Crna Gora), ili ugovora zaključenih u prodajnim objektima, na sajmovima i izložbama (npr. Makedonija). Viši nivo zaštite potrošača je ostvaren i nekorišćenjem ograničenja i izuzetaka predviđenih u Direktivi 85/577, npr. nekorišćenjem mogućnosti da se izuzmu ugovori vrednosti ispod 60 EKU koja je data u njenom čl. 3. (1) (npr. Hrvatska, Makedonija i Bosna i Hercegovina), i ne izuzimajući ni jedan (npr. Bosna i Hercegovina) ili neke od ugovora uključenih u čl. 3. (2) Direktive 85/577 (npr. Albanija, Srbija). Transpozicioni zakoni država učesnica, s izuzetkom Srbije, uređuju na eksplicitan način uslove u pogledu forme i sadržaja obaveštenja, a sankcije u slučaju kršenja ovih uslova idu od toga da sankcije nisu predviđene (Bosna i Hercegovina) do vremenski neograničenog prava potrošača na raskid ugovora i novčanih kazni do cca. 13.700 evra (Hrvatska). Zakon o zaštiti potrošača Bosne i Hercegovine i Hrvatske ne govori o pravu na odustanak, nego o pravu na "raskid". Albanija, Hrvatska i Srbija (u njenom Nacrtu predloga za novi potrošački zakon) koriste klauzulu minimalne harmonizacije i predviđaju rok za povlačenje (raskid) od četrnaest dana, dok u Bosni i Hercegovini zakonodavac daje petnaest dana. Međutim, samo su crnogorski i hrvatski zakonodavac odlučili da odlože početak roka za povlačenje u slučaju da trgovac nije ispunio zahteve u vezi obaveštavanja. Na taj način, samo hrvatski Zakon o zaštiti potrošača ostaje u skladu sa odlukama ESP-a u predmetu *Heininger* i *Hamilton,* propisujući da u takvim slučajevima pravo potrošača na raskid ugovora neće biti vremenski ograničeno, dok crnogorski Zakon o zaštiti potrošača određuje rok od tri meseca, odnosno sedam dana od zaključenja ugovora. U Albaniji, Bosni i Hercegovini i Makedoniji rok za povlačenje počinje od dana zaključenja ugovora, bez obzira na eventualno kršenje dužnosti trgovca da pošalje pisano obaveštenje i, shodno tome, ovi zakoni direktno krše čl. 5.1) Direktive 85/577. Pisana forma kao zahtev za odustanak je prihvaćena u svim zemljama učesnicama. Srpski Nacrt predloga za novi Zakon o zaštiti potrošača daje mogućnost odustanka putem "obrasca za raskid" koji obezbeđuje trgovac a uređuje Vlada Republike Srbije. Dejstvo odustanka uključuje obavezu kupca da vrati primljenu robu o svom trošku (sve države učesnice) i obavezu trgovca da vrati plaćeni iznos novca u roku od 15 dana (Bosna i Hercegovina i Albanija) ili 30 dana (Crna Gora i Hrvatska). U skladu sa makedonskim zakonom kao i Nacrtom Zakona o obligacionim odnosima Bosne i Hercegovine dejstva odustanka su ista kao dejstva raskida ugovora predviđena Zakonom o obligacionim odnosima.

B. DIREKTIVA O NEPRAVIČNIM ODREDBAMA U POTROŠAČKIM UGOVORIMA (93/13)

Koordinatori*: Marija Karanikić Mirić (I-IV), Zvezdan Čađenović (V-VII)*

I. Uvod: Politički razlozi za kontrolu pravičnosti standardnih odredaba u potrošačkim ugovorima

1. Prava država učesnica pre prvih pokušaja da se transponuje Direktiva o nepravičnim odredbama u potrošačkim ugovorima[129]

U vremenu koje je prethodilo prvim pokušajima da se u domaća prava transponuje Direktiva 93/13/EEZ,[130] u zemljama učesnicama nije bilo posebnih pravila o ništavosti nepravičnih odredaba u potrošačkim ugovorima.

U članovima 142-144 jugoslovenskog Zakona o obligacionim odnosima, koji je usvojen 30. marta 1978. godine, postojala su opšta pravila o ništavosti nepravičnih odredaba u athezionim ugovorima.[131] Ta pravila odnosila su se na standardne odredbe u ugovorima po pristupu, kako između dva pravna ili dva fizička lica, tako između pravnog i fizičkog lica. U zakonu je postojao manji broj posebnih pravila o ugovorima u privredi, ali nije bilo posebnih pravila o potrošačima i potrošačkim ugovorima. Pored toga, u zakonu nije bilo procesnih pravila.

Nakon što je 1992. godine došlo do raspada SFRJ, jugoslovenski Zakon o obligacionim odnosima nastavio je da se primenjuje u novoj Saveznoj Republici Jugoslaviji, uz određene izmene i dopune iz 1993. godine. Taj zakon ostao je na snazi i u Državnoj Zajednici Srbije i Crne Gore, koja je formirana 2003. godine. Nakon prestanka Državne Zajednice, Zakon o obligacionim odnosima ostao je osnovni formalni izvor obligacionog prava u Republici Srbiji.[132]

Posle raspada SFRJ, jugoslovenski Zakon o obligacionim odnosima nastavio je da se primenjuje i u novoformiranoj Republici Hrvatskoj, kao nacionalni Zakon o obveznim odnosima. Taj zakon menjan je i dopunjavan u nekoliko navrata.[133] Važeći Zakon o obveznim odnosima Republike Hrvatske usvojen je 2005. a izmenjen i dopunjen 2008. godine.[134]

Jugoslovenski Zakon o obligacionim odnosima nastavio je da se primenjuje i u Republici Makedoniji i Republici Crnoj Gori u vremenu nakon raspada savezne države. Makedonski zakonodavac je 2001. godine usvojio novi Zakon o obligacionim odnosima, koji je izmenjen i dopunjen nekoliko puta.[135] U Crnoj Gori, novi Zakon o obligacionim odnosima usvojen je 2008. godine.[136]

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[129] Pod državama učesnicama misli se na države čije pravo je predmet ove studije.

[130] Direktiva Saveta 93/13/EEC od 5. aprila 1993. o nepravičnim odredbama u potrošačkim ugovorima, OJ L 095, 21/04/1993 P. 0029 - 0034.

[131] Jugoslovenski Zakon o obligacionim odnosima objavljen je u *Službenom listu SFRJ* br. 29/78, a stupio je na snagu šest meseci kasnije, 1. oktobra 1978. Menjan je i dopunjavan nekoliko puta pre raspada SFRJ. Vid. *Službeni list SFRJ* br. 39/85, 45/89 i 57/89.

[132] Za kasnije izmene i dopune u Srbiji, vid. *Službeni list SRJ* br. 31/93, 31/93, 22/99, 23/99, 35/99, 44/99.

[133] Zakon o prihvatanju Zakona o obveznim odnosima, *NN RH* br. 53/1991, 73/1991 sa izmenama i dopunama (*NN RH* br. 03/1994, 07/1996, 112/1999).

[134] Zakon o obveznim odnosima, *NN RH* br. 35/2005, 41/2008.

[135] Zakon o obligacionim odnosima, *Službeni list RMak br.* 18/2001.

[136] Zakon o obligacionim odnosima, *Službeni list Crne Gore* br. 47/2008.

Jugoslovenski Zakon o obligacionim odnosima recipiran je i u pravni sistem novoformirane Bosne i Hercegovine. Do toga je došlo 11. aprila 1992. godine. Recepcija jugoslovenskog Zakona o obligacionim odnosima odvijala se zasebno u dva trenutno postojeća administrativna entiteta Bosne i Hercegovine – u Federaciji Bosne i Hercegovine[137] i u Republici Srpskoj.[138]

Da sumiramo. Države koje su nastale nakon što je prestala da postoji Socijalistička Federativna Republika Jugoslavija, u prvo vreme su recipirale i, uz određene izmene, zadržale pravila jugoslovenskog Zakona o obligacionim odnosima. Pre nego što je u ovim državama došlo do prvih pokušaja da se u domaće pravo transponuje Direktiva o nepravičnim odredbama u potrošačkim ugovorima, pravila koja su derivirala iz članova 142-144 jugoslovenskog Zakona o obligacionim odnosima bila su najbliža onome na šta se ta direktiva odnosi. Pomenuta pravila bila su ista u svim državama koje su nastale nakon raspada SFRJ.

U svim zakonima koji potiču od jugoslovenskog Zakona o obligacionim odnosima nalaze se pravila o opštim uslovima formularnih ugovora. Svi navedeni zakoni propisuju ništavost odredaba opštih uslova koje su protivne samom cilju zaključenog ugovora ili dobrim poslovnim običajima, čak i ako su opšti uslovi koji ih sadrže odobreni od nadležnog organa. Pored toga, sud može da odbije primenu pojedinih odredbi opštih uslova koje lišavaju drugu stranu prava da stavi prigovore, ili onih na osnovu kojih ona gubi prava iz ugovora ili gubi rokove, ili koje su inače nepravične ili preterano stroge prema njoj.

Opšti uslovi koje je utvrdila jedna strana ugovornica, bilo da su sadržani u formularnom ugovoru, bilo da se na njih ugovor poziva, dopunjuju sporazumno utvrđene posebne pogodbe. Obavezna snaga opštih uslova i posebnih pogodaba po pravilu je jednaka.

Opšti uslovi moraju biti objavljeni na uobičajeni način. Oni obavezuju ugovornu stranu koja im je pristupila jedino ako su joj bili poznati ili morali biti poznati u času zaključenja ugovora. U slučaju da postoji neslaganje između opštih uslova i sporazumno određenih pogodbi, prevagu odnose sporazumno određene pogodbe. Ako dođe do spora, nejasne odredbe athezionih ugovora tumače se u korist one strane koja je ugovoru pristupila.

Svi zakoni koji potiču od jugoslovenskog Zakona o obligacionim odnosima sadrže pravilo o apsolutnoj ništavosti ugovora koji je protivan prinudnim propisima, javnom poretku ili dobrim običajima, ako cilj povređenog pravila ne upućuje na neku drugu sankciju ili ako zakon u određenom slučaju ne propisuje što drugo. Ništavost jedne ugovorne odredbe ne povlači ništavost samog ugovora, ako on može opstati bez ništave odredbe, i ako ona nije bila ni uslov ugovora ni odlučujuća pobuda zbog koje je ugovor zaključen. Sud pazi na ništavost ugovora po službenoj dužnosti. Pravo na isticanje ništavosti ne gasi se protekom vremena. Na ništavost se može pozivati svako (pravno-) zainteresovano lice a utvrđivanje ništavosti može da zahteva i državni tužilac.

U članu 686 Albanskog građanskog zakonika iz 1994. godine nalaze se pravila o sudskoj kontroli opštih uslova u formularnim ugovorima.[139] Ugovorne odredbe koje je unapred formulisala jedna ugovorna strana ništave su: ako nisu bile poznate drugoj strani, ako narušavaju princip ravnopravnosti ugovornih strana i remete ravnotežu među njihovim interesima, ili ako ograničavaju odgovornost one strane koja ih je formulisala. Formularni ugovori tumače se u korist strane koja nije uticala na njihovu sadržinu.

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[137] Član 1 Zakona o usvajanju Zakona o obligacionim odnosima služio je kao osnov za recepciju Zakona o obligacionim odnosima bivše SFRJ u Federaciji BiH. Vid. *Službeni list Republike Bosne i Hercegovine* br. 2/92, 13/93 i 13/94.

[138] Član 12 Ustavnog zakona o primeni Ustava Srpske Republike Bosne i Hercegovine služio je kao pravni osnov za usvajanje Zakona o obligacionim odnosima bivše SFRJ u entitetu koji se danas naziva Republika Srpska. Vid. *Službeni glasnik Republike Srpske* br. 3/92.

[139] Albanski građanski zakonik, *Sl. list RAl br.* 11/1994.

2. Model Direktive o nepravičnim odredbama u potrošačkim ugovorima

Direktiva o nepravičnim odredbama u potrošačkim ugovorima omogućava sudsku kontrolu pravičnosti ugovornih odredaba u formularnim potrošačkim ugovorima. Ugovorna odredba smatra se nepravičnom ako je protivna načelu savesnosti i poštenja i ako izaziva značajnu neravnotežu u pogledu prava i obaveza ugovornih strana na štetu potrošača. Pored opštih (standardnih) odredaba u potrošačkim ugovorima po pristupu, sud kontroliše pravičnost odredaba koje je trgovac unapred formulisao za potrebe zaključenja ugovora sa određenim potrošačem. Pitanje koje ostaje otvoreno jeste može li sud da kontroliše pravičnost posebnih pogodbi, to jest onih odredaba u potrošačkom ugovoru koje trgovac nije samostalno unapred formulisao, nego je o njihovoj sadržini pregovarao sa određenim potrošačem. Pored pravičnosti, sudovi ispituju transparentnost standardnih odredaba u potrošačkim ugovorima.

Direktiva o nepravičnim odredbama u potrošačkim ugovorima sadrži indikativnu listu standardnih odredaba koje se smatraju nepravičnim. Sudovi ispituju pravičnost standardnih odredaba u potrošačkim ugovorima po službenoj dužnosti.[140] Nejasna ugovorna odredba koju je unapred formulisao trgovac, tumači se na način koji je najpovoljniji za potrošača.

Direktiva 93/13 spada u takozvane minimalne direktive. To znači da je minimalnom klauzulom Direktive 93/13 država članica ovlašćena da svojim nacionalnim propisima garantuje potrošačima jaču zaštitu od one koja im je garantovana Direktivom.[141] Kao razlog za kontrolu pravičnosti standardnih odredaba u potrošačkim ugovorima, u odlukama Evropskog suda pravde po pravilu se navodi mogućnost da trgovac zloupotrebi vlastitu poziciju moći:[142] "Potrošač se nalazi u slabijem položaju od trgovca, kako po pregovaračkoj snazi, tako po nivou raspoloživog znanja. Zbog svoje slabe pozicije potrošač često pristaje na one ugovorne odredbe koje je trgovac unapred formulisao, na čiju sadržinu potrošač nije mogao da utiče."

3. Prava država učesnica nakon pokušaja da se transponuje Direktiva o nepravičnim odredbama u potrošačkim ugovorima

Preuzimanje osnovnih potrošačkih direktiva u albansko pravo izvršeno je donošenjem posebnih zakona i odluka Saveta ministara. Direktiva o nepravičnim odredbama u potrošačkim ugovorima transponovana je usvajanjem Zakona o zaštiti potrošača Republike Albanije iz 2008. godine.[143]

Prvi pokušaj transponovanja većeg broja potrošačkih direktiva u hrvatsko pravo izvršen je 2003. godine, usvajanjem prvog okvirnog Zakona o zaštiti potrošača.[144] Taj Zakon zamenjen je novim Zakonom o zaštiti potrošača Republike Hrvatske iz 2007. godine.[145]

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[140] Odluka ESP od 27 juna 2000. godine, objedinjeni predmeti C-240/98 do C-244/98 – *Océano Grupo Editorial SA v. Murciano Quintero* [2000] ECR I-04941; Odluka ESP od 21. novembra 2002. godine, predmet C-473/00 – *Cofidis v. Fredout* [2002] ECR I-10875; Odluka ESP od 26 oktobra 2006. godine, predmet C-168/05 – *Elisa María Mostaza Claro v. Centro Móvil Milenium SL* [2006] ECR I-10421.

[141] S. Weatherill, *Law And Integration in the European Union*, Oxford University Press, Oksford 1995, 151-157; C. Barnard, *The Substantive Law iz the EU: The Four Freedoms*, Oxford University Press, Oksford, 2007, 600; F. De Cecco, "Room to Move? Minimum Harmonization and Fundamental Rights", *Common Market Law Review*, tom 43, 1/2006, 9-30.

[142] Odluka ESP od 27 juna 2000. godine, objedinjeni predmeti C-240/98 do C-244/98 – *Océano Grupo Editorial SA v. Murciano Quintero* [2000] ECR I-04941.

[143] Zakon o zaštiti potrošača, *Sl. list RAl br.* 61/08.

[144] Zakon o zaštiti potrošača, *NN RH* br. 96/03.

[145] Zakon o zaštiti potrošača, *NN RH* br. 79/07, 125/07, 79/09, 89/09.

Prvi pokušaj da se jednim okvirnim zakonom uredi oblast zaštite potrošača u Bosni i Hercegovini učinjen je 2002. godine.[146] Važećim Zakonom o zaštiti potrošača iz 2006. godine u pravo Bosne i Hercegovine transponovan je veći broj potrošačkih direktiva, uključujući Direktivu 93/13.[147]

Prvi Zakon o zaštiti potrošača u Republici Makedoniji usvojen je 2000. a dopunjen 2002. godine [148] Makedonski zakonodavac usvojio je važeći Zakon o zaštiti potrošača 2004. godine. Taj zakon je menjan i dopunjavan u dva navrata.[149]

Prvi okvirni Zakon o zaštiti potrošača u Srbiji i Crnoj Gori usvojen je 2002. godine. Reč je o saveznom zakonu koje je važio na teritoriji obe republike u sastavu Savezne Republike Jugoslavije (docnije Državne Zajednice Srbija i Crna Gora).[150]

Savezni Zakon o zaštiti potrošača ukinut je 2005. godine u Republici Srbiji, kada je usvojen važeći Zakon o zaštiti potrošača.[151]

Vlada Republike Srbije pokušala je u nekoliko navrata da izradi nacrt neophodnih izmena i dopuna tog zakona. Od te ideje se na kraju odustalo i Vlada je pristupila izradi nacrta sasvim novog okvirnog zakona o zaštiti potrošača. Nacrt Zakona o zaštiti potrošača Republike Srbije (u daljem tekstu: NZZP) ušao je u javnu raspravu i njegovo usvajanje može se očekivati u poslednjem kvartalu 2010. godine.[152]

U Crnoj Gori, savezni Zakon o zaštiti potrošača godine ukinut je 2007. godine, usvajanjem novog Zakona o zaštiti potrošača.[153]

Kao što je već rečeno, u pravima onih država koje su nastale nakon raspada SFRJ postoje posebna pravila o opštim uslovima u formularnim ugovorima. Njihovi zakoni o obligacionim odnosima nastali su na temelju jugoslovenskog Zakona o obligacionim odnosima iz 1978. godine i uređuju obligacione odnose pravnih lica, fizičkih lica, kao i odnose između pravnog i fizičkog lica. Prilikom transponovanja Direktive 93/13 u prava bivših jugoslovenskih republika, po pravilu nisu unošene izmene u zakone o obligacionim odnosima, nego su usvajani posebni zakoni.

Zakon o zaštiti potrošača Bosne i Hercegovine iz 2006. godine primenjuje se samo na ugovorne odnose između trgovaca i potrošača (*Business-to-Consumer – B2C*). Pravila Zakona o obligacionim odnosima o tumačenju nejasnih opštih uslova u formularnim ugovorima primenjuju se i na pogodbe o kojima su trgovac i potrošač posebno pregovarali. Sudska kontrola nepravičnih odredaba ograničena je na one odredbe o kojima trgovac i potrošač nisu *lično* pregovarali. Tu je reč o pogrešnom prevodu izraza *pojedinačno* koji je upotrebljen u Direktivi. Prema pravilima Direktive, van domašaja sudske kontrole nalaze se ugovorne odredbe o kojima je trgovac posebno pregovarao sa konkretnim potrošačem, bez obzira na to da li su ovi pregovori vođeni lično.

Hrvatski Zakon o zaštiti potrošača iz 2007. godine primenjuje se samo na ugovore između trgovca i potrošača. Zakon predviđa sudsku kontrolu opštih uslova formularnih potrošač-

[146] Zakon o zaštiti potrošača, *Sl. glasnik BiH* br. 17/02.

[147] Zakon o zaštiti potrošača, *Sl. glasnik BiH* br. 25/06.

[148] Zakon o zaštiti potrošača, *Sl. list RMak br.* 63/00, 4/02.

[149] Zakon o zaštiti potrošača, *Sl. list RMak br.* 38/04, 77/07, 103/08.

[150] Savezni Zakon o zaštiti potrošača, *Sl. glasnik SRJ* br. 37/02.

[151] Zakon o zaštiti potrošača, *Sl. glasnik RS* br. 79/05.

[152] Nacrt zakona o zaštiti potrošača, Ministarstvo trgovine i usluga Republike Srbije, http://www.mtu.gov.rs/cms/?page_id=362, preuzeto 25.06.2010.

[153] Zakon o zaštiti potrošača, *Sl. list CG* br. 26/07.

kih ugovora, to jest samo onih ugovornih odredaba o kojima trgovac i potrošač nisu posebno pregovarali. Isto važi prema makedonskom Zakonu o zaštiti potrošača iz 2004. godine i crnogorskom Zakon o zaštiti potrošača iz 2007. godine.

Prema odredbi člana 2, stav 2 hrvatskog Zakona o zaštiti potrošača, na ugovore zaključene između trgovca i potrošača primenjuju se pravila Zakona o obveznim odnosima, ako Zakon o zaštiti potrošača ne propisuje neko specijalno pravilo. Isti odnos zakona kojim se uređuje zaštita potrošača i zakona kojim se uređuju obligacioni odnosi postoji u drugim državama učesnicama.

Zakon o zaštiti potrošača Republike Srbije iz 2005. godine ne može se smatrati ozbiljnim pokušajem da se u srpsko pravo transponuje Direktiva o nepravičnim odredbama u potrošačkim ugovorima.[154] U tom zakonu preuzeto je nekoliko već poznatih pravila iz Zakona o obligacionim odnosima, koje se odnose na ugovore po pristupu. To preuzimanje izvršeno je polovično. NZZP (Nacrt Zakona o zaštiti potrošača o kojem se u Srbiji trenutno (leto 2010. godine) vodi javna rasprava) predviđa sudsku kontrolu pravičnosti svih odredaba potrošačkih ugovora – kako opštih uslova koje je unapred formulisao trgovac, tako posebnih pogodbi o kojima su trgovac i potrošač pregovarali.

II. Oblast primene

1. Potrošač. Trgovac (prodavac robe odnosno pružalac usluga). Javna preduzeća.

a. Potrošački ugovori (između trgovca i potrošača – B2C*), ugovori u privredi (između trgovaca –* B2B*) i privatni ugovori (između fizičkih lica –* P2P*)*

Direktiva 93/13 odnosi se na potrošačke ugovore, to jest na ugovore zaključene između trgovaca i potrošača. U gotovo svim državama koje su predmet ove studije, zakon kojim se pomenuta Direktiva transponuje u nacionalna prava omogućava sudsku kontrolu pravičnosti onih odredaba u potrošačkim ugovorima koje je unapred formulisao trgovac.

Albanski Zakon o zaštiti potrošača propisuje da se pravila o nepravičnim odredbama primenjuju samo na potrošačke ugovore.[155] Pravilo iste sadržine važi u Hrvatskoj, Bosni i Hercegovini, Makedoniji i Crnoj Gori.

Zakon o zaštiti potrošača Republike Srbije iz 2005. odnosi se na pravne poslove između trgovca (prodavca robe odnosno pružaoca usluga) i potrošača, ali je pojam potrošača proširen na pravna lica pod određenim uslovima. Odredbe NZZP odnose se samo na ugovore zaključene između trgovca i fizičkog lica u svojstvu potrošača.

U državama koje su nastale nakon raspada SFRJ, pravila o opštim uslovima formularnih ugovora sadržana u zakonima kojima se uređuju obligacioni odnosi i dalje se primenjuju na ugovore koji se ne kvalifikuju kao potrošački (ugovori između dva trgovca ili ugovori između dva fizička lica).

b. Pojam potrošača

Prema Direktivi o nepravičnim odredbama u potrošačkim ugovorima potrošač je fizičko lice koje postupa u svrhe koje su izvan njegove profesionalne, poslovne ili zanatske delatnosti. Pojedine države koje su predmet ove studije samo delimično su transponovale ovo pravilo.

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[154] Zakon o zaštiti potrošača, *Sl.glasnik RS* br.79/05

[155] Član 2 i član 27, stav 1, Zakon o zaštiti potrošača, *Sl. list RAl br.* 61/08.

Prema albanskom Zakonu o zaštiti potrošača, potrošač je fizičko lice koje postupa u svrhe koje izlaze iz okvira njegove profesionalne, poslovne ili zanatske delatnosti. Albanski zakonodavac proširio je pojam potrošača na neprofitne organizacije.[156]

Prema makedonskom Zakonu o zaštiti potrošača, potrošač je fizičko lice koje kupuje proizvode ili pribavlja usluge za neposrednu ličnu potrošnju, odnosno za potrebe izvan svoje zanatske, poslovne ili profesionalne delatnosti.[157]

U crnogorskom pravu, potrošač je fizičko lice koje kupuje, naručuje, prihvata, ili koristi robu ili usluge, uključujući usluge javnih službi, u svrhe koje nisu poslovne. Potrošač je i lice kojem je upućena ponuda da stupi u ugovorni odnos sa takvom namenom. Crnogorski Zakon o zaštiti potrošača definiše grupu potrošača, odnosno grupu formiranu od strane potrošača u cilju pružanja pomoći članovima grupe da steknu pravo svojine nad određenim proizvodima.

Prema Zakonu o zaštiti potrošača Republike Hrvatske, potrošač je fizičko lice koje sklapa pravni posao ili deluje na tržištu u svrhe koje nisu namenjene njegovoj poslovnoj delatnosti, niti obavljanju delatnosti slobodnog zanimanja.[158]

Prema važećem Zakonu o zaštiti potrošača Republike Srbije, potrošač je svako fizičko lice koje kupuje proizvode ili usluge za sopstvene potrebe, ili za potrebe svog domaćinstva. Potrošač je i privredno društvo, preduzeće, drugo pravno lice ili preduzetnik kada kupuje proizvode ili usluge za sopstvene potrebe. Prema NZZP, potrošač je samo fizičko lice, i to ono koje postupa *pretežno* izvan svoje poslovne delatnosti, profesije ili zanata.

Zakon o zaštiti potrošača Bosne i Hercegovine definiše potrošača kao fizičko lice koje kupuje, stiče ili koristi proizvode ili usluge za svoje lične potrebe i potrebe svog domaćinstva. Ovde je pojam potrošača sužen. Nije dovoljno da fizičko lice postupa izvan svog zanata, poslovne delatnosti ili profesije, nego je neophodno da ono to čini za svoje lične potrebe i potrebe svog domaćinstva.

c. Pojam trgovca (prodavca robe odnosno pružaoca usluga)

Prema odredbi člana 2(2) Direktive 93/13, trgovac (prodavac robe, odnosno pružalac usluga) podrazumeva fizičko ili pravno lice koje postupa u okviru svoje poslovne, profesionalne ili zanatske delatnosti. Ako je reč o pravnom licu, ono ima status trgovca bez obzira na to što se nalazi u privatnoj ili državnoj svojini. Pojam trgovca tumači se široko, pa obuhvata poljoprivrednike i lica koja se bave slobodnim profesijama.

U albanskom pravu, trgovac je fizičko ili pravno lice koje postupa u svrhe sopstvene profesionalne ili poslovne delatnosti ili zanata, uključujući svakoga ko postupa u ime ili za račun trgovca.[159]

U pravu Bosne i Hercegovine, trgovac je lice koje neposredno ili kao posrednik među drugim licima prodaje proizvode ili pruža usluge potrošaču.[160] Ova definicija uža je od definicije sadržane u Direktivi, utoliko što umesto lica koje postupa u određene svrhe upućuje na lica koja prodaju proizvode ili pružaju usluge.

U crnogorskom pravu, trgovac je lice koja prodaje robu ili pruža usluge potrošačima. Kao i u potrošačkom pravu Bosne i Hercegovine, ovde je pojam trgovca sužen na lica koja

[156] Član 3, stav 6, Zakon o zaštiti potrošača, *Sl. list RAl br.* 61/08.

[157] Član 4, Zakon o zaštiti potrošača, *Sl. list RMak br.* 38/04, 77/07, 103/08.

[158] Član 3, stav 1, alineja 4, Zakon o zaštiti potrošača, *NN RH* br. 79/07, 125/07, 79/09, 89/09.

[159] Član 3, stav 14, Zakon o zaštiti potrošača, *Sl. list RAl br.* 61/08.

[160] Član 1, stav 5, Zakon o zaštiti potrošača, *Sl. glasnik BiH* br. 25/06.

prodaju robu ili pružaju usluge, što makar na prvi pogled isključuje period koji prethodi zaključenju ugovora.

U hrvatskom pravu, trgovac je fizičko ili pravno lice koje sklapa pravni posao ili deluje na tržištu u okviru svoje poslovne delatnosti, ili u okviru obavljanja delatnosti slobodnog zanimanja.[161]

U Makedoniji, trgovac je pravno ili fizičko lice koje, u toku obavljanja svoje delatnosti, neposredno zadovoljava potrebe građana za proizvodima i uslugama. Makedonski Zakon o zaštiti potrošača ne ulazi u pitanje vlasništva nad pravnim licem koje neposredno zadovoljava potrebe građana za proizvodima i uslugama, pa se može zaključiti da se svako takvo pravno lice kvalifikuje kao trgovac, bilo da se ono nalazi u privatnoj bilo u državnoj svojini.

Prema važećem Zakonu o zaštiti potrošača Republike Srbije, trgovac je privredno društvo, preduzeće, drugo pravno lice i preduzetnik, koji prodaje proizvode ili pruža usluge potrošaču. Prema NZZP (pomenuti Nacrt Zakona o zaštiti potrošača o kojem se trenutno vodi javna rasprava), trgovac je fizičko ili pravno lice koje postupa u okviru svoje poslovne delatnosti, profesije ili zanata, kao i svako ko dela u ime i za račun trgovca.

d. Javna preduzeća

Albanski Zakon o zaštiti potrošača iz 2008. godine ne pominje javna preduzeća. Isto važi za srpski Zakon o zaštiti potrošača iz 2005. godine.

Treba napomenuti da pomenuti Nacrt Zakona o zaštiti potrošača iza kojeg stoji Ministarstvo trgovine i usluga Republike Srbije (NZZP) sadrži posebno poglavlje čiji cilj je da se u srpsko pravo transponuju Direktiva 2002/22/EZ (dopunjena Direktivom 2009/136/EZ) o univerzalnim uslugama u oblasti telekomunikacija, Direktiva 2009/72/EZ o električnoj energiji i Direktiva 2009/73/EZ o gasu, u meri u kojoj su one od značaja za pitanja zaštite prava i interesa potrošača. NZZP propisuje posebnu dužnost trgovca koji pruža usluge od opšteg ekonomskog interesa da potrošača obavesti o pojedinostima koje su od značaja za donošenje racionalne odluke o stupanju u ugovorni odnos. Međutim, NZZP ne sadrži nikakva posebna pravila o nepravičnim odredbama ugovora za slučaj da uslugu od opšteg ekonomskog interesa pruža javno preduzeće. Odsustvo posebnih pravila o nepravičnim odredbama ugovora između javnog preduzeća i potrošača, znači da se na te ugovore primenjuju opšta pravila o nepravičnim odredbama u potrošačkim ugovorima.

Makedonski Zakon o zaštiti potrošača sadrži tri člana koji se odnose na pružanje javnih usluga potrošačima,[162] ali nijedan od tih članova ne odnosi se na nepravičnost ugovornih odredaba.

U Bosni i Hercegovini, kada javna preduzeća sa potrošačima zaključuju formularne ugovore, njihov ugovorni odnos uređen je opštim pravilima potrošačkog prava. To znači da se na opšte uslove formularnih ugovora između javnog preduzeća i potrošača primenjuju pravila Zakona o zaštiti potrošača o nepravičnim odredbama u potrošačkim ugovorima.

U hrvatskom pravu, pravna lica javnog prava smatraju se za trgovce kada stupaju u građanskopravne odnose. To se na prvom mestu odnosi na javna preduzeća koja pružaju javne usluge iz člana 24 hrvatskog Zakona o zaštiti potrošača. Pravilo iste sadržine važi u Crnoj Gori.

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[161] U hrvatskom Zakonu o zaštiti potrošača upotrebljava se reč *trgovac*, a ne *prodavac* ili *pružalac usluga*. S. Šarčević, E. Čikara, “European vs National Terminology in Croatian Legislation Transposing EU Directives”, u: S. Šarčević (ed.), *Legal Language in Action: Translation, Terminology, Drafting and Procedural Issues,* Globus, Zagreb 2009, 205. i dalje.

[162] Član 118-120, Zakon o zaštiti potrošača, *Sl. list RMak br.* 38/04, 77/07, 103/08.

2. Ugovori na koje se ova pravila ne primenjuju

a. Ugovori u oblasti naslednog, porodičnog, radnog i kompanijskog prava

Prema tački 10 Preambule Direktive o nepravičnim odredbama u potrošačkim ugovorima, pravila Direktive ne odnose se na ugovore u oblasti radnog, naslednog i porodičnog prava, ugovor o ortakluku i ugovore o osnivanju i organizaciji privrednih društava. Nije sporno da se ugovor o radu, kao i porodičnopravni i naslednopravni ugovori, ne mogu se kvalifikovati kao potrošački. S druge strane, otvara se pitanje da li se ugovor o ortakluku i ugovor osnivanju privrednog društva mogu pod određenim uslovima označiti kao potrošački. Sticanje prava na udelu u privrednom društvu može se pod određenim uslovima kvalifikovati kao potrošački ugovor.

U albanskom Zakonu o zaštiti potrošača nema izričite odredbe o tome da se pravila o nepravičnim odredbama ne primenjuju na pomenute vrste ugovora. Isto važi za Zakon o zaštiti potrošača Bosne i Hercegovine. Međutim, ugovori radnog, porodičnog, naslednog i kompanijskog prava isključeni su iz primene pomenutih zakona o zaštiti potrošača posredno, pomoću zakonskih odredaba o tome ko su strane u potrošačkom ugovoru. Naime, način na koji su definisani pojmovi trgovca i potrošača onemogućava primenu pravila o nepravičnim odredbama u potrošačkim ugovorima na ugovore radnog, porodičnog, naslednog i kompanijskog prava. Isto važi u srpskom, hrvatskom,[163] crnogorskom i makedonskom pravu.

Nasuprot svemu navedenom, ugovor o prodaji akcija može se kvalifikovati kao potrošački ugovor. U tom slučaju na njega bi se primenjivala nacionalna pravila o ništavosti nepravičnih odredaba u potrošačkim ugovorima.

b. Ugovori o ustupanju prava na nepokretnostima

Albanski Zakon o zaštiti potrošača ne sadrži posebna pravila o ugovorima koji se odnose na nepokretnosti. Makedonski pravni pisci smatraju da ugovore koji se odnose na nepokretnosti ne treba kvalifikovati kao potrošačke ugovore.

Prema Zakonu o zaštiti potrošača Bosne i Hercegovine, fizičko lice koje kupuje, stiče ili koristi *proizvode* ili usluge za svoje lične potrebe i za potrebe svog domaćinstva. Zakonska definicija robe obuhvata proizvode i nepokretnu imovinu. Postoji izvesna nedoslednost u upotrebi reči roba i proizvod u zakonskom tekstu. Zakonodavac ih ponekad koristi kao sinonime, što bi moglo da znači da ugovori koji se odnose na nepokretnosti spadaju u delokrug Zakona o zaštiti potrošača Bosne i Hercegovine.

Hrvatski Zakon o zaštiti potrošača dopušta takvo tumačenje prema kojem se pravila o ništavosti nepravičnih odredaba u potrošačkim ugovorima primenjuju na ugovore o prodaji ili ustupanju nekog užeg prava kako na pokretnim stvarima, tako na nepokretnostima. Isto važi u crnogorskom pravu, budući da crnogorski zakonodavac nije izričito propisao da se reč roba odnosi samo na pokretne stvari.

U srpskom Zakonu o zaštiti potrošača nema posebnih pravila kojima se iz pojma potrošačkih ugovora izuzimaju ugovori o prodaji ili ustupanju nekog užeg prava na nepokretnosti. NZZP (pomenuti Nacrt Zakona o zaštiti potrošača iza kojeg stoji Ministarstvo trgovine i usluga Republike Srbije) definiše robu kao svaku telesnu pokretnu stvar; s tim što se kao roba ne smatraju: stvar prodata u izvršnom postupku ili na drugi način po sili zakona; voda i gas koji se ne prodaju u ograničenoj ili unapred utvrđenoj količini; električna energija. To znači da se odredbe NZZP o ništavosti nepravičnih odredaba u potrošačkim ugovorima ne odnose na ugo-

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[163] M. Baretić, "Nepoštene odredbe u potrošačkim ugovorima", u M. Dika, Z. Pogarčić (ured.), *Obveze trgovca u sustavu zaštite potrošača*, Narodne novine, Zagreb 2003, 67.

vore o prodaji nepokretnosti. NZZP definiše proizvod kao svaku robu i uslugu, uključujući nepokretnosti, prava i obaveze. Međutim, ta definicija proizvoda ima ograničenu primenu: ona se odnosi na proizvode u domenu zabrane nepoštenog poslovanja, odnosno transponovanja u srpsko pravo Direktive 2005/29 o nepoštenom poslovanju.

3. Ugovorne odredbe na koje se ova pravila ne primenjuju

a. Ugovorne odredbe koje su u skladu sa imperativnim propisima

Prema članu 1(2) Direktive 93/13, pravila te Direktive ne odnose se na ugovorne odredbe koje su u skladu sa imperativnim zakonskim i podzakonskim normama i sa pravilima ili principima međunarodnih konvencija koje su potpisane od strane država članica ili Zajednice, posebno u oblasti transporta.

Albanski Zakon o zaštiti potrošača ne propisuje takav izuzetak. Isto važi za Zakon o zaštiti potrošača Bosne i Hercegovine i Zakon o zaštiti potrošača Crne Gore.[164]

Hrvatski zakonodavac preuzeo je pomenuto pravilo iz Direktive 93/13. Ono se nalazi u članu 96, stav 5 hrvatskog Zakona o zaštiti potrošača. Tu je propisano da se pravila o nepravičnim ugovornim odredbama ne primenjuju na one ugovorne odredbe koje su u skladu sa imperativnim zakonskim normama, odnosno odredbama i načelima međunarodnih konvencija koje su obavezujuće za Republiku Hrvatsku. Isto pravilo prihvaćeno je u makedonskom pravu.[165]

Važeći Zakon o zaštiti potrošača Republike Srbije ne sadrži pravilo kojim bi se u srpsko pravo transponovao pomenuti izuzetak iz Direktive. Štaviše, prema odredbi člana 143 srpskog Zakona o obligacionim odnosima, odredbe opštih uslova koje su protivne samom cilju zaključenog ugovora ili dobrim poslovnim običajima ništave su, čak i ako su opšti uslovi koji ih sadrže odobreni od nadležnog organa. Isto pravilo sadržano je u zakonima kojima se uređuju obligacioni odnosi u svim ostalim bivšim jugoslovenskim republikama. NZZP (pomenuti Nacrt Zakona o zaštiti potrošača Republike Srbije) predviđa da se pravila o ništavosti nepravičnih odredaba u potrošačkim ugovorima ne odnose na ugovorne odredbe čija sadržina je propisana prinudnim zakonskim ili podzakonskim normama.

b. Posebne pogodbe između trgovca i potrošača

Prema pravilima Direktive 93/13, sudska kontrola nepravičnosti i posledične ništavosti ugovornih odredaba ograničena je na one odredbe potrošačkih ugovora čija sadržina nije sporazumno ugovorena, to jest na ugovorne odredbe koje je trgovac unapred formulisao. Pravila Direktive ne primenjuju se na posebne pogodbe, to jest na ugovorne odredbe o čijem je postojanju i sadržini trgovac pregovarao sa određenim potrošačem.

Prema članu 27, stav 2 albanskog Zakona o zaštiti potrošača, pravila o ništavosti nepravičnih ugovornih odredaba ne odnose se na posebne pogodbe u potrošačkom ugovoru. Na trgovca pada teret dokazivanja da je reč o posebnoj pogodbi a ne o opštem uslovu formularnog ugovora. Ista pravila mogu se naći u crnogorskom Zakonu o zaštiti potrošača.

Član 51, stav 1 makedonskog Zakona o zaštiti potrošača propisuje isto isključenje posebnih pogodbi. Međutim, opšta pravila o ništavosti sadržana u makedonskom Zakonu o obliga-

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[164] Prema članu 9 Ustava Republike Crne Gore, potvrđeni i objavljeni međunarodni ugovori i opšteprihvaćena pravila međunarodnog prava sastavni su dio unutrašnjeg pravnog poretka, imaju primat nad domaćim zakonodavstvom i neposredno se primjenjuju kada odnose uređuju drukčije od unutrašnjeg zakonodavstva. Prema članu 16 Ustava Republike Srbije opšteprihvaćena pravila međunarodnog prava i potvrđeni međunarodni ugovori sastavni su deo pravnog poretka Republike Srbije i neposredno se primenjuju.

[165] Član 53, stav 4, Zakon o zaštiti potrošača, *Sl. list RMak br.* 38/04, 77/07, 103/08.

cionim odnosima mogu se primeniti kako na opšte uslove formularnih ugovora, tako na posebne pogodbe.

Zakon o zaštiti potrošača Bosne i Hercegovine propisuje da se pravila o nepravičnim odredbama primenjuju samo na one odredbe o kojima trgovac i potrošač nisu lično pregovarali. Zakonodavac je tu pogrešno transponovao pravilo kojim se iz Direktive izuzimaju ugovorne odredbe o kojima su trgovac i potrošač posebno pregovarali. Umesto odredbi o kojima je *posebno* pregovarano sa konkretnim potrošačem, zakonodavac pominje odredbe o kojima je pregovarano *lično*, to jest bez posrednika.

Prema članu 96 hrvatskog Zakona o zaštiti potrošača, pravila o nepravičnim odredbama ne primenjuju se na posebne pogodbe, to jest odredbe koje su posebno ugovorene sa određenim potrošačem. Kada trgovac tvrdi da je o nekoj odredbi posebno pregovarano sa potrošačem, teret dokazivanja leži na trgovcu.

Prema članu 296 novog Zakona o obveznim odnosima Republike Hrvatske, ništave su odredbe opštih uslova ugovora koje, suprotno načelu savesnosti i poštenja, izazivaju očiglednu neravnopravnost u pravima i obvezama strana na štetu strane koja pristupa ugovoru ili ugrožavaju postizanje svrhe ugovora, čak i ako su opšti uslovi koji ih sadrže odobreni od nadležnog tela. Međutim, to pravilo se ne primenjuje na one opšte uslove ugovora čiji sadržaj je preuzet iz važećih propisa, ili se pre sklapanja ugovora o njima pojedinačno pregovaralo, a druga strana je pritom mogla da utiče na njihov sadržaj, kao ni na odredbe o predmetu i ceni, ako su jasne, razumljive i lako uočljive.[166]

Već je rečeno da važeći Zakon o zaštiti potrošača Republike Srbije ne predstavlja ozbiljan pokušaj da se u srpsko pravo transponuje Direktiva 93/13. Naprotiv, taj zakon samo preuzima neka pravila iz Zakona o obligacionim odnosima koja se tiču athezionih ugovora. Pored toga, srpski Zakon o obligacionim odnosima sadrži opšta pravila o apsolutnoj ništavosti, ali ta pravila ne prave razliku između unapred formulisanih ugovornih odredaba i onih odredaba o kojima je posebno pregovarano sa određenim kupcem. Prema NZZP (pomenuti Nacrt Zakona o zaštiti potrošača Republike Srbije), pravila o ništavosti odnose se na sve nepravične ugovorne odredbe. Ugovorna odredba označava svaku odredbu potrošačkog ugovora, uključujući posebne pogodbe o čijoj sadržini je potrošač pregovarao ili mogao da pregovara s trgovcem, i opšte odredbe čiju sadržinu je unapred odredio trgovac ili treća strana.

III. Kriterijum pravičnosti ugovornih odredaba

1. Koncept Direktive o nepravičnim odredbama potrošačkih ugovora

Prema članu 3(1) Direktive 93/13, ugovorna odredba čija sadržina nije sporazumno ugovorena smatra se nepravičnom ako protivno načelu savesnosti i poštenja stvara bitnu nesrazmeru u pravima i obavezama ugovornih strana na štetu potrošača. Tim pravilom propisano je jedno opšte merilo prema kojem se utvrđuje da li je neka odredba u potrošačkom ugovoru nepravična. Opšti uslov formularnog ugovora nepravičan je ako dovodi do bitne nesrazmere u pravima i obavezama ugovornih strana na štetu potrošača. Međutim, sudska kontrola pravičnosti ne može se odnositi na onu ugovornu odredbu kojom je uređen predmet ugovora. Pravilima Direktive onemogućena je kontrola pravičnosti ugovorne odredbe kojom je određen predmet ugovora i odnos uzajamnih davanja, izuzev ako je ta ugovorna odredba nejasna i nerazumljiva. Nesrazmera u pravima i obavezama ugovornih strana na štetu potrošača ne sme

[166] Ograničenje iz stava 296 hrvatskog Zakona o obveznim odnosima smatra se suviše uskim. Vid. S. Petrić, „Opšti uslovi ugovora prema novom ZOO", u Z. Slakoper (ured.), Bankovni i financijski ugovori, Pravni fakultet u Rijeci, Rijeka 2007, str. 37.

se ticati predmeta ugovora i odnosa između robe odnosno usluge i cene, već ta nesrazmera mora postojati u pogledu preostalih ugovornih prava i obaveza. Položaj potrošača upoređuje se sa položajem u kojem bi on bio da odredba o kojoj je reč nije ugovorena.

Pored svega navedenog, opšte merilo sadržano u članu 3(1) Direktive 93/13 nalaže da ugovorna odredba mora biti u skladu sa načelom savesnosti i poštenja da bi mogla da se kvalifikuje kao pravična.

Taj uslov može se tumačiti na više načina. Može biti da jedno podrazumeva drugo, to jest da je svaka ugovorna odredba koja značajno remeti ravnotežu u ugovornim pravima i obavezama trgovca i potrošača, i to na teret potrošača, protivna načelu savesnosti i poštenja. S druge strane, može se uzeti da je ugovorna odredba nepravična ako kumulativno zadovoljava dva uslova: ako je protivna načelu savesnosti i poštenja i ako značajno remeti ravnotežu u interesima ugovornih strana na štetu potrošača. Na kraju, može se uzeti da je ugovorna odredba nepravična ako zadovoljava makar jedan od pomenuta dva uslova.

Dakle, prema članu 4(2) Direktive 93/13, prilikom utvrđivanja nepravičnog karaktera ugovorne odredbe, ne procenjuje se način na koji je uređen predmet ugovora, niti se procenjuje u kojoj meri je ugovorena cena ili naknada srazmerna robi ili usluzi koja se uzvrat duguje, ako je ugovorna odredba napisana jednostavnim i razumljivim jezikom. Prema članu 4(1) Direktive 93/13, prilikom utvrđivanja nepravičnog karaktera ugovorne odredbe uzima se u obzir priroda robe ili usluge koja je predmet ugovorne obaveze, sve okolnosti koje su prethodile zaključenju ugovora, kao i sve druge odredbe istog potrošačkog ugovora i odredbe onih ugovora koji su povezani sa potrošačkim ugovorom. Direktiva 93/13 sadrži Aneks u kojem se nalazi ilustrativna, indikativna lista opštih odredaba u potrošačkim ugovorima, koje se smatraju nepravičnim.

2. Merilo pravičnosti u državama učesnicama

Prema članu 3 Direktive 93/13, a u vezi sa tačkom 15 Preambule, svaka država članica ima obavezu da propiše opšte merilo, to jest kriterijum za utvrđivanje da li je odredba u potrošačkom ugovoru koju je unapred formulisao trgovac pravična prema potrošačima. Prema tom kriterijumu procenjuje se pravičnost opštih (standardnih) uslova formularnih ugovora, kao i onih ugovornih odredaba koje nisu opšte ali potrošač nije mogao da utiče na njihovu sadržinu. Direktiva 93/13 sadrži minimalnu klauzulu. To znači da su države članice slobodne da potrošačima garantuju jaču zaštitu od nepravičnih odredaba od one zaštite koja im je garantovana pravilima Direktive 93/13. U tom smislu države su slobodne da sudsku kontrolu prošire na posebne pogodbe, to jest na ugovorne odredbe o kojima je trgovac posebno pregovarao sa određenim potrošačem.

Prema članu 94 Zakona o zaštiti potrošača Bosne i Hercegovine, trgovac ne sme da zahteva ugovorne odredbe koje su nepravične ili koje bi prouzrokovale štetu potrošaču. Ugovorne odredbe koje potrošač nije lično ugovarao smatraju se nepravičnim ako stvaraju značajnu nejednakost između prava i obaveza ugovornih strana na štetu potrošača; ako bi ispunjenje ugovornih obaveza značajno odstupilo od opravdanog očekivanja potrošača; ili ako su u suprotnosti s principom poštenja, savesti i dobrim poslovnim običajima. Svaki od navedenih uslova dovoljan je da se odredba potrošačkog ugovora kvalifikuje kao nepravična.

Prema članu 93 Zakona o zaštiti potrošača Bosne i Hercegovine, ugovorne odredbe treba da budu razumljive i u vezi s drugim odredbama u istom ili drugom ugovoru između istih strana, uzimajući u obzir prirodu proizvoda ili usluge i svih drugih učesnika u vezi sa zaključenjem ugovora. Uzima se da nejasne odredbe imaju ono značenje koje je povoljnije za potrošača. Pravilo Direktive 93/13 kojim se isključuje mogućnost kontrole pravičnosti onih ugovornih odredaba kojima je određen predmet ugovora ili odnos uzajamnih davanja nije transponovano u pravo Bosne i Hercegovine.

Hrvatski zakonodavac doslovno je transponovao pravilo iz člana 3(1) Direktive 93/13. U članu 96, stav 1 Zakona o zaštiti potrošača Republike Hrvatske stoji da se ugovorna odredba o kojoj se nije pojedinačno pregovaralo smatra nepravičnom ako, suprotno načelu savesnosti i poštenja, izaziva znatnu neravnotežu u pravima i obvezama ugovornih strana na štetu potrošača. Prema članu 99 hrvatskog Zakona nije dopušteno ocenjivati jesu li ugovorne odredbe o predmetu ugovora i ceni pravične, ako su te odredbe jasne, lako razumljive i uočljive. To znači da je isključena mogućnost kontrole pravičnosti onih ugovornih odredaba kojima je određen predmet ugovora ili odnos uzajamnih davanja. Članom 98 propisano je da se prilikom ocene da li je određena ugovorna odredba pravična uzima u obzir priroda robe ili usluge koja predstavlja predmet ugovora, sve okolnosti pre i tokom zaključenja ugovora, ostale ugovorne odredbe, kao i drugi ugovor koji, s obzirom na ugovor koji se ocenjuje, predstavlja glavni ugovor.

Zakon o obveznim odnosima Republike Hrvatske propisuje u članu 296, stav 1 ništavost odredaba opštih uslova ugovora koje, suprotno načelu savesnosti i poštenja, stvaraju očiglednu nesrazmeru u pravima i obvezama strana na štetu strane koja pristupa ugovoru. ili ugrožavaju ostvarivanje svrhe ugovora, čak i ako je nadležno telo odobrilo opšte uslove. Ipak, ovo pravilo se ne primenjuje na odredbe o predmetu i ceni ugovora, ako su te odredbe jasne, razumljive i lako uočljive. Prilikom ocene ništavosti određene odredbe opštih uslova uzimaju se u obzir sve okolnosti pre i u vreme sklapanja ugovora, pravna priroda ugovora, vrsta robe ili usluge koja je predmet prestacije, ostale odredbe ugovora, kao i odredbe drugog ugovora s kojim je ta odredba opštih uslova ugovora povezana.

Prema članu 143 Zakona o obligacionim odnosima Republike Srbije, ništave su one odredbe opštih uslova koje su protivne samom cilju zaključenog ugovora ili dobrim poslovnim običajima, čak i ako su opšti uslovi koji ih sadrže odobreni od nadležnog organa. Sud može da odbije primenu pojedinih odredbi opštih uslova koje lišavaju drugu stranu prava da stavi prigovore, ili onih na osnovu kojih ona gubi prava iz ugovora ili gubi rokove, ili koje su inače nepravične ili preterano stroge prema njoj. Važeći Zakon o zaštiti potrošača Republike Srbije samo preuzima neke odredbe Zakona o obligacionim odnosima koje se tiču ugovora po pristupu. Prema Nacrtu Zakona o zaštiti potrošača Republike Srbije (NZZP), ugovorna odredba smatra se nepravičnom ako: za posledicu ima značajnu nesrazmeru u obavezama ugovornih strana, na štetu potrošača; ili za posledicu ima da izvršenje ugovorne obaveze opterećuje potrošača bez opravdanog razloga; ili za posledicu ima da se izvršenje ugovora značajno razlikuje od onoga što je potrošač osnovano očekivao; ili je protivna zahtevu transparentnosti; ili je u suprotnosti sa načelom savesnosti i poštenja. Pri proceni da li je ugovorna odredba nepravična, u obzir se uzima: priroda robe ili usluga na koje se ugovor odnosi; okolnosti pod kojima je ugovor zaključen; ostale odredbe istog potrošačkog ugovora, ili drugog ugovora s kojim je potrošački ugovor povezan; način na koji je postignuta saglasnost o sadržini ugovora, i način na koji je, s obzirom na zahtev transparentnosti, potrošač obavešten o sadržini ugovora. NZZP propušta da u srpsko pravo transponuje pravilo Direktive 93/13 koje onemogućava kontrolu pravičnosti ugovornih odredaba kojima je određen predmet ugovora ili odnos uzajamnih davanja.

Albanski zakonodavac doslovno je preuzeo kriterijum pravičnosti iz Direktive 93/13. Prema Zakonu o zaštiti potrošača Republike Albanije, ugovorna odredba čija sadržina nije sporazumno ugovorena smatra se nepravičnom ako, suprotno načelu savesnosti i poštenja, izaziva znatnu neravnotežu u pravima i obvezama ugovornih strana na štetu potrošača. Smatra se da sadržina odredbe nije sporazumno ugovorena ako je ta odredba sačinjena unapred, tako da potrošač nije mogao da utiče na njenu sadržinu, naročito ako se odredba nalazi u ugovoru koji je formularan. Činjenica što je sadržina određene ugovorne odredbe, ili jednog nje-

nog dela, sporazumno ugovorena, ne isključuje primenu pravila o ništavosti na ostatak ugovora, ako se taj ugovor ipak kvalifikuje kao formularan. Ako trgovac tvrdi da je o opštoj odredbi posebno pregovarano, teret dokazivanja leži na njemu. Nepravičnost ugovorne odredbe ceni se s obzirom na prirodu robe ili usluge koje je predmet ugovorne obaveze, sve okolnosti koje su prethodile zaključenju ugovora, kao i sve druge odredbe istog ugovora ili drugog ugovora prema kojem je dati potrošački ugovor akcesoran.

Makedonski zakonodavac je takođe doslovno transponovao pravila Direktive 93/13 koja se odnose na kriterijum pravičnosti opštih uslova formularnih potrošačkih ugovora.

Prema crnogorskom Zakonu o zaštiti potrošača, nepravična odredba u potrošačkom ugovoru je ona odredba o kojoj se nije pojedinačno pregovaralo i koja, suprotno načelu savesnosti i poštenja, narušava ravnotežu prava i obaveza na štetu potrošača. Ravnoteža prava i obaveza ugovornih strana ne mora biti značajno narušena da bi se ugovorna odredba smatrala nepravičnom; dovoljno je da je ravnoteža narušena i da je to na štetu potrošača. To znači da je obim zaštite potrošača postavljen nešto šire nego u Direktivi 93/13: nepravičnost ugovorne odredbe lakše je utvrditi po pravilima crnogorskog Zakona o zaštiti potrošača nego po pravilima Direktive 93/13.

3. Način na koji je Aneks Direktive 93/13 transponovan u državama učesnicama

a. Pravna priroda Aneksa

Prema članu 3(3) Direktive 93/13, Aneks sadrži indikativnu i nezaključenu listu odredaba koje se kvalifikuju kao nepravične. Taj spisak obično nosi naziv siva lista. Nepravičnost ugovornih odredaba koje su navedene u Aneksu oborivo se pretpostavlja. Spisak iz Aneksa nije konačan: ugovorna odredba koja se ne nalazi na listi može da bude nepravična a ugovorna odredba sa liste to ne mora biti. Sud ili drugi nadležni organ mora imati slobodu da proceni da li su odredbe iz Aneksa nepravične u konkretnom slučaju, imajući u vidu opšte merilo pravičnosti propisano Direktivom 93/13.[167]

b. Transpozicija Aneksa u zemljama učesnicama

1. tabela: Transpozicija Aneksa br. 1 Direktive o nepravičnim odredbama u potrošačkim ugovorima

Albanski zakonodavac u celosti je preuzeo listu odredbi iz Aneksa br. 1, ali kao takozvanu crnu listu, odnosno spisak odredaba koje se bez izuzetka smatraju nepravičnim. To znači da se u albanskom pravu neoborivo pretpostavlja da su te ugovorne odredbe nepravične.[168] Ugovorne odredbe sa crne liste ne proizvode pravno dejstvo, one su apsolutno ništave. Pored toga, ugovaranje tih odredaba u poslovanju sa potrošačima sankcionisano je kao prekršaj.

Zakon o zaštiti potrošača Bosne i Hercegovine sadrži crnu listu na kojoj se nalaze dvadeset i dve ugovorne odredbe koje se smatraju nepravičnim.[169] Ona se u određenoj meri preklapa sa sivom listom iz Direktive 93/13. Ipak, izrazi koje koristi zakonodavac ne odgovaraju u potpunosti izrazima iz Direktive, što stvara potrebu da se utvrdi prava namera zakonodavca. Može se, dakle, zaključiti da je siva lista nepravičnih ugovornih odredaba iz Direktive 93/13 samo delimično preuzeta u pravo Bosne i Hercegovine.

Crnogorski zakonodavac je delimično transponovao Aneks Direktive 93/13, propisujući ništavost samo za neke ugovorne odredbe od onih koje su pobrojane u Aneksu i dodajući na

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[167] Odluka ESP od 7. maja 2002. godine, predmet C-478/99, *Commission of the European Communities v. Kingdom of Sweden* [2002] ECR I-04147.

[168] Član 27, stav 3, Zakon o zaštiti potrošača, *Sl. list RAl br.* 61/08.

[169] Član 96, Zakon o zaštiti potrošača, *Sl. glasnik BiH* br. 25/06.

zakonom propisanu listu jednu ugovornu odredbu koje nema u Aneksu.[170] Ugovorne odredbe sa zakonom propisane liste nepravične su u svakom slučaju, bez izuzetka. U tom smislu, crnogorski Zakon o zaštiti potrošača sadrži crnu listu nepravičnih odredaba u potrošačkim ugovorima.

U članu 97 hrvatskog Zakona o zaštiti potrošača transponovana je u potpunosti siva lista iz Aneksa Direktive 93/13. Reč je o otvorenoj, indikativnoj listi odredaba koje se mogu smatrati nepravičnim.

Makedonski zakonodavac samo je delimično transponovao listu iz Aneksa Direktive 93/13. Spisak nepravičnih ugovornih odredaba iz makedonskog zakona predstavlja crnu listu, to jest katalog odredaba koje su nepravične same po sebi. Na taj spisak dodate su neke odredbe kojih nema u Aneksu Direktive 93/13.[171]

Siva lista iz Aneksa I Direktive 93/13 nije preuzeta u srpskom pravu. Lista nepravičnih ugovornih odredaba ne postoji ni u važećem Zakonu o zaštiti potrošača, niti u Zakonu o obligacionim odnosima Republike Srbije. NZZP (pomenuti Nacrt Zakona o zaštiti potrošača Republike Srbije) previđa da se u srpsko pravo transponuju Aneks II (spisak ugovornih odredaba čija se nepravičnost neoborivo pretpostavlja) i Aneks III (spisak ugovornih odredaba čija se nepravičnost oborivo pretpostavlja) iz Predloga Direktive o pravima potrošača.[172]

Član Direktive 93/13	Crna lista	Siva lista	Nije transponovano
ANEKS br. 1.a Smrt ili fizička povreda	ALB (član 27), MAK (član 73), CG (član 64)[173]	HRV (član 97, alineja 1)	BA, SRB

[170] Član 64, stav 1, tačka 19, Zakon o zaštiti potrošača, *Sl. list CG* br. 26/07. Zakonodavac je na listu dodao ugovornu odredbu kojom se isključuje ili ograničava pravo potrošača na srazmerno sniženje ukupnog troška kredita u slučaju vraćanja kredita pre ugovorenog roka.

[171] To su odredbe koje predviđaju: pravo trgovca da jednostrano odredi ili izmeni rok za isporuku proizvoda ili izvršenje usluge; ograničenje prava potrošača da raskine ugovor kada trgovac ne ispunjava svoje obaveze iz garancije; ograničenje prava potrošaču da ugovor prestane u slučaju više sile; isključenje odgovornosti trgovca za štetu koju je skrivio ili za neizvršenje obaveze koja je bitan element ugovora; isključenje odgovornosti trgovca za pravne i skrivene materijalne nedostatke proizvoda; zabrana poravnanja međusobnih obaveza kada su za to ispunjeni zakonski uslovi; nametanje nerazumnog roka u kojem potrošač mora trgovca da obavesti o nedostacima na proizvodu; određivanje unapred iznosa koji potrošač treba da plati trgovcu u slučaju neizvršavanja svojih obaveza a da ista obaveza ne postoji za trgovca; postavljanje neodređenog roka za ispunjenje obaveze trgovca bez određivanja razumnog roka za prestanak ugovora; neopravdano isključenje ili ograničenje zakonskih prava i obaveza potrošača prema trgovcu ili trećem licu u slučaju neizvršenja ili delimičnog izvršenja obaveza od strane trgovca; isključenje kontrole nepravičnosti ugovorne odredbe.

[172] Proposal for a Directive of the European Parliament and of the Council on consumer rights, COM(2008) 614/3.

[173] Ugovorne odredbe sa crne liste crnogorskog Zakona o zaštiti potrošača odstupaju od formulacija koje je u Direktivi 93/13 upotrebio evropski zakonodavac. Na primer, u odredbi kojom se transponuje tačka b Aneksa nema reči *neodgovarajuće* i ne pominje se prebijanje potraživanja koje trgovac ima prema potrošaču sa potraživanjem koje potrošač ima prema trgovcu. U odredbi kojom se transponuje tačka c Aneksa ne pominje se vezivanje obaveze trgovca za uslov čije ostvarenje zavisi jedino od njegove volje, iako je upravo to smisao tačke c. U odredbi kojom se transponuje tačka i Aneksa nedostaje reč *neopozivo* i zakonodavac propušta da naglasi da potrošač mora imati *stvarnu* priliku da se upozna sa sadržinom ugovora. U odredbi kojom se transponuje tačka l Aneksa ne pominje se previsoka cena. U odredbi kojom se transponuje tačka p Aneksa, umesto smanjenja garancija koje su date potrošaču, zakonodavac govori o dovođenju potrošača u nepovoljniji položaj.

ANEKS br. 1.b Neispunjenje, delimično ispunjenje ili neadekvatno ispunjenje ugovorne obaveze	ALB (član 27), MAK (član 61), CG (član 64)	HRV (član 97, alineja 2)	BA, SRB
ANEKS br. 1.c Uslov čije ostvarenje zavisi isključivo od volje prodavca	ALB (član 27), MAK (član 54), CG (član 64)	HRV (član 97, alineja 3)	BA, SRB
ANEKS br. 1.d Pravo trgovca da zadrži primljeno ako potrošač odustane od ugovora ili zaključenja ugovora, ako za potrošača nije ugovoreno pravo na isti iznos u slučaju da trgovac odustane od ugovora ili zaključenja ugovora	ALB (član 27), CG (član 64)	HRV (član 97, alineja 4)	BA, SRB, MAK
ANEKS br. 1.e Nesrazmerno visok iznos naknade	ALB (član 27), BA (član 96, tačka g), MAK (član 72) CG (član 64)	HRV (član 97, alineja 1)	SRB
ANEKS br. 1.f Pravo trgovca da raskine ugovor i zadrži ono što je primio na ime usluge koju nije pružio	ALB (član 27), MAK (član 74), CG (član 64)	HRV (član 97, alineja 6 i 7)	BA, SRB
ANEKS br. 1.g Raskid ugovora na neodređeno vreme bez prethodnog upozorenja	ALB (član 27), CG (član 64)	HRV (član 97, alineja 8)	BA, SRB, MAK
ANEKS br. 1.h Automatsko produženje ugovora na određeno vreme	ALB (član 27), MAK (član 70), CG (član 64)	HRV (član 97, alineja 9)	BA, SRB
ANEKS br. 1i Nametanje potrošaču onih ugovornih odredaba s kojima nije imao stvarnu priliku da se upozna	ALB (član 27), CG (član 64)	HRV (član 97, alineja 10)	BA, SRB, MAK
ANEKS br. 1.j Jednostrana izmena ugovornih odredaba	ALB (član 27), MAK (član 62), CG (član 64)	HRV (član 97, alineja 11)	BA, SRB
ANEKS br. 1.k Jednostrana izmena bitnih obeležja robe ili usluge koju duguje trgovac	ALB (član 27), BA (član 96, tačka d), MAK (član 56), CG (član 64)	HRV (član 97, alineja 12)	SRB
ANEKS br. 1.l Određivanje ili povećanje cene	ALB (član 27), MAK (član 55, stav 1), CG (član 64)	HRV (član 97, alineja 13)	BA, SRB
ANEKS br. 1.m Pravo trgovca da odredi da li je roba ili usluga u skladu sa ugovorom, ili da tumači ugovorne odredbe;	ALB (član 27), MAK (član 58), CG (član 64)	HRV (član 97, alineja 14 i 15)	BA, SRB
ANEKS br. 1.n Ograničavanje odgovornosti posrednika	ALB (član 27), MAK (član 75), CG (član 64)	HRV (član 97, alineja 16)	BA, SRB
ANEKS br. 1.o Obavezivanje potrošača da izvrši sve obaveze i ako trgovac nije izvršio svoje	ALB (član 27), MAK (član 59), CG (član 64)	HRV (član 97, alineja 17)	BA, SRB

ANEKS br. 1.p Mogućnost ustupanja prava i obaveza iz ugovora	ALB (član 27), BA (član 96, tačka t), MAK (član 77), CG (član 64)	HRV (član 97, alineja 18)	SRB
ANEKS br. 1q Isključenje ili otežavanje vršenja prava potrošača da preduzme pravne radnje; uskraćivanje uvida u dokaze ili prebacivanje tereta dokazivanja na potrošača.	ALB (član 27), MAK (član 71), CG (član 64)	HRV (član 97, alineja 19)	BA, SRB

2. tabela: Transpozicija Aneksa br. 2 Direktive o nepravičnim odredbama u potrošačkim ugovorima

Aneksom br. 2 Direktive 93/13 državama je dopušteno da propišu određene izuzetke u oblasti ugovora o pružanju finansijskih usluga. Ako država odluči da iskoristi ovu opciju, ona može da propiše da pojedine odredbe iz Aneksa br. 1 nisu nepravične u slučaju da ih sa potrošačem ugovori pružalac finansijskih usluga. Ona država koja propusti da iskoristi opciju iz Aneksa br. 2, garantuje potrošačima viši stepen zaštite.

Aneks br. 2 Direktive 93/13 nije transponovan u albansko, srpsko i hrvatsko pravo. Crnogorski zakonodavac iskoristio je neke od opcija koje su mu date Aneksom II.

Aneks br. 2 Direktive 93/13 nije transponovan u pravo Bosne i Hercegovine nisu transponovan. Međutim, tu je zakonodavac propustio da transponuje i one tri odredbe iz Aneksa br. 1 Direktive 93/13, na koje bi izuzeci iz Aneksa br. 2 trebalo da se odnose.

Činjenica što zakonodavac nije iskoristio mogućnosti koje mu ostavlja Aneks br. 2, ne znači da je u Bosni i Hercegovini potrošačima garantovan viši stepen zaštite. Tu nije napravljen izuzetak, ali nije ni propisano pravilo od kojeg bi se mogao napraviti izuzetak.

Član Direktive 93/13	Transponovan Aneks II	Nije transponovan Aneks II
ANEKS br. 2.a Izuzetak od člana 1.g za pružaoce finansijskih usluga		HRV, SRB, ALB, MAK, CG
ANEKS br. 2.b rečenica 1 Izuzetak od člana 1.j za pružaoce finansijskih usluga	MAK(član 55, stav 2, tačke 2 i 3)	HRV, SRB, ALB, CG
ANEKS br. 2b, rečenica 2 Izuzetak od člana 1.j kada je potrošač slobodan da poništi ugovor		HRV, SRB, ALB, MAK, CG
ANEKS br. 2.c Izuzetak od člana 1.g, 1.j i 1.l u slučaju proizvoda ili usluga gde je cena povezana sa fluktuacijama na berzi akcija, kao i u slučaju ugovora o kupoprodaji strane valute		HRV, SRB, ALB, MAK, CG
ANEKS br. 2.d Izuzetak od člana 1.l u slučaju odredbi o indeksiranju cene	MAK (član 55, stav 2, tačka 1), CG (član 64)[2]	HRV, SRB, ALB

[174] Odredbe crnogorskog Zakona o zaštiti potrošača i ovde odstupaju od formulacija koje je u upotrebio evropski zakonodavac. U Aneksu II, tačka d, pominju se zakonom dozvoljene ugovorne odredbe o indeksiranju cena, pod uslovom da je način na koji se cene menjaju izričito naveden u ugovoru. Umesto toga, crnogorski zakonodavac govori o cenama proizvoda koje se utvrđuju na osnovu propisanog metoda, ako je taj metod izričito opisan.

IV. Pravne posledice nepravičnosti ugovornih odredaba

a. Posledice koje predviđa Direktiva 93/13

Prema članu 6(1) Direktive o nepravičnim odredbama u potrošačkim ugovorima, država je dužna da propiše da potrošača ne obavezuje nepravična odredba iz ugovora koji je prema pravilima domaćeg prava potrošač zaključio sa trgovcem (prodavcem robe odnosno pružaocem usluga). Zaključeni ugovor dalje obavezuje ugovorne strane ako može da opstane bez te nepravične ugovorne odredbe: Direktiva 93/13 dopušta da ugovor opstane, prema pravilima o delimičnoj ništavosti, ako je to moguće nakon što se utvrdi na nepravična odredba ne proizvodi pravna dejstva.

Evropski sud prave istakao je u odluci *Mostaza Claro* da je odredba člana 6(1) Direktive 93/13 obavezujuća, to jest imperativna po svojoj pravnoj prirodi. Ta odredba uvažava slabiju poziciju jedne ugovorne strane i ima za cilj uspostavljanje ravnoteže i jednakosti između strana. Formalna ravnoteža između prava i obaveza jedne i druge ugovorne strane nije dovoljna.[175]

aa. Nepravična ugovorna odredba ne obavezuje potrošača

Način na koji je sročena odredba člana 6(1) Direktive 93/13 otvara prostor za raspravu o tome o kojoj vrsti ništavosti je reč.

Danas je jasno da isključivo apsolutna ništavost nepravične odredbe u potrošačkim ugovorima odgovara shvatanjima Evropskog suda pravde. Ustanova relativne ništavosti, to jest rušljivosti (koja znači da ugovor proizvodi pravno dejstvo i konvalidira protekom vremena ako ugovorna strana u čijem interesu je konstituisana rušljivost ne zahteva blagovremeno da se ugovor poništi), nije u skladu sa odlukama Evropskog suda pravde u slučajevima *Océano*, *Cofidis* i *Mostaza Claro*.[176]

Domaći sudovi dužni su da kontrolišu pravičnost odredaba u potrošačkim ugovorima po službenoj dužnosti. Pored toga, domaći sudovi treba da budu ovlašćeni da samostalno nalože prikupljanje dokaza u pogledu činjeničnih navoda stranaka. Pravilo nacionalnog prava po kojem domaći sud više ne može, nakon isteka određenog roka, da utvrđuje da li je odredba potrošačkog ugovora nepravična i posledično ništava, nije u skladu sa Direktivom 93/13.[177]

bb. Posledice po ugovornu odredbu i ugovor u celini

Ništavost jedne ugovorne odredbe ne povlači za sobom ništavost ugovora u celini. Zaključeni ugovor obavezuje obe strane, ako on može da opstane bez odredbe koja je nepravična i zato ništava. Ustanova delimične ništavosti omogućava da ugovor preživi apsolutnu ništavost jedne ugovorne odredbe, ako to dopušta svrha i pravna priroda ugovora.

U Direktivi 93/13 nema pravila o izmeni nepravične ugovorne odredbe, to jest o mogućnosti da nepravična odredba opstane u izmenjenom obliku. Mogućnost da sud izmeni nepravičnu odredbu u potrošačkom ugovoru tako da izmenjena odredba obavezuje ugovorne strane, otvorila bi pitanje postojanja i kvaliteta saglasnosti volja trgovca i potrošača.

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[175] Odluka ESP od 26. oktobra 2006, predmet C–168/05 – *Elisa María Mostaza Claro v. Centro Móvil Milenium SL* [2006] ECR I–10421.

[176] Odluka ESP od 27. juna 2000, spojeni predmeti C–240/98 do C–244/98 – *Océano Grupo Editorial SA v. Murciano Quintero* [2000] ECR I–04941;Odluka ESP od 21. novembra 2002, C–473/00 – *Cofidis v. Fredout*, [2002] ECR I–10875; Odluka ESP od 26. oktobra 2006, C–168/05 – *Elisa María Mostaza Claro v. Centro Móvil Milenium SL* [2006] ECR I–10421.

[177] Odluka ESP od 21. novembra 2002, predmet C–473/00 – *Cofidis v. Fredout*, [2002] ECR I–10875.

b. Transponovanje pravila o ništavosti nepravične ugovorne odredbe

aa. Apsolutna ništavost

Apsolutna ništavost nepravičnih odredaba u potrošačkim ugovorima propisana je u Hrvatskoj, Makedoniji, Crnoj Gori i Bosni i Hercegovini. To je u skladu sa članom 6(1) Direktive 93/13, kao i sa praksom Evropskog suda pravde.[178] U svim navedenim pravnim sistemima zaključeni ugovor obavezuje ugovorne strane, ako može da opstane bez ništave odredbe.

Prema pravilima hrvatskog prava sudovi su ovlašćeni da utvrđuju nepravičnost i posledičnu ništavost ugovorne odredbe po službenoj dužnosti. Po odredbama članova 296, 323 i 327 hrvatskog Zakona o obveznim odnosima, pravo da se pozove na ništavost ugovora ili ugovorne odredbe ima svako zainteresovano lice. To pravo ima i državni tužilac. Hrvatski Zakon o zaštiti potrošača ne daje ovlašćenje sudovima da menjaju sadržinu nepravične odredbe u potrošačkom ugovoru. U zakonima drugih bivših jugoslovenskih republika, koji deriviraju iz jugoslovenskog Zakona o obligacionim odnosima, postoje odredbe poput navedenih odredaba hrvatskog Zakona o obveznim odnosima. Takav je slučaj u Srbiji, Crnoj Gori, Makedoniji i Bosni i Hercegovini.

Prema odredbi člana 102 hrvatskog Zakona o zaštiti potrošača, ništavost jedne odredbe ugovora ne povlači ništavost samog ugovora, ako on može da opstane bez ništave odredbe. Slično pravilo nalazi se u članu 324, stav 1 hrvatskog Zakona o obveznim odnosima, koji propisuje da ništavost neke odredbe ugovora ne povlači ništavost ugovora, ako on može da opstane bez ništave odredbe i ako ona nije bila ni uslov ugovora ni odlučujuća pobuda zbog koje je ugovor sklopljen. Prema sledećem stavu, kada je ništavost ustanovljena upravo da bi ugovor bio oslobođen te odredbe i važio bez nje, ugovor će biti valjan čak i ako je ništava odredba bila uslov ili odlučujuća pobuda ugovora.

Već je rečeno da se u svim ostalim zakonima o obligacionim odnosima koji su nastali na temelju jugoslovenskog Zakona o obligacionim odnosima, mogu naći pravila koja su po sadržini ista kao pravila iz člana 324 hrvatskog Zakona o obveznim odnosima. To važi za Srbiju, Crnu Goru, Bosnu i Hercegovinu i Makedoniju. Takođe, prema svim pomenutim zakonima, pravila o delimičnoj ništavosti omogućavaju da ugovor opstane pod jednim dodatnim uslovom, a to je da ništava odredba nije bila ni uslov ugovora, ni odlučujuća pobuda zbog koje je ugovor zaključen. Taj dodatni uslov otežava opstanak ugovora u kojem postoji neka apsolutno ništava odredba i njega nema u Direktivi 93/13. U pomenutim zakonima dalje se otvara pitanje da li je ništavost ugovorne odredbe ustanovljena upravo da bi ugovor bio oslobođen te odredbe i važio bez nje. Treba sagledati odnos između nacionalnog zakona kojim se uređuje zaštita potrošača i nacionalnog zakona kojim se uređuju obligacioni odnosi, i videti može li se ovaj dodatni uslov (da ništava odredba nije bila ni uslov ugovora, ni odlučujuća pobuda za njegovo zaključenje) primeniti na potrošačke ugovore. Pitanje je da li taj dodatni uslov važi a ne kako se on tumači.

Prema odredbama članova 94 i 96 Zakona o zaštiti potrošača Bosne i Hercegovine a u vezi sa odredbom člana 105, stav 2 Zakona o obligacionim odnosima Bosne i Hercegovine, nepravične odredbe u potrošačkim ugovorima su apsolutno ništave. Zakon o zaštiti potrošača ne predviđa mogućnost da sud izmeni nepravičnu odredbu tako da ta odredba u izmenjenom obliku obavezuje ugovorne strane. Zakon ne predviđa ni mogućnost da se nepravična ugovorna odredba podeli na deo koji je ništav i deo koji opstaje.

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[178] Odluka ESP od 27. juna 2000, spojeni predmeti C–240/98 to C–244/98 – *Océano Grupo Editorial SA v. Murciano Quintero* [2000] ECR I–04941; Odluka ESP od 21. novembra 2002, C–473/00 – *Cofidis v. Fredout*, [2002] ECR I–10875; Odluka ESP od 26. oktobra 2006, predmet C–168/05 – *Elisa María Mostaza Claro v. Centro Móvil Milenium SL* [2006] ECR I–10421.

U Zakonu o zaštiti potrošača Bosne i Hercegovine nema posebnih pravila o delimičnoj ništavosti. Ipak, članom 94 tog zakona uređuje se ništavost ugovorne odredbe a ne ništavost ugovora. To treba tumačiti u vezi sa članom 105 Zakona o obligacionim odnosima Bosne i Hercegovine, tako da zaključeni ugovor vezuje ugovorne strane ako može da opstane bez nepravične odredbe koja je pogođena sankcijom apsolutne ništavosti. Prema odredbi člana 105, stav 2 Zakona o obligacionim odnosima, spremnost ugovorne strane za koju je ništava odredba bila uslov ili odlučujuća pobuda za zaključenje ugovora, da ugovor zaključi bez te odredbe, nema pravni značaj. To je u skladu sa pravilom iz člana 6(1) Direktive 93/13.

Odredbom člana 66 crnogorskog Zakona o zaštiti potrošača propisana je apsolutna ništavost nepravičnih odredaba u potrošačkim ugovorima. Ništavost ugovorne odredbe ne povlači ništavost samog ugovora, ako on može da opstane bez ništave odredbe.

Odredbom člana 83 makedonskog Zakona o zaštiti potrošača propisana je apsolutna ništavost nepravičnih odredaba u potrošačkim ugovorima. Takva odredba ne proizvodi pravna dejstva. Prema članu 84 istog zakona, svako pravno zainteresovano lice, uključujući organizacije za zaštitu potrošača, može da zahteva od suda da utvrdi ništavost nepravične odredbe u potrošačkom ugovoru. Sud će utvrditi da je nepravična odredba ništava *ex tunc*, to jest da ona ne proizvodi pravno dejstvo od početka. U članu 82, stav 2 makedonskog Zakona o zaštiti potrošača propisano je da ništavost odredbe ne povlači ništavost potrošačkog ugovora, ako on može da opstane bez ništave odredbe. Makedonski Zakon o zaštiti potrošača ne predviđa mogućnost da sud izmeni nepravičnu odredbu tako da ta odredba u izmenjenom obliku obavezuje ugovorne strane. Zakon ne predviđa ni mogućnost da se nepravična ugovorna odredba podeli na deo koji je ništav i deo koji opstaje.

Srpski Zakon o obligacionim odnosima sadrži sva pravila o ništavosti i delimičnoj ništavosti koja sadrže ostali zakoni koji deriviraju iz jugoslovenskog Zakona o obligacionim odnosima. Prema pravilu iz člana 103, stav 1, ništav je svaki ugovor koji je protivan prinudnim propisima, javnom poretku ili dobrim običajima. Prema odredbama člana 105, ništavost neke odredbe ugovora ne povlači ništavost ugovora, ako on može da opstane bez ništave odredbe i ako ona nije bila ni uslov ugovora ni odlučujuća pobuda zbog koje je ugovor sklopljen. Kada je ništavost ustanovljena upravo da bi ugovor bio oslobođen te odredbe i važio bez nje, ugovor će biti punovažan čak i ako je ništava odredba bila uslov ili odlučujuća pobuda ugovora. Sud pazi na ništavost po službenoj dužnosti. Na ništavost se može pozivati svako zainteresovano lice. Pravo da zahteva utvrđenje ništavosti ima i javni tužilac. To pravo se ne gasi protekom vremena.

Već je rečeno da važećim Zakonom o zaštiti potrošača Republike Srbije nije transponovana Direktiva 93/13. To ovim zakonom nije ni pokušavano. Prema pomenutom Nacrtu Zakona o zaštiti potrošača koji je izradilo Ministarstvo trgovine i usluga Republike Srbije (NZZP), nepravične ugovorne odredbe su ništave a ništavost neke odredbe ugovora ne povlači ništavost samog ugovora, ako on može opstati bez ništave odredbe. NZZP ne predviđa mogućnost da sud izmeni nepravičnu odredbu tako da ta odredba u izmenjenom obliku obavezuje ugovorne strane, kao ni mogućnost da se nepravična ugovorna odredba podeli na deo koji je ništav i deo koji opstaje. Na kraju, treba istaći da NZZP pod ugovornom odredbom podrazumeva svaku odredbu potrošačkog ugovora, uključujući posebne pogodbe o čijoj sadržini je potrošač pregovarao ili mogao da pregovara s trgovcem, i opšte odredbe čiju sadržinu je unapred odredio trgovac ili treća strana.

bb. Relativna ništavost

U svim državama koje su predmet ove studije, nepravične odredbe u potrošačkim ugovorima pogođene su sankcijom apsolutne ništavosti. Jedini izuzetak u tom smislu mogla bi da bude Albanija, čije pravo u ovom slučaju ostaje nedorečeno.

cc. Nejasna pravna situacija

Prema članu 28 albanskog Zakona o zaštiti potrošača, ako se utvrdi nepravičnost neke odredbe u potrošačkom ugovoru, smatra se da ta odredba ne proizvodi pravno dejstvo od trenutka zaključenja ugovora. Iz ove formulacije nije jasno da li albanski zakonodavac propisuje apsolutnu ili relativnu ništavost (rušljivost) nepravičnih odredaba u potrošačkim ugovorima.

Prema članu 28 albanskog Zakona o zaštiti potrošača i članu 111 Albanskog građanskog zakonika ništavost jedne ugovorne odredbe ne povlači ništavost samog ugovora, ako on može opstati bez ništave odredbe.

dd. Izmena, dopuna i prilagođavanje odredbe i ugovora

Zakoni o zaštiti potrošača Albanije, Srbije, Crne Gore, Makedonije i Bosne i Hercegovine ne predviđaju mogućnost da sud izmeni ili dopuni nepravičnu odredbu u potrošačkom ugovoru tako da ta odredba u izmenjenom obliku obavezuje ugovorne strane. Međutim, zakoni koji potiču od jugoslovenskog Zakona o obligacionim odnosima sadrže odredbe o zelenaškim ugovorima i propisuju da oštećeni iz zelenaškog ugovora može da zahteva od suda da se njegova obaveza smanji na pravičan iznos. Sud će udovoljiti takvom zahtevu ako je to moguće, a u tom slučaju ugovor sa odgovarajućom izmenom ostaje na snazi. Pravilo te sadržine nalazi se u članu 141 srpskog ZOO, članu 135 crnogorskog ZOO, članu 129 makedonskog ZOO, članu 329 hrvatskog ZOO i članu 141 ZOO Bosne i Hercegovine.

ee. Podela ugovorne odredbe na važeći i nevažeći deo

Zakoni o zaštiti potrošača zemalja učesnica ne predviđaju mogućnost da se nepravična odredba u potrošačkom ugovoru podeli na deo koji je ništav i deo koji opstaje.

ff. Posledice po ugovor u celini

Svi zakoni kojima se uređuju obligacioni odnosi, a koji potiču od jugoslovenskog Zakona o obligacionim odnosima, sadrže odredbe o delimičnoj ništavosti. Reč je o apsolutnoj ništavosti jedne ugovorne odredbe. Ništavost neke odredbe ugovora ne povlači ništavost i samog ugovora, ako on može opstati bez ništave odredbe, i ako ona nije bila ni uslov ugovora ni odlučujuća pobuda zbog koje je ugovor zaključen. Pravilo te sadržine nalazi se u članu 105 srpskog ZOO, članu 103 crnogorskog ZOO, članu 82 makedonskog ZOO, članu 102 hrvatskog ZOO i članu 105 ZOO Bosne i Hercegovine.

c. Naknada štete

Prema zakonima o zaštiti potrošača svih država koje su predmet ove studije, pitanje naknade pretrpljene štete prepušteno je opštim pravilima nacionalnog prava o odgovornosti za štetu.

V. Zahtev transparentnosti iz člana 5 Direktive 93/13

Prema članu 5 Direktive 93/13, ako su sve ili pojedine odredbe budućeg ugovora potrošaču predložene u pisanoj formi, te odredbe moraju biti izražene jednostavnim i razumljivim jezikom. U slučaju sumnje u pogledu značenja ugovorne odredbe, primenjuje se ono tumačenje koje je najpovoljnije za potrošača.

Ideja da odredbe potrošačkog ugovora moraju biti transparentne, odnosno izražene jednostavnim i razumljivim jezikom, u skladu je sa obavezama trgovca da u različitim situacijama obavesti potrošača o svim pojedinostima koje su od značaja za donošenje racionalne odluke o stupanju u ugovorni odnos. Takve obaveze trgovca propisane su različitim evropskim potrošačkim direktivama.

1. Zahtev da odredbe budu izražene jednostavnim i razumljivim jezikom

a. Pravila Direktive 93/13

Prema članu 5 Direktive 93/13, trgovac je dužan da potrošaču saopšti odredbe budućeg ugovora jednostavnim i razumljivim jezikom. Ta dva kriterijuma, jednostavnost i razumljivost jezika kojim su izražene ugovorne odredbe, međusobno se dopunjuju. Zahtev transparentnosti, to jest zahtev da jezik potrošačkog ugovora bude jednostavan i razumljiv, podrazumeva da u ugovoru nema nejasnoća, povoda za nerazumevanje, nedoumica, te da potrošač može lako da razume sadržinu ugovornih odredaba koje mu trgovac nudi.

b. Transponovanje pravila iz člana 5 Direktive 93/13

Gotovo sve države učesnice transponovale su pravilo iz člana 5 Direktive 93/13 u domaće pravo. Neke su to učinile doslovno, kao Albanija, dok su u drugima pravljena određena odstupanja od izraza koje je upotrebio evropski zakonodavac.

Prema albanskom Zakonu o zaštiti potrošača, ako su sve ili pojedine odredbe budućeg ugovora potrošaču predložene u pisanoj formi, te odredbe moraju biti izražene jednostavnim i razumljivim jezikom.[179] Pravilo iste sadržine može se naći u članu 80 makedonskog Zakona o zaštiti potrošača, članu 65, stav 1 crnogorskog Zakona o zaštiti potrošača i članu 100 hrvatskog Zakona o zaštiti potrošača. Hrvatski zakonodavac opravdano dodaje uslovima iz Direktive 93/13 zahtev da pisane ugovorne odredbe budu lako uočljive. Prema članu 93, stav 2 Zakona o zaštiti potrošača Bosne i Hercegovine, ugovorne odredbe treba da budu razumljive i u vezi s drugim odredbama u istom ili drugom ugovoru između istih strana uzimajući u obzir prirodu proizvoda ili usluge i svih drugih učesnika u vezi sa zaključenjem ugovora.

Prema odredbi člana 142, stav 2 srpskog Zakona o obligacionim odnosima, opšti uslovi formularnih ugovora moraju se objaviti na uobičajeni način. Važeći srpski Zakon o zaštiti potrošača ne preuzima pravilo iz člana 5 Direktive 93/13: zakonodavac ne postavlja zahtev da pisane odredbe potrošačkog ugovora budu izražene jasnim i razumljivim jezikom. Prema NZZP (pomenuti Nacrt Zakona o zaštiti potrošača koji je izradilo Ministarstvo trgovine i usluga Republike Srbije), ugovorna odredba obavezuje potrošača ako je izražena jednostavnim i jasnim jezikom, i ako bi je shvatio razuman čovek potrošačevog znanja i informisanosti. Pored toga, NZZP propisuje dužnost trgovca da ugovornu odredbu učini dostupnom potrošaču pre zaključenja ugovora, na način koji, s obzirom na korišćeno sredstvo komunikacije, potrošaču pruža stvarnu mogućnost da se upozna sa sadržinom odredbe.

Prema pravilu iz važećeg srpskog Zakona o zaštiti potrošača tipski ugovor mora da bude napisan na jeziku koji je u službenoj upotrebi u Republici Srbiji. U crnogorskom Zakonu o zaštiti potrošača stoji da standardne odredbe u formularnim ugovorima moraju biti sastavljene na jeziku koji je u službenoj upotrebi u Republici. U protivnom, trgovac podleže prekršajnoj odgovornosti.[180]

c. Tumačenje pravila o transparentnosti u nacionalnim pravima

U albanskom i makedonskom pravu nema posebnih pravila o tumačenju zahteva da odredbe potrošačkog ugovora budu izražene jednostavnim i razumljivim jezikom. Crnogorski zakonodavac postavio je nedvosmisleni zahtev da tipski potrošački ugovor bude na jeziku koji je u zvaničnoj upotrebi. Isto je učinio srpski zakonodavac. U Zakonu o zaštiti potrošača Bo-

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[179] Član 28, stav 1, Zakon o zaštiti potrošača, *Sl. list RAl br.* 61/08.

[180] Član 129, stav 1, tačka 19, Zakon o zaštiti potrošača, *Sl. list CG* br. 26/07.

sne i Hercegovine stoji da ugovorne odredbe treba da budu razumljive. Tako široko postavljen zahtev mora se podvrgnuti dodatnom tumačenju.

Hrvatski zakonodavac pokazao je dobro razumevanje člana 5 Direktive 93/13, upotpunivši pravilo koje je preuzeto iz Direktive zahtevom da odredbe potrošačkog ugovora koji je zaključen u pisanoj formi moraju biti lako uočljive. U tom smislu, zakon garantuje potrošaču viši stepen zaštite nego Direktiva 93/13 i pripadajuća praksa Evropskog suda pravde. Različiti oblici nepoštenog poslovanja, kao što je štampanje potrošačkog ugovora izuzetno sitnim slovima, vređaju pravilo o transparentnosti koje je propisano hrvatskim zakonom. Na istom tragu je srpski NZZP koji predviđa da je trgovac dužan da ugovornu odredbu učini dostupnom potrošaču pre zaključenja ugovora, na način koji, s obzirom na korišćeno sredstvo komunikacije, potrošaču pruža stvarnu mogućnost da se upozna sa sadržinom te odredbe.

2. Posledice nedostatka transparentnosti

a. Pravila sadržana u Direktivi 93/13

U članu 5 Direktive 93/13 stoji da odredbe koje su potrošaču predložene u pisanoj formi moraju biti sročene jednostavnim i razumljivim jezikom i da se one tumače na način koji je najpovoljniji potrošača. Evropski zakonodavac u istom članu propisuje da se izloženo pravilo o transparentnosti ne primenjuje u postupcima za zaštitu kolektivnih prava potrošača.

Pravna posledica ugovaranja nejasne i nerazumljive odredbe sastoji se u primeni pravila tumačenja *contra proferentem*, to jest tumačenju ugovora na štetu one strane koja je samostalno uredila sadržinu formularnog ugovora. Direktivom je propisano da se nejasna i nerazumljiva odredba tumači u korist potrošača, i to na način koji je za njega najpovoljniji. Direktiva ne propisuje posledice ugovaranja odredbe iskazane jednostavnim jezikom koji nije razumljiv za potrošača.[181]

Direktiva 93/13 ne daje odgovor na jedno važno pitanje koje se tiče pravnih posledica netransparentnosti. Reč je o pitanju da li netransparentnost jedne ugovorne odredbe nužno znači da je ta ugovorna odredba nepravična. Drugim rečima, da li je moguće da se nejasna i nerazumljiva odredba, kada se protumači na način koji je najpovoljniji za potrošača, ipak kvalifikuje kao pravična.

b. Prenošenje pravila contra proferentem *u zemljama učesnicama*

Pravilo iz člana 5 Direktive 93/13 nalaže da se u slučaju sumnje u pogledu značenja ugovorne odredbe ta odredba tumači na način koji je *najpovoljniji* za potrošača. Albanski zakonodavac doslovno je preuzeo ovo pravilo i u slučaju sumnje propisao tumačenje koje je najpovoljnije za potrošača.[182]

U Makedoniji i Bosni i Hercegovini zakonodavac propisuje tumačenje u korist potrošača. U Crnoj Gori i Hrvatskoj pravilo *contra proferentem* nalaže tumačenje koje je povoljnije (a ne najpovoljnije) za potrošača. Srpski Zakon o obligacionim odnosima nalaže tumačenje nejasnih odredaba u korist strane koja nije sastavila ugovor, dok Zakon o zaštiti potrošača propisuje tumačenje u korist potrošača. Pomenuti Nacrt Zakona o zaštiti potrošača koji je izradilo Ministarstvo trgovine i usluga Republike Srbije predviđa da sporne odredbe potrošačkog ugovora treba tumačiti u korist potrošača. To pravilo odnosilo bi se kako na ugovorne odredbe koje je unapred formulisao trgovac, tako na odredbe sa sporazumno uređenom sadržinom.

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[181] *Cf.* Martin Ebers, *Unfair Contract Terms Directive*, u: Hans Schulte-Nölke (ur.), *Consumer Law Compendium*, Universität Bielefeld, 2008, 415.

[182] Član 28, stav 1, Zakon o zaštiti potrošača, *Sl. list RAl br.* 61/08.

Čini se da u svim državama koje su predmet ove studije, pravilo *contra proferentem* važi i kada je ugovorna odredba napisana jednostavnim jezikom, ali ipak nije razumljiva za potrošača.

c. Ostale posledice netransparentnosti ugovornih odredaba u nacionalnim pravima

Crnogorski zakonodavac propisao je da formularni ugovor mora biti sastavljen na jeziku koji je u službenoj upotrebi Crnoj Gori. Sličnu odredbu sadrži važeći srpski Zakon o zaštiti potrošača. U Crnoj Gori se zaključenje formularnog potrošačkog ugovora na jeziku koji nije u službenoj upotrebi prekršajno sankcioniše.

aa. Postojanje i kvalitet saglasnosti volja o netransparentnim odredbama

Svi zakoni koji potiču od jugoslovenskog Zakona o obligacionim odnosima (a to su zakoni o obligacionim odnosima Crne Gore, Makedonije, Hrvatske, Srbije i Bosne i Hercegovine), sadrže pravilo koje bi moglo da bude od značaja za pitanje vezanosti potrošača onom odredbom formularnog ugovora koju nije mogao da razume. Prema tom pravilu, opšti uslovi formularnog ugovora moraju se objaviti na uobičajeni način i obavezuju ugovornu stranu samo ako su joj bili poznati ili morali biti poznati u času zaključenja ugovora.

bb. Nepravičnost netransparentnih odredaba

Nijedna od država koje su predmet ove studije nije propisala da se odredbe potrošačkog ugovora koje nisu napisane jednostavnim i razumljivim jezikom imaju smatrati nepravičnim. Drugim rečima, nacionalnim pravima tih država nije propisana apsolutna ništavost ugovornih odredaba koje nisu transparentne.

cc. Nejasne pravne situacije

Nejasna situacija postoji svim zemljama učesnicama u pogledu pravnih posledica netransparentnosti, odnosno građanskopravnih sankcija u slučaju da trgovac unapred formuliše odredbu potrošačkog ugovora jezikom koji nije jednostavan i razumljiv. Jedan od opštih uslova punovažnog nastanka ugovora jeste saglasnost izjavljenih volja ugovornih strana. Nije jasno u kojoj meri netransparentnost ugovorne odredbe utiče na postojanje i kvalitet te saglasnosti. Svi zakoni koji potiču od jugoslovenskog Zakona o obligacionim odnosima propisuju da ugovor ne nastaje ako među stranama postoji nesporazum o prirodi ugovora ili o osnovu ili o predmetu obaveze.

3. Zaključak

Ugovorno potrošačko pravo Evropske unije trebalo bi da pruži odgovor na pitanje da li se svaka ugovorna odredba koja nije napisana jasnim i razumljivim jezikom nužno smatra nepravičnom i stoga apsolutno ništavnom; odnosno, da li je moguće da se nejasna i nerazumljiva odredba, kada se protumači na način koji je najpovoljniji za potrošača, ipak kvalifikuje kao pravična.

VI. Postupci za zaštitu kolektivnih prava potrošača iz člana 7(2) Direktive 93/13

1. Opšti pregled

Prema članu 7(1) Direktive 93/13 država je dužna da propiše odgovarajuća efikasna pravna sredstva u cilju sprečavanja trgovaca da formularnim ugovorima nameću potrošačima nepravične ugovorne odredbe. To bi bilo u interesu potrošača i konkurenata pomenutih trgovaca. Država je slobodna da izabere koja će to pravna sredstva biti.

Član7(2) Direktive 93/13 predviđa samo da u tom smislu država propisuje pravila po kojima pojedinci i organizacije za koje zaštita potrošača predstavlja legitiman interes, mogu da pokrenu postupak pred sudom ili organom uprave i da zahtevaju da se utvrdi nepravičnost opštih uslova formularnih ugovora, kako bi se sprečilo da trgovac nastavi da potrošačima nameće nepravične ugovorne odredbe. Takav postupak može se pokrenuti odvojeno ili zajedno protiv određenog broja trgovaca iz iste privredne grane, kao i protiv njihovih udruženja preporučuju ugovaranje nepravičnih opštih uslova formularnih potrošačkih ugovora.

Gotovo sve države koje su predmet ove studije propisale su takva pravila. Izuzetak u tom smislu predstavlja Srbija. Pomenuti Nacrt Zakona o zaštiti potrošača koji je izradilo Ministarstvo trgovine i usluga Republike Srbije (NZZP) sadrži pravila koja se tiču zaštite kolektivnih prava potrošača u pogledu zabrane nepravičnih ugovornih odredaba i različitih oblika nepoštenog poslovanja.

2. Upravna kontrola nepravičnih odredaba

a. Uloga organa uprave u zemljama učesnicama

Subjekti odgovorni za zaštitu potrošača u Bosni i Hercegovini su Ministarstvo vanjske trgovine i ekonomskih odnosa, Ombudsman za zaštitu potrošača, Vijeće za zaštitu potrošača, Konkurencijsko vijeće, nadležni organi entiteta i Brčko Distrikta BiH, uredi za konkurenciju i zaštitu potrošača entiteta, udruženja potrošača, obrazovne institucije i mediji i inspekcijski i drugi organi u skladu sa zakonom.[183]

U Hrvatskoj, to su Ministarstvo gospodarstva, rada i poduzetništva, Ministarstvo zdravstva i socijalne skrbi, Državni inspektorat, Agencija za elektroničke medije (u slučaju povrede Zakona o elektroničkim medijima), Pravobranitelj za djecu (u slučaju postupanja u suprotnosti s odredbama Zakona o zaštiti potrošača kojima se uređuje nepoštena poslovna praksa), "Potrošač" – Hrvatski savez udruga za zaštitu potrošača, Savez udruga za zaštitu potrošača Hrvatske.[184]

Postupak zabrane nepravičenih ugovornih odredaba i nepoštenog poslovanja prema srpskom NZZP mogu da pokrenu potrošačke organizacije koje su za to posebno ovlašćene, privredne, profesionalne i zanatske komore i ministarstvo nadležno za poslove zaštite potrošača.

U albanskom pravu, državni organi u čiju nadležnost spada zaštita potrošača i potrošačke organizacije koje su stekle status zastupnika kolektivnih interesa potrošača, mogu da pokreću postupke kolektivne zaštite pred sudom i pred Komisijom za zaštitu potrošača.

Nasuprot tome, u Crnoj Gori i Makedoniji državni organi nemaju ovlašćenja da pokreću postupak kolektivne zaštite pred sudom.

U Crnoj Gori, određeni državni organi imaju dužnost da obaveste potrošača o tome da svoja prava može da zaštiti u postupku pred sudom. Nadzor nad sprovođenjem Zakona o za-

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[183] Član 98, u vezi sa članom 121, Zakon o zaštiti potrošača, *Sl. glasnik BiH* br. 25/06.

[184] Upor. Član 132, stav 2, Zakon o zaštiti potrošača, *NN RH* br. 79/07, 125/07, 79/09, 89/09. Pravo da pokrenu postupak pred sudom imala su sledeća pravna lica: Hrvatska gospodarska komora, Hrvatska obrtnička komora, Hrvatska udruga poslodavaca, Hrvatska udruga banaka, Hrvatski ured za osiguranje, "Potrošač" – Hrvatski savez udruga za zaštitu potrošača, Savez udruga za zaštitu potrošača Hrvatske (Uredba o određivanju pravnih osoba ovlaštenih za podnošenje tužbe u vezi sa zabranom korištenja nepoštenih ugovornih odredaba u potrošačkim ugovorima, *NN HR* 41/08). Nakon što je došlo do izmena Zakona o zaštiti potrošača (*NN RH* br. 79/09), na predlog ministra nadležnog za poslove zaštite potrošača, Vlada Republike Hrvatske usvojila je novu Uredbu i odredila lica ovlaćena za pokretanje postupka pred nadležnim trgovinskim sudom radi zaštite kolektivnih interesa potrošača (Uredba o određivanju osoba ovlaštenih za pokretanje postupka radi zaštite kolektivnih interesa potrošača, *NN RH* br. 124/09).

štiti potrošača vrši ministarstvo nadležno za poslove zaštite potrošača preko tržišnih inspektora. Inspekcijski nadzor vrše i druga resorna ministarstva, Centralna banka i drugi nadležni organi.[185] Pojedini državni organi imaju izričita ovlašćenja u pogledu kontrole opštih uslova formularnih potrošačkih ugovora.[186] U nekim slučajevima ta ovlašćenja su savetodavne prirode.[187]

Prema Zakonu o obligacionim odnosima Makedonije (kao i prema drugim zakonima koji deriviraju iz jugoslovenskog Zakona o obligacionim odnosima) državni tužilac može da zahteva od suda da utvrdi ništavost određenog ugovora ili ugovorne odredbe.

b. Istražna ovlašćenja državnih organa

U nekim od zemalja koje su predmet ove studije upravni organi imaju određena istražna ovlašćenja. Takav je slučaj sa organom nadležnim za nadzor nad tržištem u Albaniji. U Crnoj Gori, inspekcijski nadzor podrazumeva da nadležni organi imaju obavezu da prime i reaguju na svaku pritužbu potrošača i da u te svrhe od trgovca zahtevaju da im stavi na raspolaganje određena dokumenta i informacije.

Ombudsman za zaštitu potrošača u Bosni i Hercegovini ima dužnost da istražuje aktivnosti na tržištu usmjerene prema potrošaču po službenoj dužnosti ili po osnovu žalbi, kao i da preporučuje upotrebu određenih ugovornih odredaba u posebnim sektorima poslovanja.[188]

c. Pregovori i smernice

Treba razmotriti mogućnost da državne institucije učestvuju u pregovorima i daju smernice u pogledu pravičnosti opštih uslova formularnih potrošačkih ugovora.

Takva mogućnost postoji u Bosni i Hercegovini, gde je dužnost ombudsmana za zaštitu potrošača da preporučuje upotrebu određenih standardnih ugovornih odredaba u ugovorima koji se koriste u posebnim sektorima poslovanja, kao i da pregovara s predstavnicima određenih trgovinskih udruženja o modelima ugovora koji se primjenjuju u specifičnim sektorima poslovanja.

Albanska ministarstva u čiju nadležnost spadaju poslovi iz oblasti ekonomije, trgovine i energetike učestvuju u izradi kodeksa ponašanja i tipskih ugovora, u saradnji sa privrednim subjektima.[189]

Crnogorsko ministarstvo nadležno za poslove zaštite potrošača proučava i daje predloge koji se odnose na potrošače i politiku zaštite potrošača. Pored toga, vansudska zaštita u Crnoj Gori ostvaruje se preko Arbitražnog odbora za vansudsko rješavanje sporova potrošača. Prema članu 92 Zakona o bankama Crne Gore, bankarski ombudsman daje preporuke bankama i mikrokreditnim finansijskim institucijama i kreditnim unijama za poboljšanje odnosa prema klijentima. Oba navedena mehanizma mogu se primeniti u slučaju nepravičnih opštih uslova formularnih potrošačkih ugovora.

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[185] Član 124, Zakon o zaštiti potrošača, *Sl. list RCG* br. 26/07.

[186] Operator javne elektronske komunikacione mreže obavezan je da tipski pretplatnički ugovor za svaki od servisa elektronskih komunikacija koji su u ponudi operatora dostavi na saglasnost Savjetu Agencije za elektronske komunikacije i poštansku djelatnost. Vid. Član 102, Zakon o elektronskim komunikacijama, *Sl. list RCG* br. 50/2008.

[187] Bankarski ombudsman daje preporuke bankama i mikrokreditnim finansijskim institucijama i kreditnim unijama za poboljšanje odnosa prema klijentima, što se može primeniti i na opšte uslove formularnih potrošačkih ugovora. Vid. Član 92, Zakon o bankama, *Sl. list RCG* br. 17/08.

[188] Član 101, Zakon o zaštiti potrošača, *Sl. glasnik BiH* br. 25/06.

[189] Član 49, stav 2, tačke d, h, Zakon o zaštiti potrošača, *Sl. list RAl br.* 61/08.

d. Ovlašćenje javnih organa da izdaju naloge

U pojedinim državama organi uprave ovlašćeni su da trgovcima izdaju određene naloge u pogledu nepravičnih odredaba u potrošačkim ugovorima. U Albaniji, to ovlašćenje (pored sudova) ima Komisija za zaštitu potrošača.[190] U Bosni i Hercegovini, članom 101 Zakona o zaštiti potrošača propisana je dužnost ombudsmana za zaštitu potrošača da donosi odluke i preduzima druge mere u slučajevima pritužbi potrošača ili kršenja dobrih poslovnih običaja, a članom 103 njegova nadležnost da izdaje instrukcije za prestanak aktivnosti koje su u suprotnosti s potrošačkom legislativom i da iznosi te instrukcije pred sud.

Važeći Zakon o zaštiti potrošača i Zakon o obligacionim odnosima Republike Srbije ne sadrže pravila čijim propisivanjem bi bila ispunjena obaveza države iz člana 7 Direktive 93/13. Prema NZZP (pomenuti Nacrt Zakona o zaštiti potrošača koji je izradilo Ministarstvo trgovine i usluga Republike Srbije), kada utvrdi da je došlo do ponovljenog ugovaranja ili preporučivanja ugovorne odredbe koja se smatra nepravičnom, ministarstvo nadležno za poslove zaštite potrošača može da naloži da se sa time bez odlaganja prestane, zatim da naloži licu da vrati koristi koje je na taj način steklo, da zabrani ponovno ugovaranje ili preporučivanje takve odredbe i da izda uputstvo da se odluka objavi o trošku lica kojem je izrečena zabrana.

U ostalim državama koje su predmet ove studije nema takvih pravila. Treba primetiti da će u Hrvatskoj na osnovu člana 132 Zakona o zaštiti potrošača, pre pokretanja postupka za zaštitu kolektivnih interesa potrošača, ovlašćena lica prethodno pisano upozoriti trgovca da će se protiv njega pokrenuti postupak u slučaju da ne prekine s nedopuštenim ponašanjem u roku od 14 dana.[191]

3. Sudska kontrola nepravičnih odredaba

a. Vrste postupaka predviđenih nacionalnim pravima

Gotovo sve pomenute države propisuju postupke zabrane ugovaranja, ili preporučivanja da se ugovaraju, nepravične odredbe u potrošačkim ugovorima. Izuzetak je Srbija u kojoj nije transponovan član 7 Direktive 93/13. Međutim, NZZP predviđa da na predlog ovlašćenih predlagača sud može da oglasi ništavnom nepravičnu odredbu, da naloži licu da bez odlaganja prekine upotrebu te nepravične odredbe u poslovanju s potrošačima, da naloži vraćanje koristi koja je na taj način stečena, da zabrani ponovnu upotrebu te nepravične odredbe i da odredi da se odluka objavi o trošku onoga kome je izrečena zabrana. Treba istaći da NZZP uređuje i skraćeni postupak.

Prema pravilima albanskog Zakona o parničnom postupku, sud može da zabrani određeno postupanje, da naloži da se prestane sa određenim postupanjem, i da naloži objavljivanje ispravke ili objavljivanje donete odluke u odgovarajućem obliku, u celini ili delimično, u cilju otklanjanja trajnih posledica datog postupanja. Nasuprot tome, od makedonskih sudova može se zahtevati jedino da utvrde ništavost ugovora ili ugovorne odredbe.[192]

Prema članovima 120 i 122, stav 2 i 4, Zakona o zaštiti potrošača Bosne i Hercegovine kojima je izvršena obaveza države iz člana 7(2) Direktive 93/13, nadležni sud će svojim ak-

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[190] Član 55, Zakon o zaštiti potrošača, *Sl. list RAl br.* 61/08.

[191] Inspektori ministarstava nadležnog za poslove zaštite potrošača i Državni inspektorat bili su ovlašćeni da izreknu novčanu kaznu u iznosu od 10.000 do 100.000 HRK (cca. 1.370 do 13.700 EUR) pravnom licu koje nameće uslove ugovora koji su nepravični u smislu odredaba Zakona o zaštiti potrošača. Ta mogućnost ukinuta je izmenama hrvatskog Zakona o zaštiti potrošača (*NN RH* br. 79/09).

[192] Član 83, Zakon o zaštiti potrošača, *Sl. list RMak br.* 38/04, 77/07, 103/08.

tom narediti prestanak bilo kakvog čina ili prakse koji su u suprotnosti s odredbama Zakona o zaštiti potrošača ili drugih propisa, a koji štete zajedničkim interesima potrošača. Sud ima ovlaštenja da naloži objavljivanje presude u celosti ili delimično u medijima ili da zatraži korektivnu izjavu od tužene strane. U slučaju kršenja odredaba koje se odnose na postavljanje nekorektnih uslova u potrošačkim ugovorima, postupak pred nadležnim sudom može biti pokrenut zajednički ili pojedinačno protiv trgovaca iz istog ekonomskog sektora ili njihovih asocijacija, koji koriste ili preporučuju postavljanje sličnih nekorektnih uslova. U istom postupku, institucija ili udruženje ima ovlaštenja da zahtijeva kompenzaciju za štetu nanesenu kolektivnim interesima potrošača.[193] Naknada štete može se zahtevati po pravilima Zakona o obligacionim odnosima.

Pravilima iz Glave II, Deo V hrvatskog Zakona o zaštiti potrošača uređen je postupak za zaštitu kolektivnih interesa potrošača. Na osnovu člana 131(1) svako ovlašćeno lice ima pravo da pokrene postupak za zaštitu kolektivnih interesa potrošača protiv lica koje deluje u suprotnosti sa zakonskim odredbama o nepravičnim odredbama u potrošačkim ugovorima. Postupak može biti pokrenut protiv pojedinog trgovca ili grupe trgovaca iz istog privrednog sektora, čije je postupanje u suprotnosti sa pomenutim odredbama, protiv komorskih i interesnih udruženja trgovaca koje preporučuju protivpravno postupanje, ili protiv sastavljača kodeksa postupanja trgovaca kojima se preporučuje nepošteno poslovanje. Važno je napomenuti da do donošenja konačne odluke sud može odrediti privremenu meru kojom nalaže prekid određenog postupanja koje je suprotno zakonskim odredbama o nepoštenim odredbama u potrošačkim ugovorima. Na osnovu člana 136, sud će odlukom: 1) utvrditi čin povrede propisa o zaštiti potrošača i precizno ga definisati; 2) narediti tuženom da prekine postupanje koje je protivno propisima o zaštiti potrošača, te narediti mu da, ukoliko je to moguće, usvoji mere koje su potrebne za uklanjanje štetnih posledica sopstvenog protivpravnog postupanja, i 3) zabraniti mu takvo ili slično ponašanje ubuduće. Ta odluka obavezuje tuženog da se ubuduće uzdrži od istog ili sličnog protivpravnog postupanja u odnosu na sve potrošače (član 138). Sud će narediti tuženom da objavi u celosti ili delimično odluku o vlastitom trošku, ako to objavljivanje može da doprinese da se ublaže ili potpunosti otklone štetne posledice povrede propisa o zaštiti potrošača (član 136a). Opisani postupak ne sprečava lice kojem je šteta naneta da pokrene pred nadležnim sudom postupak za naknadu štete protiv lica koje mu je pričinilo štetu nedopuštenim postupanjem, ili da pokrene pred nadležnim sudom postupak za poništenje ili utvrđenje ništavosti ugovora koji je zaključen pod uticajem nedopuštenog postupanja, odnosno da pred sudom pokrene bilo koji drugi postupak kojim će zahtevati ostvarivanje svojih prava iz Zakona o zaštiti potrošača ili drugih zakona (član 140). Štaviše, sudska odluka doneta u postupku za zaštitu kolektivnih interesa potrošača obavezuje ostale sudove u postupku koji potrošač lično pokrene radi naknade štete pričinjene ponašanjem tuženika. Naknada štete može se dobiti prema pravilima građanskog prava.

Crnogorski Zakon o zaštiti potrošača sadrži pravila o sudskoj zabrani nepravičnih odredaba u potrošačkim ugovorima.[194] Mogućnost izricanja zabrane licima koja preporučuju ugovaranje tih odredaba nije izričito uređena, što nije u skladu sa Direktivom 93/13.[195] Moguće je izricanje privremene zabrane u hitnom postupku. Prema članu 114, stav 2, sud može do do-

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[193] Član 123, Zakon o zaštiti potrošača, *Sl. glasnik BiH* br. 25/06.

[194] Član 114, Zakon o zaštiti potrošača, *Sl. list CG* br. 26/07.

[195] Izricanje sudske zabrane licima koja preporučuju ugovaranje nepravičnih odredaba nije izričito uređeno crnogorskim pravom. Međutim, zakonske odredbe mogle bi se tumačiti tako da je izricanje takve zabrane moguće, budući da se po Zakonu o zaštiti potrošača tužba može podneti i protiv udruženja trgovaca, koja po pravilu predlažu modele ugovora.

nošenja odluke da zabrani korišćenje ugovornih odredbi za koje se učini verovatnim da nisu pravične. Potrošač čije je pravo ili interes povređen može da podnese zahtev za naknadu štete pred nadležnim sudom, u skladu sa opštim propisima. To može da učini i organizacija potrošača.[196]

b. Predlog za izricanje sudske zabrane

Pored državnih institucija o kojima je već bilo reči, predlog za izricanje zabrane nepravičnih odredaba sudu mogu da podnesu potrošačke organizacije. Ono to mogu da učine samostalno (u Makedoniji i Crnoj Gori) ili preko udruženja potrošačkih organizacija (u Albaniji, Hrvatskoj i Bosni i Hercegovini). NZZP (pomenuti Nacrt Zakona o zaštiti potrošača koji je izradilo Ministarstvo trgovine i usluga Republike Srbije) predviđa aktivnu legitimaciju kako potrošačkih organizacija, tako udruženja potrošačkih organizacija. Prema odredbama NZZP aktivno su legitimisane i privredne, profesionalne i zanatske komore. U crnogorskom pravu, pravo da se zahteva izricanje zabrane nepravičnih odredaba dato je i potrošaču kao pojedincu, koji može da podnese tužbu nadležnom sudu protiv pojedinog trgovca, više trgovaca koji posluju u istom privrednom sektoru ili udruženja trgovaca radi poništenja nepravičnih ugovornih odredaba, uključujući odredbe sa crne liste.

c. Pravne posledice kolektivnih postupaka: Princip res judicata

U većini zemalja koje su predmet ove studije sudska odluka može imati dejstvo samo prema trgovcu koji je strana u sporu. Ta odluka nema dejstva prema drugim trgovcima koji ugovaraju iste ili slične nepravične odredbe u formularnim potrošačkim ugovorima. Međutim, pojedini nacionalni propisi dopuštaju da se postupak pokrene protiv više trgovaca koji posluju u istom privrednom sektoru ili udruženja trgovaca i da se na taj način dođe do sudske odluke koja obavezuje veći broj trgovaca. Takav je slučaj u Bosni i Hercegovini, Hrvatskoj, Makedoniji i prema srpskom NZZP. U nekim državama, primera radi u Hrvatskoj i Bosni i Hercegovini, društveni značaj sudske odluke može da se proširi objavljivanjem presude ili ispravke.

I pored opšteg pravila *res judicata*, u crnogorsko pravo uvedena je jedna novina. Naime, prema članu 114, stav 3, crnogorskog Zakona o zaštiti potrošača, unapred formulisana odredba potrošačkog ugovora može se osporavati pred sudom u pogledu pravnog dejstva u predmetnom slučaju kao i u pogledu sličnih odredbi budućih ugovora. To pravilo usmereno je, između ostalog, protiv izigravanja presude od strane trgovaca, budući da zabranjuje svako buduće ugovaranje ne samo iste, nego i sličnih odredaba.

4. Zaključak

Opšti zaključak je sledeći. Sve države koje su predmet ove studije upustile su se u određenom stepenu u zadatak da transponuju Direktivu 93/13 u nacionalno pravo. Budući da je prošlo kratko vreme od implementacije direktive u domaća prava, te da se nova nacionalna pravila tek kratko vreme primenjuju, možda je previše rano za dublje razmatranje praktičnih implikacija obavljenog posla. Institucije koje su dobile potrebna ovlašćenja u oblasti zaštite prava i interesa potrošača još uvek su mlade i potrebno je dati im vremena za razvoj pre nego što njihov rad bude bio ocenjen. U slučaju Srbije, ako NZZP (Nacrt Zakona o zaštiti potrošača koji je izradilo Ministarstvo trgovine i usluga Republike Srbije) uđe u zakonodavni postupak u obliku u kakvom je sada (jun 2010. godine), čini se da će zahtev da se u srpsko pravo transponuje Direktiva 93/13 biti zadovoljen.

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[196] Član 112, Zakon o zaštiti potrošača, *Sl. list CG* br. 26/07.

VII. Praktičan uticaj Direktive o nepravičnim ugovornim odredbama

1. Uticaj na nivo zaštite potrošača

U pravima država koje su predmet ove studije i ranije su postojala pravila prema kojima sud može da odbije primenu pojedinih odredbi opštih uslova koje lišavaju stranu, koja pristupa ugovoru, određenih prava ili su inače nepravične ili preterano stroge prema njoj.

U meri u kojoj je u pojedinim nacionalnim pravima transponovana Direktiva 93/13, potrošačima je garantovana jača zaštita od nepravičnih ugovornih odredaba koje je unapred formulisao trgovac. U praktičnom smislu, potrošači se retko pozivaju na pravila preuzeta iz Direktive 93/13, pa je i sudska praksa koja se tiče tih pravila veoma skromna.[197]

Nema podataka o bitnim promenama u načinu poslovanja, to jest o nastojanju trgovaca da obezbede poštovanje pravila kojima je domaći zakonodavac transponovao Direktivu 93/13, tako što će korigovati opšte uslove formularnih ugovora. Utisak je da kreditne institucije i osiguravajuća društva nameću nepravične odredbe u potrošačkim ugovorima češće nego što to drugi čine. Sve navedeno ukazuje na slabu edukovanost potrošača i na manjkavosti u mehanizmima zaštite njihovih individualnih i kolektivnih prava.

2. Dodatna opterećenja ili troškovi za trgovce

Nedostaci od kojih pate mehanizmi za ostvarivanje i zaštitu prava koja su potrošačima garantovana Direktivom 93/13, dovode do toga da Direktiva 93/13 zapravo ne stvara značajna dodatna opterećenja i troškove za trgovce.

3. Posebne teškoće u vezi sa transponovanjem Direktive 93/13

Nisu uočene.

[197] U Hrvatskoj postoje brojne sudske odluke koje se pozivaju na odredbe Zakona o obveznim odnosima o opštim uslovima formularnih ugovora.

C. DIREKTIVA O UGOVORIMA NA DALJINU (97/7)

Koordinatori: *Nada Dollani* i *Neda Zdraveva /*
Jadranka Dabović-Anastasovska / Nenad Gavrilović

I. Zakonodavstvo zemalja učesnica pre usvajanja Direktive o ugovorima na daljinu

Pre transponovanja Direktive 97/7, zaštita potrošača u oblasti prodaje na daljinu bila je prilično beznačajna. Pre usvajanja prvih zakona o zaštiti potrošača, nijedno zakonodavstvo zemalja učesnica nije sadržavalo nikakvu izričitu odredbu niti su imali ikakvu sličnu zaštitu u oblasti prodaje na daljinu, osim Hrvatske koja je regulisala prodaju na daljinu članom 16d starog Zakona o trgovini[198] kao ugovor između trgovca i potrošača, gde se jedno ili više sredstava za komunikaciju na daljinu upotrebljava do zaključenja ugovora.

Pokušaji da se transponuje Direktiva o ugovorima na daljinu su počeli kada su prvi zakoni o zaštiti potrošača stupili na snagu. Dok su u Hrvatskoj i Bosni, ugovori o ugovorima na daljinu bili regulisani u celosti Zakonom o zaštiti potrošača iz 2003[199] i Zakonom o zaštiti potrošača iz 2002[200], albanski Zakon o zaštiti potrošača iz 2003[201] i makedonski Zakon o zaštiti potrošača iz 2000[202] su postigli samo delimičnu implementaciju i nisu svi aspekti prodaje na daljinu njima bili obuhvaćeni. Na drugoj strani, Srbija i Crna Gora, uprkos usvajanju Saveznog Zakona o Zaštiti potrošača iz 2002[203], teško da su načinili ikakav pokušaj da se transponuje Direktiva o ugovorima na daljinu; i umesto toga na prodaju na daljinu i ugovore o uslugama primenjivali su se opšti propisi zakona o ugovorima (to jest, Zakon o obligacionim odnosima).

Mnogo bolja harmonizacija je postignuta novim zakonima o zaštiti potrošača usvojenim od strane zemalja učesnica. Albanija je provela skoro potpuno transponovanje Direktive o ugovorima na daljinu Zakonom o zaštiti potrošača iz 2008[204], koji je dopunjen pravilima o implementaciji. Bosna je regulisala ugovore o ugovorima na daljinu Zakonom o zaštiti potrošača iz 2006[205], koji je zadržao mnoge sličnosti sa ranijom verzijom, uz manje izmene. Usvajanjem novog Zakona o zaštiti potrošača iz 2007[206] Hrvatska je u potpunosti regulisala predmetno pitanje. Makedonija je usvajanjem novog Zakona o zaštiti potrošača iz 2004[207] podigla harmonizaciju unutrašnjeg zakonodavstva sa Direktivom o ugovorima na daljinu na mnogo viši nivo. Isto se može reći za crnogorski Zakon o zaštiti potrošača iz 2007[208]. Pored toga, no-

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[198] Zakon o trgovini, *NN* br. 11/96, 30/99, 75/99, 76/99, 62/01, 109/01.

[199] Zakon o zaštiti potrošača – Glava VII. Dela II., član 35-55; *NN* br. 96/03.

[200] Zakon o zaštiti potrošača, *Sl. glasnik BiH* br. 17/02.

[201] Zakon o zaštiti potrošača, *Sl. list RA Br*. 9135/03.

[202] Zakon o zaštiti potrošača *Sl. list RM Br.* 63/2000.

[203] Savezni Zakon o zaštiti potrošača, *Sl. list SRJ* Br. 37/02. Posvetio je tri pasusa situaciji prodaje na daljinu (i od vrata do vrata) – sedam dana za odustajanje, bez troškova i opravdanja; rok za odustajanje od robe je bio od dana njenog primanja, a za usluge od dana zaključivanja ugovora, i konačno, potrošač je bio u obavezi da plati troškove vraćanja robe.

[204] Deo IV, Poglavlje II (član 36-39) Zakona o zaštiti potrošača, *Sl. list RA Br*. 61/08, i Odluka Saveta Ministara „O ugovorima o prodaji na daljinu", *Sl. list RA Br*. 64/2009.

[205] Član 42-51 Zakona o zaštiti potrošača, *Sl. glasnik BiH* br. 25/06.

[206] Glava VII. Dela II. (član 36-55 Zakona o zaštiti potrošača, *NN* br. 79/07, 125/07, 79/09, 89/09, 133/09.

[207] Zakon o zaštiti potrošača , *Sl. list RM Br.* 38/04.

[208] Zakon o zaštiti potrošača , *Sl. list RCG* Br. 26/07, koji sadrži posebno poglavlje, međutim, još uvek sa određenim varijacijama i/ili proširenja područja Direktive.

vi Zakon o Unutrašnjoj trgovini Crne Gore takođe sadrži nekoliko odredbi koje se odnose na Prodaju na daljinu[209]. Na drugoj strani, Srbija, u svom Zakonu o zaštiti potrošača iz 2005[210] na uprošćeni način pokušava da transponuje Direktivu o ugovorima na daljinu, koji zapravo rezimira i ponovo izlaže propise srpskog Zakona o obligacionim odnosima[211] koji se odnose na pravne posledice nedostatka usaglašenosti, i tvrdi da se ti propisi takođe odnose na slučajeve kataloške prodaje i probne kupovine. Međutim, Nacrt predloga novog Zakona o zaštiti potrošača (Nacrt Predloga)[212] namerava da transponuje Direktivu o ugovorima na daljinu u svoje Poglavlje III.

II. Područje primene

1. Potrošač

U članu 2(2) ove Direktive, potrošač se definiše kao "fizičko lice koje, u ugovorima koje obuhvata ova Direktiva, deluje u svrhe koje su izvan njegovog zanimanja, poslovanja ili profesije".

a. Zakonodavne tehnike

Zakonodavci svih zemalja učesnica su izabrali da usvoje opštu definiciju potrošača. Svaki od njih ima poseban zakon o zaštiti potrošača, a definicija potrošača se nalazi odmah na početku dotičnih zakona. U svim zemljama učesnicama, pojam potrošača se odnosi na ceo zakon. Nijedna od zemalja nije transponovala definiciju o potrošaču samo glede ugovora o ugovorima na daljinu, jer su odredbe Direktive o ugovorima na daljinu transponovane u okviru dotičnih Zakona o zaštiti potrošača pod posebnim poglavljima; zbog toga, nije smatrano neophodnim da se propisuju različite definicije potrošača koje se odnose na različite Direktive koje su transponovane u okviru tog pojedinačnog zakona.

Novi razvoji mogu da se očekuju u nekoliko zemalja. Naime, u srpskom Nacrtu predloga pojam potrošača se proširuje u svrhe poglavlja koje se bavi sa turističkim paket aranžmanima i tajm šeringom. A novi Nacrt Zakona o obligacionim odnosima u Bosni i Hercegovini daje novu definiciju za pojam potrošača, koja je na jednoj strani šira od aktuelnog pojma, ali na drugoj strani ograničena u području primjene na „zaključenje pravnog posla“[213].

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[209] Zakon o unutrašnjoj trgovini (*Sl. list RCG* Br. 49/08) koji su svom članu 17(2) predviđa „trgovinu izvan poslovnih prostorija“, navodeći da prodaja na daljinu može da se obavlja ili direktno od strane trgovca ili preko lica kojima trgovac da ovlašćenje za prodaju robe potrošačima.

[210] Zakon o zaštiti potrošača, *Sl. list RS* Br. 79/05. Poglavlje VIII, pod naslovom *Kupovina na daljinu*, obuhvata član 24 o kataloškoj prodaji, član 25 o prodaji preko uzorka ili modela, član 26 o probnoj kupovini, član 27 o ponudi preko sredstava elektronske komunikacije, i član 28 o prodaji po inerciji. Ta pravila mogu pre da se shvate kao pokušaj ponovnog utvrđivanja odredbi Zakona o obligacionim odnosima (iz bilo kojih razloga), nego kao pokušaj transponovanja Direktive o ugovorima na daljinu. Činjenica da se ti članci dotiču pitanja koja su obično povezana za prodaju na daljinu, ni na koji način ne nagoveštava da oni zaista transponuju Direktivu o ugovorima na daljinu u srpski zakon.

[211] Zakon o obligacionim odnosima, *Sl. list SFRJ* Br. 29/78, 39/85, 45/89 i 57/89, *Sl. list SRJ* Br. 31/93, 22/99, 35/99, 44/99.

[212] Nacrt Predloga novog Zakona o zaštiti potrošača (Nacrt predloga), koga priprema Ministarstvo trgovine i usluga Republike Srbije.

[213] Član 15 Nacrta Zakona o obligacionim odnosima Bosne i Hercegovine iz 2010 definiše potrošača kao „svakog subjekta koji zaključi neki pravni posao u svrhu koja ne spada u njegovu privrednu ili samostalnu profesionalnu djelatnost“. Ova u principu široka definicija (jer obuhvata i pravna lica) isključuje predugovorne situacije, jer se odnosi samo na „zaključenje pravnog posla“.

b. Sadržaj definicija

U pravnoj definiciji potrošača *de lege lata*, može se primetiti niz varijacija. U poređenju sa definicijom iz Direktive 97/7, širu definiciju daje albanski Zakon o zaštiti potrošača, koji u svom članu 3(6) kaže „Potrošač je svaka osoba, koja kupuje ili koristi robu ili usluge za ispunjenje ličnih potreba, za svrhe koje se ne odnose na trgovinske aktivnosti ili vršenje profesije. U smislu ovog zakona, i ne-profitne organizacije se smatraju potrošačima"[214]. Time se pojam potrošača proširuje takođe i na ne-profitne organizacije. U Bosni i Hercegovini, pravna lica su potpuno isključena članom 1(3) Zakona o zaštiti potrošača, na osnovu koga je „potrošač svako fizičko lice koje kupuje, stiče ili koristi proizvode ili usluge za svoje lične potrebe i potrebe svog domaćinstva". Ograničavanjem opsega na delovanje potrošača na kupovinu, sticanje ili upotrebu neke usluge ili proizvoda, i njegovim dodatnim smanjivanjem u svrhe „ličnih potreba i potreba njegovog domaćinstva", kao uslovi koji se moraju zajedno ispuniti, obim definicije je veoma ograničen[215]. Definicija koja je bliža onoj iz Direktive 97/7 je propisana u hrvatskom Zakonu o zaštiti potrošača, koji u svom članu 3(1) četvrti pasus, definiše potrošača kao svaku fizičku osobu „koja sklapa pravni posao ili djeluje na tržištu u svrhe koje nisu namijenjene njegovoj poslovnoj djelatnosti niti obavljanju djelatnosti slobodnog zanimanja". Veoma uska definicija je data u članu 4(1) makedonskog Zakona o zaštiti potrošača, koji navodi da je „potrošač svako fizičko lice koje kupuje proizvode ili koristi usluge za direktnu ličnu potrošnju, u svrhe koje nisu namenjene za obavljanje zanimanja, poslovnih aktivnosti ili profesije". U nekom stepenu šira definicija je data u članu 1, pasus 8 crnogorskog Zakona o zaštiti potrošača, koji definiše potrošača kao fizičko lice koje kupuje, naručuje, prima, koristi robu ili usluge, uključujući javne servise, za ne-poslovne, to jest ne-profesionalne svrhe, ili kome je namenjena ponuda za neki proizvod ili uslugu. Veoma uska definicija u poređenju sa definicijom Direktive 97/7 je data u srpskom Zakonu o zaštiti potrošača, koji u članu 2, paragraf 1-2, definiše potrošača „kao svako fizičko lice koje kupuje proizvode ili usluge za svoje vlastite potrebe ili za potrebe svog domaćinstva". Na jednoj strani, ova definicija je preuska („kupovina za potrebe potrošača ili potrebe njihovih domaćinstava"). Na drugoj strani, ona je takođe preširoka, jer se obim proširuje i na društvo, preduzeće, ostale pravne subjekte ili preduzetnike, kada kupuju proizvode ili usluge za svoje vlastite potrebe. Mnogo bolja definicija potrošača, koja je kompatibilna sa Direktivom 97/7 je data u Poglavlju I srpskog Nacrta predloga, gde se potrošač definiše kao svako fizičko lice koje deluje uglavnom u svrhe mimo njegovog zanimanja, poslovanja, zanata ili profesije.

aa. Uključivanje određenih pravnih lica

Kao i u Direktivi 97/7, hrvatsko, makedonsko, i crnogorsko zakonodavstvo o ugovorima na daljinu se odnosi samo na fizička lica. Takođe, u bosansko-hercegovačkom Zakonu o zaštiti potrošača, definicija potrošača se ograničava na fizička lica. Međutim, usvajanjem bosansko-hercegovačkog nacrta Zakona o obligacionim odnosima 2010, definicija potrošača u tom nacrtu zakona uključuje takođe i pravna lica. U slučaju kolizije ta dva zakona, na osnovu člana 1(2) bosansko-hercegovačkog Zakona o zaštiti potrošača, primeniće se zakon koji

[214] To je prevod reč po reč autora albanskog Zakona o zaštiti potrošača. Zvanični prevod glasi: "Potrošač" je svako fizičko lice, koje deluje u svrhe koje nisu u vezi sa zanimanjem, poslom ili upražnjavanjem njegove profesije. U smislu ovog zakona, neprofitne organizacije se takođe smatraju za potrošače. Vidi član 3(6) Zakona o zaštiti potrošača, *Sl. list RA Br*. 61/08.

[215] Vidi supra fn. 17.

pruža viši nivo zaštite[216]. U Srbiji, definicija potrošača obuhvata ne samo svako fizičko lice, već se proširuje i na društva, preduzeća, druge pravne subjekte ili preduzetnike, kada kupuju proizvode ili usluge za svoje vlastite potrebe. Albanija je jedina zemlja gde zakon *expressis verbis* uključuje neka (ne sva) pravna lica. Naime, na osnovu člana 3(6) druge rečenice albanskog Zakona o zaštiti potrošača, i ne-profitne organizacije se smatraju za potrošače.

Pregled: Uključivanje pravnih lica

Ograničenje na fizička lica	BiH, HR, MAK, CG
Uključivanje određenih pravnih lica	AL, SRB

bb. Pojašnjenje slučajeva „kombinovane" svrhe

Definicija potrošača u članu 2(2) Direktive 97/7 ne objašnjava jasno da li lice koje zaključi neki ugovor namenjen u „kombinovanu" svrhu (na pr. neka svrha koja je delimično u okviru a delimično izvan okvira njegovog zanimanja ili profesije, na primer, kupovina automobila i za privatnu i za profesionalnu upotrebu) spada pod pojam potrošača. Nijedno zakonodavstvo zemalja učesnica ne sadrži odredbu ili objašnjenje slučajeva kombinovane svrhe. Što se tiče varijacija u tekstu definicije potrošača, može se primetiti sledeće.

U hrvatskom Zakonu o zaštiti potrošača nema jasnog objašnjenja da li je osoba koja zaključi ugovor u „kombinovane" svrhe potrošač. Takođe, do sada nije bilo sudske prakse koja bi mogla biti od pomoći po tom pitanju. Međutim, na osnovu sudske prakse Evropskog suda pravde[217] hrvatska pravna teorija smatra da ocena da li je neko lice potrošač ili nije treba da se da na osnovu svih činjenica koje su postojale u vreme zaključivanja ugovora. Dakle, ako neko fizičko lice u vreme zaključenja ugovora deluje u svrhe koje spadaju u sferu njegovog ili njenog posla ili profesionalne aktivnosti, to lice se neće smatrati za potrošača[218].

Bosansko-hercegovački Zakon o zaštiti potrošača, umesto definisanja potrošača kao fizičkog lica koje „deluje" u određene svrhe kao u Direktivi 97/7, ograničava se na kupovinu, sticanje ili korištenje proizvoda ili usluga od strane fizičkog lica. Od još veće važnosti je ograničenje na „lične potrebe i potrebe njegovog domaćinstva", koje zbog veznika „i" treba da se shvati kumulativno, dok negativno formulisana definicija u Direktivi uključuje svaku svrhu koja se ne odnosi na zanimanje, posao ili profesiju potrošača. Zbog toga, na osnovu bosansko-hercegovačkog Zakona o zaštiti potrošača, slučajevi „kombinovane svrhe" biće prilično retki tako da još uvek nema nacionalne pravne prakse[219] po tom pitanju. Slučajevi „kombinovane svrhe" će pre biti mogući u okviru sfere bosansko-hercegovačkog Nacrta zakona o obli-

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[216] Shodno tome, pravna lica mogu da dobiju zaštitu potrošača po bosansko-hercegovačkom Nacrtu Zakona o obligacionim odnosima iz 2010. To bi bilo u suprotnosti sa sudskom praksom Evropskog Suda Pravde, na primer od 14 marta 1991 C-361/89 *Patrice di Pinto* (1991) ECR I-01189; videti takođe Z. Meškić, *„Harmonizacija Evropskog potrošačkog prava – Zelena knjiga 2007. Godina i Nacrt Zajedničkog referentnog okvira"*, Zbornik radova Pravnog fakulteta u Splitu 3/2009, str559; N. Misita, *Osnove prava zaštite potrošača Evropske zajednice*, Pravni centar, Fond otvoreno društvo Bosne i Hercegovine, Sarajevo 1997.

[217] Presuda Evropskog suda pravde od 3. jula 1997, C-269/95 – *Francesco Benincasa/Dentalkit Srl* (1997), ECRI-3767.

[218] M. Dika, Z.Pogarčić (ur.), *Obveze trgovca u sustavu zaštite potrošača*, Narodne novine, Zagreb 2003.

[219] Najnovije objašnjenje po pitanju definicije potrošača u pravu EU donosi presuda Evropskog suda pravde *Gruber*; presuda ESP od 20. januara 2005., C-464/01 – *Johhan Gruber v Bay Wa AG* (2005) ECR I-00439; Za dalje podatke videti Z. Meškić, *„Harmonizacija Evropskog potrošačkog prava – Zelena knjiga 2007. Godina i Nacrt Zajedničkog referentnog okvira"*, Zbornik radova Pravnog fakulteta u Splitu 3/2009, str 559.

gacionim odnosima 2010, koji definiše potrošača sa gotovo istom formulacijom kao Direktiva 97/7. Uprkos tome, bosansko-hercegovački Nacrt zakona o obligacionim odnosima 2010 takođe ne sadrži nijednu odredbu sa objašnjenjem slučajeva kombinovane svrhe.

U Makedoniji i Crnoj Gori fizičko lice se smatra potrošačem samo ako je on ili ona zaključio ugovor u čisto privatne svrhe. Ista situacija postoji i u srpskom zakonodavstvu. U tim zemljama, nema odredbi o slučajevima kombinovane svrhe.

Isto tako, u albanskom Zakonu o zaštiti potrošača, nema jasne odredbe koja može da pokrije transakcije sa kombinovanom svrhom. Po albanskom zakonu, potrošač može da deluje u svrhu zadovoljenja ličnih potreba, u svrhe koje se ne odnose na poslovne aktivnosti ili vršenje profesije. Takođe, ne-profitne organizacije se smatraju potrošačima kada deluju u gore navedene svrhe. Svrha „zadovoljenja ličnih potreba" i „svrha izvan poslovne aktivnosti ili vršenja profesije" su odvojene zarezom i nema nikakvog veznika koji bi ih međusobno povezao. Tako da se mogu shvatiti u smislu da kada se zaključuje ugovor ili jedna ili druga svrha treba da se izvrši. Ta situacija nije razjašnjena ni u sudskoj praksi ni u teoriji u ovoj oblasti.

Pregled: transakcije sa „kombinovanom" svrhom kao potrošački ugovor

Čisto lična svrha	MAK, CG
I „kombinovana svrha", pretežna svrha preovladava	
I „kombinovana svrha" – nejasno je da li lična svrha mora da pretegne	
Nema jasnog pravila o transakcijama sa „kombinovanom" svrhom koje je vidljivo	AL, HR, BiH, SRB

c. Proširenje na određene profesionalce

Albansko zakonodavstvo proširuje definiciju potrošača takođe i na ne-profitne organizacije u smislu Zakona o zaštiti potrošača, nudeći tako najširu zaštitu u poređenju sa ostalim zemljama učesnicama. Bosansko-hercegovački Zakon o zaštiti potrošača sužava definiciju potrošača u poređenju sa Direktivom 97/7 i ne sadrži proširenja na određenje profesionalce. U Hrvatskoj, iako član 3(1) pasus 4 Zakona o zaštiti potrošača ne štiti profesionalce kao potrošače, izuzeci mogu da se nađu u nekim *lex specialissima*[220]. U Makedoniji, nema proširenja primene na određene profesionalce.

U Crnoj Gori, član 2(8) Zakona o zaštiti potrošača se odnosi samo na fizička lica i tako ne pruža zaštitu pravnih lica. To je takođe bio pristup i namera zakonodavca kada je regulisao predmetno pitanje (međutim, izraz „...ili kome je ponuda za proizvod ili uslugu usmerena", ostavlja mesto za tumačenje. Ostale varijante proširenja (na pr. Pravna lica, zaposleni) nisu razmatrane. U Srbiji, član 2, paragraf 1-2 Zakona o zaštiti potrošača iz 2005, definiše potrošača kao bilo koje fizičko lice. Kako je funkcija ove odredbe ograničena samo na kupovinu za „njihove vlastite potrebe ili za potrebe njihovog domaćinstva", potrošač može takođe da bude i društvo, preduzeće, drugi pravni subjekt ili preduzetnik, kada kupuju proizvode ili usluge za svoje vlastite potrebe. Međutim, pod Poglavljem I srpskog Predloga Nacrta Zakona o zaštiti potrošača, potrošač se definiše kao svako fizičko lice koje deluje *uglavnom* u svrhe koje su izvan njegovog zanimanja, posla, zanata ili profesije, što može da se protumači kao proširenje definicije takođe na profesionalce, jer koristi reč „uglavnom", a ne kaže „samo".

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[220] Na primer u članu 304. hrvatskog Zakona o kreditnim institucijama pre poslednje izmene objavljene u *NN* br. 153/09. Ta odredba je definisala potrošača kao fizičko lice, koje je klijent kreditne institucije. Na osnovu te definicije potrošač je takođe mogao biti i fizičko lice koje deluje u okviru svoje komercijalne aktivnosti.

Pregled: proširenje na određene profesionalce

Proširenje na određene profesionalce	AL: neprofitne organizacije SRB: ostala pravna lica CG: na koga je usmerena ponuda za proizvod ili uslugu
Objašnjenje da su zaposleni potrošači	-

dd. Primeri za razlike u formulaciji

Zakonodavstva svih zemalja učesnica se razlikuju u formulacijama kada definišu potrošača. Hrvatska definicija je najbliža formulaciji iz Direktive 97/7, utoliko jer obuhvata „svaku fizičku osobu „koja sklapa pravni posao ili djeluje na tržištu u svrhe koje nisu namijenjene njegovoj poslovnoj djelatnosti niti obavljanju djelatnosti slobodnog zanimanja“. S druge strane, na osnovu crnogorskog zakonodavstva, potrošač je fizičko lice koje kupuje, naručuje, prima, koristi robu ili usluge, uključujući javne servise, za ne-poslovne, to jest ne-profesionalne svrhe, ili na koga je usmerena ponuda za neki proizvod ili uslugu. Makedonska definicija za potrošača označava svako fizičko lice koje kupuje proizvode ili koristi usluge za direktnu ličnu potrošnju, u svrhe koje nisu namenjene za obavljanje zanimanja, poslovne aktivnosti ili profesije. Albanska definicija je šira po pitanju kategorije lica, ali nije mnogo jasna po pitanju akcija i svrha, jer ista obuhvata svako lice, koje kupuje ili koristi robu ili usluge radi ispunjenja ličnih potreba, u svrhe koje nisu u vezi sa poslovnom aktivnošću ili obavljanjem profesije. U smislu tog zakona, i ne-profitne organizacije se smatraju za potrošače. Iako različite po formulaciji, takve definicije izgleda da pravilno transponuju Direktivu, ili se mogu tumačiti u skladu sa Direktivom.

Samo Bosna i Hercegovina i Srbija imaju prilično uske definicije koje su prilično slične jedna drugoj. Bosansko-hercegovački zakonodavac je suzio definiciju potrošača na svako fizičko lice koje kupuje, pribavlja, ili koristi proizvode ili usluge za svoje lične potrebe i potrebe svog domaćinstva. Srpska definicija je nešto šira i uključuje i pravna lica. Po srpskom zakonodavcu, potrošač je svako lice koje kupuje proizvode ili usluge za svoje lične potrebe ili za potrebe svog domaćinstva. Potrošač je takođe i kompanija, preduzeće, drugi pravni subjekti ili preduzetnik, kada kupuje proizvode ili usluge za svoje vlastite potrebe. Međutim, i Bosna i Srbija imaju različitu formulaciju u svojim nacrtima zakona[221].

2. Isporučilac

Po odredbama Direktive 97/7, druga strana u ugovoru o ugovorima na daljinu se zove isporučilac, koji se definiše kao „svako fizičko ili pravno lice koje, u ugovoru koga obuhvata ova Direktiva, deluje u svom komercijalnom ili profesionalnom svojstvu“. Formulacija ove definicije blago varira od definicije o pojmu trgovca koja se koristi u drugim direktivama za zaštitu potrošača. Glavni cilj te definicije isporučioca je prosto da razjasni da se Direktiva odnosi samo na situacije B2C, ali ne u C2C odnosima.

Zakonodavstva svih zemalja učesnica su transponovala pojam trgovca umesto isporučioca za celo polje primene i sve svrhe njihovih zakona o zaštiti potrošača. Albanski Zakon o zaštiti potrošača sadrži širu definiciju koja obuhvata i lica koja deluju u ime ili za račun trgovca. Po članu 3(14) Albanskog Zakona o zaštiti potrošača, „trgovac“ označava svako fizičko ili pravno lice koje deluje u svrhe koje se odnose na njegovu privrednu aktivnost, zanimanje, poslovanje, zanat ili profesiju i svako ko deluje u ime ili za račun nekog trgovca. Različitu definiciju daje bosansko-hercegovački Zakon o zaštiti potrošača, koji u svom članu 1(5) defini-

[221] Vidi *supra*, pod naslovom „b. Sadržaj definicija“.

še trgovca kao „svako lice koje direktno ili kao posrednik među drugim licima, prodaje proizvode ili pruža usluge potrošaču". Zbog ograničenja na „prodaju proizvoda i pružanje usluga", lično polje primene ove odredbe prilično je usko[222]. Širu definiciju, bližu definiciji albanskog zakonodavstva, propisuje hrvatski Zakon o zaštiti potrošača, koji u svom članu 3(1) osmi pasus definiše „trgovca" kao „bilo koju osobu „koja sklapa pravni posao ili djeluje na tržištu u okviru svoje poslovne djelatnosti ili u okviru obavljanja djelatnosti slobodnog zanimanja". Potonji uključuje i pravna lica javnog prava i ne-profitne organizacije. Makedonski Zakon o zaštiti potrošača, u članu 4(1) drugi pasus, definiše trgovca kao svako fizičko ili pravno lice koje, u toku vršenja svoje aktivnosti, direktno zadovoljava potrebe građana za proizvodima ili uslugama. U isto vreme, treba uzeti u obzir da se aktivnost trgovanja reguliše Zakonom o trgovini[223]. Pošto ta definicija ne obuhvata agente, primenjuju se opšta pravila o posredništvu koje reguliše makedonski Zakon o obligacionim odnosima[224]. Član 2 pasus 11, crnogorskog Zakona o zaštiti potrošača definiše „trgovca" kao osobu koja prodaje robu ili pruža usluge potrošačima. Po pitaju Direktivinog proširenja definicije i na one koji deluju u i me ili ispred trgovca, crnogorski Zakon o zaštiti potrošača ništa ne kaže[225]. Pod članom 2(3) srpskog Zakona o zaštiti potrošača, trgovac je kompanija, preduzeće, drugi pravni subjekt ili preduzetnik, kada prodaje proizvode ili pruža usluge potrošačima[226]. Definicija u srpskom predlogu nacrta Zakona o zaštiti potrošača je vrlo slična albanskoj definiciji o trgovcu.

3. Ugovori koji spadaju u opseg Direktive

a. Definicija „ugovora o ugovorima na daljinu"

Po članu 2(1) Direktive, termin „ugovor o ugovorima na daljinu" označava svaki ugovor koji se odnosi na robe ili usluge, u okviru organizovane prodaje na daljinu ili šeme pružanja usluga od strane isporučioca, koji, u svrhu ugovora, isključivo koristi jedno ili više sredstava komunikacije na daljinu sve do i uključujući momenat kada je ugovor zaključen.

Zakonodavstva svih zemalja članica, osim Srbije, su doslovno ili skoro doslovno transponovali ovu definiciju. Albanski Zakon o zaštiti potrošača, u svom članu 36(1) predviđa da „ugovori o ugovorima na daljinu označavaju svaki ugovor koji se odnosi na robe ili usluge zaključen između isporučioca i potrošača u okviru organizovane prodaje na daljinu ili šeme pružanja usluga od strane isporučioca, koji, u svrhu tog ugovora, isključivo koristi jedno ili više sredstava komunikacije na daljinu sve do i zaključno sa momentom zaključenja ugovora".

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[222] Član 14 Nacrta Zakona o obligacionima odnosima Bosne i Hercegovine iz 2010 se odnosi na „privrednika" i definiše ga kao „fizičkog ili pravnog subjekta koji prilikom zaključivanja pravnog posla deluje u vršenju svoje privredne ili samostalne profesionalne djelatnosti". Kao neuspešna formulacija i na bosanskom jeziku, izraz „deluje u vršenju" takođe isključuje predugovorne situacije, na suprot direktivama o zaštiti potrošača.

[223] Zakon o trgovini, *Sl. list RM Br.* 16/04.

[224] Zakon o obligacionim odnosima, *Sl. list RM Br.* 18/2001.

[225] Bez obzira na to, član 17(2) Zakona o unutrašnjoj trgovini (*Sl. list RCG* Br. 49/08) koji reguliše „trgovinu izvan poslovnih prostorija", predviđa da prodaja na daljinu može da se obavlja ili direktno od strane trgovca ili preko lica kome trgovac izda ovlašćenje za prodaju robe potrošačima. Član 17 (3) dalje predviđa da prodaju izvan poslovnih prostorija mogu da obavljaju trgovci koji su registrovani za tu vrstu trgovine, a Zakon o dodatno obavezuje crnogorsko Ministarstvo ekonomije da usvoji podzakon o vrsti robe i načinu obavljanja prodaje od vrata do vrata.

[226] Srpski nacrt predloga definiše trgovca kao svako fizičko ili pravno lice koje, u ugovorima obuhvaćenim ovim zakonom, deluje u svrhe koje se odnose na njegovo zanimanje, posao, zanat ili profesiju, i svako ko deluje u ime ili ispred trgovca.

Bosansko-hercegovački Zakon o zaštiti potrošača takođe daje definiciju o ugovorima o ugovorima na daljinu jednaku onoj iz Direktive, u kojoj se određuje da „Ugovor o ugovorima na daljinu je svaki ugovor koji se odnosi na prodaju proizvoda ili usluga, organizovanu od strane trgovca putem nekog sredstva prodaje na daljinu, a zaključuje se između trgovca i potrošača. Do konačnog zaključenja ugovora koristi se jedno ili više sredstava za daljinsku komunikaciju ". Hrvatski Zakon o zaštiti potrošača u svom članu 36 definiše da ugovor sklopljen na daljinu označava „ugovor sklopljen između trgovca i potrošača u okviru organizirane prodaje proizvoda ili organiziranog obavljanja usluga trgovca koji za potrebe sklapanja takvih ugovora isključivo koristi jedno ili više sredstava daljinske komunikacije". Dakle, hrvatski zakonodavac je transponovao definiciju iz člana 2(1) Direktive 97/7 skoro doslovno. Međutim, deo definicije koji propisuje da se ugovor zaključuje upotrebom jednog ili više sredstava komunikacije na daljinu „sve do i uključujući momenat kada je ugovor zaključen", nije transponovan. Ista situacija može da se nađe u makedonskom Zakonu o zaštiti potrošača, koji u svom članu 84 definiše da je „Ugovor o ugovorima na daljinu ugovor zaključen između trgovca i potrošača u okviru organizovane prodaje proizvoda ili organizovanog pružanja usluga od strane trgovca koji, u vreme zaključivanja ugovora, koristi ekskluzivno jedno ili više sredstava komunikacije na daljinu". Crnogorski Zakon o zaštiti potrošača u svom članu 37 koristi vrlo sličnu odredbu koja daje isto značenje kao definicija iz Direktive 97/7: „Ugovor o ugovorima na daljinu će označavati ugovor koji je ugovaran i zaključen preko sredstava komunikacije na daljinu u okviru prodajne mreže koju je napravio trgovac". Za razliku od toga, u srpskom Zakonu o zaštiti potrošača iz 2005, nema odgovarajućih odredbi. Ali u srpskom Predlogu nacrta, ugovor o ugovorima na daljinu označava svaki ugovor o prodaji ili uslugama gde trgovac, za zaključenje ugovora, *pretežno* koristi jedno ili više sredstava komunikacije na daljinu.

b. Definicija „sredstava za komunikaciju na daljinu"

Član 2(4), rečenica 1 Direktive 97/7 definiše „sredstva komunikacije na daljinu", kao jednog od elemenata ugovora o ugovorima na daljinu, kao „svako sredstvo koje, bez istovremenog fizičkog prisustva isporučioca i potrošača, može da se upotrebi za zaključenje ugovora između tih strana".

Član 2(4), rečenica 2 Direktive 97/7 se poziva na Aneks I koji sadrži prilično detaljnu pokaznu listu primera sredstava komunikacije na daljinu. Većina zemalja učesnica je uključila takvu listu u svoj Zakon o zaštiti potrošača.

Većina njih je transponovala tu definiciju doslovce ili sa samo nekim odstupanjima u formulaciji. Primer za doslovno transponovanje je albanski Zakon o zaštiti potrošača, čiji član 36(2) glasi: „Sredstva za komunikaciju na daljinu su sva sredstva koja, bez istovremenog fizičkog prisustva isporučioca i potrošača, mogu da se upotrebe za zaključenje ugovora". Bosansko-hercegovački Zakon o zaštiti potrošača u svom članu 42(2) definiše sredstva komunikacije na daljinu kao svako sredstvo koje, bez stvarnog fizičkog prisustva trgovca i potrošača, može biti korišteno za zaključenje ugovora između tih strana. Hrvatski Zakon o zaštiti potrošača u svom članu 37(1) definiše sredstva daljinske komunikacije kao ona sredstva koja su pogodna za sklapanje ugovora između trgovca i potrošača bez istodobnog fizičkog prisustva trgovca i potrošača na jednome mestu. Makedonija je transponovala definiciju sa samo nekim varijacijama u formulaciji. Član 85 makedonskog Zakona o zaštiti potrošača navodi sledeće: „Sredstva komunikacije na daljinu su ona sredstva koja su pogodna za zaključivanje ugovora između trgovca i potrošača bez istovremenog fizičkog prisustva trgovca i potrošača". Slično tome, Crna Gora je transponovala definiciju sa samo nekim varijacijama u formulaciji. Član 2(19) crnogorskog Zakona o zaštiti potrošača glasi sledeće: „Sredstva komunikacije na daljinu će označavati svako sredstvo komunikacije koje omogućava zaključivanje ugo-

vora između trgovca i potrošača, bez njihovog neposrednog fizičkog prisustva". Samo u srpskom zakonodavstvu nema sličnih odredbi. Ali u srpskom Nacrtu predloga, *sredstva komunikacije na daljinu* označavaju svako sredstvo koje, bez istovremenog fizičkog prisustva trgovca i potrošača, mogu da se upotrebe za zaključenje ugovora između tih strana.

Zakonodavstva svih zemalja učesnica, osim Srbije, su uključile listu sličnu onoj u Aneksu I u svojim Zakonima o zaštiti potrošača. Takve liste su samo indikativne a ne detaljne. Albanski Zakon o zaštiti potrošača u članu 36(2) obuhvata: „standardna pisma, štampani materijal, štampani materijala sa narudžbenicom, katalog, elektronsku poštu, elektronsku trgovinu, faks, telefon i televiziju". Druga lista sredstava komunikacije je data u Uredbi[227], koja obuhvata preostala sredstva komunikacije iz Aneksa I i predviđa proširenje na internet i računare. To takođe nije detaljna lista, jer obuhvata svako sredstvo koje može da se upotrebi za zaključivanje ugovora o ugovorima na daljinu. Indikativna lista primera sredstava komunikacije na daljinu kako je definisano u Aneksu I Direktive 97/7 je preuzeta u članu 37(2) hrvatskog Zakona o zaštiti potrošača i poboljšana dodavanjem „interneta" na listu. Član 85(2) makedonskog Zakona o zaštiti potrošača predviđa da sredstva za komunikaciju obuhvataju između ostalog: adresovani ili neadresovani štampani materijal, standardna pisma, štampane reklame sa narudžbenicom, kataloge, telefon sa automatskim ili ljudskim odgovorom, radio, videofon, videotekst, faks, televiziju, e-mail. Većina sredstava prezentovanih u Aneksu I Direktive su uključena u hrvatsku definiciju; za ostala se može shvatiti da spadaju u neku širu kategoriju, ili se može shvatiti da je lista samo primjerična a ne konačna. U Crnoj Gori, iako većina sredstava navedena u Aneksu I Direktive se navode u Zakonu o zaštiti potrošača, nisu ipak sva transponovana *ad literam*. Neka od njih (na pr. telefon sa ljudskim glasom, telefon bez ljudskog glasa, videofon, videotekst, neadresovani štampani materijal, adresovani štampani materijal, pisani obrasci) mogu da se nađu pod terminima „..telefon, pisani materijali, televizija..." koji su prošireni na različite varijacije istih dodatkom „i slična sredstva". Srpski Zakon o zaštiti potrošača iz 2005 ne uključuje takvu listu, ali u srpskom Nacrtu predloga su uključena sredstva komunikacije na daljinu kao što su: adresovani ili neadresovani štampani materijal, standardno pismo, reklama u štampi sa narudžbenicom, katalog, telefon, uključujući telefon bez ljudske intervencije (mašina sa automatskim pozivom, audiotekst), radio, videofon (telefon sa ekranom), videotekst (mikrokompjuter i televizijski ekran) sa tastaturom ili ekranom na dodir (touch screen), elektronska pošta, faks mašina, televizija (telešoping), internet.

c. Definicija „operatera sredstava za komunikaciju"

Član 2(5) Direktive 97/7 definiše 'operatera sredstava za komunikaciju' kao „svako javno ili privatno fizičko ili pravno lice čije zanimanje, posao ili profesija obuhvata to da isporučiocima stavlja na raspolaganje jedno ili više sredstava komunikacije na daljinu". Treba napomenuti da termin 'operater sredstava za komunikaciju' je termin koji uglavnom objašnjava samog sebe i koristi se u Direktivi samo u dva slučaja, to jest u članu 5(2) i članu 11(3)(b), prvi koji je mali izuzetak od opšteg pravila, drugi sadrži prilično opšti zadatak dodeljen zemljama članicama koji može da se implementira na mnogo načina. Zbog toga, lako je moguće da se ova dva člana Direktive transponuju bez jasne definicije termina 'operatera sredstava za komunikaciju' ili čak bez ikakve njegove upotrebe.

Samo su Hrvatska i Makedonija transponovale u njihove Zakone o zaštiti potrošača definiciju 'operatera sredstava za komunikaciju'. Član 38(1) hrvatskog Zakona o zaštiti potrošača definiše operatera sredstava daljinske komunikacije kao bilo koju osobu „čiji posao, zani-

[227] Albanska Odluka Saveta Ministara br. 64 od 21.01.2009, *Sl. list RA Br.* 8/09.

manje ili djelatnost uključuje i omogućavanje trgovcu uporabu jednog ili više sredstava daljinske komunikacije". Nasuprot članu 2(5) Direktive 97/7, ova odredba ne pravi razliku između fizičkih i pravnih ili javnih i privatnih lica jer široki termin 'osoba' obuhvata sve to. Po članu 86 makedonskog Zakona o zaštiti potrošača, operater sredstava komunikacije na daljinu je svako javno ili privatno fizičko ili pravno lice čiji posao, profesija ili aktivnost nudi isporučiocu upotrebu jednog ili više sredstava za komunikaciju na daljinu. Ta definicija, mada nije tačna u formulaciji, barem u svom okviru i smislu daje osnove za poređenje sa Direktivom 97/7. Nema definicije termina 'operater sredstava za komunikaciju' u crnogorskom Zakonu o zaštiti potrošača. I pored toga, taj pojam se upotrebljava u ovom zakonu u istom kontekstu[228] kao što se navodi u članu 5(2) Direktive. Time se ne krši Direktiva 97/7, jer jedna upotreba pojma ne povećava potrebu pravne definicije 'operatera sredstava za komunikaciju'. Međutim, posebni zakoni koji regulišu različite oblasti politike sadrže pripadajuće definicije *operatera* u dotičnim oblastima (na pr. Isporučilac usluga u informatičkom društvu[229], operateri javnih mreža elektronske komunikacije[230]). Albanija je transponovala ovu definiciju tehnikom copy paste, koja je identična formulaciji u Direktivi 97/7, podzakonskim aktom[231]. Bosna i Hercegovina i Srbija nisu uopšte transponovali ovu definiciju.

d. Izuzeci koje predviđa član 3 Direktive o ugovorima na daljinu

aa. Ugovori zaključeni preko automata za prodaju ili automatizovanih komercijalnih prostorija

Izuzeci (član 3(1) drugi pasus	Zemlje učesnice
Kao u Direktivi	AL, BiH
Sa varijacijama	HR, CG, MAK
Nije transponovano	SRB

Izuzimanje po pitanju ugovora zaključenih preko automata za prodaju ili automatizovanih komercijalnih prostorija su usvojili Albanija[232] i Bosna[233]. Takođe, srpski Predlog nacrta je transponovao ovo izuzeće kao u Direktivi. Hrvatska[234], Makedonija[235] i Crna Gora[236] su transponovale izuzeća koja se odnose na ugovore zaključene preko automata za prodaju, ali nisu implementirale izuzeće za „automatizovane komercijalne prostorije".

bb. Ugovori zaključeni sa operaterima telekomunikacija preko upotrebe javnih telefonskih govornica, član 3(1) treći pasus

Izuzeci (član 3(1) treći pasus)	Zemlje učesnice
Kao u Direktivi	AL, HR, MAK, CG
Sa varijacijama	
Nije transponovano	BiH, SRB

[228] Član 40 paragraf 2 Zakona o zaštiti potrošača, *Sl. list RCG* Br. 26/07.

[229] Zakon o elektronskoj trgovini, *Sl. list RCG* Br. 84/04.

[230] Zakon o elektronskim komunikacijama, *Sl. list RCG* Br. 50/08.

[231] Albanska Odluka Saveta Ministara br. 64 od 21.09.2009, *Sl. list RA Br*. 8/09.

[232] Član 36,3 (a) Zakona o zaštiti potrošača, *Sl. list RA Br*. 61/08.

[233] Član 43 Zakona o zaštiti potrošača, *Sl. glasnik BiH* br. 17/02.

[234] Član 39 pasus 3 Zakona o zaštiti potrošača, *NN* br. 79/07, 125/07, 79/09, 89/09, 133/09.

[235] Član 87(1), pasus 2, Zakon o zaštiti potrošača *Sl. list RM Br.* 38/04, 77/2007 i 103/2008.

[236] Član 47(1) (1) Zakona o zaštiti potrošača, *Sl. list RCG* Br. 26/07.

Ovo izuzimanje je transponovano od strane većine zemalja učesnica, kao što su Albanija[237], Hrvatska[238], Makedonija[239], i Crna Gora[240], dok Bosna i Srbija to nisu uradile. Međutim, srpski Nacrt predloga ga transponuje.

cc. Ugovori zaključeni za izgradnju i prodaju nepokretne imovine, član 3(1) četvrti pasus

Izuzeci (član 3(1) četvrti pasus)	Zemlje učesnice
Kao u Direktivi	AL, HR, MAK,
Sa varijacijama	BiH, CG
Nije transponovano	SRB

Albanija[241], Hrvatska[242], i Makedonija[243] su transponovali ovaj primer kao u Direktivi 97/7. Tako su iz odredbi o ugovorima na daljinu izuzeti ugovori zaključeni za izgradnju i prodaju nepokretne imovine ili koji se odnose na ostala prava nepokretne imovine, izuzev za rentiranje. Bosna i Hercegovina je transponovala ovo izuzeće sa jednom varijacijom u tekstu. Naime, odredbe o ugovorima o ugovorima na daljinu se neće primenjivati na ugovore koji se odnose na nepokretnu imovinu, osim ugovora o najmu. Ova odredba obezbeđuje viši nivo zaštite potrošača[244]. Ovo izuzeće je transponovano takođe i u crnogorskom Zakonu o zaštiti potrošača, ali bez dela koji se odnosi na „ili druga prava iz nepokretne imovine[245]. Srbija nije uopšte transponovala ovo izuzeće.

dd. Ugovori zaključeni na aukciji, član 3(1) pasus 5

Izuzeci (član 3(1) peti pasus)	Zemlje učesnice
Kao u Direktivi	AL, BiH
Sa varijacijama	HR, MAK, CG
Nije transponovano	SRB

Albanija[246] i Bosna[247] su transponovale ovo izuzeće kao u Direktivi 97/7. U Hrvatskoj odredbe Zakona o zaštiti potrošača o ugovorima za prodaju na daljinu se ne primenjuju na ugovore sklopljene „javnom dražbom“[248]. U Makedoniji je nejasno da li je to izuzeće implementirano u nacionalnom zakonodavstvu ili ne. Makedonski Zakon o zaštiti potrošača koristi izraz „ugovori zaključeni preko javnih nabavki“. Pošto ugovori o javnim nabavkama *per se*, ne spadaju pod primenu Zakona o zaštiti potrošača, trebalo bi shvatiti da se ovaj izraz odnosi na svaki ugovor zaključen postupkom javnog tendera. U Crnoj Gori ugovori koji su zaključeni na aukciji se transponuju Zakonom o zaštiti potrošača kao izuzeće, ali sa malom razli-

[237] Član 36,3 (b) Zakona o zaštiti potrošača, *Sl. list RA Br*. 61/0.

[238] Član 39 pasus 3 Zakona o zaštiti potrošača, *NN* br. 79/07, 125/07, 79/09, 89/09, 133/09.

[239] Član 87(1), pasus 3, Zakon o zaštiti potrošača, *Sl. list RM Br.* 38/04, 77/2007 i 103/2008.

[240] Član 47(1) (2) Zakona o zaštiti potrošača, *Sl. list RCG* Br. 26/07.

[241] Član 36,3 (c) Zakona o zaštiti potrošača *Sl. list RA Br*. 61/08.

[242] Član 39 pasus 4 Zakona o zaštiti potrošača *NN* br. 79/07, 125/07, 79/09, 89/09, 133/09.

[243] Član 87(1), pasus 4, Zakon o zaštiti potrošača, *Sl. list RM Br.* 38/04, 77/2007 i 103/2008.

[244] Član 43 Zakona o zaštiti potrošača, *Sl. glasnik BiH* br. 17/02.

[245] Član 47(1) (3) (4) Zakona o zaštiti potrošača *Sl. list RCG* Br. 26/07.

[246] Član 36,3 (ç) Zakona o zaštiti potrošača *Sl. list RA Br*. 61/08.

[247] Član 43 Zakona o zaštiti potrošača, *Sl. glasnik BiH* br. 17/02.

[248] Član 39 pasus 6 Zakona o zaštiti potrošača, *NN* br. 79/07, 125/07, 79/09, 89/09, 133/09.

kom u formulaciji. On se formalno odnosi na „ugovore zaključene posle prodaje metodom javnog tendera“[249]. Međutim, ovaj izraz kada se koristi za namernu prodaju neke robe, znači „aukcijska prodaja“, jer Zakon o unutrašnjoj trgovini u članu 18 reguliše „javnu i aukcijsku vrstu prodaje“, gde potonje znači „prodaja metodom javnog tendera na određenom mestu i u određeno vreme“[250]. Vredno je napomenuti da ovo izuzeće takođe pokriva prinudnu aukcijsku prodaju, koja se kao prodaja javnim nadmetanjem određenih zaplenjenih pokretnih dobara reguliše Zakonom o izvršnom postupku[251]. Srpsko zakonodavstvo nije uopšte transponovalo ovo izuzeće.

ee. Delimično izuzeće ugovora za snabdevanje namirnicama itd koje isporučuju redovni dostavljači, član 3(2) pasus 1

Izuzeci (član 3(2) prvi pasus)	Zemlje učesnice
Kao u Direktivi	AL, HR, MAK,
Sa varijacijama	CG
Nije transponovano	BiH, SRB

Po članu 3(2) prvi pasus Direktive 97/7, članovi 4 (prethodna informacija), 5 (potvrda), 6 (pravo na odustanak) i 7(1) (obaveza izvršenja naloga u roku od maksimum 30 dana) se ne odnosi na ugovore „za snabdevanje namirnicama, pićem ili drugim robama namenjenim za svakodnevnu potrošnju koje se isporučuju kod kuće potrošača, na njegovo prebivalište ili radno mesto, od strane redovnih dostavljača“.

Albanija[252], Hrvatska[253] i Makedonija[254] su transponovale ovo delimično izuzeće baš kao u Direktivi 97/7. Ovo delimično izuzimanje je transponovano u crnogorski Zakon o zaštiti potrošača, ali bez pozivanja na isporuku od strane „redovnih dostavljača“[255]. U odnosu na mesto isporuke ta odredba ne koristi reči „kuća“ i „prebivalište“ potrošača, već kaže „svakodnevna upotreba u domaćinstvu“ što bi u praksi obuhvatilo oba izraza iz Direktive 97/7. „Radno mesto“ se transponuje kako treba. Bosna i Hercegovina i Srbija nisu uopšte transponovale ovo delimično oslobađanje.

ff. Delimično izuzimanje ugovora za pružanje usluga smeštaja, prevoza, keteringa ili rekreacije, član 3(2) drugi pasus

Izuzeci (član 3(2) drugi pasus)	Zemlje učesnice
Kao u Direktivi	MAK
Sa varijacijama	AL, HR, CG
Nije transponovano	BiH, SRB

[249] Član 47(1) (5) Zakona o zaštiti potrošača, *Sl. list RCG* Br. 26/07.

[250] Vlada Crne Gore, na osnovu člana 19 Zakona o unutrašnjoj trgovini trenutno sprema Dekret kojim će regulisati uslove za organizaciju javnih i aukcijskih prodaja, vrsta robe koje se mogu prodavati u tim vrstama prodaje.

[251] Zakon o izvršnom postupku, u članu 87 reguliše prodaju metodom javnog tendera (javne aukcije) u slučaju pokretne robe veće vrednosti i kada sud očekuje da mogu biti prodati po većoj ceni od procenjene vrednosti.

[252] Član 36,3 (d) Zakona o zaštiti potrošača *Sl. list RA Br*. 61/08.

[253] Član 40 (1) pasus 1 Zakona o zaštiti potrošača, *NN* br. 79/07, 125/07, 79/09, 89/09, 133/09.

[254] Član 100(1), pasus 1, Zakon o zaštiti potrošača, *Sl. list RM Br.* 38/04, 77/2007 i 103/2008.

[255] Član 47paragraf 2 tačka 1 Zakona o zaštiti potrošača, *Sl. list RCG* Br. 26/07.

Član 3(2) drugi pasus predviđa da se članovi 4, 5, 6, i 7(1) neće primenjivati na ugovore za pružanje usluga smeštaja, prevoza, keteringa ili rekreacije, kada isporučilac preuzima, kada se ugovor zaključi, da pruži te usluge nekog posebnog dana ili u okviru nekog posebnog perioda.

Izuzev, u slučaju sportskih događaja na otvorenom prostoru, isporučilac može da zadrži pravo da ne primeni član 7(2) u posebnim okolnostima.

Ovaj član Direktive 97/7 je primenjivan u Evropskom sudu pravde (C-336/03 – *Easyca*[256]). Sud je držao da član 3(2) Direktive treba da se tumači kao da znači da „ugovori za pružanje usluga u prevozu" obuhvataju ugovore za pružanje usluga iznajmljivanja automobila. To mišljenje nudi neke smernice za buduće primenjivanje ove odredbe. Sud je izjavio da izuzimanje ima za cilj zaštitu interesa isporučioca određenih usluga kako oni ne bi trpeli nesrazmerne posledice koje proističu iz otkazivanja. Primer za to bi bila rezervacija koja je načinjena i onda otkazana od strane potrošača uz obaveštenje neposredno pre datuma navedenog za pružanje te usluge. Po mišljenju Evropskog suda pravde, posao sa iznajmljivanjem automobila predstavlja aktivnost koju, protiv takvih posledica, zakonodavstvo namerava da zaštiti preko izuzeća. Razlog je što takvi poslovi moraju da prave aranžmane za izvršenje na datum određen u vreme rezervisanja dogovorene usluge, i stoga trpe iste posledice u slučaju otkazivanja kao i drugi koji rade u sektoru prevoza ili drugim sektorima navedenim u izuzimanjima[257].

Samo je Makedonija[258] verno transponovala član 3(2) pasus 2 Direktive 97/7. Albanija[259] je izostavila, ili „zaboravila" tokom sastavljanja, drugi deo rečenice (prema kojem izuzev u slučaju sportskih događaja na otvorenom prostoru, isporučilac može da zadrži pravo da ne primeni član 7(2) u posebnim okolnostima). Hrvatski Zakon o zaštiti potrošača u članu 40 (1) drugi pasus određuje da se odredbe članova 43 – 51 i član 52(1) ovoga Zakona (o prethodnoj obavijesti i pravu na raskid ugovora) neće primenjivati na „ugovore o smještaju, prijevozu i opskrbi pripremljenom hranom (catering), i uslugama za slobodno vrijeme kojima se trgovac obvezuje ispuniti svoju obvezu u točno određenom trenutku ili u točno određenom roku". Temeljem člana 40(2) Zakona o zaštiti potrošača izuzetno, kod ugovora o pružanju usluga razonode na otvorenome, trgovac može ugovorom isključiti od primjene na taj ugovor odredbu člana 52(2) Zakona (glede neispunjenja ugovora od strane trgovca) u pojedinim, ugovorom određenim, situacijama. Suštinski deo ovog delimičnog oslobađanja, to jest deo odredbe koja reguliše da datum izvršenja mora da bude fiksan u vreme zaključenja ugovora, nije bio izričito transponovan. Situacija je slična u Crnoj Gori. Delimično izuzimanje je transponovano u crnogorskom Zakonu o zaštiti potrošača uz manje varijacije, tako da je skoro potpuno transponovanje Direktive u nacionalni zakon neupitno. Varijacije su sledeće: a) iako Direktiva 97/7 zahteva da datum izvršenja mora da bude utvrđen „kada se ugovor zaključuje". Crnogorsko zakonodavstvo je izostavilo ove reči, ali krajnji rezultat je isti jer formulacija paragrafa sugeriše da datum treba bude „u ugovoru"; b) iako je Crna Gora transponovala drugi deo izuzimanja (rekreativni događaji na otvorenom prostoru), to se ne odnosi na „posebne okolnosti", već umesto toga na „slučajeve navedene u ugovoru"[260].

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[256] Presuda Evropskog suda pravde, mart 2005, C-336/03- *EasyCar (UK) v Office of fair trading* (2005) ECR I-1947.

[257] Presuda ESP od 10. marta 2005., , C-336/03- *EasyCar (UK) v Office of fair trading*. Ceo komentar ovog slučaja je dat u Consumer Law Compendium, Februar 2008, str. 527.

[258] Član 100(1), pasus 2, Zakon o zaštiti potrošača, *Sl. list RM Br.* 38/04, 77/2007 i 103/2008.

[259] Član 36,3 (dh) Zakona o zaštiti potrošača *Sl. list RA Br*. 61/08.

[260] Član 47paragraf 2 tačka 2 Zakona o zaštiti potrošača, *Sl. list RCG* Br. 26/07.

III. Instrumenti za zaštitu potrošača

1. Obaveze davanja informacija

a. Predugovorna obaveza informisanja potrošača

Član 4(1) Direktive 97/7 obavezuje države da predvide u svom zakonodavstvu obavezu isporučioca da potrošaču pruži, blagovremeno pre zaključenja ugovora o ugovorima na daljinu, sledeće informacije:

a) Identitet isporučioca i, u slučaju ugovora po kojima se zahteva plaćanje unapred, njegovu adresu;
b) Glavne karakteristike roba ili usluga;
c) Cenu roba ili usluga uključujući sve poreze;
d) Troškove isporuke, gde je moguće;
e) Uslove plaćanja, isporuke ili izvršenja;
f) Postojanje prava na odustanak, osim u slučajevima na koje se odnosi član 6(3);
g) Troškovi upotrebe sredstava komunikacije na daljinu, kada se obračunava mimo osnovne cene;
h) Period u kome ponuda ili cena ostaju važeće;
i) Kada je moguće, minimalno trajanje ugovora u slučaju ugovora za isporuku proizvoda ili usluga koje će se vršiti trajno ili periodično.

Na osnovu člana 4(2), informacije moraju da se pruže na jasan i razumljiv način koji u svakom smislu odgovara upotrebljenom sredstvu komunikacije na daljinu, dok član 4(3) dodatno objašnjava da u slučaju komunikacije telefonom, identitet isporučioca i komercijalna svrha poziva moraju biti izričito jasni na početku svakog razgovora sa potrošačem.

Sve zemlje, osim Srbije, su uključile takvu obavezu i napravile tačno takvu ili sličnu listu informacija koje treba da se daju. U svrhu ove studije, istaći ćemo sledeće aspekte:

aa. "U primerenom roku" pre zaključenja ugovora

Postoje određene razlike u transponovanju ovog uslova. Tačno takva formulacija je upotrebljena u Albaniji (Zakon o zaštiti potrošača član 37(1)) i Hrvatskoj (član 43(1) Zakona o zaštiti potrošača: „u primjerenom roku prije sklapanja ugovora"). Varijacija u formulaciji postoji u Makedoniji, gde je zakonodavac upotrebio izraz *određeno vreme pre zaključenja*, bez definisanja kako se ono određuje (član 89(1) Zakona o zaštiti potrošača). U Crnoj Gori je upotrebljen izraz *pre zaključenja*. Ovaj uslov nije transponovan u zakonodavstvu Bosne i Hercegovine i Srbije[261].

bb. Dodatne obaveze predugovornog obaveštavanja

Sve ove zemlje, osim Srbije, su dodale još neke informacije na listu. U Albaniji su one iznete u članu 37(1) Zakona o zaštiti potrošača. Član 44 Zakona o zaštiti potrošača u Bosni i Hercegovini propisuje odredbu o daljem obaveštavanju o mestu i kontaktima sa trgovcem i isporučiocem u svakom slučaju, ne samo za „ugovore koji zahtevaju plaćanje unapred, o identifikaciji roba ili usluga, informacije o garancijama i post prodajnim uslugama i nadležnost i primenu određenih materijalnih prava u slučaju nekog spora. Isto to je dato u članu 43(1) hr-

[261] Poglavlje II, Glava 2 Nacrta predloga sadrži dva člana koja se bave sa opštom obavezom trgovca o predugovornom davanju informacija, navodeći informacije koje je trgovac u obavezi da pruži potrošaču pre zaključivanja ugovora o prodaji ili uslugama, uključujući posebne obaveze posrednika za davanje informacija.

vatskog Zakona o zaštiti potrošača, koji dodatno zahteva da isporučilac/trgovac pruži informacije koje se odnose na pravo potrošača na raskid ugovora kao i o situacijama u kojima je ono isključeno. Konačno, član 43(4) Zakona o zaštiti potrošača određuje još jednu dodatnu predugovornu informaciju koja sadrži upozorenje „da ugovor u ime i za račun maloljetnika ili potpuno poslovno nesposobne osobe mogu sklopiti samo njihovi zakonski zastupnici, odnosno upozorenje da djelomično poslovno sposobne osobe mogu sklopiti ugovor samo uz suglasnost njihova zakonskog zastupnika". Proširenja koja postoje u makedonskom Zakona o zaštiti potrošača (član 89(2)) se odnose na odredbu o detaljnim informacijama koje se odnose na identitet trgovca/isporučioca u svakom slučaju, identitet proizvoda ili usluge i pravo na povlačenje. Proširene informacije o identitetu trgovca/isporučioca i pravo na povlačenje će biti dati i u crnogorskom zakonodavstvu takođe. Pored toga Zakon o elektronskoj trgovini određuje dužnosti u vezi specifičnih informacija iz sektora[262].

U Srbiji, trenutno nema odgovarajućih odredbi u Zakonu o obligacionim odnosima ili Zakonu o zaštiti potrošača iz 2005[263].

b. Pisana potvrda, član 5

Član 5(1) Direktive obavezuje isporučioca da da, blagovremeno u toku izvršenja ugovora, pisanu potvrdu (ili potvrdu na nekom drugom trajnom mediju) o nekim informacijama koje će se dati pre ugovora, osim ako su te informacije već date potrošaču u takvoj formi.

U albanskom zakonodavstvu ovaj zahtev je transponovan doslovno (član 37 (2 a,b,c,ç) Zakona o zaštiti potrošača). Zakon o zaštiti potrošača Bosne i Hercegovine (član 45(1))[264] i Hrvatske (član 44 (1, 2)), Makedonije (član 91) i Crne Gore (član 40(1)) zahteva pisanu potvrdu koja će se dati najkasnije po isporuci robe/usluge. Ta pisana potvrda treba da sadrži sve informacije koje se od trgovca/isporučioca traže da ih pruži, dok Direktiva zahteva samo da neke od njih budu date.

aa. Formalni zahtevi

Član 5(1) Direktive određuje da potrošač mora da primi pisanu potvrdu, ili potvrdu u nekom drugom trajnom mediju koji mu je na raspolaganju i pristupačan, o nekim informacijama datim u članu 4 Direktive.

Formalni zahtevi	Zemlje učesnice
Kao u Direktivi	AL, BiH, HR, MAK
Nisu transponovani	SRB
Varijacije	CG

Zahtev koji se odnosi na medij za davanje potvrde (u pisanom ili nekom drugom trajnom, raspoloživom i pristupačnom mediju) je transponovan doslovno u Albaniji (član 37 (2

[262] Član 14 Zakona o elektronskoj trgovini, *Sl. list RCG* Br. 84/04.

[263] Nacrt predloga navodi informacije koje treba da se daju i način na koji treba da se daju.

[264] Na osnovu člana 146 (3) Bosansko-hercegovački Nacrt Zakona o obligacionim odnosima od 2010. potrošač ima pravo da dobije punu informaciju o svom pravu na opoziv na nekom trajnom nosaču podataka. Ta informacija treba da sadrži ime i adresu primaoca opoziva, kao i početak perioda opoziva. Član 146 (4) BDLO dalje predviđa, da ako potrošački ugovor nije overen kod beležnika informacija o pravu na povlačenje treba da bude posebno potpisana ili da sadrži kvalifikovan elektronski potpis. Ako ugovor treba da bude zaključen u pisanoj formi, potrošač mora da primi original ili kopiju potvrde ugovora ili pisanu ponudu potrošača za zaključenje ugovora.

a,b,c,ç) Zakona o zaštiti potrošača), Bosni i Hercegovini (član 45(1) Zakona o zaštiti potrošača), Hrvatskoj (član 44(1) Zakona o zaštiti potrošača) i Makedoniji (član 91 Zakona o zaštiti potrošača). Crnogorski zakon je dao samo opciju pisane potvrde (član 40(1) Zakona o zaštiti potrošača). Ova odredba nije transponovana u Srbiji.

bb. Vreme potvrđivanja

Na osnovu člana 5(1) Direktive, potrošač mora da primi pisanu potvrdu, ili potvrdu u nekom drugom trajnom mediju koji mu je na raspolaganju i pristupačan, o informacijama na koje se odnosi član 4(1) (a) do (f), blagovremeno za vreme izvršenja ugovora, a najkasnije u vreme isporuke (ne primenjuje se kada je u pitanju roba za isporuku trećim licima).

Postoje razlike u prenošenju ovog zahteva. U Albaniji je prenet doslovno. U Bosni i Hercegovini postoje razlike jer član 45 (1) Zakona o zaštiti potrošača koji reguliše ovo pitanje ne uključuje izraz „*blagovremeno*". Po članu 44 (1) hrvatskog Zakona o zaštiti potrošača potvrda prethodnih informacija mora da se da „što je moguće prije, a najkasnije u trenutku isporuke proizvoda, odnosno najkasnije na dan početka pružanja usluge". Makedonski Zakon o zaštiti potrošača (član 91, paragraf 1, drugi deo rečenice) definiše da ta potvrda mora da se da blagovremeno za vreme izvršenja ugovora, a najkasnije u vreme isporuke proizvoda ili na dan davanja usluga, i ne pravi razliku između isporuke proizvoda potrošaču za njegovu/njenu ličnu upotrebu ili za neko treće lice. Član 39 crnogorskog Zakona o zaštiti potrošača izostavlja deo „na robu koja nije za isporuku trećim licima" i „najkasnije u vreme isporuke". Ovaj zahtev nije prenet u srpski Zakon.

Formalni zahtevi	Zemlje učesnice
Kao u Direktivi	AL
Nisu transponovani	SRB
Varijacije	BiH, HR, MAK, CG

cc. Obaveštenja koje će se dati u svakom slučaju, član 5(1), rečenica 2

Isporučilac, na osnovu člana 5(1) rečenica 2 Direktive, mora da da određena obaveštenja u svakom slučaju, a to su:

- Pisana informacija o uslovima i procedurama za upražnjavanje prava na odustanak;
- Geografska adresa mesta poslovanja isporučioca na koju potrošač može da uputu reklamacije;
- Informacije o post-prodajnim uslugama i postojećim garancijama; i
- Rešenje o raskidu ugovora, kada je na neodređeno vreme ili u trajanju preko jedne godine.

Ovaj uslov je doslovno transponovan u Albaniji. U Bosni i Hercegovini to se smatra predugovornim obaveštavanjem (član 44 Zakona o zaštiti potrošača) koje mora biti potvrđeno pre zaključivanja ugovora. Isti je slučaj sa zakonodavstvom u Hrvatskoj (član 43 (1) i član 44 (2) Zakona o zaštiti potrošača), Makedoniji (član 90 Zakona o zaštiti potrošača) i Crnoj Gori (član 39(1) tačke 6,7,8 i 9 i član 40(1) Zakona o zaštiti potrošača). Ovaj zahtev nije transponovan u srpskom zakonodavstvu.

dd. Izuzeće od člana 5(1) za usluge izvršene preko upotrebe sredstava za komunikaciju na daljinu

Član 5(2) Direktive 97/7 omogućava izuzimanje da isporučilac ne mora da da potvrdu za usluge koje su izvršene preko upotrebe sredstava za komunikaciju na daljinu, kada se one

izvrše samo jednom prilikom i kada ih fakturiše operater tog sredstva za komunikaciju na daljinu. I pored toga, potrošač u svakom slučaju mora da bude u mogućnosti da dobije geografsku adresu mesta poslovanja isporučioca na koju može da uputi reklamacije.

Odgovarajuće odredbe postoje u zakonodavstvu Albanije, Hrvatske, Makedonije i Crne Gore. Srbija i Bosna i Hercegovina nisu transponovale ovo izuzeće u svoja nacionalna zakonodavstva.

c. Sankcije za povredu obaveza davanja obaveštenje

Većina odredbi Direktive o sankcijama za povredu dužnosti davanja obaveštenja su prilično opšte i time ostavljaju veliku slobodu izbora nacionalnim zakonodavcima. Mogu se uočiti sledeće vrste sankcija:

- Produženje roka za odustanak u članu 6(1);
- Zabrane;
- Pravo konkurenata na traženje odštete;
- Novčane kazne po krivičnom ili upravnom pravu;
- Ostale posledice iz privatnog prava.

Sve ove zemlje, osim Srbije[265], daju neki oblik sankcija za povredu obaveza za davanje informacija.

aa. Produženje roka za odustanak iz člana 6(1)

Produženje roka za povlačenje	Zemlje učesnice
Kao u Direktivi	AL, HR, MAK, CG
Varijacije	BiH
Nije transponovano	SRB

Sankcije za produženje roka za odustanak iz člana 6(1) su implementirane kao u Direktivi u nacionalnom zakonodavstvu Albanije[266]. U Bosni i Hercegovini ovo pravilo je transponovano (član 47(4 i 5) Zakona o zaštiti potrošača); međutim, rok u kome potrošač može da odustane od ugovora produžen je na 15 dana. Treba napomenuti da nasuprot presudi *Heninger*[267] Evropskog suda pravde, u Bosni i Hercegovini rok za povlačenje može da počne čak pre nego što je obaveštenje sa informacijama dato potrošaču. On ističe u roku od tri meseca od prijema roba od strane potrošača, ili zaključenja ugovora u slučaju pružanja usluga, i stoga sledi kritike presude *Heininger*, da period za povlačenje ne može da se produžava zauvek usled nemanja obaveštenja o davanju informacija[268].

[265] Nacrt predloga obuhvata sankcije za zakasnele informacije o pravu na povlačenje (Poglavlje III Nacrta predloga) kao i efekat navođenja potrošača da zaključi ugovor bez poštovanja uslova za davanje informacija (Poglavlje II, Glava 2 Nacrta predloga). Nacrtom predloga teret dokazivanja u vezi sa ispunjenjem obaveze o davanju informacija pada na trgovca. Takođe se očekuje da će nacrt predloga obuhvatiti i poglavlje o administrativnim kaznama.

[266] Tačke 11 i 12 Odluke Saveta Ministara br. 64 od 21.01.2009. br. 08/09.

[267] Presuda Evropskog suda pravde od 13. decembra 2001., C-481/99 – *Georg Heininger and Helga Heininger v. Bayerische Hypound Vereinsbank AG* (2001) ECRI-09945.

[268] Videti Z. Meškić, *Europäisches Verbraucherrecht – Gemeinschaftsrechtliche Vorgaben und europäische Perspektiven*, Band 18 der Schriftenreihe des Ludwig Boltzmann Institutes für Europarecht, Beč, 2008., str. 84; treba napomenuti da se očekuje da taj problem bude rešen usvajanjem Nacrta Zakona o obligacionim odnosima od 2010., sa time da rok za opoziv od 15 dana, na osnovu člana 146 (3) Nacrta Zakona o obligacionim odnosima, počinje kada informacija o pravu na opoziv bude data potrošaču.

Hrvatski zakonodavac je doslovno transponovao član 6(1) Direktive 97/7 u članu 46 (1-4) Zakona o zaštiti potrošača, kao i makedonsko (član 93 Zakona o zaštiti potrošača) i crnogorsko zakonodavstvo (član 41(2) Zakona o zaštiti potrošača). Kao što je gore navedeno, srpsko zakonodavstvo trenutno ne propisuje ovu sankciju.

bb. Tužbe za zaštitu kolektivnih interesa potrošača

Poštovanje obaveze o davanju informacija može da se sprovede preko postupka zabrane na osnovu člana 55 Zakona o zaštiti potrošača Albanije, članova 120-124 Zakona o zaštiti potrošača Bosne i Hercegovine, člana 131 et seq. Zakona o zaštiti potrošača Hrvatske i člana 103 Zakona o zaštiti potrošača Makedonije. U Crnoj Gori to je delimično transponovano Zakonom o zaštiti potrošača[269]. Nije bilo transponovanja ove mogućnosti u zakonodavstvu Srbije.

cc. Pravo konkurenata na traženje odštete

Zakonska odredba koja postoji u nekim zemljama EU, kojom konkurencija takođe može da traži odštetu protiv isporučioca koji povredi obaveze o davanju informacija i time stekne nezakonitu prednost nad učesnicima na tržištu koji poštuju zakon, nije donesena u nacionalnim zakonodavstvima proučavanih zemalja.

dd. Novčane kazne po krivičnom i upravnom pravu

Većina zemalja članica EU je navela administrativne sankcije, po kojima su isporučioci koji ne daju informacije krivi za prekršaj i mogu biti novčano kažnjeni.

Isto postoji i u proučavanim zemljama jugo-istočne Evrope osim u Srbiji. Naime, član 57 (2,a) albanskog Zakona o zaštiti potrošača propisuje novčane kazne do 70.000 leka (cca. 520 Evra). U Bosni i Hercegovini novčane kazne variraju između 2.500 Evra i 8.000 Evra zavisno od prekršaja (član 126 Zakona o zaštiti potrošača). U Hrvatskoj, na osnovu člana 145 (1) pasus 23 i 24, trgovac koji ne pruži informacije biće sankcionisan novčanom kaznom of 15.000 do 100.000 HRK (cca. 1.370 Evra do 13.700 Evra), dok na osnovu člana 145 (3) fizičkom licu za isti prekršaj sledi kazna u iznosu od 5.000 do 15.000 HRK (cca. 685 do 13.700 Evra). Članom 136 (1) red 30 Zakona o zaštiti potrošača Makedonije povreda obaveze trgovca za davanje pisane potvrde može imati za posledicu novčanu kaznu u iznosu od 3.500 do 5.000 Evra. U Crnoj Gori, prekršajne novčane kazne će se nametnuti trgovcu za prekršaj napravljen preko povrede obaveza koje se odnose na prethodno davanje informacija, pisanu potvrdu informacija i ograničenja na upotrebu određenih sredstava komunikacija na daljinu (član 129(1) tačke 13, 14 i 15 Zakona o zaštiti potrošača), kao i posebna kazna za odgovorno lice ako je trgovac pravni subjekt (član 129(2) Zakona o zaštiti potrošača).

ee. Ostale posledice po privatnom pravu

Primenom propisa građanskog prava, a posebno zakona o ugovorima, ostale posledice privatnog prava, u svim proučavanim zemljama obuhvataju zahtev za naknadu štete u slučaju raskida ugovora.

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[269] I pored toga, u slučaju prodaje na daljinu područje primene instrumenata propisanih Poglavljem o "Odredbama o kaznama" je više nego efikasno i pruža adekvatnu zaštitu interesa potrošača. Naime, nije neophodno da neki postupak trgovca povredi kolektivne interese potrošača, ali je dovoljno da je došlo samo do povrede obaveza u odnosu na prethodno davanje informacija, pisanu potvrdu informacija ili ograničenja upotrebe određenih sredstava komunikacije na daljinu (član 129 paragraf 1 stavke 13, 14, 15 i paragraf 2 Zakona o zaštiti potrošača).

2. Pravo na odustanak

a. Izuzimanja od prava na odustanak

aa. Izuzimanje od prava na povlačenje ako je pružanje usluga počelo pre završetka perioda od sedam radnih dana (član 6(3) prvi pasus)

Većina zemalja je transponovala izuzimanje od prava na odustanak ako je pružanje usluga počelo pre završetka perioda od sedam radnih dana, kako se navodi u članu 6(3) prvi pasus Direktive 97/7, osim Srbije[270].

U Albaniji, Zakon daje 14 kalendarskih dana za početak izvršenja. Član 6(2) prvi pasus Direktive 97/7 je doslovno prenet u član 48 (1a) Zakona o zaštiti potrošača Bosne i Hercegovine, ali treba napomenuti da gore navedeni član sadrži lingvističku grešku jer navodi da „potrošač ne može odustati od prava na poništenje ugovora", što se samo može protumačiti kao greška u prevodu. Hrvatska je transponovala to izuzimanje propisivanjem u članu 49 prvi pasus Zakona o zaštiti potrošača da osim ako se stranke nisu drugačije dogovorile, potrošač nema pravo na raskid ugovora ako je riječ o ugovoru o pružanju usluge, ako je pružanje usluge, uz izričit pristanak potrošača, započelo prije isteka roka u kojem je potrošač imao pravo tražiti raskid ugovora. Slična formulacija je upotrebljena u makedonskom zakonodavstvu (član 96, prvi pasus Zakona o zaštiti potrošača) i u Crnoj Gori (član 42(1) tačka 1 Zakona o zaštiti potrošača). Takva formulacija do određenog stepena varira od teksta Direktive, jer izostavljanjem teksta „pre završetka perioda od sedam radnih dana" nacionalne odredbe izgleda da idu izvan Direktive i produžavaju ovaj rok dalje, posebno u slučajevima kada potvrda o informacijama nije uopšte data. Mora da se ponovi da će to moći da se primeni, samo ako je potrošač dao jasnu saglasnost da pružanje usluga počne pre završetka perioda u okviru koga je potrošač imao pravo na raskid ugovora.

Izuzimanje (član 6(3) pasus 1)	Zemlje učesnice
Kao u Direktivi	BiH
Nije transponovano	SRB
Varijacije	AL, HR, MAK, CG

bb. Izuzimanje od prava na povlačenje u slučaju roba i usluga čija cena zavisi od fluktuacija na finansijskom tržištu (član 6(3) drugi pasus)

Ovo izuzimanje je doslovno transponovano u zakonodavstvo Bosne i Hercegovine (član 48(1c) Zakona o zaštiti potrošača), u Hrvatskoj (član 49 drugi pasus Zakona o zaštiti potrošača), Makedoniji (član 96, drugi pasus Zakona o zaštiti potrošača) i Crnoj Gori (član 42 paragraf 1 tačka 2 Zakona i zaštiti potrošača).

Izuzimanje (član 6(3) pasus 2)	Zemlje učesnice
Kao u Direktivi	BiH, HR, MAK, CG
Nije transponovano	AL, SRB
Varijacije	

[270] Pod Nacrtom predloga novog Zakona o zaštiti potrošača u Srbiji, u odnosu na ugovore o ugovorima na daljinu, pravo na povlačenje se neće primenjivati na sledeće (osim ako se ugovorne strane ne dogovore drugačije): (1) usluge gde je izvršenje počelo, uz prethodnu jasnu saglasnost potrošača, pre kraja roka za povlačenje; (2) isporuke robe ili usluga za koje cena zavisi od promena na finansijskom tržištu koje trgovac ne može da kontroliše; (3) isporuka zatvorenih audio ili video snimaka ili kompjuterkog softvera koje je otvorio potrošač; (4) usluge igara na sreću i lutrije.

cc. izuzimanje od prava na povlačenje u slučaju kada se roba izrađuje po specifikacijama potrošača itd. (član 6(3) treći pasus)

Ovo izuzimanje je implementirano u nacionalnom zakonodavstvu Bosne i Hercegovine (član 48(1) red d) i e Zakona o zaštiti potrošača), Hrvatske (član 49 treći pasus Zakona o zaštiti potrošača), Makedonije (član 96, treći pasus Zakona o zaštiti potrošača) i Crne Gore (član 42(1) tačka 3 Zakona o zaštiti potrošača) gde treba razumeti da izostavljanje izraza „ili brzo ističe" ne treba smatrati kao prepreku za pravilnu implementaciju navedenog izuzimanja[271].

Izuzimanje (član 6(3) pasus 3)	Zemlje učesnice
Kao u Direktivi	BiH, HR, MAK, CG
Nije transponovano	AL, SRB
Varijacije	

dd. Izuzimanje od prava na povlačenje u odnosu na audio i video snimaka, ili kompjuterskog softvera (član 6(3) četvrti pasus)

Na osnovu član 48 (1f) Zakona o zaštiti potrošača Bosne i Hercegovine, osim ako se ne dogovori drugačije između strana, potrošač neće imati pravo na raskid ugovora po pitanju ugovora za prodaju audio ili video snimaka ili kompjuterskog softvera koje je koristio potrošač. Shodno tome, izraz „koje potrošač nije otvarao" je zamenjen izrazom „koje je potrošač koristio". Slično tome, u članu 49 četvrti pasus Zakona o zaštiti potrošača Hrvatske, predviđeno je isto izuzimanje, dok je upotrebljen izraz „koje je potrošač otpakirao". Članom 96 četvrti pasus makedonskog Zakona o zaštiti potrošača, potrošač neće imati pravo da raskine ugovor po pitanju ugovora za prodaju audio ili video snimaka ili kompjuterskog softvera koji je bio raspakovan (otvoren) od strane potrošača. Doslovno transponovanje je predviđeno u članu 42(1) tačka 4 Zakona o zaštiti potrošača Crne Gore. Albanija i Srbija nisu transponovale ovo izuzimanje.

Izuzimanje (član 6(3) pasus 4)	Zemlje učesnice
Kao u Direktivi	CG
Nije transponovano	AL, SRB
Varijacije	HR, BiH, MAK

ee. Izuzimanje od prava na povlačenje po pitanju novina, periodike i časopisa (član 6(3) pasus 5)

Odredba člana 6(3) peti pasus Direktive je transponovana, doslovno, u zakonodavstvu Bosne i Hercegovine (član 48(1g) Zakona o zaštiti potrošača), Hrvatske (član 49 peti pasus Zakona o zaštiti potrošača), Makedonije (član 96 peti pasus Zakona o zaštiti potrošača), i Crne Gore (član 42, paragraf 1 tačka 5 Zakona o zaštiti potrošača).

Izuzimanje (član 6(3) pasus 5)	Zemlje učesnice
Kao u Direktivi	BiH, HR, MAK, CG
Nije transponovano	AL, SRB
Varijacije	

[271] Član 42 paragraf 1 tačka 3 Zakona o zaštiti potrošača.

ff. Izuzimanje od prava na povlačenje po pitanju usluga u oblasti kockanja i lutrije (član 6(3) pasus 6)

Izuzimanje (član 6(3) pasus 6)	Zemlje učesnice
Kao u Direktivi	
Nije transponovano	AL, MAK, SRB
Varijacije	BiH, HR, CG

Izuzimanje koje je dato u članu 6(3) pasus 6 (izuzimanje ugovora koji se odnose na kockanje i lutriju) je transponovano u Bosni i Hercegovini, Hrvatskoj i Crnoj Gori uz manje izmene. Naime, član 48 (1b) Zakona o zaštiti potrošača Bosne i Hercegovine koristi širi izraz „usluge igara na sreću“. U članu 49 pasus 6 Zakona o zaštiti potrošača Hrvatske upotrebljen je izraz „igre na sreću“, kao i u članu 42(1) tačka 6 Zakona o zaštiti potrošača Crne Gore, gde treba napomenuti da je taj izraz usklađen sa nacionalnim zakonodavstvom[272].

b. Formalni uslovi za upražnjavanje prava na povlačenje

Direktiva ne sadrži izričitu odredbu koja omogućava zemljama članicama da regulišu formalne uslove za upražnjavanje prava na povlačenje od strane potrošača. Ali kako član 5(1) prvi pasus Direktive predviđa da potrošač bude obavešten o „uslovima i procedurama za upražnjavanje prava na povlačenje“, generalno se pretpostavlja da zemlje članice imaju slobodu da regulišu formalne uslove.

Albansko zakonodavstvo ne predviđa nikakvu formalnu proceduru za upražnjavanje prava na povlačenje. U Bosni i Hercegovini, članom 47(6) Zakona o zaštiti potrošača od potrošača se traži da obaveštenje o odustajanju u pisanoj formi, međutim, nije potrebno objasniti razloge za to[273]. Procedura za raskid ugovora u Hrvatskoj je data u članu 47 Zakona o zaštiti potrošača, na osnovu koga potrošač treba da pošalje trgovcu pisanu obavest o raskidu. Ugovor je raskinut u trenutku kada trgovac primi obavest o raskidu (član 47 (2) Zakona o zaštiti potrošača), pod uslovom da je pisana obavest o raskidu poslata u navedenim vremenskim rokovima iz (člana 47 (3) Zakona o zaštiti potrošača). U Srbiji ovo pitanje nije regulisano.

c. Rok za povlačenje

aa. Dužina roka

Direktiva predviđa rok od sedam radnih dana. Zemlje učesnice koje regulišu ovo pitanje (to jest: sve osim Srbije[274]) imaju različita pravila po pitanju dužine roka koji poštuje minimum koga predviđa Direktiva.

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272 Videti crnogorski Zakon o igrama na sreću, *Sl. list RCG* Br. 52/04 I *Sl. list RCG* Br. 13/07.

273 Na osnovu člana 146 (1) Nacrta Zakona o obligacionim odnosima od 2010. opoziv ne mora da sadrži nikakvo objašnjenje, ali mora da bude dato na nekom trajnom nosaču podataka ili dokumentu. Povratak robe ima isti efekat kao i opoziv.

274 Nema odgovarajućih odredbi u Zakonu o obligacionim odnosima i Zakonu o zaštiti potrošača iz 2005. Po Nacrtu predloga: Po pitanju ugovora na daljinu i ugovora izvan poslovnih prostorija, potrošač će imati rok od 14 dana da se povuče iz tih ugovora, bez davanja razloga. Upražnjavanje njegovog prava na povlačenje iz ugovora će u potpunosti osloboditi potrošača od bilo koje obaveze koja proističe iz ugovora iz koga se povukao. Jedini trošak koja se može zaračunati potrošaču na osnovu upražnjavanja njegovog prava na povlačenje mogu biti direktni troškovi za vraćanje robe. Pod Nacrtom predloga novog Zakona o zaštiti potrošača Srbije rok za povlačenje od 14 dana počinje na početku prvog sata prvog dana i završava se istekom poslednjeg sata poslednjeg dana tog roka. Izjava o povlačenju će se smatrati odgovarajućom ako je poslata u okviru navedenog roka. Vraćanje primljene robe trgovcu u okviru roka, u kome potrošač

Albanski zakon predviđa rok od 14 kalendarskih dana (član 37(3) Zakona o zaštiti potrošača), član 47(1) Zakona o zaštiti potrošača Bosne i Hercegovine propisuje da potrošač ima pravo, bez troškova i bilo kakvog objašnjenja, da odustane od ugovora o ugovorima na daljinu u roku od 15 dana[275]. Sedam radnih dana je rok koji je usvojen u Hrvatskoj (član 45(1) Zakona o zaštiti potrošača) i Crnoj Gori (član 41(1) Zakona o zaštiti potrošača). U Makedoniji je taj rok osam radnih dana (član 92(1) Zakona o zaštiti potrošača).

bb. Početak roka

(1) Početak roka u slučaju isporuke robe

Početak u slučaju isporuke robe (član 6(1) rečenica 3, pasus 1)	Zemlje učesnice
Kao u Direktivi	BiH, HR, MAK, CG
Nije transponovano	AL, SRB
Varijacije	

Član 6(1), rečenica 3, prvi pasus Direktive 97/7 navodi početak roka za povlačenje u slučaju isporuke robe kao dan primanja robe od strane potrošača.

On je transponovan, kako je predviđeno u nacionalnom zakonodavstvu Bosne i Hercegovine (član 47(1,2,4 i 5) Zakona o zaštiti potrošača), Hrvatske (član 45(2) Zakona o zaštiti potrošača), Makedonije (član 92(2) Zakona o zaštiti potrošača), i Crne Gore (član 41(1) Zakona o zaštiti potrošača).

Ovo pitanje nije regulisano u Albaniji i Srbiji.

(2) Početak roka u slučaju pružanja usluga

Početak u slučaju pružanja usluga (član 6(1) rečenica 3, pasus 2)	Zemlje učesnice
Kao u Direktivi	BiH, HR, MAK, CG
Nije transponovano	AL, SRB
Varijacije	

Član 6(1), rečenica 3, drugi pasus Direktive 97/7 predviđa početak roka za povlačenje u slučaju pružanja usluga „od dana zaključenja ugovora ili od dana kada su obaveze date u članu 5 ispunjene ako su ispunjene posle zaključenja ugovora".

Ova odredba je transponovana u zakonodavstvo Bosne i Hercegovine (član 47(3,4,5) Zakona o zaštiti potrošača[276]), Hrvatske (član 45 (3) Zakona o zaštiti potrošača), Makedonije (član 92(3) Zakona o zaštiti potrošača) i Crne Gore (član 41(1) Zakona o zaštiti potrošača).

Ovo pitanje nije regulisano u zakonodavstvu Albanije i Srbije.

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ima pravo na povlačenje, će se smatrati izjavom o povlačenju. Smatraće se da je potrošač izvršio svoje pravo na povlačenje u trenutku kada je izjava o povlačenju poslata trgovcu. U slučaju ugovora za prodaju robe na daljinu, rok za povlačenje počinje od dana kada je potrošač ili neko treće lice osim prevoznika i naznačeno od strane potrošača steklo materijalni posed nad svakom naručenom robom. U slučaju ugovora na daljinu za pružanje usluga, rok za povlačenje počinje od dana zaključivanja ugovora.

[275] Isti rok je dat u članu 146 (3) Nacrta Zakona o obligacionim odnosima od 2010.

[276] Član 146 Nacrta Zakona o obligacionim odnosima od 2010. ne pravi razliku između isporuke robe i pružanja usluga. Rok za opoziv od 15 dana počinje izjavom volje za opozivom ili vraćanjem robe, ali ne pre nego što je potrošač primio punu informaciju o svom pravu na opoziv.

cc. Poštansko pravilo/pravilo slanja

Direktiva 97/7 ne sadrži nikakvu odredbu koja određuje kako potrošač može da iskoristi pravo na povlačenje na vreme; međutim, ona sadrži pravilo kako obaveštenje treba da se isporuči trgovcu.

U Albaniji, Bosni i Hercegovini, Hrvatskoj i Srbiji[277], ovo predmetno pitanje nije regulisano. Crna Gora ga je regulisala na način da potrošač može da raskine ugovor o ugovorima na daljinu slanjem pisanog obaveštenja trgovcu (član 43(1) Zakona o zaštiti potrošača), gde će ugovor biti raskinut u vreme kada trgovac primi obaveštenje o raskidu.

U eventualnom slučaju da trgovac ne primi obaveštenje opšte pravilo člana 5 paragraf 3 Zakona o zaštiti potrošača će se primeniti što dalje jača položaj potrošača jer se u njemu kaže da „u slučaju bilo kakvog spora o pravu potrošača da iskoristi prava data u ovom Zakonu koja se odnose na poštovanje roka za upražnjavanje prava, smatraće se da potrošač ima pravo po tom pitanju".

d. Efekti povlačenja

U vezi sa efektima povlačenja, Direktiva predviđa barem neke osnovne principe u članu 6(1) i (2):

- Potrošač mora da bude u mogućnosti da se povuče bez ikakve kazne.
- Isporučilac će biti u obavezi da nadoknadi sume koje je platio potrošač bez zaračunavanja troškova; nadoknada mora da se izvrši što je pre moguće a u svakom slučaju u roku od 30 dana.
- Jedini trošak koji može biti zaračunat potrošaču za upražnjavanje prava na povlačenje jeste direktan trošak za povraćaj robe.

Po albanskom zakonodavstvu, povlačenje ima efekta da ugovor između strana više nije na snazi. U Bosni i Hercegovini, na osnovu člana 47(1) Zakona o zaštiti potrošača potrošač ima pravo, bez zaračunavanja troškova i bez ikakvog objašnjenja, da odustane od ugovora o ugovorima na daljinu. U tom slučaju, trgovac je u obavezi da vrati plaćeni iznos bez odlaganja, najkasnije 15 dana od dana kada je primio pisano obaveštenje potrošača (član 47(6) Zakona o zaštiti potrošača), i da plati, pored zakonske kamate na zaostatak, dodatnih 10% od ukupne vrednosti za svakih 30 dana kašnjenja sa vraćanjem (član 47(7) Zakona o zaštiti potrošača)[278]. Po hrvatskom zakonodavstvu (član 48 Zakona o zaštiti potrošača), potrošač će vratiti proizvod trgovcu na svoj vlastiti trošak (član 48(1) Zakona o zaštiti potrošača) i ne odgovara za štetu koju trgovac pretrpi zbog raskida ugovora (član 48(2) Zakona o zaštiti potrošača). Dalje, trgovac je dužan što je pre moguće a najkasnije u roku od 30 dana od dana prijema pisane obavesti o raskidu, vratiti potrošaču cjelokupan iznos koje je primio od potrošača do tog trenutka na osnovu ugovora, povećan za zatezne kamate po kamatnoj stopi poslovne banke trgovca za oročene štedne uloge na tri meseca ceo period, računajući od primitka pisane obavesti o raskidu do isplate (član 48(3) Zakona o zaštiti potrošača). Članom 95 Zakona

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[277] Potrošač će obavestiti trgovca o svojoj odluci o povlačenju na nekom trajnom medijumu, bilo u izjavi upućenoj trgovcu sastavljenoj njegovim rečima, ili uz upotrebu modela za povlačenje. Za ugovore na daljinu zaključene na Internetu, trgovac može dodatno dati opciju potrošaču da elektronskim putem popuni i pošalje standardni obrazac za povlačenje na website-u trgovca. U tom slučaju, trgovac će dati potrošaču potvrdu o prijemu tog povlačenja putem e-maila bez odlaganja.

[278] Na osnovu člana 148 Nacrta Zakona o obligacionim odnosima od 2010., opoziv ima iste efekte kao i raskid ugovora, određen opšte primenjivim pravilima Nacrta Zakona o obligacionim odnosima. Privrednik dolazi u docnju, ako ne vrati plaćeni iznos u roku od 30 dana nakon izjave volje za opozivom ili vraćanje robe od strane potrošača. Potrošač vraća robu na trošak i rizik privrednika.

o zaštiti potrošača Makedonije, u slučaju raskida ugovora, potrošač je u obavezi da vrati proizvod trgovcu na svoj vlastiti trošak i nije odgovoran za štetu koju trgovac pretrpi kao rezultat raskida ugovora. Trgovac je u obavezi da u roku od 30 dana od datuma prijema pisanog obaveštenja o raskidu, da vrati potrošaču ukupan iznos koga je potrošač platio, na osnovu ugovora, do trenutka raskida ugovora, osim za direktne troškove povraćaja proizvoda. Opšta obaveza plaćanja kamata ostaje, kako proističe iz Zakona o obligacionim odnosima. Zakon o zaštiti potrošača Crne Gore (član 44(4)) predviđa da potrošač u slučaju povlačenja snosi troškove povraćaja robe, međutim on neće biti odgovoran da nadoknadi trgovcu štetu (troškove, kamatu, penale, i slično) u slučaju otkazivanja ugovora. Trgovac je u obavezi da nadoknadi, besplatno, iznose koje je potrošač već platio, međutim, odredba ispušta izraz „što je pre moguće" i daje vremenski rok od 30 dana koji počinje da teče od dana prijema pisanog obaveštenja o raskidu ugovora. Po opštim pravilima ugovora strana koja vraća novac će biti u obavezi da plati kamatu na zaostatke od dana primanja uplate[279]. Konačno, po pitanju obaveze potrošača da vrati primljenu robu, Crna Gora je odredila rok od 30 dana od dana slanja obaveštenja.

U Srbiji nema odgovarajućih odredbi u Zakonu o obligacionim odnosima i Zakona o zaštiti potrošača iz 2005[280].

e. Otkazivanje ugovora o kreditu

Po članu 6(4) Direktive otkazivanje ugovora potrošača će povlačiti za sobom i otkazivanje svih ugovora o kreditu odobrenih u svrhu određene kupovine, bez ikakvih penala, troškova ili kamata protiv potrošača. Istovetne odredbe postoje u zakonodavstvu Albanije (član 37(4) Zakona o zaštiti potrošača), Bosne i Hercegovine (član 48(2) Zakona o zaštiti potrošača), Hrvatske (član 50 i 51 Zakona o zaštiti potrošača), Makedonije (član 97 i 98 Zakona o zaštiti potrošača) i Crne Gore (član 45 Zakona o zaštiti potrošača) koje su sve zamenile izraz „bez ikakvih penala" objašnjenjem da trgovac neće imati pravo na nikakvu „nadoknadu troškova, kamatu ili penale"). Nema odgovarajućih odredbi u srpskom Zakonu o obligacionim odnosima i Zakonu o zaštiti potrošača iz 2005[281].

3. Izvršenje

a. Obaveza izvršenja narudžbe u roku od maksimum 30 dana (član 7(1))

Trgovac mora da izvrši narudžbu za isporuku proizvoda ili usluge koju je dobio od potrošača u roku od maksimum 30 dana od dana posle onog kada je potrošač prosledio svoju narudžbu isporučiocu, osim ako se strane ne dogovore drugačije, po Zakonu o zaštiti potrošača

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[279] Član 127 paragraf 5 Zakona o obligacionim odnosima.

[280] Po Nacrtu predloga: Upražnjavanje prava na povlačenje će raskinuti obaveze strana na izvršenje pod ugovorima na daljinu ili izvan poslovnih prostorija. Trgovac će nadoknaditi svaku uplatu primljenu od potrošača u roku od 30 dana od dana kada je primio saopštenje o povlačenju. Ako trgovac zaostaje u nadoknadi iznosa koga je platio potrošač, on će, pored zatezne kamate, platiti dodatnih 10 posto od sume koju je uplatio potrošač za svakih 30 dana kašnjenja.

[281] Po Nacrtu predloga: Ako potrošač upražnjava svoje pravo na povlačenje iz ugovora na daljinu ili izvan poslovnih prostorija, svaki pomoćni ugovori će automatski biti raskinuti, bez ikakvog troška za potrošača. Isto se odnosi na ugovore o kreditima u vezi sa potrošačkim ugovorima, bez obzira da li je kredit odobrio trgovac ili neko treće lice. U slučaju da je kredit odobrilo neko treće lice, trgovac je u obavezi da obavesti davaoca kredita da se potrošač povukao iz ugovora o ugovorima na daljinu. Davaoc kredita će nadoknaditi potrošaču novčani iznos, zajedno sa kamatom, koji je plaćen za robu ili usluge do trenutka povlačenja, bez odlaganja i najkasnije u roku od 30 dana od dana kada je obavešten o povlačenju.

Albanije (član 37(5)), po Zakonu o zaštiti potrošača Hrvatske (52(1)), po Zakonu o zaštiti potrošača Makedonije (član 99(1)), i po Zakonu o zaštiti potrošača Crne Gore (član 46(1)). U Bosni i Hercegovini zakonodavac je usvojio striktnija pravila nego ona data u članu 7(1) Direktive odlučujući da skrati maksimalan rok na 15 dana (član 49(1) Zakona o zaštiti potrošača). Nema odgovarajućih odredbi u srpskom Zakonu o obligacionim odnosima i Zakonu o zaštiti potrošača iz 2005[282].

b. Obaveza isporučioca da obaveštenje i nadoknadu u slučaju nedostupnosti naručenih roba ili usluga (član 7(2))

Na osnovu člana 7(2) Direktive 97/7, u slučaju da naručena roba ili usluge ne mogu biti isporučene jer nisu na raspolaganju, isporučilac je u obavezi da obavesti potrošača i mora da mu nadoknadi sve već uplaćene iznose što je pre moguće, a u svakom slučaju u roku od 30 dana.

Član 7(2) u Albaniji je transponovan onako kako je naveden u Direktivi (tačka 20 Odluke Saveta Ministara br. 64 od 21.01.2009.). U Bosni i Hercegovini postoji obavezujuća odredba koja se odnosi na trajanje perioda u kome nadoknada treba da se izvrši, to jest naveden je rok od 15 dana (član 49 (2) Zakona o zaštiti potrošača). Zakoni Hrvatske, Makedonije i Crne Gore su proširili opcije za potrošače u slučaju kada trgovac nema naručenu robu na raspolaganju i o tome obavesti potrošača. Naime, potrošaču je data opcija da ugovor održi na snazi ili da ga raskine. Ako potrošač odluči da raskine ugovor, trgovac je u obavezi da izvrši nadoknadu što je pre moguće a najkasnije u roku od 30 dana. U Makedoniji je ovo regulisano članom 99 (2 i 3) Zakona o zaštiti potrošača. Zakoni Hrvatske (član 52 (2 i 3) Zakona o zaštiti potrošača) i Crne Gore (član 46(2) Zakona o zaštiti potrošača) to i dalje proširuju izričito navodeći da će trgovac biti u obavezi platiti kamate. Nema odgovarajućih odredbi u srpskom Zakonu o obligacionim odnosima i Zakonu o zaštiti potrošača iz 2005.

c. Upotreba opcije date u članu 7(3) Direktive o ugovorima na daljinu

Data opcija je upotrebljena u zakonodavstvu o zaštiti potrošača samo u Albaniji (tačka 21 Odluke Saveta Ministara br. 64 od 21.01.2009.). U Bosni i Hercegovini, Hrvatskoj, Makedoniji, Crnoj Gori i Srbiji, iako nije predviđena u zakonodavstvu o zaštiti potrošača *per se*, ta opcija može da se koristi u praksi primenom principa opšteg ugovornog prava o fakultativnim obavezama i nemogućnosti izvršenja.

1. Plaćanje karticom

Članom 8 Direktive, zemlje članice treba da obezbede da postoje odgovarajuće mere da se potrošaču omogući:

- Da zahteva poništenje plaćanja kada je izvršena zloupotreba njegove platne kartice u vezi sa ugovorima o ugovorima na daljinu obuhvaćene ovom Direktivom,
- Da mu se u slučaju zloupotrebe, rekreditira isti iznos koji je uplaćen ili da mu se vrati.

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[282] Po Nacrtu predloga: U odnosu na ugovore izvan poslovnih prostorija i ugovore na daljinu, trgovac je u obavezi da izvrši nalog potrošača u roku od maksimum 30 dana od dana zaključivanja ugovora, osim ako su se strane drugačije dogovorile. Trgovac ne može da traži nikakvo plaćanje unapred od potrošača na osnovu ugovora izvan poslovnih prostorija i ugovora na daljinu. Ako naručena roba ili usluge ne mogu da se isporuče jer nisu na raspolaganju, trgovac je u obavezi da odmah obavesti potrošača da nisu na raspolaganju.

Plaćanje po kartici	Zemlje učesnice
Kao u Direktivi	AL
Nije transponovano	CG, SRB
Varijacije	BiH, HR
Transponovanje nije potpuno jasno	

Ovaj uslov je transponovan kao u Direktivi u albanski zakon (član 37 (6) Zakona o zaštiti potrošača). Ima izmena u transponovanju u Bosni i Hercegovini gde na osnovu člana 48(3) potrošač ima pravo povratka celokupnog iznosa u gotovini ili na platnoj kartici, dok je izostavljeno pravo da zahteva poništenje plaćanja kada je načinjena zloupotreba njegove platne kartice u vezi sa ugovorom o ugovorima na daljinu. U Hrvatskoj, članom 53 Zakona o zaštiti potrošača oštećeni je potrošač ovlašten da zahteva storniranje plaćanja, odnosno ako je plaćanje već izvršeno, potrošač ima pravo zahtijevati od trgovca da mu vrati ili nadoknadi plaćeni iznos uvećan za zatezne kamate po kamatnoj stopi poslovne banke trgovca za oročene štedne uloge na tri mjeseca za cijelo razdoblje, računajući od dana kada je plaćanje izvršeno.

Ova odredba Direktive nije transponovana u zakonodavstvo Crne Gore i Srbije[283].

2. Inertia Selling

Član 9 Direktive 97/7, kako je dopunjeno Direktivom 2005/29, obavezuje zemlje članice da „preduzmu mere neophodne za oslobađanje potrošača od bilo kakve naknade u slučajevima netražene isporuke, kada odsustvo odgovora ne predstavlja saglasnost, uzimajući u obzir zabranu prodaje po inerciji datu u Direktivi 2005/29“. Zabrana prodaje po inerciji postoji u svim zemljama, osim u Srbiji, uz razliku da se tretira ili pod ugovorima o ugovorima na daljinu (Albanija, Bosna i Hercegovina, Hrvatska i Makedonija) ili kao nepoštena trgovačka praksa (Crna Gora) ili prodaja izvan poslovnih prostorija (Srbija)[284].

a. Zabrana isporuke roba ili usluga potrošaču koje nisu naručene

Prodaja po inerciji (član 9, prvi pasus)	Zemlje učesnice
Kao u Direktivi	AL, BiH, HR, MAK, CG
Nije transponovano	
Varijacije	SRB

[283] Po Poglavlju II, Glava 4 Nacrta predloga koje se bavi modalitetima plaćanja, ako plaćanje izvrši potrošač ili u ime ili ispred potrošača preko banke ili pošte, smatraće se izvršenim na datum kada banka ili pošta primi propisan nalog za uplatu.

[284] Pravilo o prodaji po inerciji sadržano u Nacrtu predloga zabranjuje isporuku robe ili usluga potrošaču a da iste potrošač nije prethodno naručio, kada takva isporuka uključuje zahtev za plaćanje. Nikakva potraživanja naspram potrošača ne mogu se zasnivati na isporuci netražene robe ili usluga. Potrošač ima pravo da smatra isporuku netražene robe ili usluga kao bezuslovan promotivni poklon. Ako netražena roba dođe greškom do potrošača, i ako je potrošač znao o toj grešci ili je mogao da zna za nju da je obratio standardnu pažnju, onda potrošač mora da obavesti trgovca o grešci u razumnom vremenu, ili pošalje robu nazad o trošku trgovca. Izvršenje se neće smatrati netraženim ako, umesto izvršenja koje je naručio potrošač, trgovac ponudi izvršenje koje je jednako u kvalitetu i ceni, i ako se potrošaču da na znanje da on nije u obavezi da to prihvati i da ne mora da plati za vraćanje robe trgovcu.

Zabrana isporuke roba ili usluga potrošaču koje potrošač nije pre toga naručio, kada takva isporuka uključuje zahtev za plaćanje je transponovana kao u članu 9, prvi pasus Direktive, u zakonodavstvo Albanije (član 38(1) Zakona o zaštiti potrošača), Bosne i Hercegovine (član 50(1) Zakona o zaštiti potrošača)[285], Makedonije (član 102, paragraf 1 Zakona o zaštiti potrošača) i Crne Gore (član 67(3) tačka 5 Zakona o zaštiti potrošača) gde postoji mala izmena u upotrebljenoj formulaciji ali smisao Direktive je očuvan. Hrvatska (član 54(1) Zakona o zaštiti potrošača) takođe sledi Direktivu ali ide još jedan korak dalje jer član 54(2) predviđa da će se takvi proizvodi smatrati promidžbenim darom trgovca. U Srbiji, članom 28, Zakona o zaštiti potrošača iz 2005 predviđeno je da je (1) nuđenje proizvoda ili usluga potrošaču izvan poslovnih prostorija isporučioca (uz upotrebu kataloga, uzorka ili prezentovanja modela, prikazivanje proizvoda u svrhu saopštavanja informacija o njegovim karakteristikama) kao i (2) slanje ponude na adresu potrošača (elektronskim sredstvima ili na neki drugi način), dozvoljeno samo ako je potrošač prethodno dao svoj pristanak – to jest ako potrošač da zeleno svetlo da ponuda bude poslata.

b. Oslobađanje potrošača od davanja bilo kakve nadoknade u slučajevima netražene isporuke; odsustvo odgovora ne predstavlja pristanak

Od potrošača se neće zahtevati nikakva nadoknada za proizvod primljen putem netražene isporuke i odsustvo njegovog odgovora neće predstavljati pristanak, kako se traži u članu 9, pasus 2 Direktive, po zakonodavstvu Albanije (član 38(2) Zakona o zaštiti potrošača) i Bosne i Hercegovine (član 50(2) Zakona o zaštiti potrošača koji čak ovlašćuje potrošača da zadrži u svom posedu netraženi proizvod ili uslugu). Zakoni Makedonije i Hrvatske održavaju svrhu Direktive; međutim način regulisanja varira utoliko što predviđaju da neka odredba u opštim uslovima ugovora trgovca ili u njegovoj ponudi poslatoj bez prethodnog naloga potrošača, na osnovu koje bi odsustvo odgovora značilo pristanak, biće ništavna i nevažeća (član 54(3) Zakona o zaštiti potrošača Hrvatske i član 102(2) Zakona o zaštiti potrošača Makedonije). Crna Gora nije transponovala navedenu odredbu *per se*; međutim, efekti ove odredbe Direktive mogu da se uoče u opštim uslovima ugovornog prava (Zakon o obligacionim odnosima, član 37(1,2)).

3. Ograničenja upotrebe određenih sredstava komunikacije na daljinu

Član 10 Direktive 97/7 navodi da upotreba uređaja za automatsko pozivanje i faks mašina zahteva prethodnu saglasnost potrošača. Sve zemlje članice su transponovale ovu odredbu. U Albaniji (član 39 Zakona o zaštiti potrošača) prethodna saglasnost potrošača je potrebna isporučiocu za upotrebu telefona, faksa ili elektronske pošte. Slično tome, u Bosni i Hercegovini (član 51 Zakona o zaštiti potrošača), bez prethodne saglasnosti potrošača, trgovac ne sme da koristi individualna sredstva komunikacije na daljinu (telefon, faks, e-mail itd.). U Hrvatskoj postoji varijacija koja povećava nivo zaštite, regulisanjem načina upotrebe tih sredstava. Naime, po članu 42(1) Zakona o zaštiti potrošača "uporaba telefona bez ljudskog posredovanja (automatskih govornih automata), elektroničke pošte i telefaks uređaja u svrhu sklapanja ugovora dopuštena je samo uz prethodnu suglasnost potrošača". Upotreba drugih sredstava daljinske komunikacije u cilju zaključenja ugovora može biti dopuštena samo ako se potrošač tomu izričito ne protivi (član 42(2) Zakona o zaštiti potrošača). Upotrebu sredstava da-

[285] Član 28 (1) Nacrta Zakona o obligacionim odnosima od 2010. dodatno predviđa da nikakva obaveza ne može da proistekne iz isporuke robe ili usluga potrošaču a da nije naručena. Isporučilac može samo da traži vraćanje robe (član 28 (2)). Potrošač može da vrati robu sam ili da obavesti privrednika da preuzme robu o svom trošku u primjerenom vremenu.

ljinske komunikacije u navedenim situacijama nije dopušteno naplatiti potrošaču (član 42(3) Zakona o zaštiti potrošača). Član 10 Direktive je u potpunosti transponovan u makedonski Zakon o zaštiti potrošača (član 89) i crnogorski Zakon o zaštiti potrošača (član 38(1,1)). U Srbiji nema pravila po tom pitanju[286].

IV. Upotreba opcija datih u Direktivi

1. Opcija zemalja članica da se dozvoli isporučiocu da potrošaču obezbedi robe ili usluge jednakog kvaliteta i cene

Član 7(3) Direktive 97/7 sadrži opciju za zemlje članice da predvide da isporučioc može da obezbedi potrošaču robu jednakog kvaliteta i cene, ako je takva mogućnost data pre zaključenja ugovora, ili u ugovoru.

Opcija je transponovana	AL
Opcija nije transponovana	
Nema izričitog transponovanja, ali opšte ugovorno pravo ima slični efekat	BiH, HR, MAK, CG, SRB
Samo za robu, ne za usluge	
Informacija mora biti data pisanim putem	
Mogućnost mora biti data pre zaključenja ugovora	

U Albaniji, ova opcija postoji pod tačkom 21 Odluke Saveta Ministara br. 64 od 21.01.2009. U Bosni i Hercegovini, nema odgovarajuće odredbe u Zakonu o zaštiti potrošača, već samo u odredbama opšteg ugovornog prava bosansko-hercegovačkog Zakona o obligacionim obavezama. U Hrvatskoj, pozivanje na ovu opciju može se naći u članu 52. Zakona o zaštiti potrošača koji se bavi ispunjenjem ugovora u roku, gde se u paragrafu 2 daje mogućnost potrošaču da izabere da li će raskinuti ugovor ili „ostaviti trgovcu primjereni naknadni rok za ispunjenje“. Pravo zamene je regulisano u hrvatskom opštem ugovornom pravu, tj u Zakonu o obveznim odnosima. Ovo pitanje je regulisano na isti način u Makedoniji (mogućnost produženja roka izvršenja postoji u članu 99(2) Zakona o zaštiti potrošača; ostala pitanja pokrivena su opštim ugovornim pravom) i u Crnoj Gori (mogućnost produženja roka izvršenja postoji u članu 46(2) Zakona o zaštiti potrošača; ostala pitanja pokrivena su opštim ugovornim pravom. U Srbiji generalno pitanja izmene izvršenja su regulisana Zakonom o obligacionim odnosima[287].

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[286] Po Nacrtu predloga, korišćenje telefonskog marketinga, sistema automatskog pozivanja bez ljudske intervencije (mašine za automatsko pozivanje), faks mašina ili elektronske pošte u svrhe direktnog marketinga je dozvoljeno samo u odnosu na potrošača koji je prethodno dao svoj pristanak. Ostala sredstva komunikacije na daljinu koja dozvoljavaju individualne komunikacije mogu da se koriste samo ako nema jasne primedbe od strane potrošača. Ako se potrošač izričito saglasio sa korišćenjem telefonskog marketinga, sistema automatskog pozivanja bez ljudske intervencije (mašine za automatsko pozivanje), faks mašine ili detaljima njegovog elektronskog kontakta za elektronsku poštu, on će biti obavešten o komercijalnoj prirodi komunikacije na jasan I nedvosmislen način, čim komunikacija otpočne.

[287] Po Nacrtu predloga, izvršenje se neće oceniti kao netraženo ako, umesto izvršenja koje je tražio potrošač, trgovac ponudi izvršenje koje je jednako po kvalitetu i ceni, i ako se potrošaču skrene pažnja da on nije u obavezi da ga prihvati niti da mora da plati za njegovo vraćanje trgovcu.

2. Opcija zemalja članica da isporučiocu nametnu teret dokazivanja

Član 11(3)(a) Direktive omogućava zemljama članicama da predvide da se teret dokazivanja po pitanju postojanja prethodnih informacija, pisane potvrde, poštovanja vremenskih rokova ili saglasnosti potrošača može nametnuti isporučiocu.

Upotreba opcije	Zemlje učesnice
Da	AL, HR, MAK, CG (delimično)
Ne	BiH, SRB

U Albaniji je to predviđeno tačkom 45. Odluke Saveta Ministara br. 64 od 21. 01. 2009. godine, u Hrvatskoj je predviđeno u članu 55. Zakona o zaštiti potrošača, i u Makedoniji članom 105. Zakona o zaštiti potrošača. Ova opcija je delimično transponovana u Crnoj Gori i vrši se samo u vezi sa postojanjem poštovanja vremenskih rokova, jer po članu 5(3) Zakona o zaštiti potrošača u slučaju bilo kakvih sporova o podobnosti potrošača da upražnjava prava koja se odnose na ispunjenje roka za upražnjavanje prava, smatraće se da potrošač ima prava po tom pitanju. Ova opcija ne postoji u zakonima Bosne i Hercegovine[288] i Srbije[289].

3. Opcija zemalja članica da predvide dobrovoljan nadzor samo-regulirajućih organa

Član 11(4) Direktive 97/7 daje zemljama članicama opciju da predvide dobrovoljan nadzor samo-regulirajućih organa.

Upotreba opcije	Zemlje učesnice
Da	HR, MAK
Ne	AL, BiH, CG, SRB

Takva opcija je predviđena samo u Hrvatskoj i Makedoniji. Hrvatski član 141. Zakona o zaštiti potrošača je širi od Direktive jer propisuje ne samo mogućnost dobrovoljne kontrole postupanja trgovaca od strane određenih samostalnih organizacija, već takođe daje određenim organima i organizacijama mogućnost da pokreću odgovarajuće postupke pred tim samostalnim organizacijama protiv onih članova tih organizacija koji deluju suprotno odredbama o zaštiti potrošača. U Makedoniji ova opcija nije izričito transponovana. Međutim, članom 103 Zakona o zaštiti potrošača, svako lice koje ima opravdani interes može da zahteva od suda da naredi određenom trgovcu ili operateru sredstava komunikacije na daljinu da prekine sa poslovnom praksom koja je suprotna odredbama datim u ugovorima o ugovorima na daljinu. Time, samo-regulirajući organi imaju pravo na takve akcije.

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[288] Na osnovu člana 146 (5) Nacrta Zakona o obligacionim odnosima od 2010. teret dokazivanja po pitanju početka roka za opoziv je na privredniku.

[289] Pravilo koje se trenutno može primeniti je u suprotnosti sa zahtevom Direktive. Naime, postoji opšte proceduralno pravilo da strana koja tvrdi da ima neko pravo, ili da su uslovi za izvršenje određenog prava ispunjeni, mora da dokaže svoje tvrdnje (član 223 (2) Zakona o građanskom postupku iz 2004). Međutim, pod Poglavljem II, Glava 2 Nacrta predloga koje se bavi opštim obavezama trgovca za davanje informacija, teret dokazivanja po pitanju ispunjenja obaveze davanja informacija je na trgovcu.

4. Opcija zemalja članica da zabrane trgovinu određenim robama ili uslugama, posebno medicinskih proizvoda, u okviru svoje teritorije, u vidu ugovora o ugovorima na daljinu

Član 14, rečenica 2 Direktive 97/7 predviđa opciju zabrane trgovine određenih roba ili usluga, posebno medicinskih proizvoda, u okviru svoje teritorije, u vidu ugovora o ugovorima na daljinu.

Upotreba opcije	Zemlje učesnice
Da	HR, MAK
Ne	AL, BiH, SRB
Transponovanje nije potpuno jasno	CG

Ova opcija je predviđena i proširena u zakonodavstvu Hrvatske i Makedonije. Član 41. Zakona o zaštiti potrošača Hrvatske reguliše zabranu zaključivanja ugovora preko sredstava komunikacije na daljinu u vezi sa prodajom lekova, medicinskih i veterinarsko-medicinskih proizvoda, eksploziva, duvanskih proizvoda, oružja i ostalih proizvoda, čija zabrana prodaje na daljinu je regulisana posebnim propisima. Članom 88. Zakona o zaštiti potrošača Makedonije, nije dozvoljeno zaključivanje ugovora o prodaji lekova, medicinskih i veterinarskih proizvoda, i eksploziva upotrebom sredstava komunikacije na daljinu[290].

U Crnoj Gori nema opcije o trgovini medicinskih proizvoda preko ugovora o ugovorima na daljinu jer Zakon o lekovima[291] reguliše da se prodaja lekova na malo vrši samo u apotekama.

[290] Treba napomenuti da u Makedoniji trgovinu medicinskih i veterinarskih proizvoda kao i eksploziva regulišu posebni zakoni.

[291] Član 69 paragraf 1 Zakona o lekovima (*Sl. list RCG* Br. 80/04 i 18/08).

D. DIREKTIVA O PRODAJI ROBE ŠIROKE POTROŠNJE (99/44)

Koordinatori: *Zlatan Meškić / Neda Zdraveva / Jadranka Dabović-Anastasovska/Nenad Gavrilović*

I. Zakonodavstvo zemalja članica pre usvajanja Direktive o prodaji robe široke potrošnje

Pre transponovanja Direktive 99/44 nacionalna prava zemalja učesnica su sadržavala odredbe u okviru njihovog Zakona o obligacionim odnosima/Građanskog Zakonika koje regulišu prodaju robe, i koje se mogu primeniti na sve vrste ugovora i ne odnose se striktno na ugovore o prodaji robe široke potrošnje. Sve zemlje učesnice su barem delimično transponovale odredbe Direktive 94/44 u njihove propise o zaštiti potrošača, dok su samo neke od njih dodatno ili uglavnom prenele Direktivu u njihov opšte primenjivi Zakon o obligacionim odnosima (Makedonija, Hrvatska i Crna Gora).

U zemljama naslednicama bivše Jugoslavije važio je opšti Zakon o obligacionim odnosima[292] i sadržavao je razrađena pravila o odgovornosti prodavca o saobraznosti robe sa ugovorom o prodaji (članovi 475-500 Zakona o obligacionim odnosima), o saobraznosti pruženih usluga sa ugovorom o pružanju usluga (članovi 614-621 Zakona o obligacionim odnosima), i o komercijalnim garancijama prodavca i proizvođača za pravilno funkcionisanje tehničke robe (članovi 501-507 Zakona o obligacionim odnosima). Taj Zakon je zamenjen novim zakonima u Hrvatskoj[293], Crnoj Gori[294], i Makedoniji[295].

U Albaniji, važeći Građanski Zakonik iz 1994., sadrži opšte primenjiva pravila o prodaji robe[296], dok je Zakon o zaštiti potrošača iz 2003.[297], bio prvi zakon u Albaniji koji je utvrdio određene aspekte prodaje robe široke potrošnje; potonji je zamenjen novim Zakonom o zaštiti potrošača[298] u 2008. godini. Sličan razvoj se desio u Bosni i Hercegovini, koja je usvajanjem Zakona o zaštiti potrošača iz 2002[299], dobila svoje prve odredbe ograničene na zaštitu potrošača u okviru poglavlja II o „Prodaji proizvoda i pružanju usluga", koji je zamenjen novim Zakonom o zaštiti potrošača iz 2006[300], čije poglavlje III sadrži malo izmenjene odredbe pod istim naslovom. Srpski Zakon o zaštiti potrošača iz 2005[301], može se bolje razumeti kao pokušaj ponavljanja postojećih odredbi Zakona o obligacionim odnosima, nego kao pokušaj transponovanja Direktive o prodaji robe široke potrošnje.

[292] Jugoslovenski Zakon o obligacionim odnosima, *Sl. list SFRJ* br. 29/78, 39/85, 46/85, 45/89, 57/89; Zakon o građanskim obligacionim odnosima, *Sl. list RH* br. 53/91, 73/91, 107/95, 7/96, 112/99, 88/01; *Sl. list SRJ* br. 31/93, 22/99, 23/99, 35/99, 44/99. Od raspada Jugoslavije taj Zakon je preko nasleđivanja ostao da se primenjuje u dve malo različite verzije u svakom entitetu Bosne i Hercegovine, to jest Zakon o obligacionim odnosima Republike Srpske (*Sl. list Republike Srpske* br. 17/93, 57/98, 39/03, 74/04) i Zakon o obligacionim odnosima Federacije Bosne i Hercegovine (*Sl. list Republike Bosne i Hercegovine* br. 2/92, 13/93, 13/94 i *Sl. list Federacije Bosne i Hercegovine* br. 29/03). Pošto se odredbe koje su bitne za ovu analizu ne razlikuju, u cilju veće jasnoće ovaj tekst će se pozivati samo na „Zakon o obligacionim odnosima Bosne i Hercegovine".

[293] Zakon o obveznim odnosima, *NN* br. 35/05, 41/08.

[294] Zakon o obligacionim odnosima, *Sl. list RCG* br. 47/08.

[295] Zakon obligacionim odnosima, *Sl. list RMak* br. 18/2001

[296] Građanski zakonik *Sl. list RAl* br. 11/94

[297] Zakon o zaštiti potrošača, *Sl. list RAl* br. 84/03

[298] Deo IV, Poglavlje I (član 34-35) Zakona o zaštiti potrošača *Sl. list RAl* br. 61/08.

[299] Zakon o zaštiti potrošača, *Sl. glasnik BiH* br. 17/02

[300] Zakon o zaštiti potrošača, *Sl. glasnik BiH* br. 25/06.

[301] Zakon o zaštiti potrošača, *Sl. list RS* Br. 79/05.

Hrvatska, Crna Gora i Makedonija su transponovale Direktivu 99/44 dopunom njihovih Zakona o obligacionim odnosima kao i uvođenjem odredbi koje se odnose na potrošače u njihov Zakon o zaštiti potrošača. Transponovanje Direktive 99/44 u novi hrvatski Zakon o obveznim odnosima iz 2005.[302] je takođe upotrebljeno da se proširi primena nekih njenih pravila na sve naplatne ugovore (član 400. et seq. Zakona o obveznim odnosima)[303]. Međutim, kao centralni akt za zaštitu potrošača hrvatski Zakon o zaštiti potrošača[304] sadrži član 5. o obavezi trgovca za ispunjenje ugovora potrošaču. Paragraf (1) te odredbe propisuje da je trgovac dužan potrošaču ispuniti ugovor u skladu s odredbama Zakona o zaštiti potrošača i propisima obveznog prava. Dalje, temeljem paragrafa (2), u slučaju materijalnog nedostatka na proizvodu na odnose potrošača i trgovca primenjuju se odgovarajuće odredbe Zakona o obveznim odnosima.

U Crnoj Gori, pored već opisanog jugoslovenskog Zakona o obligacionim odnosima, posebni propisi su postojali u okviru Federalnog jugoslovenskog Zakona o trgovini[305] i kasnije u okviru Zakona o zaštiti potrošača Savezne Jugoslavije[306]. Konačno, Direktiva 99/44 je transponovana u crnogorski Zakon o zaštiti potrošača iz 2007.[307] i novi crnogorski Zakon o obligacionim odnosima iz 2008., koji se sada istovremeno primenjuju. Makedonski Zakon o zaštiti potrošača iz 2000.[308], sadrži samo pravila o odgovornosti za neispravne proizvode. Ta pravila su zamenjena 2004[309] godine važećim makedonskim Zakonom o zaštiti potrošača koji je transponovao odredbe propisane u Direktivi o zaštiti potrošača za slučajeve neusaglašenosti proizvoda sa njihovom deklaracijom kao i Zakonom o obligacionim odnosima iz 2001. koji je poslednji put dopunjen u 2008.

II. Područje primene

1. Opšte područje

Odredbe Zakona o obligacionim odnosima/Građanskog zakonika zemalja učesnica, uključujući one koje se odnose na odgovornost za saobraznost sa ugovorom, odnose se na transakcije B2B, B2C i P2P. Dalje, one sadrže posebne odredbe o odgovornosti isporučioca za saobraznost pruženih usluga sa ugovorom o uslugama.

Transponovanje Direktive 99/44 u hrvatski Zakon o obveznim odnosima je takođe rezultovalo ustanovljavanjem određenih posebnih pravila koja su primenjiva samo na transakcije potrošača. Propisi o zaštiti potrošača u zemljama učesnicama se mogu primeniti samo na transakcije B2C. Pažnja mora da se obrati na činjenicu da je na osnovu srpskog Zakona o zaštiti potrošača pojam potrošač proširen i uključuje pravna lica koja deluju izvan svojeg zanimanja, posla, zanata ili profesije. Međutim, srpski zakonodavac trenutno priprema Nacrt predloga za novi zakon o zaštiti potrošača (Nacrt predloga)[310], koji je namenjen za primenu na B2C transakcije i regulaciju odgovornosti trgovca kako za saobraznost robe sa ugovorom o prodaji tako i saobraznost usluga sa ugovorom o uslugama.

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[302] Zakon o obveznim odnosima *NN* br. 35/05.

[303] S. Petrić, "Odgovornost za materijalne nedostatke stvari prema novom Zakonu o obveznim odnosima" *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, Vol. 27, 1/2006., str. 87– 128.

[304] Zakon o zaštiti potrošača, *NN* br. 79/07, 125/07, 79/09, 89/09, 113/09.

[305] Savezni Zakon o trgovini, *Sl. list SRJ* br. 46/90, 32/93, 50/93, 41/94, 29/96.

[306] Savezni zakon o zaštiti potrošača, *Sl. list SRJ* br. 37/02

[307] Zakon o zaštiti potrošača, *Sl. list RCG* br. 26/07.

[308] Zakon o zaštiti potrošača, *Sl. list RMak* br. 63/00.

[309] Zakon o zaštiti potrošača, *Sl. list RMak* br. 38/04.

[310] Nacrt Predloga novog Zakona o zaštiti potrošača (Nacrt Predloga), koga je pripremilo Ministarstvo za trgovinu i usluge Republike Srbije.

2. Definicija 'potrošača'

Zemlje učesnice, osim Srbije, ograničavaju pojam potrošača na „fizička lica". Pod članom 2(1) srpskog Zakona o zaštiti potrošača iz 2005., potrošač je svako fizičko lice koje kupuje proizvode ili usluge za svoje vlastite potrebe ili za potrebe svog domaćinstva. Zahvaljujući paragrafu (2), potrošač je takođe i društvo, preduzeće, drugi pravni subjekt ili preduzetnik, kada kupuju proizvode ili usluge za svoje vlastite potrebe. To znači da je pojam potrošača po srpskom Zakonu o zaštiti potrošača iz 2005. neprihvatljivo širok, jer on uključuje pravna lica koja deluju izvan svog zanimanja, poslovanja, zanata ili profesije. Pod Poglavljem I srpskog Nacrta predloga, potrošač se definiše kao svako fizičko lice koje deluje uglavnom u svrhe koje su izvan njegovog zanimanja, poslovanja, zanata ili profesije. Član 1(3) bosansko-hercegovačkog Zakona o zaštiti potrošača sadrži istu definiciju kao član 2(1) srpskog Zakona o zaštiti potrošača, ali zahtijeva kriterijume „lične potrebe potrošača i potrebe njegovog domaćinstva". Ova definicija je veoma ograničena u poređenju sa definicijom potrošača iz Direktive 99/44. Umesto „delovanja u svrhe koje nisu u vezi sa njegovim zanimanjem, poslovanjem ili profesijom", što je upotrebljeno u definiciji potrošača u Direktivi, bosansko-hercegovački Zakon o zaštiti potrošača ograničava delovanje potrošača na kupovinu, sticanje ili korišćenje usluga ili proizvoda, i dodatno ga redukuje na svrhu njegovih „ličnih potreba i potreba njegovog domaćinstva", što zahvaljujući vezi „i" treba da se posmatra kumulativno[311].

U Albaniji potrošač je svako fizičko lice, koje deluje u svrhe koje nisu u vezi sa njegovim zanimanjem, poslovanjem ili obavljanjem njegove profesije. U smislu tog zakona, neprofitne organizacije se takođe smatraju potrošačima[312]. Makedonski Zakon o zaštiti potrošača definiše potrošača kao „svako fizičko lice koje kupuje proizvode ili koristi usluge za direktnu ličnu potrošnju, u svrhe koje nisu namenjene za obavljanje njegovog zanimanja, poslovanja ili profesije"[313]. Iako se razlikuje u formulaciji, ta definicija obuhvata sve aspekte definicije date u Direktivi. Na osnovu crnogorskog Zakona o zaštiti potrošača potrošač je fizičko lice koje kupuje, naručuje, prima, upotrebljava robu ili usluge, uključujući javne servise, u neposlovne, to jest neprofesionalne svrhe, ili na koga je usmerena ponuda za neki proizvod ili uslugu. Taj Zakon takođe utvrđuje izraz „grupa potrošača" definisan kao grupa koju su osnovali potrošači sa ciljem da članovi te grupe steknu vlasnička prava nad određenim proizvodima uz pomoć te grupe.

Hrvatska je jedina zemlja učesnica koja je u vezi sa prodajom robe odredila definiciju potrošača u svom Zakonu o obveznim odnosima. U Hrvatskoj definicija 'potrošača' može da se izvede iz posebne odredbe Zakona o obveznim odnosima koja se odnosi na kupoprodaju, a koja definiše potrošački ugovor. Član 402(3) hrvatskog Zakona o obveznim odnosima definiše potrošačke ugovore kao „ugovore koje fizička osoba kao kupac sklapa izvan svoje gospodarske ili profesionalne djelatnosti s fizičkom ili pravnom osobom koja kao prodavatelj djeluje u okviru svoje gospodarske ili profesionalne djelatnosti (potrošački ugovor)". Po svom sadržaju ta definicija odgovara definiciji potrošača kako je reguliše član 1(2)(a) Direktive 99/44.

3. Definicija 'prodavca/trgovca'

Samo hrvatski zakon se poziva na izraz „prodavac" i izvodi ga u odnosu na prodaju potrošačke robe iz drugog dela definicije potrošačkog ugovora kako je definisano u članu

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[311] Član 15 Nacrta Zakona o obligacionim odnosima Bosne i Hercegovine definiše potrošača kao "svaki subjekt koji zaključuje neki pravni posao u svrhu koja ne spada u njegovu privrednu ili samostalnu profesionalnu djelatnost".

[312] Član 3(6) Zakon o zaštiti potrošača, *Sl. list RAl* Br. 61/08.

[313] Član 4 red 1 Zakona o zaštiti potrošača, *Sl. list RMak* Br. 38/04

402(3) Zakona o obveznim odnosima, gde postoji referenca na fizičku ili pravnu osobu „koja kao prodavatelj djeluje u okviru svoje gospodarske ili profesionalne djelatnosti". Pored male izmene u formulaciji, ova definicija odgovara definiciji prodavca propisane u članu 1(2)(c) Direktive 99/44.

Zakoni drugih zemalja članica koriste izraz „trgovac". Na osnovu člana 3 (14) albanskog Zakona o zaštiti potrošača, „trgovac" označava svako fizičko ili pravno lice koje deluje u svrhe koje se odnose na njegovu komercijalnu aktivnost, zanimanje, poslovanje, zanat ili profesiju i svako ko deluje u ime ili ispred nekog trgovca. Trgovac se definiše u članu 1 (5) Zakona o zaštiti potrošača Bosne i Hercegovine kao „svako lice koje, direktno ili kao posrednik, prodaje proizvode ili pruža usluge potrošaču". Kao i u slučaju pojma potrošača, definicija je sužena na „prodaju proizvoda ili pružanje usluga", što generalno smanjuje područje primene Zakona o zaštiti potrošača. Član 14. Nacrta Zakona o obligacionim odnosima Bosne i Hercegovine se odnosi na 'privrednika', kojeg definiše kao 'fizički ili pravni subjekt koji u vreme zaključivanja pravnog posla deluje u vršenju[314] svoje privredne ili samostalne profesionalne djelatnosti"[315]. Ova definicija isključuje predugovorne situacije iz područja svoje primene. Pod članom 2 (3) srpskog Zakona o zaštiti potrošača, trgovac je društvo, preduzeće, drugi pravni subjekt ili preduzetnik, kada prodaje proizvode ili pruža usluge potrošaču[316]. Makedonski Zakon o zaštiti potrošača definiše trgovca kao „svako fizičko ili pravno lice koje, u toku obavljanja svojih aktivnosti, direktno zadovoljava potrebe građana za proizvodima i uslugama[317].

Na osnovu crnogorskog Zakona o zaštiti potrošača trgovac je „lice koje prodaje proizvode ili pruža usluge potrošačima". Ova definicija podrazumeva pravna ili fizička lica i indirektno sugeriše da ugovor ne mora da bude zaključen u okviru njegovog zanimanja, poslovanja ili profesije. Štaviše, transponovanje odredbi o potrošačima u crnogorsko pravo se oslanja na odredbe crnogorskog Zakona o unutrašnjoj trgovini, gde bi upućivanje na taj pravni akt proširilo područje primene izraza trgovac[318].

4. Definicija „robe široke potrošnje"

Nijedna od odredbi zemalja učesnica o potrošačima ne sadrži definiciju o robi široke potrošnje koja odgovara članu 1 (2) b Direktive 99/44. Trenutna situacija bi bila promenjena usvajanjem srpskog Nacrta predloga novog zakona o zaštiti potrošača, koji definiše robu kao svaku materijalnu pokretnu stvar, izuzev: (a) robe koje se prodaje po izvršnom postupku ili na neki drugi način po sili zakona; (b) vode i gasa kada nisu namenjeni za prodaju u ograničenoj ili određenoj količini; i (c) struje.

Roba široke potrošnje, uključujući robu koja se koristi u kontekstu pružanja neke usluge, će na osnovu člana 3(7) i člana 29(1) albanskog Zakona o zaštiti potrošača označavati svaku pokretnu stvar koja je namenjena za potrošače ili koju će verovatno upotrebljavati potrošači, koja će pod razumno predvidljivim okolnostima, biti korištena od potrošača čak i ako im

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[314] "Deluje u vršenju" je neuspešna formulacija i na bosanskom jeziku.

[315] Član 15. Nacrta Zakona o obligacionim odnosima Bosne i Hercegovine iz 2006. je sadržavao istu definiciju, ali se odnosio na "preduzetnika".

[316] Poglavlje I srpskog Nacrta Predloga novog Zakona o zaštiti potrošača definiše trgovca kao svako fizičko ili pravno lice koje, u ugovorima obuhvaćenim ovim zakonom, deluje u svrhe koje se odnose na njegovo zanimanje, posao, zanat, ili profesiju, i svako ko deluje u ime ili ispred trgovca.

[317] Slična definicija je data u članu 2 Zakona o trgovini, *Sl. list RMak* Br. 16/04, 128/06, 63/07, 88/08, 159/08, 20/09 i 105/09.

[318] Član 6 Zakona o unutrašnjoj trgovini, *Sl. list RCG* Br. 49/08.

nije namijenjena, i isporučena je ili učinjena dostupnom, bilo uz naknadu ili ne, u okviru neke ekonomske aktivnosti, bez obzira da li je nova, korišćena ili prerađena.

U Bosni i Hercegovini potrošač se definiše kao lica „koje kupuje, pribavlja ili koristi proizvode ili usluge", dok roba na osnovu člana 1(9) Zakona o zaštiti potrošača obuhvata „proizvode i nepokretnu imovinu". Shodno tome, proizvodi mogu da se shvate kao da obuhvataju samo pokretnu imovinu, što takođe vodi ka smanjenju područja primene celog Zakona o zaštiti potrošača. Uprkos tome, čak i Poglavlja Zakona o zaštiti potrošača Bosne i Hercegovine koji se u svom naslovu jasno ograničavaju na „proizvode i usluge", sadrže odredbe u vezi sa „robama i uslugama". Izrazi „robe i usluge" i „proizvodi i usluge" se koriste kao sinonimi u više navrata[319]. Poglavlje III o prodaji proizvoda se odnosi samo na proizvode, dok se Poglavlje IV u vezi sa „garancijama za proizvode" protivno svom naslovu odnosi na robu. Upitno je da li se upotreba izraza „roba" ili „proizvodi" u odredbama Zakona o zaštiti potrošača Bosne i Hercegovine zasniva na volji zakonodavca da isključi nepokretnu imovinu iz područja primene ove odredbe korišćenjem izraza „proizvodi".

Propisi hrvatskog Zakona o obveznim odnosima o odgovornosti prodavca za materijalne nedostatke stvari se mogu primeniti na ugovore o kupoprodaji i na sve druge naplatne ugovore. Zbog toga je hrvatski zakonodavac smatrao da nema potrebe za izričitim transponovanjem definicije Direktive o potrošačkoj robi, jer iste odredbe se mogu primeniti ne samo na potrošačku robu već i na sve druge predmete kupoprodaje (na primer usluge i nekretnine). Na osnovu odredaba Zakona o obveznim odnosima, predmet kupoprodaje mogu biti stvari, prava i imovina.

Makedonski Zakon o zaštiti potrošača ne definiše „robu široke potrošnje". Taj zakon sadrži definiciju 'proizvoda' koja glasi: „Proizvod" je svaki predmet bez obzira na nivo njegove obrađenosti, namenjen da bude ponuđen potrošačima[320]". Član 165 (b) makedonskog Zakona o obligacionim odnosima, u smislu tog Zakona, definiše „proizvod" kao pokretni predmet, kao i nezavisan predmet ugrađen u neki pokretan ili nepokretan predmet, uključujući struju i druge vrste energije. Shodno tome, postojeća definicija predstavlja značajnu varijaciju od definicije date u Direktivi.

Određena izuzimanja navedena u članu 1(2)(b) Direktive 99/44 po pitanju roba prodatih putem ovršnog postupka ili na neki drugi način po sili zakona i voda i gas kada nisu dati u prodaju u ograničenoj ili određenoj količini nisu transponovana ni u jednoj od zemalja učesnica. Međutim, član 409. hrvatskog Zakona o obveznim odnosima reguliše da će odgovornost za materijalne nedostatke biti isključena kod prisilne javne prodaje. Štaviše, opšta odredba o „stvari" reguliše da stvar mora da bude u prometu i da će ugovor o kupoprodaji stvari koja je *extra commercium* biti ništavan i da se posebni propisi primenjuju na prodaju stvari čiji je promet ograničen (član 380(1) i (2) hrvatskog Zakona o obveznim odnosima).

a. Isključivanje robe prodate na javnoj aukciji iz pojma „roba široke potrošnje" član 1 paragraf (3))

Nijedna od zemalja učesnica nije izričito isključila „polovnu robu prodatu na javnoj aukciji gde potrošači imaju priliku da lično prisustvuju prodaji" iz definicije „robe široke potrošnje".

U Makedoniji pojam prodaje na javnim aukcijama se odnosi na obaveze prodavca da označi cene tamo gde se po zakonu predviđa da prodavac nije u obavezi da se pridržava na-

[319] Videti primer člana 49. Zakona o zaštiti potrošača u vezi sa ugovorima o prodaji na daljinu. Član 49.(1) definiše obavezu trgovca da isporuči "proizvod ili uslugu" u roku od 15 dana od naloga potrošača. Sledeći stav, međutim, definiše posledice neisporučivanja "robe ili usluga".

[320] Član 4, pasus 5, Zakona o zaštiti potrošača, *Sl. list RMak* Br. 38/04.

značenih maloprodajnih cena i uslova prodaje, u slučaju javne i aukcijske prodaje, prodaje umetničkih radova i antikviteta, ili za proizvode kupljene u toku nuđenja određenih usluga. Roba prodata na javnim aukcijama je takođe isključena iz primene odredbi koje se odnose na ugovore o prodaji na daljinu. Treba zaključiti da roba prodata na javnim aukcijama treba da se smatra isključenom iz robe široke potrošnje na osnovu makedonskog zakona.

Crnogorske odredbe o prodaji robe za vreme prinudne javne prodaje, iz Zakona o obligacionim odnosima[321] takođe su važne za ovo pitanje. Naime, nasuprot opštem pravilu o saobraznosti, vlasnik čija roba se prodaje na prinudnoj javnoj prodaji neće se smatrati odgovornim za nedostatke iste. Ipak, ova odredba ne pokriva situaciju dobrovoljne prodaje na aukcijama.

5. Definicija 'prodaje'

Zemlje učesnice daju definiciju prodaje samo u njihovom opšte primenjivom Zakonu o obligacionim odnosima. Sa gotovo istom formulacijom član 376. (1) hrvatskog Zakona o obveznim odnosima, član 454. Zakona o obligacionim odnosima Bosne i Hercegovine i Srbije, član 705. Građanskog zakonika Albanije i član 442.(1) makedonskog Zakona o obligacionim odnosima predviđaju da se ugovorom o prodaji prodavac obavezuje da isporuči kupcu stvar koju on prodaje kupcu tako da kupac stiče pravo vlasništva, i kupac je u obavezi da plati cenu prodavcu.

Nijedna od zemalja učesnica nije izričito transponovala član 1. (4) Direktive 99/44. Međutim, u Hrvatskoj ovoj odredbi je nađen ekvivalent u članu 357. (1) Zakona o obveznim odnosima. Ta odredba predviđa da kod naplatnog ugovora svaki ugovaratelj odgovara za materijalne nedostatke svog ispunjenja. To podrazumijeva ne samo prodavca već i izvođača kod ugovora o djelu. U Bosni i Hercegovini odgovornost za materijalne nedostatke se reguliše u dva uzastopna člana sa gotovo istom formulacijom (članovi 18. i 19. Zakona o zaštiti potrošača), jedan od njih se odnosi na proizvode u ugovorima o prodaji a drugi na pružanje usluga. Dodatno, u Bosni i Hercegovini i Srbiji, član 600. njihovih Zakona o obligacionim odnosima navodi da ugovorom o pružanju usluga isporučilac preuzima obavezu da izvrši određeni posao, kao što je proizvodnja ili popravka nekog predmeta, ili da izvrši neki fizički ili intelektualni posao i slično, dok kupac usluga preuzima obavezu da mu zauzvrat plati novčanu naknadu. Crnogorski Zakon o zaštiti potrošača koristi „prenošenja na potrošače" kao izraz za prodaju roba i pružanje usluga potrošačima kao krajnjim korisnicima, i davanje uzoraka robe. Pored toga, već dati pojam trgovca i dalji slučajevi proširenja po crnogorskom Zakonu o unutrašnjoj trgovini podstiče efekte da će te dodatne transakcije biti takođe obuhvaćene u praksi.

III. Instrumenti zaštite potrošača

1. Saobraznost sa ugovorom

a. Uopšteno o uslovu „saobraznosti sa ugovorom" (član 2)

aa. Zahtev za isporučivanje robe u skladu sa ugovorom

Albanija je doslovno transponovala član 2 (1) Direktive 99/44, navodeći da prodavac mora da isporučuje robu potrošačima koja je usaglašena sa ugovorom o prodaji[322]. Na osnovu člana 15 srpskog Zakona o zaštiti potrošača, prodavac ili davaoc usluge će biti u obavezi da isporuče potrošaču proizvod ili uslugu kvaliteta koji je propisan ili naveden u ugovoru.

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[321] Član 495 Zakona o obligacionim odnosima, *Sl. list RCG* Br. 47/08.

[322] Član 29 (2) Zakona o zaštiti potrošača *Sl. list RAl* br. 61/08.

U ostalim zemljama učesnicama, zahtev za isporučivanje usaglašenih roba proističe iz odgovornosti trgovca za materijalne nedostatke (Bosna i Hercegovina[323], Hrvatska[324]) ili opšte odredbe o izvršenju dogovorenih obaveza (Makedonija[325], Crna Gora[326]).

bb. Pretpostavka saobraznosti

Albanija je jedina zemlja učesnica koja u svom Zakonu o zaštiti potrošača pozitivno definiše kriterijume za pretpostavku saobraznosti[327]. Zakoni o obligacionim odnosima svih ostalih zemalja učesnica sadrže listu slučajeva kada postoji materijalni nedostatak[328] (Bosna i Hercegovina, Hrvatska, Makedonija, Crna Gora i Srbija), suprotno modelu člana 2 (2) Direktive 99/44, koji definiše kriterijume saobraznosti robe sa ugovorom. Gore navedene odredbe nisu propisane kao zakonske pretpostavke.

Makedonski Zakon o zaštiti potrošača dodatno definiše kada će se smatrati da neki proizvod ima nedostatak i kada usaglašenost treba da se pretpostavi. Članom 42 (1) makedonskog Zakona o zaštiti potrošača, proizvod ima nedostatak kada ne ispunjava opšte obaveze o bezbednosti i ne pruža bezbednost koju neko lice ima pravo da očekuje, uzimajući u obzir sve okolnosti, kao što su: na osnovu prezentacije proizvoda; svrha za koju se sa razlogom očekuje da će se proizvod koristiti; vreme kada je proizvod plasiran na tržište; i kada ne ispunjava opštu obavezu saobraznosti ili ugovorne obaveze.

cc. Kriterijumi za pretpostavku saobraznosti (član 2 paragraf (2) sl. (a)-(d) generalno)

U zemljama naslednicama bivše Jugoslavije kriterijumi za materijalne nedostatke dati u članu 479. jugoslovenskog Zakona o obligacionim odnosima su ostali isti u Bosni i Hercegovini, Srbiji i Makedoniji[329], dok su ih Hrvatska[330] i Crna Gora[331] dopunili koristeći potpuno istu formulaciju.

Na osnovu člana 479. jugoslovenskog Zakona o obligacionim odnosima (još uvek važećim u Bosni i Hercegovini i Srbiji[332], sada član 467 makedonskog Zakona o obligacionim odnosima) materijalni nedostatak postoji: 1) ako stvar nema potrebna svojstva za njenu redovnu upotrebu ili za promet; 2) ako stvar nema potrebna svojstva za naročitu upotrebu za koju

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[323] Član 18 Zakona o zaštiti potrošača, *Sl. list BiH* br. 25/06; Videti takođe članove 478 i 456 Zakona o obligacionim odnosima Bosne i Hercegovine i Republike Srpske, OG SFRJ No. 29/78, 39/85, 46/85, 45/89, 57/89, *Sl. List Republike Bosne I Hercegovine*, 2/29, 13/93, 13/94 *Sl. list Federacije Bosne i Hercegovine,* br. 29/03, *Sl. list Republike Srpske* br. 17/93, 57/98, 39/03, 74/04.

[324] Članovi 357. i 400. Zakona o obveznim odnosima, *NN* br. 35/05, 41/08.

[325] Članovi 10 i 11 Zakona o obligacionim odnosima, *Sl. list RMak* Br. 18/01.

[326] Član 12 Zakona o zaštiti potrošača, *Sl. list RCG* Br. 26/07.

[327] Član 29(3) Zakona o zaštiti potrošača, *Sl. list RAl* br. 61/08.

[328] Član 467 Zakona o obligacionim odnosima, *Sl. list RMak* br. 18/01; član 401. Zakona o obveznim odnosima, *NN* br. 35/05, 41/08; član 479 Zakona o obligacionim odnosima Bosne i Hercegovine i Srbije, *Sl. list SFRJ* br. 29/78, 39/85, 46/85, 45/89, 57/89; član 487 Zakona o obligacionim odnosima, *Sl. list RCG* br. 47/08.

[329] Član 467. Zakona o obligacionim odnosima *Sl. list RMak* Br. 18/01.

[330] Član 401. Zakona o obveznim odnosima, *NN* br. 35/05, 41/08.

[331] Član 487. Zakona o obligacionim odnosima, *Sl. list RCG* Br. 47/08.

[332] Po srpskom Nacrtu predloga novog zakona o zaštiti potrošača, pretpostaviće se da je isporučena roba u saglasnosti sa ugovorom ako ispunjava sledeće uslove: (a) slaže se sa opisom koga je dao trgovac i poseduje kvalitete koje je trgovac prezentovao potrošaču kao uzorak ili model; (b) podesna je za svaku konkretnu upotrebu za koju je potrebna potrošaču i koja je bila poznata ili je morala biti poznata trgovcu u vreme zaključivanja ugovora; (c) podesna je za svrhe u koje se roba iste vrste obično koristi; ili (d) pokazuje kvalitet i učinak koji su normalni za robu iste vrste i koje potrošač može sa razlogom da očekuje,

je kupac nabavlja, a koja je bila poznata prodavcu, ili mu je morala biti poznata; 3) ako stvar nema svojstva i odlike koje su izričito ili prećutno ugovorene, odnosno propisane; 4) kad je prodavac predao stvar koja nije saobrazna uzorku ili modelu, osim ako su uzorak ili model pokazani samo radi obaveštenja. Kako poređenje člana 479 jugoslovenskog Zakona o obligacionim odnosima sa članom 2 (2) Direktive 99/44 pokazuje, te odredbe se blago razlikuju: Član 479 (2) jugoslovenskog Zakona o obligacionim odnosima isključuje uzorke koji su pokazani samo radi obaveštenja, koji nisu isključeni članom 2 (2) (a) Direktive 99/44; član 2 (2) (b) Direktive obuhvata samo određene svrhe roba o kojima su se dogovorili potrošač i prodavac, dok član 479 (2) jugoslovenskog Zakona o obligacionim odnosima dodatno predviđa zaštitu u slučajevima kada je prodavcu trebala da bude poznata posebna svrha za koju kupac namerava da koristi robu; konačno, jugoslovenski Zakon o obligacionim odnosima ne predviđa zaštitu u slučajevima opisanim u članu 2 (2) (d) Direktive 99/44[333].

Temeljem člana 401 (1) hrvatskog Zakona o obveznim odnosima i člana 487 (1) crnogorskog Zakona o obligacionim odnosima koji imaju istu formulaciju, nedostatak postoji: 1) ako stvar nema potrebna svojstva za svoju redovnu upotrebu ili za promet; 2) ako stvar nema potrebna svojstva za posebnu upotrebu za koju je kupac nabavlja, a koja je bila poznata prodavcu ili mu je morala biti poznata; 3) ako stvar nema svojstva i odlike koje su izrijekom ili prešutno ugovorene, odnosno propisane; 4) kad je prodavac predao stvar koja nije jednaka uzorku ili modelu, osim ako su uzorak ili model pokazani samo radi obavesti; 5) ako stvar nema svojstva koja inače postoje kod drugih stvari iste vrste i koja je kupac mogao opravdano da očekuje prema naravi stvari, posebno uzimajući u obzir javne izjave prodavca, proizvođača i njihovih predstavnika o svojstvima stvari (reklame, označavanje stvari i dr.); 6) ako je stvar nepravilno montirana pod uslovom da je usluga montaže uključena u ispunjenje ugovora o prodaji; 7) ako je nepravilna montaža posledica nedostataka u uputama za montažu. Iako kriterijumi iz člana 2(2) Direktive 99/44 na jednoj strani i člana 401 (1) hrvatskog Zakona o obveznim odnosima i člana 487 crnogorskog Zakona o obligacionim odnosima na drugoj strani se generalno poklapaju, ima i nekih razlika. Na primer, pod članom 2(2) Direktive 99/44 prihvata se da je potrošačka roba sukladna ugovoru ako odgovara određenoj svrsi za koju ju potrošač traži i sa kojom je on „upoznao prodavca" u vreme zaključenja ugovora i „koju je prodavac prihvatio". Član 401 (1) tačka 2) hrvatskog Zakona o obveznim odnosima i član 487 (1) tačka (2) crnogorskog Zakona o obligacionim odnosima nude viši nivo zaštite

imajući u vidu vrstu robe i sve javne izjave o određenim karakteristikama robe koje je dao trgovac, proizvođač, posebno u reklamiranju ili na oznakama.

Po srpskom Nacrtu predloga, nesaobraznost pružene usluge sa ugovorom postoji: (1) ako je usluga u suprotnosti sa podacima koje je trgovac dao kada je reklamirao uslugu, ili drugačije pre zaključenja ugovora; na sadržaj usluge, ili na njeno izvršenje, ili na druge okolnosti koje se odnose na kvalitet ili korišćenje usluge; (2) ako je usluga u suprotnosti sa podacima koje je trgovac davao tokom pružanja usluge, ako se može smatrati da su takvi podaci imali uticaj na odluke potrošača; (3) ako usluga nije podesna za određenu svrhu za koju je potrošaču potrebna, i za koju je trgovac znao ili je morao da zna u vreme zaključenja ugovora; (4) ako usluga nije podesna za svrhe za koju su usluge iste vrste normalno potrebne; ili (5) ako usluga ne odgovara razumnim očekivanjima, imajući u vidu vrstu usluge i sve javne izjave o određenim karakteristikama usluge koje je dao trgovac, posebno u reklamiranju.

[333] Član 536. Nacrta Zakona o obligacionim odnosima Bosne i Hercegovine iz 2010, koji najviše odgovara aktualnom članu 479. Zakona o obligacionim odnosima Bosne i Hercegovine, transponuje član 2 (2) Direktive 99/44 u svom stavu 1(d). Tako, materijalni nedostatak postoji kada nekoj stvari nedostaju kvaliteti koje potrošači mogu da očekuju usled javnih izjava prodavca ili proizvođača, posebno u reklamiranju ili na oznakama, osim ako ta izjava nije bila poznata niti je morala biti poznata prodavcu, bila je propisno promenjena u trenutku zaključenja ugovora ili nije mogla da utiče na odluku za zaključenje ugovora.

propisujući da je određena svrha „bila poznata prodavcu ili mu je morala biti poznata". Konačno, postoji odredba u članu 5 (4) hrvatskog Zakona o zaštiti potrošača koja predviđa da „nedostatak na proizvodu, odnosno obavljenoj usluzi, kada je to nužno, dokazuje se vještačenjem u za to ovlaštenim ustanovama ili uz pomoć ovlaštenog sudskog vještaka, a troškove vještačenja snosi potrošač ili trgovac, ovisno o rezultatu vještačenja". Crna Gora je takođe preko Zakona o zaštiti potrošača utvrdila dodatne faktore za saobraznost kao što su tačna mera ili količina robe, odgovarajuća ambalaža u skladu sa vrstom i karakteristikama robe, propisan ili dogovoren kvalitet, a ako kvalitet nije propisan ili dogovoren – standardan kvalitet robe ili usluga, način određivanja ili obračuna cene itd[334].

Na osnovu člana 29 (3) albanskog Zakona o zaštiti potrošača, kao jedine odredbe zemalja članica koja pozitivno definiše kriterijume za saobraznost, za robu široke potrošnje se pretpostavlja da je u skladu sa ugovorom ako: 1) odgovara opisu koga je dao prodavac i poseduje kvalitete robe koju je prodavac nudio potrošaču kao uzorak ili model; 2) je podobna za bilo koju određenu upotrebu za koju je potrošač traži i koju je obznanio prodavcu u vreme zaključenja ugovora i koju je prodavac prihvatio; 3) je podobna za svrhe u koje se roba iste vrste normalno koristi; 4) pokazuje svojstva i učinak koji su normalni za robu iste vrste i koje potrošač može razumno da očekuje, s obzirom na vrstu robe i uzimajući u obzir javne izjave o posebnim svojstvima robe koje je dao prodavac, proizvođač ili njegov predstavnik, posebno u reklamiranju ili na oznakama.

dd. Vreme u kome se saobraznost procenjuje

U zemljama naslednicama bivše Jugoslavije odredbe jugoslovenskog Zakona o obligacionim odnosima, po pitanju vremena u kojem se saobraznost procenjuje, još uvek su važeće. Član 478 Zakona o obligacionim odnosima Bosne i Hercegovine i Srbije, član 400 (1) hrvatskog Zakona o obveznim odnosima, član 486. crnogorskog Zakona o obligacionim odnosima i član 466 makedonskog Zakona o obligacionim odnosima predviđaju da će prodavac biti odgovoran za materijalne nedostatke stvari u trenutku prelaska rizika na kupca. Momenat prelaska rizika se određuje članom 456 Zakona o obligacionim odnosima Bosne i Hercegovine i Srbije, članom 444 makedonskog Zakona o obligacionim odnosima, članom 378 (1) hrvatskog Zakona o obveznim odnosima i članom 464 crnogorskog Zakona o obligacionim odnosima, kao momenat isporuke te stvari, i stoga je u saglasnosti sa članom 2 (1) Direktive 99/44[335]. Albanija nije transponovala ovu odredbu u svoj Zakon o zaštiti potrošača.

b. Javne izjave i izuzimanja (član 2 paragraf (2) (d) i član 2 paragraf (4))

Pod članom 480 (3) Zakona o obligacionim odnosima Bosne i Hercegovine[336] i Srbije[337], kao i članom 467 (3) makedonskog Zakona o obligacionim odnosima prodavac će biti odgovoran za nedostatke koji su mogli biti lako uočeni od strane kupca, ako je izjavio da je roba

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[334] Članovi 12 i 16 Zakona o zaštiti potrošača, *Sl. list RCG* Br. 26/07.

[335] Na osnovu člana 513 (3) Nacrta Zakona o obligacionim odnosima Bosne i Hercegovine iz 2010., odredbe ovog člana, koje odgovaraju članu 456 bosansko-hercegovačkog Zakona o obligacionim odnosima, koje se odnose na trenutak prelaska rizika, ne mogu se promeniti na štetu potrošača.

[336] Kako je gore opisano, član 536 (4) Nacrta Zakona o obligacionim odnosima Bosne i Hercegovine bi preneo član 2 (2) d i član 2 (4) Direktive 99/44.

[337] Po srpskom Nacrtu predloga novog zakona o zaštiti potrošača, trgovac neće biti obavezan javnim izjavama ako pokaže da postoji jedna od sledećih situacija: (a) on nije bio, i nije sa razlogom mogao da bude, svestan dotične izjave; (b) u vreme zaključenja ugovora ta izjava je bila ispravljena; (c) ta izjava nije mogla da utiče na odluku o kupovini robe. Dalje, po Nacrtu predloga, pružena usluga nije u saglasnosti sa

bez ikakvih nedostataka ili da ima određena svojstva ili odlike. Te odredbe su dopunjene u članu 487 (1) tačka 5 i (2) crnogorskog Zakona o obligacionim odnosima i članu 401 (1) tačka 5 i članu 401 (2) hrvatskog Zakona o obveznim odnosima, gde su član 2 (2) d i član 2 (4) Direktive 99/44 doslovno transponovani. Jedini izuzetak je da član 2 (4) Direktive 99/44 predviđa da prodavac neće biti obavezan javnim izjavama ako pokaže da on nije bio, i „nije sa razlogom mogao biti svestan predmetne izjave", dok član 401 (2) hrvatskog Zakona o obveznim odnosima i član 487 (2) crnogorskog Zakona o obligacionim odnosima koriste izraz „nije znao niti morao znati za te izjave".

Makedonski Zakon o zaštiti potrošača u članu 42 (2), četvrti pasus, posebno se odnosi na javne izjave kao jedan od kriterijuma kojima se procenjuje saobraznost, međutim on ne isključuje izuzimanja predviđena u članu 2 (4) Direktive. Albanija nije transponovala član 2 (2) d i član 2 (4) u svoj Zakon o zaštiti potrošača.

c. Isključenje kad je potrošač svestan nedostatka saobraznosti (član 2 paragraf (3))

Član 29 (5) albanskog Zakona o zaštiti potrošača je doslovno transponovao član 2 (3) Direktive 99/44, navodeći da će se smatrati da nesaobraznost ne postoji u svrhu ovog člana, ako je, u vreme kada je ugovor bio zaključen, potrošač bio svestan, ili razumno nije mogao biti nesvestan nesaobraznosti, ili ako nesaobraznost potiče iz materijala koje je isporučio potrošač. U svim ostalim zemljama učesnicama, još uvek se primenjuju propisi jugoslovenskog Zakona o obligacionim odnosima iz 1978[338], gde prodavac nije odgovoran za nedostatke ako su isti bili poznati kupcu u vreme zaključenja ugovora ili ako je bilo nemoguće da oni njemu ostanu nepoznati[339]. Smatraće se da nedostaci nisu ostali nepoznati kupcu ako su oni mogli biti lako uočeni običnim pregledom robe od strane brižljive osobe kao kupca, sa prosečnim znanjem i iskustvom karakterističnim za osobu iste profesije[340]. Međutim, prodavac će biti odgovoran za nedostatke, koji su mogli biti lako uočeni od strane kupca, ako je izjavio da roba nema nedostataka ili da ima određena svojstva ili odlike[341].

Shodno tome, uz izuzetak nekih terminoloških razlika, zakoni zemalja učesnica sadrže odredbu koja odgovara članu 2 (3) Direktive 99/44.

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ugovorom, ako je u suprotnosti sa podacima datim prilikom marketinga usluge, ili drugačije pre zaključenja ugovora, od strane lica osim trgovca na prethodnom nivou lanca nabavke, ili u ime trgovca. Međutim, trgovac neće biti odgovoran za nesaobraznost, ako su ti podaci na vreme jasno korigovani, ili ako on niti je znao niti je mogao znati za date podatke.

[338] Član 468 makedonskog Zakona o obligacionim odnosima; član 480 Zakona o obligacionim odnosima Bosne i Hercegovine i Srbije; član 488 crnogorskog Zakona o obligacionim odnosima; član 402. hrvatskog Zakona o obveznim odnosima.

[339] U državama bivše Jugoslavije, osim Hrvatske koja je promenila sledeće ograničenje, ova odredba isključuje samo odgovornost prodavca za nedostatke za koje je kupac znao ili za koje nije mogao da ne zna, u slučajevima kada neka stvar nema kvalitete potrebne za njenu redovnu upotrebu ili promet ili ako nekoj stvari nedostaju svojstva i odlike koji su izričito ili prešutno ugovorene, odnosno propisane.

[340] Na osnovu člana 402 (3) hrvatskog Zakona o obveznim odnosima ta odredba koja se odnosi na „prosečno znanje i iskustvo" se ne odnosi na B2C ugovore..

[341] Po srpskom Nacrtu predloga za novi zakon o zaštiti potrošača, neće biti nesaobraznosti ako, u vreme kada je ugovor zaključen, potrošač je znao, ili je logično trebao da zna, o nesaobraznosti; ili ako nesaobraznost potiče iz materijala koje je nabavio potrošač. Trgovac će biti odgovoran za nesaobraznost koju je potrošač mogao lako da uoči, da je trgovac objavio da je roba u saglasnosti sa ugovorom.

d. Odredba o robi koja treba da se instalira (član 2 paragraf (5))

Član 2 (5) Direktive 99/44 je transponovan u član 401 (6) i (7) hrvatskog Zakona o obveznim odnosima i član 487 (6) i (7) crnogorskog Zakona o obligacionim obavezama. Jedina razlika koje su Hrvatska i Crna Gora napravile kada su transponovale ovu odredbu odnosi se na upotrebljene izraze „stvar" umesto „roba široke potrošnje" i „kupac" umesto „potrošač". To je međutim adekvatno jer te odredbe o odgovornosti prodavca za materijalne nedostatke se primenjuju na sve ugovore o prodaji. Član 2 (5) Direktive 99/44 je doslovno transponovan u član 29 (4) albanskog Zakona o zaštiti potrošača.

Bosna i Hercegovina, Makedonija i Srbija nisu transponovale ovu odredbu o robi koja treba da se instalira. Član 56. srpskog Zakona o zaštiti potrošača propisuje samo da tehnička uputstva, uputstva za upotrebu i deklaracija moraju da budu u pisanoj formi i na jeziku koji je u zvaničnoj upotrebi u Republici Srbiji. Makedonski Zakon o zaštiti potrošača utvrđuje obavezu prodavca da obezbedi potrošaču propisana dokumenta i dokumenta koja je pripremio proizvođač u svrhe lakše i bezbedne upotrebe proizvoda (deklaracija, garancija, tehničko uputstvo, uputstvo za montažu, uputstvo za upotrebu, spisak ovlašćenih servisa itd.), kako se definiše u članu 21. tog Zakona, istinita, jasna, čitljiva i razumljiva, napisana na makedonskom jeziku i ćiriličnom pismu, što ne isključuje dodatno korišćenje drugih jezika u isto vreme i znakova jasno čitljivih za potrošača. Član 2 (5) Direktive 99/44 je transponovan u srpski Nacrt predloga novog zakona o zaštiti potrošača i Nacrt zakona o obligacionim odnosima Bosne i Hercegovine.

2. Prava potrošača u slučajevima nesaobraznosti

a. Uopšteno o pravima potrošača u slučajevima nesaobraznosti (član 3.)

Član 3. Direktive predviđa pravna sredstva koja će biti na raspolaganju potrošaču kada postoji nesaobraznost robe. Nacionalno zakonodavstvo svih zemalja učesnica predviđa pravna sredstva u slučajevima nesaobraznosti.

Po albanskom zakonu, u slučaju nesaobraznosti, potrošač će imati pravo da mu se roba besplatno dovede u stanje koje je u skladu sa ugovorom putem popravke ili zamene, ili da se načini odgovarajuće smanjenje cene ili da se raskine ugovor u vezi sa tom robom (član 31(3) Zakona o zaštiti potrošača)[342].

Po članu 18 bosansko-hercegovačkog Zakona o zaštiti potrošača[343], potrošač ima pravo na popravku, zamenu i raskid ugovora, bez redukovanja na slučajeve nesaobraznosti koja nije neznatna.

U Hrvatskoj prava potrošača su transponovana u član 410. Zakona o obveznim odnosima[344] i u članu 5 (2) Zakona o zaštiti potrošača[345]. U Crnoj Gori, izbor potrošača je između popravke i zamene, međutim, kada je to nemoguće, ili ne može biti izvedeno u nekom razumnom vremenu ili bez većih neprijatnosti za potrošača, moguće je tražiti smanjenje cene ili (u slučaju veće neusaglašenosti) raskid ugovora.

U Makedoniji, ovo pitanje se reguliše i Zakonom o obligacionim odnosima[346] i Zakonom o zaštiti potrošača (član 43)[347]. Na osnovu Zakona o obligacionim odnosima Makedoni-

[342] Zakon o zaštiti potrošača od 17.04.2008., *Sl. list RAl* br. 61/08.
[343] Zakon o zaštiti potrošača Bosne i Hercegovine, *Sl. glasnik BiH* br. 25/06.
[344] Zakon o obveznim odnosima, *NN* br. 35/05, 41/08.
[345] Zakon o zaštiti potrošača, *NN* br. 79/07, 125/07, 79/09, 89/09, 133/09.
[346] Zakon o obligacionim odnosima, *Sl. list RMak* br. 18/01, 4/02, 5/03, 84/08, 81/09 i 161/09.
[347] Zakon o zaštiti potrošača, *Sl. list RMak* br. 38/04, 77/07, i 103/08.

je, generalno kupac (kako se pravila odnose na sve ugovore o prodaji), u slučajevima nedostataka kupljene robe ima pravo da: 1) zahteva od prodavca da otkloni nedostatak ili da mu isporuči drugi proizvod bez nedostatka (izvršenje ugovora); 2) zahteva smanjenje cene; 3) zamenu proizvoda odgovarajućim proizvodom iste robne marke, tipa, industrijskog dizajna, ili oznake o poreklu ili geografske oznake proizvoda; 4) uz odgovarajuće smanjenje ili povećanje maloprodajne cene; 5) raskid ugovora, vraćanje plaćenog iznosa i nadoknadu pretrpljene štete. Taj zahtev može da načini potrošač, po vlastitom izboru, nadležnom inspekcijskom organu ili trgovcu ili distributeru, u mestu gde je proizvod kupljen ili u mestu prebivališta potrošača. U slučaju kada potrošač kupi namirnice sa nedostatkom, trgovac je u obavezi da načini zamenu sa proizvodom odgovarajućeg kvaliteta ili da vrati plaćeni iznos potrošaču, pod uslovom da su nedostaci otkriveni u okviru navedenog roka trajanja u kome proizvod može da se upotrebljava.

Po članu 34. srpskog Zakona o zaštiti potrošača[348], potrošač ima pravo da uloži žalbu u slučaju nesaobraznosti i na osnovu te žalbe ima pravo na pravna sredstva.

aa. Implementacija pravnih sredstava

Pravna sredstva propisana u Direktivi (član 3) su transponovana u nacionalno zakonodavstvo proučenih zemalja, u Zakon o zaštiti potrošača i Zakon o obligacionim odnosima, ili u oba; sa određenim varijacijama.

bb. Izbor potrošača između pravnih sredstava

Po albanskom Zakonu o zaštiti potrošača potrošač ima pravo na: 1) popravku, 2) zamenu; 3) odgovarajuće smanjenje cene; 4) raskid ugovora.

U Bosni i Hercegovini, član 18. Zakona o zaštiti potrošača predviđa slobodu izbora između pravnih sredstava, bez mogućnosti smanjenja cene. Odredbe bosansko-hercegovačkog Zakona o obligacionim odnosima[349], koje nisu ograničene na B2C ugovore, zahtevaju da kupac prvo traži ispunjenje (popravku ili zamenu), a u slučajevima da je prodavac imao razumno vreme za izvršenje popravke ili zamene, daju pravo na smanjenje cene ili raskid ugovora.

Član 410. hrvatskog Zakona o obveznim odnosima ostavlja potrošaču izbor između sledećih pravnih sredstava: 1) zahtevati od prodavca da nedostatak ukloni; ili 2) zahtevati od prodavca da mu preda drugu stvar bez nedostatka; ili 3) zahtevati sniženje cene; ili 4) izjaviti da raskida ugovor. Povrh toga, prema Zakonu o obveznim odnosima u svakom od tih slučajeva kupac ima pravo i na popravljanje štete prema općim pravilima o odgovornosti za štetu, uključujući i štetu koju je zbog nedostatka stvari pretrpio na drugim svojim dobrima. Odredbe člana 412 (1) i člana 413 Zakona o obveznim odnosima vode ka zaključku da kupac može prvenstveno i alternativno upotrebiti prva tri pravna sredstva a pravo na raskid ugovora samo kada ne uspe sa svojim zahtevom za ispunjenje ugovora, uz određene izuzetke u članu 412 (2, 3) Zakona o obveznim odnosima. Činjenica da potrošač ima izbor između upotrebe pravnih sredstava se međutim potvrđuje članom 5 (2) Zakona o zaštiti potrošača, koji predviđa da je

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[348] Zakon o zaštiti potrošača iz 2005 *Sl. list RS* br. 79/05.

[349] Od raspada Jugoslavije savezni Zakon o obligacionim odnosima je putem sukcesije ostao da se primenjuje u dve malo različite verzije u svakom entitetu Bosne i Hercegovine, kao Zakon o obligacionim odnosima Republike Srpske i Zakon o obligacionim odnosima Federacije Bosne i Hercegovine. Pošto se odredbe relevantne za ovu analizu ne razlikuju, u cilju veće jasnoće ovaj tekst će se odnositi samo na „Zakon o obligacionim odnosima Bosne i Hercegovine; *Sl. list SFRJ* br. 29/78, 39/85, 46/85, 45/89, 57/89 i *Sl. list Republike Srpske* br. 17/93, 57/98, 39/03, 74/04, *Sl. list Republike Bosne i Hercegovine* br. 2/92, 13/93, 13/94 i *Sl. list Federacije Bosne i Hercegovine* br. 29/03.

u skladu s odredbama Zakona o obveznim odnosima o odgovornosti za materijalne nedostatke stvari, trgovac dužan, „prema izboru potrošača“, ukloniti nedostatak na proizvodu, predati drugi proizvod bez nedostatka, sniziti cenu ili vratiti plaćeni iznos za proizvod, te ispuniti i druge obveze propisane tim odredbama.

U Makedoniji, Zakon o obligacionim odnosima i Zakon o zaštiti potrošača postavlja drugačija pravila po pitanju izbora 'potrošača' između pravnih sredstava. Zakonom o obligacionim odnosima (članovi 476-488) ugovorna strana (ne obavezno potrošač jer reguliše sve ugovore) ima pravo prvo da zahteva da ugovor bude izvršen (otklanjanje nedostatka ili isporuka drugog proizvoda bez nedostatka). Ako ugovor ne bude izvršen u dodatnom periodu datom za izvršenje kupac ima pravo da odustane od ugovora. Zakon ne navodi kada kupac može da traži smanjenje cene. Zakon o obligacionim odnosima navodi da kupac može da održi taj ugovor čak iako postoje osnove za njegov raskid; tako da se može zaključiti da je to slučaj kada smanjenje cene treba da se traži. Zaštita koju pruža Zakon o zaštiti potrošača, na drugoj strani, ostavlja potrošaču slobodu izbora između pravnih sredstava. Taj Zakon, međutim, predviđa zvaničan zahtev za korištenje tih prava: članom 45, paragraf 1, u cilju korištenja svojih prava potrošač je u obavezi da priloži fiskalni račun za proizvod ili jasno vidljivu čitljivu pisanu priznanicu, a za proizvode koji imaju garantni rok, takođe i potvrdu o garanciji ili neki drugi dokument koji zamenjuje garanciju. U Crnoj Gori, na osnovu člana 25. Zakona o zaštiti potrošača[350], potrošač ima slobodu izbora između sva četiri pravna sredstva. To je u suprotnosti sa rešenjima datim u opštem zakonodavstvu o prodaji, jer tamo je hijerarhija (to jest: održavanje ugovora) prvi izbor koji mora da se sledi (član 497. i 498. Zakona o obligacionim odnosima)[351]. Situacija je slična u Srbiji, gde potrošač ima pravo da se žali u odnosu na proizvod ili uslugu za koje je izdata garancija, u vezi sa nedostacima koji se pojave u roku od šest meseci nakon datuma nabavljanja tog proizvoda ili usluge. Po članu 35. Zakona o zaštiti potrošača, ako je takva žalba uložena usled nedostatka u proizvodu, potrošač će imati pravo: 1) da mu se proizvod koji je kupio zameni novim proizvodom, to jest proizvodom odgovarajuće robne marke (modela, tipa), ili 2) da mu se iznos plaćen za taj proizvod refundira, u iznosu maloprodajne cene za takav proizvod na dan refundiranja, ili 3) da se nedostaci na proizvodu otklone. Ako je takva žalba uložena zbog nedostatka u vršenju usluge, potrošač će imati pravo: 1) da nedostatak bude otklonjen, ili 2) da mu se refundira iznos koji je platio, ili 3) na smanjenje cene u srazmeri sa nedostatkom u pruženoj usluzi. Ako pretrpi štetu uzrokovanu proizvodom sa nedostatkom ili neizvršenjem usluge, ili izvršenjem usluge sa nedostatkom, potrošač može da zahteva nadoknadu. Potrošač može da iskoristi gore navedena prava pod uslovom da nedostatak nije uzrokovan njegovom greškom. Zakon o obligacionim odnosima uspostavlja hijerarhiju dostupnih pravnih sredstava (član 488-490 tj član 618-620) kojim potrošač najpre mora da traži izvršenje ugovora pa ako prodavac/davaoc usluge to ne izvrši, onda da zahteva raskid ugovora.

b. Kriterijum „nesrazmernosti“ (član 3 paragraf (3))

Član 3 (3) Direktive 99/44 primenjuje faktor srazmernosti u razmatranju toga da li je neko određeno pravno sredstvo dostupno.

Albansko zakonodavstvo (član 31 (4) Zakona o zaštiti potrošača) omogućuje potrošaču da zahteva da prodavac popravi robu ili može da traži da je prodavac zameni, u svakom slučaju besplatno, osim ako je to nemoguće ili nesrazmerno. Neko pravno sredstvo će se smatra-

[350] *Sl. list RCG* Br. 26/07

[351] Zakon o obligacionim odnosima Crne Gore *Sl. list RCG* Br. 47/08.

ti nesrazmernim ako nameće troškove prodavcu koji, u poređenju sa alternativnim pravnim sredstvom, su nerazumni, imajući u vidu: i) vrednost koju bi roba imala da nema nesukladnosti, ii) značaj nesukladnosti, i iii) da li bi alternativno pravno sredstvo moglo biti ispunjeno bez veće nepogodnosti za potrošača, uzimajući u obzir vrstu robe i svrhu za koju je potrošaču roba bila potrebna.

Kriterijum nesrazmernosti, kako je dato u članu 3. (3) Direktive 99/44 nije transponovan u zakonodavstvo Bosne i Hercegovine, ni u Zakon o zaštiti potrošača ni u bosansko-hercegovački Zakon o obligacionim odnosima. Međutim, princip srazmernosti je opšti princip koji proističe iz načela savesnosti i poštenja navedenog u članu 12. bosansko-hercegovačkog Zakona o obligacionim odnosima, koji generalno daje mogućnost tumačenja člana 18. Zakona o zaštiti potrošača ili 488. Zakona o obligacionim odnosima u svetlu odredbi člana 3 (3) Direktive 99/44. Situacija je slična u Hrvatskoj. Odredba Zakona o obveznim odnosima o odgovornosti prodavca za materijalne nedostatke ne predviđa kriterij srazmernosti za određivanje da li je neko određeno pravno sredstvo dostupno. Međutim, isti rezultat može da se postigne tumačenjem pravila o materijalnim nedostacima u skladu sa načelom savjesnosti i poštenja. Temeljem člana 4. Zakona o obveznim odnosima „u zasnivanju obveznih odnosa i ostvarivanju prava i obveza iz tih odnosa sudionici su dužni pridržavati se načela savjesnosti i poštenja“. Isti princip savjesnosti i poštenja, kako se predviđa u makedonskom Zakonu o obligacionim odnosima će se primeniti kada se kriterijum srazmernosti uzima u razmatranje. U Crnoj Gori nema transponovanja ispitivanja srazmernosti, što odgovara rezultatu uređivanja pravnih sredstava bez hijerarhijskog reda[352].

Trenutno nema transponovanja ispitivanja srazmernosti u srpskom zakonodavstvu. Po nacrtu predloga, kada usluge nisu u saglasnosti sa ugovorom, potrošač ima pravo: (a) da nesaobraznost bude otklonjena izvršenjem u skladu sa prvobitnim nalogom, (b) na smanjenje cene, i (c) na raskid ugovora. Potrošač ima pravo da izabere između tih opcija. Ako trgovac ne ispoštuje zahtev potrošača da otkloni nesaobraznost izvršenjem u skladu sa prvobitnim nalogom, potrošač ima pravo da isto takvo izvršenje ostvari na drugom mestu, o trošku trgovca. Trgovac je u obavezi da bez odlaganja nadoknadi troškove izvršenja ostvarenog na drugom mestu. U svim drugim aspektima, odredbe budućeg srpskog zakona o zaštiti potrošača koje se odnose na obavezu trgovca u vezi nesaobraznosti isporučene robe pod ugovorima o prodaji, primenjivaće se shodno odgovornosti trgovca za nesaobraznost pruženih usluga u ugovorima za pružanje usluga.

aa. Nemogućnost

Pravila o nemogućnosti kako su data u Direktivi 99/44 nisu transponovana u Zakon o zaštiti potrošača Albanije. U odgovarajućim slučajevima primenjivaće se opšta pravila Građanskog zakonika.

U Hrvatskoj, po pitanju nemogućnosti, mogu sa primeniti pravila iz člana 269. i 270. Zakona o obveznim odnosima. Na osnovu tih pravila „činidba mora biti moguća“ kako bi nastala ugovorna obaveza. To je takođe u skladu sa članom 8 (2) Direktive 99/44, koja predviđa da se mogu propisati ili zadržati striktnije odredbe, koje su u skladu s Ugovorom u oblasti koju pokriva ova Direktiva, da bi obezbedile viši nivo zaštite potrošača.

[352] Interesantno je primetiti da je redovna praksa sudova u slučajevima nesaobraznosti pod Zakonom o obligacionim odnosima bila da ako je popravka nemoguća, ili nije opravdana, prodavac je u obavezi da obezbedi kupcu drugu stvar bez nedostataka, drugim rečima kupac može da zahteva drugu stvar, ako nedostatak ne može da se popravi ili je njegova popravka ekonomski neopravdana.

Član 18. Zakona o zaštiti potrošača Bosne i Hercegovine se ne poziva na nemogućnost izvršenja. Na osnovu člana 490. (2) bosansko-hercegovačkog Zakona o obligacionim odnosima kupac može da raskine ugovor čak i bez dopuštanja naknadnog vremenskog roka, koji je u svim drugim slučajevima neophodan, ako kupac, nakon što je obavešten o nedostacima, obavesti potrošača o svojoj nameri da ne izvrši ugovor ili ako okolnosti određenog slučaja ne učine očiglednim da prodavac neće biti u stanju da izvrši ugovor čak ni u naknadnom vremenskom roku.

U Makedoniji, u slučaju nemogućnosti primenjuju se opšta pravila o nemogućnosti izvršenja kako je definisano u Zakonu o obligacionim odnosima (član 126–127).

Imajući u vidu činjenicu da u Crnoj Gori potrošač ima na početku slobodu izbora između sva četiri pravna sredstva, nijedan od njih nije ograničen na osnovu nemogućnosti.

Interesantno je da u slučaju da potrošač izabere popravku ili zamenu, i trgovac prihvati njegovu primedbu (poziv na pravno sredstvo), pomoćna primena Zakona o obligacionim odnosima bi aktivirala primenu „razumnog“ vremena za izvršenje ugovora (dovođenje robe u saobraznost). U ovom trenutku opšte zakonodavtsvo o prodaji predviđa da kada okolnosti određenog slučaja naznače bez sumnje da prodavac neće biti u stanju da izvrši ugovor čak ni u naknadnom vremenskom roku, ugovor može da se raskine.

U Srbiji nema *per se* implementacije pravila o nemogućnosti. Treba napomenuti da pod Nacrtom predloga, kada trgovac dokaže da je otklanjanje nesaobraznosti popravkom ili zamenom nezakonito, nemoguće ili bi trgovcu napravilo nesrazmerni napor, potrošač može da izabere da se smanji cena ili raskine ugovor. Napor trgovca je nesrazmeran ako mu stvara troškove koji, u poređenju sa smanjenjem cene ili raskidom ugovora, su preveliki, imajući u vidu vrednost robe da nije bilo nesaobraznosti i značaj nesaobraznosti.

c. „Besplatno“ (član 3 paragraf (4))

U članu 31 (4,b) albanskog Zakona o zaštiti potrošača izraz „besplatno“ u tački 3 i 4 se odnosi na neophodne troškove načinjene za dovođenje robe u stanje sukladnosti, posebno troškovi pošte, rada i materijala.

Pod članom 410 (4) Zakona o obveznim odnosima Hrvatske „troškove otklanjanja nedostatka i predaje druge stvari bez nedostatka snosi prodavatelj“.

U Bosni i Hercegovini uslov „besplatno“ nije transponovan u nacionalno zakonodavstvo.

Makedonski Zakon o obligacionim odnosima ne navodi eksplicitno da su popravka ili zamena „besplatni“ za kupca u opštim pravilima odgovornosti za materijalne nedostatke. On međutim navodi, da je popravka ili zamena obaveza prodavca koja treba da se shvati da će biti izvršena o njegovom trošku. Pored toga, član 493. (u okviru poglavlja o garanciji za pravilno funkcionisanje stvari) objašnjava da je trgovac tj. proizvođač u obavezi da o svom trošku pošalje robu u mesto gde treba da se popravi ili zameni, kao i da vrati kupcu popravljenu tj zamenjenu robu. U toku popravke/zamene prodavac snosi rizik za oštećenja ili uništenje proizvoda. U Zakonu o zaštiti potrošača (član 43, paragraf 1, prvi pasus) se jasno navodi da potrošač ima pravo na besplatnu popravku ili zamenu robe sa nedostacima. Član 45., paragraf 4 Zakona o zaštiti potrošača predviđa da će isporuku proizvoda obimnijih od 1 m^3 ili težih od deset kila u slučaju popravke, procene, zamene ili vraćanja potrošaču, trgovac izvršiti besplatno. U slučaju neizvršenja ove obaveze i u slučajevima kada u mestu boravišta potrošača nema trgovca ili proizvođača, isporuku i povratak proizvoda može da izvrši sam potrošač. U tom slučaju trgovac je u obavezi da nadoknadi neophodne troškove koji se odnose na isporuku i vraćanje proizvoda. Slično tome, član 22, paragraf 5 Zakona o zaštiti potrošača predviđa da troškovi za materijal, rezervne delove, rad, transfer i transport proizvoda koji nastanu u to-

ku otklanjanja nedostataka ili zamene proizvoda novim proizvodom na osnovu garancije, će biti na teret davaoca garancije.

U Crnoj Gori, pravno sredstvo potrošača u slučaju nesaobraznosti mora da bude dato besplatno, i prodavac mora da snosi troškove pošte, rada i materijala, kao i ostale relevantne troškove. Zakon o zaštiti potrošača ne formuliše uslov „besplatno“, ali Zakon o obligacionim odnosima to čini. Ipak, potonji ne sadrži definiciju izraza „besplatno“, već samo predviđa da troškove za dovođenje robe u stanje saobraznosti (popravka ili zamena) snosi prodavac[353]. Nema sumnje da bi u praksi to podrazumevalo sve povezane troškove – na primer kao one u Direktivi.

U Srbiji, Zakon o zaštiti potrošača iz 2005, nema izričito pravilo o troškovima za popravku ili zamenu. Isto važi za Zakon o obligacionim odnosima. Pored toga, po članu 497. Zakona o obligacionim odnosima, raskid ugovora usled nedostataka u robi će imati efekat raskida ugovora usled neizvršenja jedne od strana. Kupac će dugovati prodavcu nadoknadu za koristi od robe koju je imao neko vreme, čak iako nije u stanju da vrati robu ili deo robe, a ugovor je raskinut[354].

d. Vremenski rokovi za odgovornost prodavca

aa. Vremenski rok od dve godine

Član 5(1) Direktive 99/44 predviđa da je prodavac odgovoran za nesaobraznost koja se pojavi u roku od dve godine od isporuke.

Član 30 (1) Zakona o zaštiti potrošača Albanije predviđa da će se prodavac smatrati odgovornim kada nesaobraznost postane očigledna u roku od dve godine od isporuke robe.

Bosansko-hercegovački Zakon o obligacionim odnosima tradicionalno pravi razliku između vidljivih i skrivenih nedostataka. U istom smislu, član 18. (2) Zakona o zaštiti potrošača je primenio član 5 (1) Direktive određivanjem perioda od osam dana za upotrebu pravnih sredstava datih u članu 18 (1) Zakona o zaštiti potrošača u slučaju vidljivih nedostataka, i dve godine od isporuke u slučaju skrivenih nedostatka. Na osnovu bosansko-hercegovačkog Zakona o obligacionim odnosima, pravna sredstva data u članu 488. bosansko-hercegovačkog Zakona o obligacionim odnosima mogu da se iskoriste u roku od šest meseci u slučaju skrivenih nedostataka.

U Hrvatskoj, član 5 (1) Direktive 99/44 je transponovan u član 404 (2) Zakona o obveznim odnosima, koji predviđa da prodavac ne odgovara za nedostatke koji se pokažu pošto proteknu dve godine od predaje stvari, a kod trgovačkog ugovora šest meseci. Međutim, član 404 (4) Zakona o obveznim odnosima predviđa da se ti rokovi mogu produžiti ugovorom. Dalje, član 407. Zakona o obveznim odnosima predviđa da kupac ne gubi pravo da se pozove na neki nedostatak i kad nije ispunio svoju obvezu pregleda stvari bez odgađanja, ili obvezu da u određenom roku obavesti prodavca o postojanju nedostatka, a i kad se nedostatak pokazao tek nakon proteka dve godine, odnosno kod trgovačkih ugovora šest meseci od predaje stvari, ako je taj nedostatak bio poznat prodavcu ili mu nije mogao ostati nepoznat. Takođe

[353] Član 496. paragraf 4 Zakona o obligacionim odnosima.

[354] Po Nacrtu predloga, potrošač će imati pravo da mu se nesaobraznost ispravi potpuno besplatno. Pored njegovog prava da mu se nesaobraznost ispravi popravkom ili zamenom, ili da se smanji cena, ili raskine ugovor; potrošač će imati pravo da traži obeštećenje za svaki gubitak koji je posledica nesaobraznosti, pod opštim uslovima o odgovornosti za štetu. Po Nacrtu predloga, u odnosu na komercijalne garancije, trgovac ili proizvođač će snositi troškove transporta robe u cilju njene popravke ili zamene, kao i troškove slanja popravljene ili zamenjene robe nazad potrošaču. Trgovac ili proizvođač će snositi rizik za gubitak ili oštećenje robe za vreme gore navedenog perioda.

postoji dvogodišnji rok u članu 422 (1) Zakona o obveznim odnosima protekom kojeg se gase sva prava kupca[355].

U makedonskom zakonodavstvu nema tačnog transponovanja pravila o „dvogodišnjem roku". Članom 488. Zakona o obligacionim odnosima, kupac, koji je na vreme obavestio prodavca o postojanju nedostatka (nesaobraznosti) gubi svoja prava u roku od jedne godine, računajući od dana kada je poslato obaveštenje, osim ako je prevarom prodavca kupac sprečen od upražnjavanja svojih prava. Kupac koji je na vreme obavestio prodavca može nakon isteka tog roka, zahtevati smanjenje cene ili obeštećenje kao prigovor na zahtev prodavca za plaćanje cene, pod uslovom da kupac još nije izvršio plaćanje. Članom 46. Zakona o zaštiti potrošača, potrošač ima pravo da ispostavi zahteve po pitanju svojih prava u slučaju nesaobraznosti ako su nedostaci na proizvodu otkriveni u garantnom roku, ili u okviru perioda kada je proizvod mogao da se koristi, određenog od strane proizvođača. Za proizvode bez određenog garantnog roka, potrošač ima pravo da proizvođaču ispostavi zahteve, ako su otkriveni u roku od šest meseci od isporuke proizvoda, osim ako duži rokovi nisu predviđeni ugovorom ili nekim drugim zakonom. Zahtevi ne mogu da se ispostave u odnosu na proizvode čiji nedostaci su otkriveni nakon roka trajanja, ili nakon perioda u kome je proizvod mogao da se upotrebljava. Rokovi, dati u ovom članu, počinju da teku od dana kada je proizvod isporučen potrošaču, a ako ne mogu biti utvrđeni, od datuma proizvodnje. Biće obavezno da se navedu rokovi trajanja za proizvode čije upotrebne osobine mogu da se pogoršaju nakon određenog perioda (netrajni proizvodi) i koji mogu predstavljati opasnost po život i zdravlje ili imovinu potrošača i okruženja i prirode (namirnice, kozmetički proizvodi, lekovi, hemijski proizvodi za zadovoljenje potreba stanovništva itd.). Rokovi upotrebe će početi da teku od datuma proizvodnje.

U Crnoj Gori takođe nema tačnog transponovanja dvogodišnjeg perioda. Umesto toga, opšte pravilo je da su prava dostupna pod uslovom da potrošač uloži žalbu odmah nakon što postane svestan nesaobraznosti (nedostatka) proizvoda a najkasnije šest meseci nakon preuzimanja proizvoda. U slučaju pogrešne cene konačan datum je tri dana od datuma plaćanja fakture, dok je za javne servise rok za cenu osam dana (član 23 (1, 3, 4) Zakona o zaštiti potrošača). Povrh toga, Zakon o obligacionim odnosima dalje uređuje ovaj predmet i predviđa da će prava kupca (blagovremeno obaveštavanje prodavca o postojanju nedostatka) biti izgubljena nakon isteka jedne godine, računajući od dana saopštavanja tog obaveštenja prodavcu. Taj period može da se produži samo u slučaju da je kupac bio sprečen da koristi svoja prava obmanom od strane prodavca (član 508. (1) Zakona o obligacionim odnosima).

U Srbiji, po članu 34. Zakona o zaštiti potrošača, potrošač će imati pravo da uloži žalbu o nesaobraznosti, u roku od šest meseci od datuma kada je stekao proizvod ili uslugu za koju je izdata garancija. Ovlašćeno lice će odlučiti o žalbi istog dana kada se uloži, a najkasnije osam dana od dana kada je žalba uložena.

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[355] Član 422 (1) Zakona o obveznim odnosima: „Prava kupca koji je pravodobno obavijestio prodavatelja o postojanju nedostatka gase se nakon isteka dvije godine, računajući od dana odašiljanja obavijesti prodavatelju, osim ako je prodavateljevom prijevarom kupac bio spriječen da ih ostvaruje". Ali postoji izuzetak predviđen u članu 422 (2) Zakona o obveznim odnosima: „(2) Međutim, kupac koji je pravodobno obavijestio prodavatelja o postojanju nedostataka može nakon proteka ovoga roka, ako još nije isplatio cijenu, zahtijevati da se cijena snizi ili da mu se naknadi šteta, kao prigovor protiv prodavateljeva zahtjeva da mu se isplati cijena". Županijski sud u Varaždinu, Gž. 1074/08–2 od 4.08. 2008. je odlučio da „kupac je iznimno ovlašten i nakon proteka prekluzivnog roka od dvije godine, ukoliko nije isplatio kupoprodajnu cijenu, zahtijevati da se ugovorena cijena snizi ili da mu se naknadi šteta zbog materijalnih nedostataka, na način da u parnici istakne prigovor protiv zahtjeva prodavatelja da mu isplati ugovorenu cijenu(...)"..

Rokovi koji su propisani u srpskom Zakonu o obligacionim odnosima su neprihvatljivo kratki iz perspektive Direktive o prodaji robe široke potrošnje, posebno imajući u vidu razliku koja je napravljena između vidljivih i neprimetnih nedostataka. Prodavac neće biti odgovoran za nedostatke koji se pojave šest meseci posle isporuke robe, osim ako duži rok nije predviđen. Kada se neispravna roba popravi, zameni, ili delimično zameni, onda rok počinje da teče od isporuke popravljene, zamenjene ili delimično zamenjene robe. Obaveštenje kupca o nedostatku u robi će obuhvatiti detaljan opis neispravnosti i poziv upućen prodavcu da pregleda taj predmet. Ako obaveštenje o nedostatku, inače blagovremeno poslato prodavcu od strane kupca preporučenom poštom, telegramom ili na neki drugi pouzdan način, zakasni ili uopšte ne dođe do prodavca, smatraće se da je kupac izvršio svoju dužnost da obavesti prodavca. Treba očekivati da će se situacija popraviti nakon usvajanja novog Zakona o zaštiti potrošača. Po Nacrtu predloga, trgovac će biti odgovoran za nesaobraznost ako nesaobraznost postane očigledna u roku od dve godine od vremena kada je rizik prešao na potrošača. Duži rok može da se predvidi. U slučaju manje popravke, garantni rok će se produžiti za vreme u kome je potrošač bio sprečen da koristi robu. U slučaju ozbiljne popravke ili zamene, garantni rok će početi da teče ispočetka od vremena kada je potrošač ili neko treće lice osim prevoznika i označeno od strane potrošača steklo materijalni posed nad zamenjenom robom.

bb. Opcija: smanjeni rok za polovnu robu

Opcija za smanjenje „dvogodišnjeg perioda“, propisana u članu 7(1) Direktive nije transponovana u zakonodavstvo Albanije, Bosne i Hercegovine, Makedonije, Crne Gore i Srbije.

U Hrvatskoj, član 404 (3) Zakona o obveznim odnosima propisuje da „kod prodaje rabljenih stvari ugovorne strane mogu ugovoriti rok od jedne godine, a kod trgovačkih ugovora i kraći rok“. Ponovo, član 404 (4) Zakona o obveznim odnosima predviđa da taj rok može da se produži ugovorom.

Zemlje učesnice koje koriste opciju iz člana 7(1)	Zemlje učesnice koje ne koriste opciju iz člana 7(1)
HR	AL, BiH, MAK, CG, SRB

cc. Opcija: obaveza obaveštavanja o nesaobraznosti u roku od 2 meseca

Član 5. paragraf (2) Direktive daje zemljama članicama opciju da predvide da potrošač mora da obavesti prodavca o nesaobraznosti u roku od dva meseca od datuma kada je potrošač to otkrio.

Ta opcija nije transponovana u zakonodavstvo Albanije.

U Bosni i Hercegovini transponovana je u član 19. (3) Zakona o zaštiti potrošača.

U Hrvatskoj je transponovana u član 403. (4) Zakona o obveznim odnosima, prema kojem kod potrošačkih ugovora potrošač kao kupac nije obvezan pregledati stvar niti je dati na pregled, ali je obvezan obavijestiti prodavca o postojanju vidljivih nedostataka u roku od dva meseca od dana kad je otkrio nedostatak, a najkasnije u roku od dve godine od prelaska rizika na potrošača. Slična odredba koja se tiče svih drugih ugovora o prodaji je predviđena u članu 404 Zakona o obveznim odnosima. Prema toj odredbi, kad se nakon primitka stvari od strane kupca pokaže da stvar ima neki nedostatak koji se nije mogao otkriti uobičajenim pregledom prilikom preuzimanja stvari, kupac je dužan, pod prijetnjom gubitka prava, o tom nedostatku obavestiti prodavca u roku od dva meseca računajući od dana kad je nedostatak otkrio, a kod trgovačkog ugovora – bez odgađanja.

Obaveza obaveštavanja o nesaobraznosti se različito reguliše u makedonskom zakonodavstvu. Kupac je u obavezi da obavesti prodavca o uočenim nedostacima što je pre moguće

ali najkasnije za osam dana. Ako se inspekcija izvrši u prisustvu obe strane obaveštenje treba izvršiti odmah (član 469, paragraf 1 i 2 Zakona o obligacionim odnosima). U slučaju da su nedostaci skriveni kupac treba da obavesti prodavca u roku od osam dana od kada je postao svestan nedostatka, a najkasnije šest meseci od dana prijema proizvoda (član 470 Zakona o obligacionim odnosima). Ovo pitanje je slično regulisano u Crnoj Gori. Rok za obaveštenje počinje odmah nakon saznanja o nesaobraznosti (nedostatku) proizvoda i traje najduže šest meseci nakon preuzimanja proizvoda. Dovoljno je poslati pisanu izjavu[356] o tome pre isteka tog perioda. Kao što je ranije rečeno, u slučaju pogrešne cene konačan datum je tri dana od datuma plaćanja fakture, dok je za javne usluge rok za cenu osam dana od dana primanja fakture[357].

Po članu 481-485 srpskog Zakona o obligacionim odnosima, kupac će biti u obavezi da pregleda robu na uobičajen način, ili da preda da se pregleda što je pre moguće u redovnom sledu događaja, i da obavesti prodavca o svim vidljivim nedostacima, u roku od osam dana, a u slučaju komercijalnih ugovora – bez odlaganja. U suprotnom slučaju, kupac će izgubiti prava koja se odnose na vidljive nedostatke. Nakon pregleda robe u prisustvu obeju strana, kupac će odmah obavestiti prodavca o svojim primedbama po pitanju vidljivih nedostataka. U suprotnom slučaju, kupac će izgubiti svoja prava u odnosu na vidljive nedostatke. U slučaju skrivenih nedostataka (nedostaci koji se ne mogu otkriti običnim pregledom), kupac je u obavezi da obavesti prodavca o njihovom postojanju u roku od osam dana od otkrića, u suprotnom slučaju, kupac će izgubiti svoja prava u odnosu na skrivene nedostatke.

Zemlje učes. koje koriste opciju obaveštavanja	Zemlje učes. koje ne koriste opciju obaveštavanja
BiH, HR, CG, MAK, SRB (sa varijacijom)	AL

dd. Opcija: suspenzija dvogodišnjeg perioda

Opcija za suspenziju dvogodišnjeg perioda nije transponovana u zakonodavstvo Albanije i Bosne i Hercegovine.

Zakonima o obligacionim odnosima u Hrvatskoj (član 405. Zakona o obveznim odnosima), Makedoniji (član 472. Zakona o obligacionim odnosima), Crnoj Gori (član 491. Zakona o obligacionim odnosima) i Srbiji (član 483. Zakona o obligacionim odnosima), kada je usled nedostatka došlo do popravke robe, isporuka drugog proizvoda (zamena), zamena delova itd., propisani rokovi za obaveštenje počinju od dana isporuke popravljene robe, isporuke druge robe, ili izvršene zamene delova. Pored ovog pravila u makedonskom Zakonu o zaštiti potrošača (član 48, paragraf 3 i 4) u slučaju otklanjanja nedostatka proizvoda, garantni rok se produžava za period u kome proizvod nije bio korišćen. Taj period će se računati od dana zahteva potrošača za otklanjanje tog nedostatka. U slučaju otklanjanja nedostatka zamenom robe koja je montirana ili koja je komponenta proizvoda koji ima određeni garantni rok, garantni rok za novu robu koja je montirana ili komponenta robe počinje da teče od dana kada je roba isporučena potrošaču.

ee. Pretpostavka nesaobraznosti tokom prvih 6 meseci

Pretpostavka iz člana 5(3) Direktive 99/44 je transponovana u albanski Zakon o zaštiti potrošača gde član 30 (2) predviđa da osim ako se drugačije ne dokaže, svaka nesaobraznost koja postane očevidna, u periodu od šest meseci od isporuke robe, smatraće se da je postoja-

[356] Član 492. paragraf 2 Zakona o obligacionim odnosima.
[357] Član 26. paragraf 1, 3 i 4 Zakona o zaštiti potrošača.

la u vreme isporuke, osim ako ta pretpostavka nije kompatibilna sa vrstom robe ili vrstom nesaobraznosti. U zakonodavstvu Bosne i Hercegovine, član 5 (3) Direktive 99/44 nije transponovan[358].

U Hrvatskoj prema članu 400 (3) Zakona o obveznim odnosima se predmnijeva da je nedostatak koji se pojavio u roku od šest meseci od prelaska rizika postojao u vrijeme prelaska rizika, osim ako prodavac ne dokaže suprotno ili suprotno proizlazi iz naravi stvari ili naravi nedostatka.

Članom 470. makedonskog Zakona o obligacionim odnosima, u slučaju skrivenih nedostataka (nedostaci koji nisu mogli biti uočeni redovnim pregledom tokom isporuke robe), kupac je u obavezi da obavesti prodavca u roku od osam dana od otkrivanja nedostatka, sa time da je to u roku šest meseci nakon kupovine robe, osim ako se strane nisu dogovorile o dužem roku. Taj rok ne zavisi od vrste robe ili vrste nesaobraznosti. Može se zaključiti da je ovo pravilo primenjeno u makedonskom zakonodavstvu.

Crna Gora generalno ispunjava zahtev dat u članu 5(3) Direktive 99/44. Tu, period za upražnjavanje pravnih sredstava ne može biti duži od šest meseci od preuzimanja proizvoda (isporuke proizvoda). Ali Crna Gora ne navodi ograničenje formulisano u članu 5 (3) Direktive da se pretpostavka ne primenjuje tamo gde bi to bilo nekompatibilno sa vrstom robe ili vrstom nesaobraznosti.

Po članu 34. srpskog Zakona o zaštiti potrošača iz 2005, potrošač će imati pravo na žalbu po pitanju proizvoda ili usluge za koje je izdata garancija, u slučaju nedostataka koji se pojave u roku od šest meseci nakon dana dobijanja tog proizvoda ili usluge. Srpski Zakon o obligacionim odnosima (član 481-485) predviđa rokove za obaveštavanje prodavca i ispostavljanje zahteva kako je predviđeno zakonom tj. u slučaju otkrivenih nedostataka u roku od 8 dana i 6 meseci, osim ako se drugačije ne usaglasi za skrivene nedostatke[359].

e. Nema raskida za 'manju' nesaobraznost (član 3 paragraf 6))

Potrošač neće imati pravo na raskid ugovora u slučaju manje nesaobraznosti u Albaniji (član 31 (7) Zakona o zaštiti potrošača), Hrvatskoj (član 410 (3) Zakona o obveznim odnosima), Makedoniji (član 466(3) Zakona o obligacionim odnosima i član 22(2) Zakona o zaštiti potrošača), Crnoj Gori (član 486(3) Zakona o obligacionim odnosima), Srbiji i Bosni i Hercegovini (član 478 i 629 Zakona o obligacionim odnosima).

Zakon o zaštiti potrošača Bosne i Hercegovine ne isključuje raskid u slučaju neznatne nesaobraznosti stoga pruža viši nivo zaštite potrošača.

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[358] U Bosni i Hercegovini ova pretpostavka je transponovana samo u član 539 Nacrta Zakona o obligacionim odnosima od 2010.

[359] U Srbiji, po Nacrtu predloga, trgovac će biti odgovoran prema potrošaču za svaku nesaobraznost koja postoji u vreme kada rizik prelazi na potrošača. Trgovac će biti odgovoran za svaku nesaobraznost koja se pojavi nakon što je rizik prešao na potrošača, ako su uzroci nesaobraznosti postojali pre prelaska rizika. Osim ako se ne dokaže drugačije, svaka nesaobraznost koja postane vidljiva u roku od šest meseci od vremena kada je rizik prešao na potrošača, pretpostavljaće se da je postojala u to vreme osim ako je ta pretpostavka nespojiva sa vrstom robe i **vrstom nesaobraznosti**. Dalje, po Nacrtu predloga, rizik od slučajnog gubitka ili oštećenja robe će preći na potrošača kada on ili neko treće lice osim prevoznika i naznačeno od strane potrošača, stekne materijalni posed nad robom. Rizik neće preći na potrošača ako je on raskinuo ugovor usled nesaobraznosti u isporučenoj robi, ili ako je tražio zamenu robe. Ako potrošač ili neko treće lice osim prevoznika i naznačeno od strane potrošača, nije preduzeo razumne postupke da stekne materijalni posed nad robom, rizik će preći na potrošača u vreme kada je isporuka dogovorena između strana ili, u slučaju da se strane nisu dogovorile o datumu isporuke, trideset dana nakon datuma zaključenja ugovora.

f. Raskid i naknada za period upotrebe

Alineja 15 navodi da zemlje učesnice mogu da predvide da kada potrošač ima pravo na nadoknadu kupovne cene, odbitak može da se načini koji uzima u obzir period u kome je potrošač koristio robu od vremena kada mu je isporučena.

Ova opcija ne postoji u albanskom Zakonu o zaštiti potrošača. Međutim, Građanski zakonik u članu 742. sadrži opštu obavezu prodavca i kupca da vrate ono što su primili za vreme izvršenja ugovora, navodeći da „*U slučaju raskida ugovora, prodavac mora da vrati plaćenu cenu i plati kupcu troškove i plaćanja koja zahteva zakon. Kupac mora da vrati stvar ako nije izgubljena ili uništena kao posledica svojih nedostataka*“, dok član 744. posebno obrađuje pitanje odbitka. U drugoj rečenici, propisan je kriterijum za odbitak: „*Ako umanjena vrednost ili šteta dođe kao rezultat postupka kupca, gornji iznos mora da se umanji za profit koga je kupac ostvario, osim kako je propisano u članu 640*“[360].

U Bosni i Hercegovini, postojanje ove opcije se povlači iz analize efekata raskida ugovora. Naime, na osnovu člana 497. bosansko-hercegovačkog Zakona o obligacionim odnosima raskid ugovora zbog nedostatka stvari će imati isti efekat kao i raskid dvostranih ugovora zbog neispunjenja. Efekti raskida zbog neizvršenja su dati u članu 132. (4) bosansko-hercegovačkog Zakona o obligacionim odnosima koji navodi da „svaka strana duguje drugoj strani nadoknadu za koristi koje je uživala u međuvremenu“ . Isti slučaj je u Hrvatskoj (član 419. (1) u vezi sa članom 368. Zakona o obveznim odnosima), Makedoniji (član 121. u vezi sa članom 485. Zakona o obligacionim odnosima), Crnoj Gori (član 127.(4) u vezi sa članom 505. Zakona o obligacionim odnosima), Srbiji (član 497. Zakona o obligacionim odnosima).

g. Obračun smanjenja cene

Albanski zakon predviđa da potrošač može da zahteva odgovarajuće smanjenje cene ili da ugovor bude raskinut ako potrošač nema pravo ni na popravku ni na zamenu, ili ako prodavac nije izvršio popravku ili zamenu.

U Bosni i Hercegovini, na osnovu člana 498. bosansko-hercegovačkog Zakona o obligacionim odnosima cena će biti smanjena u skladu sa srazmerom vrednosti stvari sa nedostatkom u vreme zaključenja ugovora. Na osnovu tog pristupa, cena će biti smanjena u istom odnosu kao i vrednost robe kako je isporučena u odnosu na vrednost koju bi imala da je bila u skladu sa ugovorom. Isti princip je primenjen u Hrvatskoj (član 420 Zakona o obveznim odnosima) gde dodatno na taj iznos prodavac je u obavezi da plati kamatu za period od plaćanja da refundiranja[361].

Slična odredba postoji u makedonskom Zakonu o obligacionim odnosima (član 486) koji je na određeni način dopunjen članom 49. Zakona o zaštiti potrošača, koji predviđa pravila koja će se primeniti u slučajevima kada je bilo promene u ceni od vremena kupovine do vremena zahteva. Naime, u slučajevima povećanja cene proizvoda revizija cene će biti načinjena, uzimajući u obzir cenu proizvoda u vreme ispostavljanja zahteva, a u slučaju da se cena proizvoda u međuvremenu smanjila, onda će u obzir biti uzeta cena proizvoda u vreme kupovine. Takođe, u crnogorskom Zakonu o obligacionim odnosima smanjenje cene će biti izvršeno u skladu sa odnosom između vrednosti robe bez nedostataka, i vrednosti robe sa nedostacima, u vreme zaključenja ugovora. U Srbiji, to se reguliše i Zakonom o zaštiti potrošača i Zakonom o obligacionim odnosima. Odredbe Zakona o obligacionim odnosima (članovi 498 i 621) su iste kao i u Bosni i Hercegovini, Hrvatskoj, Makedoniji i Crnoj Gori, dok po članu

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[360] Član 640. albanskog Građanskog zakonika predviđa nadoknadu štete.

[361] Vrhovni sud Republike Hrvatske (VSRH) Rev 2458/90 od 13.02.1991.

35 Zakona o zaštiti potrošača, to može biti iznos maloprodajne cene takvog proizvoda na dan refundiranja; a u slučaju usluga, povraćaj iznosa koji je plaćen, ili smanjenje cene u srazmeri sa nedostatkom u usluzi koja je pružena. Nema posebne odredbe Zakona o zaštiti potrošača koja se odnosi na obračun smanjenja cene – nasuprot vraćanju maloprodajne cene proizvoda.

3. Garancije

Odredbe o garancijama u članu 6. Direktive zahtevaju da garancije moraju biti pravno obavezujuće, da su date određene informacije, i da garancije ostaju obavezujuće čak i kada pravila iz ovog člana nisu ispunjena.

U albanskom zakonodavstvu (član 32. Zakona o zaštiti potrošača) nijedna ugovorna izjava o garanciji neće lišiti potrošača od prava koje ima po članu 30., 31. i 32. Zakona o zaštiti potrošača. Zakon predviđa više pravila koja se odnose na garanciju kao što su: da je prodavac dužan popuniti garanciju i dati je potrošaču; garancija će biti data potrošaču na albanskom jeziku, napisana na običnom i razumljivom jeziku, i sadržavaće potrebne podatke – naziv robe i usluga, ime i adresa davaoca garancije, rok i teritorijalni domet garancije.

U Bosni i Hercegovini, Zakon o zaštiti potrošača reguliše „garancije za proizvode ili usluge" u svojim članovima 25-27 bez direktnog pozivanja na sadržaj odredbi člana 6 Direktive 99/44. Naime, po članu 250 Zakona o zaštiti potrošača prodavac je odgovoran za materijalne nedostatke robe koji postoje u vreme isporuke, bez obzira da li on zna za tu činjenicu. Članovi 26 i 27 predviđaju zaštitu potrošača za „tehnički složene proizvode", davanjem garantnog roka od tri godine za neke uređaje i pet godina za druge tehnički složene proizvode i postavljaju pravila za popravku takvih proizvoda, rezervne delove, i licencirani servis. Bosansko-hercegovački Zakon o obligacionim odnosima sadrži pravila o garancijama za „tehničku robu", navodeći u članu 501(2) da se „ovim pravilima ne dira u pravila o odgovornosti prodavca za nedostatke stvari". Međutim, bosansko-hercegovački Zakon o obligacionim odnosima ne predviđa da garancija ne utiče na ta pravila, kako je propisano u članu 6 (2) Direktive 99/44. Ostale odredbe član 6 Direktive 99/44 takođe nisu implementirane u bosansko-hercegovačkom Zakonu o obligacionim odnosima. Članovi 501-507 predviđaju pravo potrošača na 'besplatnu' popravku neispravnog proizvoda, sve do restitucije, smanjenja cene, zamene i raskida ugovora u toku garantnog roka.

Član 5 (5) hrvatskog Zakona o zaštiti potrošača predviđa da ako trgovac ili proizvođač da jamstvo za ispravnost prodatog proizvoda dužan je ispuniti obveze propisane odredbama Zakona o obveznim odnosima o jamstvu za ispravnost prodane stvari kao i obveze preuzete jamstvom. Uslov iz člana 6. Direktive 99/44 je ispravno transponovan u član 423. Zakona o obveznim odnosima. Obavezujuća priroda garancije sledi iz člana 423 (1) i (2) Zakona o obveznim odnosima[362]. Temeljem člana 423 (3) Zakona o obveznim odnosima „jamstvo obvezuje pod uvjetima pod kojima je dano bez obzira na oblik u kojem je dano (jamstveni list, usmena izjava, popratno reklamiranje i sl.), ali je kupac ovlašten zahtijevati da mu jamstvo bude izdano u pisanom obliku ili u nekom drugom, njemu dostupnom, trajnom mediju". Od-

[362] Član 423 (1) Zakona o obveznim odnosima: „Ako proizvođač jamči za ispravnost stvari u tijeku određenog vremena, računajući od njezine predaje kupcu, kupac može, ako stvar nije ispravna, zahtijevati kako od prodavatelja tako i od proizvođača, da stvar popravi u razumnom roku ili, ako to ne učini, da mu umjesto nje preda ispravnu stvar". Član 423 (2) Zakona o obveznim odnosima: „Ako prodavatelj jamči za ispravnost stvari u tijeku određenog vremena, računajući od njezine predaje kupcu, kupac može, ako stvar nije ispravna, zahtijevati od prodavatelja da stvar popravi u razumnom roku ili, ako to ne učini, da mu umjesto nje preda ispravnu stvar."

redbe o garanciji ne isključuju primjenu pravila o odgovornosti prodavca za nedostatke stvari (član 423 (4) Zakona o obveznim odnosima). U jamstvu moraju biti navedena prava iz jamstva koja pripadaju kupcu, te jasno navedeno da jamstvo ne utiče na ostala prava koja pripadaju kupcu po drugim pravnim osnovama (član 423 (5) Zakona o obveznim odnosima). Prema članu 423 (6) Zakona o obveznim odnosima „jamstvo mora sadržavati pojedinosti koje su potrebne kupcu za ostvarivanje njegovih prava, a posebno trajanje jamstva i teritorijalno područje važenja, te ime, odnosno naziv i adresu osobe koja je izdala jamstvo". I konačno, član 423(7) Zakona o obveznim odnosima predviđa da neispunjenje obveza iz člana 423 (5) i (6) Zakona o obveznim odnosima ne utječe na valjanost jamstva. Opcija opisana u članu 6 (4) Direktive 99/44 nije upotrebljena.

U Makedoniji, postojeće odredbe o garanciji su veoma slične onima datim u Direktivi. Zakon o obligacionim odnosima predviđa, generalno, izdavanje garancija za pravilno funkcionisanje takozvane tehničke robe, pravila kada prodavac garantuje, koji su rokovi i koja su prava kupca (član 489-495). Po pitanju rokova, Zakon o obligacionim odnosima navodi da je minimalan garantni rok jedna godina a maksimalan rok za popravku robe sa nedostacima 45 dana. Zakon o zaštiti potrošača, u članu 22., reguliše detaljno pitanje garancija. Trgovac će biti u obavezi, u skladu sa tehničkim propisima koji navode proizvode za koje proizvođač, uvoznik, ili predstavnik strane firme mora da izda garanciju za kvalitet ili pravilno funkcionisanje proizvoda, dokument za način upotrebe proizvoda, da obezbedi servis za održavanje i popravku i snabdevanje rezervnim delovima u garantnom roku. Trgovac je u obavezi barem u roku od pet godina od datuma proizvodnje proizvoda ali ne manje od dve godine od roka trajanja garancije proizvoda, da obezbedi rezervne delove. U dogovoru sa potrošačem proizvod može da se servisira najviše tri puta u garantnom roku i ako proizvod nije popravljen, potrošač ima pravo da traži od trgovca da zameni proizvod drugim proizvodom iste vrste koji pravilno funkcioniše i ili da vrati iznos plaćen za kupljeni proizvod. Kao u Zakonu o obligacionim odnosima (član 466(3)), potrošač nema pravo da traži zamenu proizvoda ili vraćanje plaćenog iznosa ako je nedostatak koji se servisira minimalan ili ne utiče na kvalitet i učinak osnovnih funkcija proizvoda. U odnosu na odredbu člana 6 (1) Direktive, Zakon o zaštiti potrošača predviđa da je proizvođač u obavezi da poštuje obaveze iz potvrde o garanciji. Po pitanju zahteva o sadržaju i dejstvu garancije definisane u članu 6 (2) Direktive, Zakon o zaštiti potrošača predviđa da garancija treba da uključi: firmu ili poslovno ime i sedište davaoca garancije; podatke o identifikaciji proizvoda; izjavu o garanciji i uslovima garancije; rok trajanja garancije; rok u kome je trgovac obavezan da postupi na zahtev korisnika garancije i da otkloni nedostatke i kvarove na proizvodu; firmu ili poslovno ime i sedište trgovačke kompanije ili drugog pravnog ili fizičkog lica koje je izvršilo prodaju na malo proizvoda, datum prodaje, pečat i potpis ovlašćenog službenika i izjavu da potrošač ima zakonska prava koja proističu iz nacionalnog zakonodavstva koje reguliše prodaju proizvoda, i da na ta prava garancija neće uticati. Po pitanju zahteva člana 6(3) i člana 6(4) Direktive, Zakonom o zaštiti potrošača je predviđeno da sva dokumentacija koja se odnosi na funkcionisanje proizvoda treba da bude napisana jasno i čitljivo, na makedonskom jeziku i ćiriličnom pismu, što ne isključuje mogućnost dodatne istovremene upotrebe drugih jezika, kao i znakova lako razumljivih za potrošača. Članom 489.(5) Zakona o obligacionim odnosima, neizvršenje obaveza koje se odnose na garanciju ne utiče na važenje garancije što je u skladu sa članom 6(5) Direktive.

Odredbe o garanciji kako je dato u Direktivi, generalno su implementirane u Crnoj Gori u vrlo sličnoj formi. Međutim, crnogorski Zakon o zaštiti potrošača je takođe otišao izvan nekih zahteva Direktive posebno u informacionom sadržaju garancije jer je proširio spisak (npr. podaci za identifikaciju proizvoda i podaci o kupovini; datum isporuke proizvoda potrošaču; prava potrošača na osnovu garancije; ostali podaci u skladu sa zakonom kao i navodi iz

reklamnog materijala). Zahtev za uvođenje pozivanja na zakonska prava potrošača nedostaje samo na prvi pogled, ali tumačenje člana 20, paragraf 1, tačka 11) se odnosi na slučaj takozvane „tehničke robe“ a član 509 paragraf 3 Zakona o obligacionim odnosima sadrži odredbu identičnu Direktivi. Što se tiče uslova da garancije moraju da budu pravno obavezujuće, Zakon o zaštiti potrošača sadrži istu odredbu, mada sa drugačijim tekstom (član 19 (2)). Isti zakon definiše potvrdu o garanciji kao dokument koji prati robu i sadrži podatke propisane zakonom što jasno znači da mora da bude u pisanoj formi, bez obzira da li je obavezna ili dobrovoljna (član 19(1); u tom stepenu član 82. Zakona o zaštiti potrošača je takođe od značaja. Jezik koji je u zvaničnoj upotrebi u Crnoj Gori je obavezan, dok druge forme trajnih medijuma nisu date kao opcija. Dalje, potrošač će imati prava koja proističu iz garancije bez obzira da li je trgovac isporučio potvrdu o garanciji u pisanoj formi, u kom slučaju teret dokazivanja da je garancija isporučena je na trgovcu (član 19(3)). Po pitanju pravnih sredstava pod garancijom, hijerarhija potrošačevih pravnih sredstava (član 21 Zakona o zaštiti potrošača u vezi sa članom 510 Zakona o obligacionim odnosima) odgovara onoj u Direktivi. Održavanje ugovora je prva opcija (popravka robe), i samo tad kada popravka nije izvršena u razumnom vremenu raskid ugovora postaje opcija. Međutim, potrošač ne može da upražnjava svoja prava ako je nesaobraznost proizvoda izazvana greškom potrošača ili ako ju je ispravljalo neovlašćeno lice (član 22(2) Zakona o zaštiti potrošača).

Garancije regulišu Zakon o zaštiti potrošača i Zakon o obligacionim odnosima i u Srbiji takođe. Naime, član 21 Zakona o zaštiti potrošača se odnosi na zakon o ugovorima u odnosu na komercijalne garancije („Davaoc garancije će biti u obavezi da obezbedi servisiranje proizvoda potrošaču, u skladu sa zakonom o ugovoru.“). Po Zakonu o obligacionim odnosima (član 501 et seq) ako prodavac tehničke robe preda kupcu pisanu garanciju koju je izdao proizvođač za pravilno funkcionisanje u okviru određenog roka, računajući od trenutka isporuke robe kupcu, kupac može, ako roba ne funkcioniše ispravno, da traži i od proizvođača i od prodavca da poprave robu u razumnom roku, ili, bez toga, da je zameni onom koja funkcioniše ispravno. Ta pravila su, bez štete po odgovornost prodavca, za nesaobraznost robe. Kupac može da traži bilo od prodavca bilo od proizvođača da popravi ili zameni tehničku robu u okviru garantnog roka, bez obzira na trenutak kada se pojavilo neispravno funkcionisanje. On će imati pravo na nadoknadu zbog činjenice da nije bio u mogućnosti da upotrebljava robu od trenutka kada je tražio popravku ili zamenu pa do njenog izvršenja. Ako prodavac ne izvrši popravku ili zamenu robe u nekom razumnom roku, kupac može da raskine ugovor ili smanji cenu i traži odštetu. Prava kupca u odnosu na proizvođača prestaju jednu godinu nakon dana kada je tražio da prodavac izvrši popravku ili zamenu robe.

4. Pravo na nadoknadu

Po albanskom Zakonu o zaštiti potrošača trajanje zakonske garancije će biti automatski produženo nakon popravke radi pokrivanja budućeg ponovnog pojavljivanja istog nedostatka. U tom slučaju, potrošač će imati pravo za traži zamenu umesto druge popravke (član 31 (5) Zakona o zaštiti potrošača). Rok za žalbu i popravku se dodaje na garantni rok (član 31(8) Zakona o zaštiti potrošača).

U Bosni i Hercegovini, Hrvatskoj, Makedoniji, Crnoj Gori i Srbiji zahtevi iz člana 4. Direktive 99/44 su ispunjeni pod odredbama Zakona o obligacionim odnosima za ugovornu i vanugovornu odgovornost za štetu.

5. Prinudna priroda odredbi

Albanski Zakon o zaštiti potrošača (član 31(1, 2)) predviđa da je prodavac u obavezi da prihvati reklamacije za robu u svakom mestu gde se njegova aktivnost obavlja ili gde je zastu-

pljena, osim kada je drugo lice ovlašćeno za popravku robe. Prodavac će odmah ili u roku od tri radna dana odlučiti o prihvatanju reklamacije. Nesaobraznost sa odredbama o skladnosti sa ugovorom se smatra administrativnim prestupom i sankcioniše se novčanom kaznom od 100 000 Leka (oko 730 Evra)[363].

Član 7(1) Direktive 99/44 je implementiran u veoma sličnoj formi u Zakonima o obligacionim odnosima u Bosni i Hercegovini (član 486(2) Zakona o obligacionom odnosima), Hrvatskoj (član 408(2) Zakona o obveznim odnosima), Makedoniji (član 474 Zakona o obligacionim odnosima) i Srbiji (član 489 Zakona o obligacionim odnosima) koji predviđaju da će odredba ugovora o ograničenju ili isključenju odgovornosti za nedostatke stvari biti ništavna ako je prodavac bio svestan nedostatka i nije obavestio kupca o tome, i takođe kada je prodavac nametnuo takvu odredbu koristeći svoj monopolistički položaj. Odredbe u vezi sa time postoje u zakonima o zaštiti potrošača ovih zemalja takođe. Naime, zakonodavstvo o zaštiti potrošača predviđa da potrošač ne može da se odrekne, niti da bude lišen datih prava (član 2. Zakona o zaštiti potrošača Bosne i Hercegovine, član 6. (1) hrvatskog Zakona o zaštiti potrošača, član 65. makedonskog Zakona o zaštiti potrošača, i Nacrt predloga u Srbiji). Crnogorski Zakon o zaštiti potrošača predviđa, u okviru opšte odredbe date pod „opštim principima za upražnjavanje prava potrošača" (član 5(1)), da potrošač ne može da se odrekne prava datih u tom Zakonu, tako da će svaki uslov ugovora koji isključuje ili ograničava prava potrošača biti ništavan i nevažeći.

Član 7(2) Direktive 99/44 koji se odnosi na konflikt zakona biće obrađen u Delu 3 C (Međunarodno privatno pravo u potrošačkim ugovorima).

IV. Upotreba odredbe o minimalnoj harmonizaciji (član 8 paragraf (2))

1. Viši nivo zaštite potrošača

Kada se posmatra odredba člana 8 Direktive i nacionalno zakonodavstvo posmatranih zemalja može se zaključiti da su se sve one oslonile na njega u cilju obezbeđenja višeg nivoa zaštite potrošača, ili u svojim zakonima o zaštiti potrošača, ili u vezi tih zakona sa zakonima o obligacionim odnosima.

a. Područje primene

Proširenja opsega zaštite koja pruža nacionalno zakonodavstvo mogu se videti u različitim aspektima. Albanski Zakon o zaštiti potrošača (član 33.) predviđa takođe i obaveze posle prodaje: „Proizvođači i prodavci moraju da obezbede rezervne delove potrebne za održavanje i popravku proizvoda u okviru garantnog roka, bilo zakonski ili po ugovoru". U Bosni i Hercegovini Zakon o zaštiti potrošača može da dopusti tumačenje da nepokretnosti spadaju u područje primene njegovih pravila po pitanju materijalnih nedostataka dok Zakon o obligacionim odnosima predviđa viši nivo zaštite potrošača po pitanju njegovog područja primene, pošto se primenjuje na ugovore B2C, B2B, i P2P. Pored toga činjenica da ograničena definicija „robe široke potrošnje" u članu 1(2)(b) Direktive 99/44 nije transponovana, vodi ka posledici da će odgovarajuće odredbe biti primenjive takođe na sve druge predmete prodaje (na primer usluge i nekretnine). Isto se odnosi na Hrvatsku, Makedoniju, Crnu Goru i Srbiju. Dalje, u Hrvatskoj nema izričitog isključenja specifičnih isključenja navedenih u članu 1(2)(b) Direktive 99/44, naime glede vode i gasa kad nisu stavljeni na prodaju u točno određenom vo-

[363] Videti član 57/2b Zakona o zaštiti potrošača.

lumenu ili količini, dok u Crnoj Gori Zakon o zaštiti potrošača osim definicije „potrošača“ uključuje definiciju grupe potrošača.

aa. Obaveza proizvođača

U Albaniji obaveza proizvođača proističe iz odredbe člana 33. Zakona o zaštiti potrošača koja predviđa da proizvođači i prodavci moraju da obezbede rezervne delove potrebne za održavanje i popravku proizvoda u garantnom roku, bilo zakonski ili po ugovoru.

Zakonodavstvo u Bosni i Hercegovini (član 26 i 27 Zakona o zaštiti potrošača, član 501–507 Zakona o obligacionim odnosima), Hrvatskoj (član 401 (3) i članovi 423–424 Zakona o obveznim odnosima) i Makedoniji (član 489-490 Zakona o obligacionim odnosima i član 22 Zakona o zaštiti potrošača) daje prava potrošačima naspram prodavca i proizvođača po pitanju garancije (izdate kao garantni list).

U Crnoj Gori, po Zakonu o zaštiti potrošača, samo je trgovac odgovoran za nesaobraznost robe, osim ako drugačije nije propisano zakonom ili potrošačkim ugovorom, dok po pitanju garancije, opšte pravilo Zakona o zaštiti potrošača je da „davaoc garancije“ može da bude proizvođač, distributer, ili trgovac gde će isti biti u obavezi da, u skladu sa zakonom i tehničkim propisima (obavezne garancije), ispuni obaveze date u garanciji. Ista situacija je i u Srbiji (član 501 et seq. Zakona o obligacionim odnosima, član 21 Zakona o zaštiti potrošača).

b. Zahtev saobraznosti

Po pitanju zahteva Direktive za saobraznosti treba zaključiti da su ga sve zemlje transponovale sa određenom varijacijom.

Zakon o zaštiti potrošača Albanije (član 29 (3)) daje definiciju saobraznosti proizvoda.

U Bosni i Hercegovini, član 479 (4) Zakona o obligacionim odnosima isključuje uzorke koji su pokazani samo radi informacije (koji nisu isključeni u članu 2(2) Direktive 99/44), dok član 479(2) Zakona o obligacionim odnosima dodatno pruža zaštitu u slučajevima kada je prodavac trebao da zna o određenoj svrsi za koju kupac namerava da koristi robu (član 2(2)(b) Direktive 99/44 obuhvata samo određene svrhe robe o kojima su se saglasili potrošač i prodavac). Zakon o zaštiti potrošača nije transponovao redukovanje na nesaobraznosti koje nisu neznatne.

Hrvatsko zakonodavstvo daje veći nivo zaštite potrošača u članu 401 (1) tačka 2) Zakona o obveznim odnosima navodeći da će nedostatak postojati ako stvar nema potrebna svojstva za posebnu upotrebu za koju je kupac nabavlja, a koja je „bila poznata prodavatelju ili mu je morala biti poznata“. Dalja zaštita je data kroz transponovanje odredbe Direktive o robi koja treba da se montira (član 2 (5) Direktive 99/44) na listi kriterijuma u članu 401(6) i (7) Zakona o obveznim odnosima.

U Makedoniji određeno proširenje može da se nađe određivanjem obaveze za trgovca da proda ili obezbedi potrošaču proizvode ili usluge takvog kvaliteta i kvantiteta koji je u potpunosti u saglasnosti sa utvrđenim tehničkim zahtevima i propisima, sa propisanim standardima, normama i uslovima datim u ugovoru, navedenim uslovima, kao i informacije date od strane trgovca po pitanju proizvoda ili usluge (član 36 Zakona o zaštiti potrošača) i pravo na zamenu namirnica. Pored toga, pravilo koje postoji u Zakonu o obligacionim odnosima da će prodavac biti odgovoran za nedostatke koji su bili očigledni ali je prodavac tvrdio da nema nedostataka, predstavlja viši nivo zaštite. Obaveza predviđena za trgovca da potrošaču obezbedi određenu dokumentaciju (priručnici, uputstva itd) kao i pravila o sadržaju potvrde o garanciji, i pravila o njihovoj formi (uslovi u vezi načina na koji treba da budu napisane i jezika) predstavljaju određeno proširenje.

Crnogorski Zakon o zaštiti potrošača, zajedno sa uslovima koji se nalaze u opštem zakonodavstvu o prodaji, dodao je nove faktore za zahtev za saobraznost, kao što su: tačne mere

ili količina robe; odgovarajuća ambalaža u skladu sa vrstom i karakteristikama robe; propisan ili dogovoren kvalitet, a ako kvalitet nije propisan ili dogovoren – uobičajen kvalitet roba i usluga; način za utvrđivanje ili kalkulaciju cene. Takođe, trgovac mora da preda potrošaču propisana dokumenta (potvrdu, tehničko uputstvo, uputstvo za korišćenje, itd.), kao i dokumenta koja je dao proizvođač, u skladu sa tehničkim i drugim propisima. U odnosu na ono što je prethodno rečeno, u slučaju tehničkog priručnika, treba napomenuti da je zahtev člana 82. Zakona o zaštiti potrošača da dokumenta o proizvodu moraju biti napisana na jeziku u zvaničnoj upotrebi u Crnoj Gori, što ako ne bude urađeno može da bude protumačeno kao nesaobraznost. Potonje je posebno tačno u slučaju uputstva za instaliranje i nekorektne instalacije koja iz toga proistekne.

Pravima potrošača takođe pripada pravilo da će trgovac biti odgovoran za nedostatke, koju su mogli biti lako uočeni od strane kupca, ako je izjavio da je roba bez nedostataka ili da ima određene osobine ili karakteristike (član 488(3) Zakona o obligacionim odnosima).

Srpski Zakon o zaštiti potrošača ne sadrži definiciju o saobraznosti, dok član 479 Zakona o obligacionim odnosima definiše materijalni nedostatak u robi (a ne saobraznost robe sa ugovorom) i u svakom slučaju, Zakon o obligacionim odnosima ne uzima u obzir javne izjave[364].

c. Pravna sredstva

Nacionalno zakonodavstvo proučavanih zemalja predviđa ista pravna sredstva kao Direktiva.

U Albaniji potrošač može da izabere između popravke, zamene, odgovarajućeg smanjenja cene ili raskida ugovora.

Član 18. Zakona o zaštiti potrošača Bosne i Hercegovine predviđa slobodu izbora potrošača između pravnih sredstava.

U Hrvatskoj Zakon o obveznim odnosima utvrđuje određenu hijerarhiju pravnih sredstava, međutim, Zakon o zaštiti potrošača kao *lex specialis* predviđa da potrošač ima izbor između pravnih sredstava temeljem odredaba Zakona o obveznim odnosima koje se odnose na odgovornost za materijalne nedostatke stvari. Zakon o obveznim odnosima ide opet izvan odredbe Direktive 99/44 dajući kupcu pravo na popravljanje štete prema opštim pravilima o odgovornosti za štetu uključujući štetu izazvanu materijalnim nedostatkom stvari na njegovoj drugoj imovini (član 410(2) Zakona o obveznim odnosima). Situacija je ista u Makedoniji i Srbiji[365].

U Crnoj Gori sva četiri pravna sredstva su na raspolaganju po vlastitom izboru potrošača i odmah po pojavljivanju nesaobraznosti. Potrošač ima takođe pravo da traži odštetu, i dodatno (i nezavisno od prethodnog).

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[364] Nacrt predloga nudi viši nivo zaštite potrošača, jer propisuje da će roba biti u saglasnosti sa ugovorom ako je podesna za određenu svrhu za koju je potrošač traži i koja je poznata ili je morala biti poznata trgovcu u vreme formiranja ugovora. Ovo pravilo je nešto šire od zahteva Direktive da je roba podesna za određenu svrhu za koju je potrošač traži i koju je obznanio prodavcu u vreme formiranja ugovora i koju je prodavac prihvatio. Pored toga, Nacrt predloga sadrži pravilo o nepravilnom instaliranju robe.

[365] Nacrt predloga daje potrošaču punu slobodu izbora između pravnih sredstava. Potrošač ima pravo da traži od trgovca da ispravi nesaobraznost bilo popravkom ili zamenom, u skladu sa izborom potrošača. Ako se trgovac ogluši o zahtev potrošača da ispravi nesaobraznost popravkom ili zamenom, u skladu sa izborom potrošača, potrošač ima pravo da popravi ili kupi istu robu na drugom mestu, o trošku trgovca. Trgovac je u obavezi da bez odlaganja nadoknadi troškove popravke ili kupovine za zamenu na drugom mestu.

d. Rokovi

U Albaniji prodavac će se smatrati odgovornim kada nesaobraznost postane vidljiva u roku od dve godine od isporuke robe.

U Bosni i Hercegovini potrošač ima pravo da se pozove na nedostatak u roku od šest meseci od isporuke, osim kada je prodavac znao ili nije mogao da ne zna za taj nedostatak, kada to pravo ne ističe nakon 6 meseci.

U Hrvatskoj je implementiran dvogodišnji period (član 404 (2) Zakona o obveznim odnosima i početna tačka za opšti rok trajanja odgovornosti je trenutak odašiljanja obavesti prodavcu o nesaobraznosti (član 422 (1) Zakona o obveznim odnosima). Međutim, kupac ne gubi pravo da se pozove na nedostatak čak i kada se taj nedostatak pojavi dve godine od isporuke predmeta, ako je taj nedostatak bio poznat prodavcu ili mu nije mogao ostati nepoznat (član 407 Zakona o obveznim odnosima). Zakon o obveznim odnosima suspenduje taj dvogodišnji period dok se roba popravlja ili zamenjuje (član 405. Zakona o obveznim odnosima).

Navođenjem roka za davanje obaveštenja i rokova za popravku i/ili zamenu robe kao obaveze trgovca makedonsko zakonodavstvo na određeni način pruža viši nivo zaštite potrošača.

U Crnoj Gori, opšte pravilo je da su prava dostupna pod uslovom da potrošač uloži reklamaciju odmah nakon što postane svestan nesaobraznosti (nedostatka) proizvoda a najkasnije šest meseci nakon preuzimanja proizvoda. Zakon o obligacionim odnosima dalje uređuje ovaj predmet i predviđa da prava kupca koji blagovremeno obavesti prodavca o postojanju nedostatka će biti izgubljena nakon isteka jedne godine, računajući od dana prenošenja obaveštenja prodavcu. Taj rok može da se produži samo u slučaju da je kupac bio sprečen od korišćenja svojih prava zbog prodavčeve obmane. U odnosu na suspenziju rokova u slučaju popravke, zamene i sličnog Zakon o obligacionim odnosima (član 491) predviđa da će predmetni rokovi počinjati od trenutka isporuke popravljene robe, isporuke druge robe, zamene rezervnih delova, i slično.

Slično tome, u Srbiji Zakon o zaštiti potrošača propisuje rok od šest meseci od dana kupovine. Zakon o obligacionim odnosima sadrži veoma kratak rok od osam dana od otkrića da kupac obavesti prodavca o otkrivenim nedostacima; ako se ne iskoristi to pravo je izgubljeno. Ako kupac na vreme obavesti prodavca o postojećim nedostacima u robi, njegova prava ističu jednu godinu nakon obaveštenja, osim kada prodavac prevari kupca da ne koristi ta prava[366].

e. Garancije

Nacionalno zakonodavstvo po pitanju garancija u zemljama učesnicama je približno Direktivi i u nekim slučajevima ide ispred njenih zahteva. Hrvatski Zakon o obveznim odnosima (član 425.) predviđa produženje garantnog roka za trajanje popravke tj. njeno obnavljanje u slučaju zamene ili bitne popravke. Ista situacija postoji u makedonskom Zakonu o obligacionim odnosima (član 491), gde je dodatno garantni rok postavljen na minimum jednu godinu (član 490). Princip produženja/obnavljanja garantnog roka postoji takođe u Crnoj Gori (član 511(2)) gde će pored toga potrošač imati prava koja proističu iz garancije bez obzira da li je trgovac isporučio potvrdu o garanciji u pisanoj formi, u kom slučaju je teret dokazivanja da je garancija isporučena na trgovcu (član 19(3) Zakona o zaštiti potrošača); potrošač će imati pravo na nadoknadu štete za period u kome nije mogao da upotrebljava robu od trenutka

[366] Nacrt predloga određuje dvogodišnji period koji počinje od prelaska rizika; i ne propisuje da potrošač mora da obavesti prodavca o nesaobraznosti u roku od dva meseca od datuma kada je otkrio tu nesaobraznost kako bi imao koristi od svojih prava.

traženja popravke ili zamene do njihovog izvršenja; ako, usled neispravnog funkcionisanja roba bude zamenjena ili potpuno popravljena, garantni rok će početi da teče ispočetka od dana zamene, ili vraćanja popravljenog predmeta (član 510(2) Zakona o obligacionim odnosima).

Po članu 483 srpskog Zakona o obligacionim odnosima, ako, usled nedostatka, roba bude popravljena, druga roba bude isporučena, delovi budu zamenjeni, i slično, rok počinje da teče od trenutka isporuke popravljene robe, isporuke druge robe, zamene rezervnih delova, i slično[367].

V. Opšti komentari o adekvatnosti primene Direktive

1. Teškoće za vreme procesa transponovanja

Analiza pokazuje sledeću situaciju:

• Albanski zakonodavac je napravio doslovno transponovanje Direktive, izostavljajući neke odredbe.

• U Bosni i Hercegovini glavna primena Direktive je planirana za reformu Zakona o obligacionim odnosima koja tek treba da se sprovede. Kako je gore opisano, Zakon o zaštiti potrošača je samo delimično transponovao odredbe iz Direktive 99/44, oslanjajući se na zaštitu datu u bosansko-hercegovačkom Zakonu o obligacionim odnosima. Reforma već postojećih odredbi u bosansko-hercegovačkom Zakonu o obligacionim odnosima bi bila mnogo lakša nego usvajanja potpuno novih propisa u Zakonu o zaštiti potrošača. Usvajanjem Zakona o obligacionim odnosima 2010 većina problema koji su se desili u procesu transponovanja bila bi rešena.

• U Hrvatskoj nije bilo posebnih teškoća u transponovanju Direktive 99/44 u Zakon o obveznim odnosima. Glavni izazov je bio kako da se uklope već postojeća pravila o prodaji sa određenim pravilima iz Direktive 99/44[368].

• Makedonski zakonodavac se susreo sa teškoćama u pravljenju razlike između odgovornosti za proizvode sa nedostacima i odgovornosti za štete od neispravnih proizvoda tj. u transponovanju Direktive 99/44 i Direktive 85/374/EEC, izmijenjene Direktivom 1999/34/EC, u Zakonu o zaštiti potrošača, jer su obe vrste odgovornosti regulisane u istom poglavlju Zakona bez jasne razlike između te dve vrste odgovornosti. Zakon o zaštiti potrošača ne sledi pravilo utvrđeno Zakonom o obligacionim odnosima o hijerarhiji pravnih sredstava i ne obuhvata ispitivanje srazmernosti koje postoji u Direktivi.

• U Crnoj Gori zakonodavac nije transponovao ispitivanje srazmernosti, što odgovara uređivanju pravnih sredstava bez hijerarhije.

• Srpski zakonodavac je dao nacrt potpuno novih odredbi i stavio ih u poseban zakon o zaštiti potrošača; međutim, treba definisati odnos između odredbi građanskog kodeksa i odredbi posebnog zakona o zaštiti potrošača[369].

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[367] Po Nacrtu predloga, u slučaju manje popravke, garantni rok će se produžiti za vreme u kome je potrošač bio sprečen da koristi robu. U slučaju veće popravke ili zamene, garantni rok će početi da teče ispočetka od vremena kada potrošač ili neko treće lice osim prevoznika i koje je naznačio potrošač, stekne materijalni posed nad zamenjenom robom.

[368] *Petrić Silvija,* Odgovornost za materijalne nedostatke stvari prema novom Zakonu o obveznim, Zbornik PFR, Vol. 27, br. 1, 2006, str. 98.

[369] Nacrt predloga sadrži sledeću normu: „U slučaju konflikta ovog zakona sa drugim zakonima, ovaj zakon (to jest: budući zakon o zaštiti potrošača) ima preimućstvo."

2. Praznine u Direktivi

Analiza same Direktive je otkrila da je Direktiva 99/44 ostavila određen broj pitanja bez odgovora i njene eventualne dopune bi trebalo da regulišu:

• Definiciju 'robe', a posebno status softvera i ostalih digitalnih proizvoda po pitanju definicije;

• Pojašnjenje kriterijuma srazmernosti u Direktivi;

• Pregled robe;

• Rokove za obaveštenje o vidljivim i skrivenim nedostacima;

• Garanciju za obezbeđivanje rezervnih delova i usluga posle prodaje (i u garantnom i u vangarantnom roku) takođe treba navesti;

• Uslove pod kojima potrošač može da koristi pravna sredstva;

• Dopunsku odgovornost proizvođača;

• Pitanje obavezne garancije proizvođača.

VI. Kratak pregled

Pre transponovanja Direktive 99/44 nacionalni zakoni zemalja učesnica su sadržavali odredbe u okviru svojih Zakona o obligacionim odnosima/Građanskog zakonika koje regulišu prodaju robe, koji su bili primenjivi na sve vrste ugovora a ne samo na potrošačke ugovore. Sve zemlje učesnice su barem delimično transponovale odredbe Direktive 99/44 u njihove Zakone o zaštiti potrošača, dok su samo neke od njih, dodatno ili većinski, transponovale Direktivu u njihov opšte primenjivi Zakon o obligacionim odnosima (Makedonija, Hrvatska, Crna Gora). Odredbe Zakona o obligacionim odnosima zemalja učesnica, uključujući one koje se odnose na odgovornost za saobraznost sa ugovorom, odnose se na transakcije B2B, B2C i P2P. Dalje, one sadrže posebne odredbe o odgovornosti isporučioca za saobraznost pruženih usluga sa ugovorom o pružanju usluga. Transponovanje Direktive 99/44 u hrvatski Zakon o obveznim odnosima takođe je za rezultat imalo stvaranje nekih posebnih pravila koji su primenjivi samo na potrošačke transakcije. Nijedna od odredbi zemalja učesnica ne sadrži definiciju robe široke potrošnje koja odgovara članu 1(2)(b) Direktive 99/44. Zemlje učesnice daju definiciju prodaje samo u okviru njihovih opšte primenjivih Zakona o obligacionim odnosima, uz skoro istu formulaciju da je po ugovoru o prodaji prodavac u obavezi da kupcu preda prodanu stvar tako da kupac na njoj stekne pravo vlasništva, dok je kupac u obavezi da prodavcu plati cenu. Albanija i Srbija su transponovale član 2(1) Direktive 99/44 navodeći da prodavac mora da isporuči robu potrošaču koja je u saglasnosti sa ugovorom o prodaji. U drugim zemljama učesnicama, uslov za isporuku usaglašene robe proističe iz odgovornosti trgovca za materijalne nedostatke (Bosna i Hercegovina, Hrvatska) ili opšte odredbe o izvršenju obaveza kako je dogovoreno (Makedonija, Crna Gora). Albanija je jedina zemlja učesnica koja u svom Zakonu o zaštiti potrošača pozitivno definiše kriterijume za pretpostavku saobraznosti isporučene robe sa ugovorom. Zakon o obligacionim odnosima svih drugih zemalja učesnica sadrži spisak slučajeva kada materijalni nedostaci postoje a nisu propisani kao zakonske pretpostavke (Bosna i Hercegovina, Hrvatska, Makedonija, Crna Gora i Srbija), nasuprot modelu člana 2(2) Direktive 99/44, koji definiše kriterijume za saobraznost robe sa ugovorom. Albanija je doslovno transponovala član 2(3) Direktive 99/44 u svoj Zakon o zaštiti potrošača, navodeći da se neće smatrati neusaglašenošću u svrhe ovog člana ako je, u vreme kada je ugovor bio zaključen potrošač znao ili razumno nije mogao ne znati za ovu nesaobraznost, ili ako nesaobraznost vodi poreklo iz materijala koga je nabavio potrošač. U svim ostalim zemljama učesnicama, nepromenjena pravila sa zajedničkim poreklom iz jugoslovenskog Zakona o obligacionim odnosima iz 1978. još uvek se primenjuju, gde prodavac nije od-

govoran za nedostatke ako su oni bili poznati kupcu u trenutku zaključivanja ugovora ili ako je bilo nemoguće da oni ostanu njemu nepoznati. Nacionalno zakonodavstvo svih zemalja učesnica predviđa pravna sredstva koja su na raspolaganju potrošačima kada postoji nesaobraznost robe, kako je dato u članu 3 Direktive 99/44. Ona mogu da se nađu u Zakonu o zaštiti potrošača ili u Zakonu o obligacionim odnosima, ili u oba, sa određenim izmenama. Što se tiče izbora potrošača između pravnih sredstava, nacionalno zakonodavstvo u oblasti zaštite potrošača predviđa slobodu izbora između tih sredstava, sa ili bez nametanja formalnih uslova za njihovo upražnjavanje u svim zemljama osim u Crnoj Gori gde postoji jasna hijerarhija. Zakoni o obligacionim odnosima u Bosni i Hercegovini, Hrvatskoj, Srbiji i Makedoniji, međutim, kada regulišu pravna sredstva, koja se između ostalog odnose na sve transakcije, daju redosled kojim ona mogu da se upražnjavaju. Kada se razmatra dostupnost određenog pravnog sredstva član 3 (3) Direktive 99/44 zahteva da se u obzir uzme princip srazmernosti. Ova odredba je transponovana doslovce iz Direktive samo u zakonodavstvu Albanije. Međutim, princip savjesnosti i poštenja na kojem obaveze treba da se zasnivaju kako je propisano zakonima Bosne i Hercegovine, Hrvatske, Srbije, Makedonije i Crne Gore vodi ka tumačenju pravila o odgovornosti za nesaobraznost u istom značenju koja imaju ona iz Direktive 99/44. U proučenim zemljama nema sličnog modela kada se dođe do transponovanja pravila o nemogućnosti propisanim u članu 3 paragraf (3) Direktive 99/44. Nema transpozicije u albanskom zakonodavstvu, dok u Bosni i Hercegovini, Hrvatskoj, Srbiji, Makedoniji i Crnoj Gori primenom pravila o nemogućnosti ispunjenja, mogu se postići isti rezultati kao što je propisano Direktivom 99/44. Nacionalni propisi u okviru značenja „besplatno" kako je uređeno u članu 3 paragraf (4) Direktive 99/44, sa nekim razlikama u tekstu postoje u zakonodavstvu svih proučavanih zemalja. Član 5 (1) Direktive 99/44 navodi da je prodavac odgovoran za nesaobraznost koja se pojavi u roku od 2 godine od isporuke. Nacionalno zakonodavstvo proučavanih zemalja se razlikuje. U Albaniji, Bosni i Hercegovini i Hrvatskoj taj rok je 2 godine, dok je u Makedoniji i Crnoj Gori 1 godina. U Srbiji taj period je 6 meseci. Treba napomenuti da nacionalno zakonodavstvo Bosne i Hercegovine, Hrvatske, Srbije, Makedonije i Crne Gore pravi razliku između vidljivih i skrivenih nedostataka i daje različite rokove u okviru perioda odgovornosti kada potrošač može da iskoristi pravna sredstva u zavisnosti od vrste nedostatka. Opcija da se smanji dvogodišnji period dat u članu 7 (1) Direktive 99/44 je transponovana samo u zakonodavstvu Hrvatske. Opcija da se predvidi da potrošač mora da obavesti prodavca o nesaobraznosti u roku od 2 meseca od dana kada je potrošač to otkrio kako je dato u članu 5 paragraf (2) Direktive 99/44 nije iskorištena samo u Albaniji. Opcija za suspenziju dvogodišnjeg perioda nije transponovana u zakonodavstvo Albanije i Bosne i Hercegovine. Sve zemlje osim Bosne i Hercegovine generalno usvajaju pravila o pretpostavci nesaobraznosti u prvih 6 meseci iz člana 5 (3) Direktive 99/44. Potrošač neće imati pravo na raskid ugovora u slučaju manje nesaobraznosti kako je propisano u članu 3 paragraf (6) Direktive 99/44 u svim zemljama osim u Bosni i Hercegovini. Navod iz Alineje 15 da se za slučaj kada potrošač ima pravo na povrat kupovne cene može predvidjeti odbijanje na račun upotrebe robe od strane potrošača od vremena isporuke, može se naći u pravilima o efektima raskida ugovora koje uređuje opšte ugovorno pravo zemalja. Proučene zemlje, mada sa nekim izmenama, generalno ispunjavaju uslov člana 6 Direktive 99/44. Uslov člana 4 Direktive 99/44 je transponovan u potrošačko zakonodavstvo Albanije, dok u Bosni i Hercegovini, Hrvatskoj, Srbiji, Makedoniji i Crnoj Gori to pitanje je regulisano u odredbama zakona o obligacionim odnosima za ugovornu i vanugovornu odgovornost za štetu. Član 7 (1) Direktive 99/44 je transponovan u okviru svog značenja u svim zemljama. Nacionalno zakonodavstvo svih proučavanih zemalja se oslonilo na odredbu člana 8 Direktive 99/44 u cilju obezbeđivanja višeg nivoa zaštite potrošača, ili u njihovim zakonima o zaštiti potrošača ili u vezi tih zakona sa zakonom o obligacionim odnosima.

3. deo:
BUDUĆNOST POTROŠAČKOG UGOVORNOG PRAVA U EVROPSKOJ UNIJI I ZEMLJAMA UČESNICAMA

A. PREGLED PREDLOGA KOMISIJE O „DIREKTIVI EVROPSKOG PARLAMENTA I SAVETA O PRAVIMA POTROŠAČA"

Emilia Čikara

I. Uvod

Dana 8. oktobra 2008., Komisija je objavila svoj Predlog „Direktive Evropskog Parlamenta i Saveta o pravima potrošača"[370]. Ova horizontalna direktiva, koja se zasniva na potpunoj ciljanoj harmonizaciji treba da promeni i sjedini sadržaj Direktive 85/577, Direktive 93/13, Direktive 97/7 i Direktive 99/44 i istovremeno ukine te direktive. Taj predlog je u savjetodavnom Memorandumu opravdan činjenicom da je princip minimalne harmonizacije doveo do rascepkanog regulatornog okvira širom Evrope, a „koji uzrokuje značajne troškove usaglašavanja biznisu koji želi trgovati prekogranično" s jedne strane i rezultira niskim nivoom poverenja potrošača u prekograničnu kupovinu s druge strane[371]. Predložena Direktiva će se odnositi na ugovore o prodaji i uslugama zaključene između trgovca i potrošača[372], dok su ugovori o finansijskim uslugama isključeni, osim za određene ugovore zaključene izvan poslovnih prostorija trgovca, određene nepravične odredbe ugovora i određene opšte odredbe[373].

II. Struktura

Predlog je podeljen u sedam poglavlja. Poglavlje I. daje zajedničke definicije pojmova „potrošač", „trgovac", „ugovor o prodaji" i 17 drugih definicija (član 2.). Ono takođe reguliše princip potpune harmonizacije (član 4.). Poglavlje II. se odnosi na obaveze pružanja predugovornih informacija u svim ugovorima o prodaji i pružanju usluga zaključenim između potrošača i trgovca. Posebne obveze pružanja informacija i pravo na odustanak za ugovore sklopljene na daljinu i ugovore sklopljene izvan poslovnih prostorija trgovca regulisani su u Poglavlju III. (član 8.). Za ugovore sklopljene izvan poslovnih prostorija trgovca postoji standardni obrazac za odustanak u Aneksu I (B) Predloga koji mora da bude uključen u narudžbenicu trgovca. Poglavlje IV. sadrži odredbe koje su propisane u Direktivi 99/44 i Poglavlje V. odredbe koje su regulisane u Direktivi 93/13. Poglavlje V. prati Aneks II, koji sadrži takozvanu „crnu listu" nepravičnih ugovornih odredbi, i Aneks III, koji reguliše uslove ugovora za

[370] COM(2008) 614 final.
[371] *Ibid*., 2.
[372] Član 3 Predloga.
[373] Član 3 (2) Predloga.

koje se presumira da su nepravični. Poglavlje VI. sadrži između ostalog odredbe o transponovanju Direktive i Poglavlje VII. završne odredbe.

III. Ciljana potpuna harmonizacija

Temeljem člana 4. Predloga zemlje članice ne smeju zadržati ili propisati u svojem nacionalnom pravu, odredbe koje odstupaju od onih propisanih u ovoj Direktivi, uključujući manje ili više striktne odredbe da se obezbedi različit nivo zaštite potrošača. Iako Predlog navodi da se ova horizontalna Direktiva zasniva na potpunoj ciljanoj harmonizaciji[374], pregled Predloga otkriva da se skoro kod svih mera radi o potpunoj harmonizaciji[375]. Za razliku od dosadašnjih direktiva za zaštitu potrošača, koje su se zasnivale na principu minimalne harmonizacije i dozvoljavale zemljama članicama da usvajaju ili zadržavaju povoljnije odredbe za zaštitu potrošača na području koje su pokrivale, nova Direktiva zabranjuje odstupanja u transponovanju.

IV. Definicije

Mnoge zajedničke definicije regulisane u Poglavlju I. Predloga su promenjene i proširene kako bi obuhvatile širok opseg transakcija. Na primer, definicije „ugovora o prodaji"[376], „ugovora o uslugama[377]", i „ugovora o prodaji na daljinu" pokrivaju većinu svih potrošačkih transakcija[378]. Član 2(6) Predloga uvodi novu i pojednostavljenu definiciju za „ugovore o prodaji na daljinu" kao svaki ugovor o prodaji robe ili pružanju usluga gde trgovac, u svrhu zaključenja ugovora, isključivo koristi jedno ili više sredstava daljinske komunikacije. Na osnovu člana 2(8) Predloga „ugovor izvan poslovnih prostorija" je svaki ugovor o prodaji robe ili pružanju usluga sklopljen izvan poslovnih prostorija trgovca uz istovremeno fizičko prisustvo trgovca i potrošača ili svaki ugovor o prodaji robe ili pružanju usluga ponudu za sklapanje kojega je dao potrošač u istim okolnostima. Ugovori izvan poslovnih prostorija postoje čak i ako je ugovor o prodaji robe ili pružanju usluga zaključen u poslovnim prostorijama trgovca ali su pregovori vođeni izvan poslovnih prostorija trgovca[379], a poslovne prostorije obuhvataju i pijačnu tezgu i štand na sajmu gde trgovac obavlja svoju aktivnost na redovnoj ili privremenoj bazi[380]. Član 2(18) Predloga zamenjuje izraz „garancija" kako se upotrebljava u Direktivi 99/44 sa izrazom „komercijalna garancija". Međutim, definicija je ostala slična, osim izbacivanja jednog dela definicije, to jest „dana bez dodatnih troškova". Ova nova formulacija vodi ka uključivanju garancije koja može biti kupljena („proširene garancije"). Pojam „potrošača" je promenjen i uključuje svrhe koje su izvan njegovog „zanata" kao i uobičajeno izvan „zanimanja, posla ili profesije" u tekućim direktivama o zaštiti potrošača[381]. Pred-

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[374] COM(2008) 614 final, str. 4,5.

[375] Opšti izuzetak od potpune harmonizacije je sadržan u članu 3 (1) Predloga, koji definiše polje primene, naime ugovore o prodaji robe i ugovore o pružanju usluga koji se sklapaju između trgovaca i potrošača. Odstupanje od ovog opšteg pravila je dozvoljeno u nekim drugim odredbama koje se odnose na pravo država članica, na primer u članu 6 (2) Predloga na osnovu koga će se posledice bilo koje povrede obveze pružanja informacija (član 5) određivati u skladu sa mjerodavnim nacionalnim pravom.

[376] Član 2 (3) Predloga.

[377] Član 2 (5) Predloga.

[378] C. Twigg-Flesner, D. Metcalfe, The proposed Consumer Rights Directive – less haste, more thought?, *European Review of Contract Law* 2009, *http://ssrn.com/abstract=1345783*, poslednja poseta 19.2.2010, 2.

[379] Član 2 (8) Predloga.

[380] Član 2 (9) Predloga.

log koristi izraz „trgovac“ i zamenjuje sve različite izraze koji se koriste u aktuelnim direktivama, kao što su „isporučilac“, „prodavac“, „trgovac“ ili „prodavac ili isporučilac“. „Trgovac“ se definiše kao fizičko ili pravno lice koje „deluje u svrhu koja se odnosi na njegovo zanimanje, posao, zanat ili profesiju“, uz dodatu referencu „svako ko deluje u ime i za račun trgovca“[382].

V. Obaveze pružanja informacija

Potrošačkim informacijama se bavi Poglavlje II. (član 5. do 7. Predloga). Član 5 (1) Predloga propisuje obvezu trgovca na pružanje općih informacija, osim ako su one već očigledne iz konteksta. Te informacije se odnose na primer na glavne karakteristike proizvoda, adresu i identitet trgovca, cenu i uslove plaćanja, isporuku, izvršenje ugovora, itd., i jednom pružene one postaju deo ugovora[383]. Član 7. Predloga reguliše posebne uslove za pružanje informacija za posrednike. Pored obveze pružanja općih informacija iz Poglavlja II., Poglavlje III. predviđa u svom članu 9. obveze pružanja posebnih informacija za ugovore sklopljene na daljinu i ugovore sklopljene izvan poslovnih prostorija trgovca, kao što su informacije o načinu plaćanja, isporuci i izvršenju ugovora, o uslovima i procedurama za ostvarivanje prava na odustanak, o poslovnoj adresi trgovca na koju potrošači mogu da upućuju reklamacije itd. Glede ugovora sklopljenih izvan poslovnih prostorija trgovca, te informacije će se davati u narudžbenici (član 10. Predloga) dok će kod ugovora sklopljenih na daljinu, biti pružene ili načinjene dostupnim potrošaču pre zaključenja ugovora (član 11. Predloga).

VI. Pravo na odustanak

Članovi 12. do 19. Predloga regulišu pravo na odustanak za ugovore sklopljene na daljinu i ugovore sklopljene poslovnih prostorija trgovca. Za razliku od roka od sedam dana propisanog u aktualnim direktivama, rok za odustanak se produžava na 14 dana. Što se tiče ugovora sklopljenih izvan poslovnih prostorija trgovca rok za odustanak počinje teći kada potrošač potpiše narudžbenicu ili, u odgovarajućim okolnostima, kada je primio njenu kopiju na drugom trajnom medijumu, a za ugovore sklopljene na daljinu počinje teći kada je potrošač došao u materijalni posed robe ili u slučaju pružanja usluga od dana zaključenja ugovora[384]. Međutim, ako trgovac nije potrošaču dao informaciju o pravu na odustanak, rok za odustanak ističe tri meseca nakon što je trgovac u potpunosti izvršio ostale ugovorne obaveze[385]. Kada ostvaruje svoje pravo na odustanak potrošač mora „da obavesti trgovca o svojoj odluci o odustanku na nekom trajnom medijumu“, bilo svojim rečima, ili koristeći standardni obrazac za odustanak iz Aneksa I (B)[386]. Nikakvi drugi formalni zahtevi ne mogu se dodati na standardni obrazac za odustanak. Glede ugovora o prodaji na daljinu zaključenih putem interneta, trgovac može dodatno omogućiti potrošaču da elektronskim putem popuni i preda standardni obrazac za odustanak na website-u trgovca u kom slučaju će trgovac poslati potrošaču potvrdu o prijemu tog odustanka. Ostvarenje prava na odustanak će imati učinak prestanka obaveza ugovornih strana[387]. Nakon odustanka, trgovac mora da nadoknadi svako plaćanje primlje-

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[381] Član 2 (1) Predloga.
[382] Član 2 (2) Predloga.
[383] Član 5 (3) Predloga.
[384] Član 12 (2) Predloga.
[385] Član 13 Predloga.
[386] Član 14 Predloga.
[387] Član 15 Predloga.

no od potrošača u roku od 30 dana, ali može da sačeka dok potrošač vrati robu[388]. U slučaju odustanka potrošač je u obavezi da vrati robu trgovcu u roku od 14 dana od dana kada je saopćio svoj odustanak, osim ako trgovac ponudi da pokupi robu. Potrošaču se mogu naplatiti samo direktni troškovi za vraćanje robe i može biti odgovoran samo za umanjenu vrednost robe kao posledice rukovanja robom na način drukčiji od onog koji je nužan za osiguranje prirode i funkcionisanja robe. Ako trgovac nije pravilno obavestio potrošača o njegovom pravu na odustanak, potrošač neće biti uopšte odgovoran. Potrošač neće snositi troškove za usluge koje su u potpunosti ili delimično pružene tokom trajanja roka za odustanak kada za ugovor vrijedi pravo na odustanak[389]. Niz izuzetaka od prava na odustanak je regulisano u članu 19. Predloga i mogu se podeliti u izuzetke koji se odnose na ugovore o prodaji na daljinu (član 19(1))[390] i izuzetke koji se odnose na ugovore sklopljene izvan poslovnih prostorija trgovca (član 19(2)). Član 20. Predloga isključuje primenu celog Poglavlja III. u odnosu na određene ugovore prodaje na daljinu i ugovore sklopljene izvan poslovnih prostorija trgovca.

VII. Ugovori o prodaji

Poglavlje IV. reguliše ostala prava potrošača specifična za ugovore o prodaji i obuhvata, uz važne modifikacije, odredbe sadržane u Direktivi 99/44. Dok su većina važnih odredbi o sukladnosti, o prodavčevoj objektivnoj odgovornosti za nesukladnost, o kriterijumima za ocenjivanje nesukladnosti, o pravnim sredstvima i o komercijalnim garancijama, preuzete, uvedene su i određene nove odredbe[391]. Temeljem člana 21. Predloga ovo Poglavlje se primenjuje na ugovore o prodaji, a u slučaju ugovora kombinovane svrhe čiji predmet predstavljaju i robe i usluge, ovo se Poglavlje primjenjuje samo na robu. Primjenjuje se i na ugovore za isporuku robe koja se tek mora izraditi ili proizvesti. Međutim, Poglavlje se ne odnosi na zamjenske delove koje trgovac zameni prilikom otklanjanja nedostatka sukladnosti robe popravkom prema članu 26. Predloga. Takođe države članice mogu da odaberu da ne primene odredbe ovog Poglavlja na prodaju polovne robe na javnim aukcijama. Predlog uvodi nove odredbe o isporuci i prelasku rizika u članovima 22 i 23. Trgovac isporučuje robu prenosom materijalnog poseda na potrošača ili na neko treće lice različito od prevoznika i označeno od potrošača, u roku od maksimum trideset dana od zaključenja ugovora[392]. Kada trgovac ne ispuni svoju obavezu isporuke, potrošač ima pravo na nadoknadu svakog plaćenog iznosa u roku od 7 dana od datuma određenog za isporuku[393]. Na osnovu člana 23 (1) predloga „rizik od gubitka ili oštećenja robe prelazi na potrošača kada on ili treće lice, različito od prevoznika i označeno od strane potrošača stekne materijalni posed robe". Ako potrošač ili neko treće lice, različito od prevoznika, označeno od strane potrošača ne preduzme razumne mere u svrhu preuzimanja materijalnog poseda nad robom, rizik će preći na potrošača u vreme isporuke koje je dogovoreno između ugovornih strana[394]. Drugu novinu predstavlja različit pristup Predloga u odnosu na pravna sredstva potrošača u slučaju nesukladnosti. Iako lista pravnih sredstava ostaje suštinski ista i obuhvata popravku ili zamenu, smanjenje cene i raskid ugovo-

[388] Član 2 (16) Predloga.

[389] Član 17 Predloga.

[390] Na pr. na osnovu člana 19 (1) lit. a) Predloga kada pružanje usluge počinje za vreme trajanja roka za odustanak uz saglasnost potrošača, ne postoji pravo na odustanak.

[391] H.-W. Micklitz, N. Reich, "Crónica de una muerte anunciada: The Commission proposal for a 'Direktiva on consumer rights", *Common Market Law Review*, 46/2009., str. 501.

[392] Član 22 (1) Predloga.

[393] Član 22 (2) Predloga.

[394] Član 23 (2) Predloga.

ra, član 26 (2) Predloga daje „trgovcu“ pravo da izabere između popravke i zamene. Potrošač može da izabere pravna sredstva samo pod ograničenim uslovima u članu 26(3) i (4) Predloga[395]. Ako trgovac dokaže da je otklanjanje nesukladnosti popravkom ili zamenom nezakonito, nemoguće ili nesrazmerno, potrošač može da izabere između smanjenja cene i raskida ugovora[396]. Međutim, potrošač može da raskine ugovor samo ako nesukladnost nije neznatna. Za razliku od Direktive 99/44, Predlog jasno reguliše u svom članu 27(2) da potrošač može da traži naknadu štete za svaki gubitak koji nije ispravljen u skladu sa članom 26 o pravnim sredstvima. Važna promena se odnosi na rokove, gde novi član 28(4) Predloga nameće obvezu potrošaču da obavesti trgovca o nesukladnosti u roku od 2 meseca od otkrivanja.

VIII. Ugovorne odredbe

Poglavlje V. Predloga uključuje odredbe sadržane u Direktivi 93/13.[397] Na osnovu člana 30(1) Predloga, Poglavlje V. se odnosi na odredbe ugovora koje je unapred sastavio trgovac ili neko treće lice, na koje je potrošač pristao a da nije imao mogućnost da utiče na njihov sadržaj, posebno na unaprijed formulirane standardne ugovore. Ako je potrošač imao mogućnost uticanja na neke od njih, Poglavlje V. se još uvek odnosi na ostale odredbe ugovora koji čine deo ugovora[398]. Član 31. Predloga uvodi nove zahteve za transparentnost, pod kojima ugovorne odredbe moraju, između ostalog, biti „dostupne potrošaču na način koji mu daje stvarnu mogućnost da se upozna sa njima pre sklapanja ugovora“.[399] Takođe, trgovcu je potrebna saglasnost potrošača po pitanju svakog dodatnog plaćanja povrh plaćanja predviđenog za glavnu ugovornu obavezu trgovca. Ako trgovac koristi standardne opcije tražeći od potrošača da odbije u cilju izbegavanja dodatnog plaćanja, potrošač ima pravo na nadoknadu ovog plaćanja[400]. Isključenja prethodno sadržana u članu 4 (2) Direktive 93/13 su sada regulisana u članu 32 (3) Predloga, koji glavni predmet ugovora i adekvatnost cijene isključuje od ocjene poštenja. Prema članu 37 Predloga potrošač neće biti obavezan ugovornim odredbama koje su nepoštene, pri čemu se ugovorne odredbe propisane na „crnoj listi“ u Aneksu II smatraju nepoštenima u svim okolnostima (član 34.), a ugovorne odredbe propisane „sivom listom“ u Aneksu III, se smatraju nepoštenima osim ako je trgovac dokazao da su ugovorne odredbe poštene (član 35.). Lista u Aneksu III Predloga je veoma slična listi iz Aneksa Direktive 93/13. Međutim, ima nekoliko manjih promena i nekoliko odredaba za koje je prethodno postojala oboriva presumcija da su nepoštene unete su na „crnu listu“ u Aneksu II Predloga.

IX. Zaključci

Predlog Komisije o Direktivi o pravima potrošača predstavlja važan deo zakonodavstva, koji pokušava da razvije koherentan set pravila u evropskom potrošačkom ugovornom pravu. Uvođenje jedinstvenih zajedničkih definicija, pravila o obavezama pružanja informacija i centralno regulisanje prava na odustanak za ugovore sklopljene na daljinu i ugovore sklopljene izvan poslovnih prostorija trgovca treba da utiču na aktuelnu fragmentisanost regu-

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[395] Član 3 (5) Direktive 99/44 je zamenjen članom 26 (4) Predloga, na osnovu koga potrošač može pribeći svakom pravnom sredstvu koje je na raspolaganju prema paragrafu 1, kada postoji jedna od posebnih situacija, na pr: kada trgovac nije otklonio nesukladnost u razumnom roku.

[396] Član 26 (3) Predloga.

[397] Članovi 30 do 39 Predloga.

[398] Član 30 (2) Predloga.

[399] Član 31 (2) Predloga.

[400] Član 31 (3) Predloga.

lative u ovoj oblasti i tako doprinesu pravnoj sigurnosti potrošača. Međutim, izuzev ovih poboljšanja i nekih dodatnih pravila, Predlog uglavnom ponavlja sadržaj aktuelnih direktiva o zaštiti potrošača. Glavnu razliku predstavlja prelaz sa principa minimalne na princip potpune harmonizacije. Primena ovog principa će značiti postizanje višeg nivoa zaštite potrošača s jedne strane, i smanjenje postojećeg nivoa zaštite potrošača u pojedinačnim državama s druge strane. Dok je potpuna harmonizacija pogodna za odredbe o odustanku i o obvezama pružanja posebnih informacija, ona nije odgovarajuća za odredbe o pravnim sredstvima u ugovorima o prodaji i za odredbe o crnoj i sivoj listi nepoštenih ugovornih odredbi. Zaključno, iako Predlog treba da bude poboljšan i revidiran od strane evropskog zakonodavca, on nesumnjivo predstavlja dobru polaznu tačku za budućnost koherentnog evropskog potrošačkog ugovornog prava.[401]

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[401] Ta diskusija je nedavno nastavljena objavljivanjem Zelene knjige (Green Paper) Komisije o opcijama politike za napredovanje ka Evropskom ugovornom pravu za potrošače i biznis, COM(2010) od 1. jula 2010. Svrha te Zelene knjige je da utvrdi opcije o tome kako da se ojača unutrašnje tržište EU napretkom u oblasti Evropskog ugovornog prava, i da se pokrenu javne konsultacije da bi se dobila opredeljenja i gledišta od relevantnih interesnih grupa. U tu svrhu Komisija je okupila ekspertsku grupu koja proučava izvodljivost i upotrebljivost instrumenta Evropskog ugovornog prava i koja će pomoći Komisiji u izboru određenih delova Nacrta zajedničkog referentnog okvira koji se direktno ili indirektno odnose na ugovorno pravo. Taj instrument može da varira od neobavezujućeg do obavezujućeg, zavisno od ponuđenih opcija, gde Opcija 1. završava objavljivanjem rezultata ekspertske grupe, Opcija 2. predviđa usvajanje zvaničnog „instrumentarijuma" za EU zakonodavca, Opcija 3. se zasniva na dodavanju instrumenta Evropskog ugovornog prava Preporuci Komisije upućenoj državama članicama i Opcija 4. predviđa usvajanje Uredbe koja utvrđuje opcioni instrument Evropskog ugovornog prava u svakoj državi članici. Dalje, Opcija 5. preporučuje usvajanje Direktive o Evropskom ugovornom pravu, koja će harmonizirati nacionalno ugovorno pravo na osnovi minimalnih zajedničkih standarda. Na suprot tome Opcija 6. predviđa usvajanje Uredbe koja utvrđuje Evropsko ugovorno pravo, dok Opcija 7. sugeriše usvajanje Uredbe koja utvrđuje Evropski građanski zakonik. U zavisnosti od rezultata konsultacija, koje će teći od 1.7.2010 do 31.1.2011, Komisija će predložiti daljnje delovanje do 2012.

B. TRANSPONOVANJE PREDLOŽENE DIREKTIVE O PRAVIMA POTROŠAČA U NACIONALNE ZAKONE ZEMALJA UČESNICA

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I. Zajednički problemi u vezi sa transponovanjem predložene Direktive o pravima potrošača

Postoje brojni praktični problemi koji mogu da nastanu u procesu implementacije predložene Direktive u nacionalna prava i država članica i država učesnica. Potpuna harmonizacija će iskomplikovati integrisanje odredbi Direktive u njihov opšti sistem ugovornog prava. U prenošenju aktuelnih direktiva o zaštiti potrošača mnoge zemlje učesnice su upotrebile klauzulu minimalne harmonizacije kako bi povećale nivo zaštite potrošača. Kao posledica principa potpune harmonizacije na kome se zasniva predložena Direktiva, te zemlje će sada biti prisiljene da smanje svoj nacionalni nivo zaštite potrošača u određenim aspektima potpuno harmonizovanim predloženom Direktivom. Na kraju to može da dovede do paradoksalnog rezultata, gde će odredbe nacionalnog opšteg ugovornog prava date države biti povoljnije od posebnih pravila za zaštitu potrošača. Na primer, u transponovanju obveze pružanja informacija iz Predloga Direktive, nacionalni zakonodavac neće moći da uvede ili zadrži nikakav zahtev za dodatnim informacijama za trgovca u vezi sa ugovorom o prodaji robe ili ugovorom o pružanju usluga zaključenim sa potrošačem. Još jedan važan problem se odnosi na zakonodavnu tehniku, koja će se primeniti u transponovanju ove horizontalne direktive. Iako se od zemalja učesnica ne zahteva da doslovno kopiraju Direktivu, ona će najverovatnije biti implementirana doslovno kako bi se izbegle nepotrebne greške i previdi. Konačno, zemlje učesnice će morati da odgovore na pitanje od velike važnosti, to jest kako i gde implementirati predloženu Direktivu: u okviru postojećih građanskih zakona ili potrošačkih zakona[402]. Za neke od zemalja učesnica transponovanje predložene Direktive može čak da predstavlja motiv za reformu njihovog nacionalnog građanskog prava.

II. Transponovanje predložene Direktive o pravima potrošača u nacionalno pravo zemalja učesnica

1. Transponovanje predložene Direktive o pravima potrošača u albansko pravo

Albanski zakonodavac je usvajanjem posebnog Zakona o zaštiti potrošača već napravio izbor da ostavi prava potrošača izvan Građanskog zakonika. Taj pristup je mogao da bude nametnut iz više razloga. Jedan od glavnih razloga je možda bio nedostatak vremena. Pošto je bio pod obavezom Sporazuma o stabilizaciji i pridruženju da približi i harmonizuje zakonodavstvo sa evropskim *acquis* i želeći da garantuje politiku aktivne zaštite potrošača u kratkom vremenu[403],

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[402] H. Schulte–Nölke, "The transposition of European consumer Direktivas into the national laws of the EU–Member States", *Tijdschrift voor Consumentenrecht en handelspraktijken*, 4/2009., str. 133.

[403] Sporazum o stabilizaciji i pridruživanju između Evropskih Zajednica i njihovih država članica, sa jedne strane, i Republike Albanije, sa druge strane, koji je potpisan 12. juna 2006., stupio je na snagu 1. aprila 2009., u svom članu 6, pasus 5 glasi: „Tokom pete godine nakon datuma stupanja na snagu ovog Sporazuma, Savet za stabilizaciju i pridruživanje će oceniti napredak koji je načinila Albanija, i odlučiće da je taj napredak dovoljan za prelaz u drugu fazu u cilju postizanja punog pridruživanja...",

http://ec.europa.eu/enlargement/pdf/albania/st08164.06_en.pdf, poslednja poseta 30 April 2010.

bez sumnje albanski zakonodavac bi odabrao najkraći i najlakši način da pristupi problemima potrošača. Sa druge strane, usvajanje jednog zasebnog zakona je model koji su već ponudile mnoge zemlje članice, i stoga se čini kao prihvatljiv pristup rešavanja pitanja zaštite potrošača i ispunjavanja evropskih standarda, što je izgleda bila glavna briga vlade i zakonodavca. Pored toga, imajući u vidu da je evropsko potrošačko pravo tekući proces, izmena jednog posebnog zakona čini se boljom i razumnijom nego izmena Građanskog zakonika.

Što se tiče transponovanja predložene Direktive, koja zahteva horizontalnu potpunu harmonizaciju, vrlo je predvidivo da će albanski zakonodavac izmeniti postojeći Zakon o zaštiti potrošača iz 2008. Princip maksimalne harmonizacije će dovoljno olakšati rad na nacrtu od strane odgovornih ministarstava, jer će oni doslovno usvojiti pristup transponovanja. Ali može se takođe doći do zaključka da će transponovanje predložene Direktive predstavljati najbolju mogućnost za usvajanje „velikog rešenja" transponovanja prava potrošača u Građanski zakonik. Ta mogućnost može čak da se iskoristi kao opravdanje za reviziju i poboljšanje sistematizacije i harmonizacije celog Građanskog zakonika, izbegavanjem do sada uočenih sistemskih nedoslednosti. Još jedan argument u korist transponovanja predloga Direktive u Građanski zakonik je da tu već postoji takvo iskustvo u Albaniji. Na primer, Direktiva 85/374 o odgovornosti za proizvod je transponovana u Građanski zakonik[404] od njegovog usvajanja 1994. godine, isto se obistinilo za pravo na odustanak u slučaju prodaje od vrata do vrata[405] ili nekih nepravičnih uslova[406], koji se u stvari mogu primeniti na svaku ugovornu stranu. To „veliko rešenje" u svakom slučaju bi zahtevalo veoma jaku volju svih zainteresovanih strana.

Međutim, čini se da je verovatniji pristup izmena Zakona o zaštiti potrošača. Ta mogućnost još uvek predstavlja priliku da se postigne barem unutrašnja harmonizacija posebnih odredbi o potrošačkim ugovorima sa opštim ugovornim pravom uređenim u Građanskom zakoniku, sa ciljem da se Zakon o zaštiti potrošača načini efikasnijim i primenjivijim.

2. Transponovanje predložene Direktive o pravima potrošača u bosansko-hercegovačko pravo

U Bosni i Hercegovini horizontalna direktiva o zaštiti potrošača sa pristupom maksimalne harmonizacije verovatno može da se transponuje samo u okviru zasebnog Zakona o zaštiti potrošača. Najvažniji razlozi su političke prirode, imajući u vidu da u pravnoj oblasti koji se tako brzo menja kao što je Evropsko pravo zaštite potrošača, direktiva koja sjedinjuje većinu odredbi u ovoj oblasti neće moći da se transponuje u jedan zakon kada politička volja za njegovo usvajanje nedostaje više od jedne decenije. Naime, Nacrt zakona o obligacionim odnosima Bosne i Hercegovine iz 2006, koji je transponovao ništa manje od trinaest direktiva o potrošačima, i Nacrt zakona o obligacionim odnosima iz 2010., koga je usvojio Savet Ministara kao Predlog Zakona o obligacionim odnosima i koji je transponovao sedam Direktiva, oba nisu prošla zakonodavnu proceduru jer politički predstavnici entiteta nisu mogli da se slože da li je Bosni i Hercegovini Zakon o obligacionim odnosima potreban na nivou entiteta ili države. Zakon o zaštiti potrošača koji je usvojen na državnom nivou 2002 godine[407] i koji je zamenjen novim Zakonom o zaštiti potrošača u 2006[408] nije imao nikakvih problema te vrste. Time je odgovoreno samo na pitanje politički mogućeg transponovanja. Kada se traži najbolji način za transponovanje, mora se uzeti u obzir da Zakon o zaštiti potrošača, iako je prvi

[404] Èlan 628 et seq., Albanski građanski zakonik, *Sl. list RAl* br. 11/94.
[405] Èlan 672, Albanski građanski zakonik
[406] Èlan 686, Albanski građanski zakonik
[407] Zakon o zaštiti potrošača *Sl. glasnik BiH* Br. 17/02.
[408] Zakon o zaštiti potrošača, *Sl. glasnik BiH* Br. 25/06.

put usvojen pre osam godina, nije stekao gotovo nikakav značaj u praksi. Duga tradicija odredbi o obligacionim odnosima sadržana u Zakonu o obligacionim odnosima je nadvladala primenljivost Zakona o zaštiti potrošača kao *lex specialis* u slučaju potrošačkih ugovora. Na osnovu člana 1(2) Zakona o zaštiti potrošača u slučaju sumnje ili kolizije odredbi tog zakona i drugog pravnog izvora kao što je Zakon o obligacionim odnosima, onaj koji pruža „viši nivo zaštite potrošača" će biti primenjen. Neizvesno je da li bi takva odredba bila u koliziji sa pristupom maksimalne harmonizacije horizontalne direktive. Shodno tome, samo doslovno transponovanje u poseban pravni akt čini se mogućim, ali niti bi doprinelo bližoj povezanosti između Zakona o obligacionim odnosima i zaštiti potrošača, što je od velike važnosti za razvoj u ovoj oblasti prava generalno, niti većoj primeni u praksi.

3. Transponovanje predložene Direktive o pravima potrošača u hrvatsko pravo

Odgovor na pitanje gde transponovati predloženu Direktivu o pravima potrošača je veoma složen i zavisi od više faktora. Na početku procesa približavanja nacionalnog ugovornog prava sa *acquis*, hrvatski zakonodavac je pokušao da sačuva tradicionalni sistem i vrednosti Zakona o obveznim odnosima od čestih izmena usvajanjem specijalnog i zasebnog Zakona o zaštiti potrošača. Većina direktiva o zaštiti potrošača, između ostalih Direktive 85/577, 93/13, i 97/7, su transponovane u Zakon o zaštiti potrošača. Osim ako Zakonom o zaštiti potrošača kao *lex specialis*-om nije drukčije određeno, na obveznopravne odnose između potrošača i trgovca primijenit će se odredbe Zakona o obveznim odnosima kao *lex generalis*-a.[409] Nakon usvajanja novog Zakona o obveznim odnosima u 2005. godini, hrvatski zakonodavac je odlučio da transponovanje tri direktive o zaštiti potrošača, to jest Direktive 85/374, 90/314 i 99/44 iskoristi za modernizaciju postojećih odredbi Zakona o obveznim odnosima.[410] Konačno, u implementaciji Direktive 2008/48, hrvatski zakonodavac je odlučio da usvoji poseban Zakon o potrošačkom kreditiranju[411] kao *lex specialissima* u odnosu na Zakon o zaštiti potrošača. Opisana pravna situacija komplikuje predviđanje o mogućim načinima transponovanja predložene Direktive o pravima potrošača. Poduhvat hrvatskog zakonodavca neće zavisiti samo od pitanja sadržajne naravi već i od pitanja političke i praktične prirode. Na primer, transponovanje direktive zavisi i od vremenskog roka u kome ministarstva koja vrše pripremu treba da ispune dužnost transponovanja. Pošto se pravo potrošača smatra posebnim privatnim pravom u odnosu na opšte građansko pravo, može se pretpostaviti da će se transponovanje izvršiti u okviru Zakona o zaštiti potrošača. Glavni problem bi bilo transponovanje predložene Direktive u odnosu na odredbe Direktive 99/44, od kojih su neke transponovane izvan obaveze (supererogatory) u Zakon o obveznim odnosima kako bi pokrile ne samo B2C, već i B2B i C2C ugovore o prodaji. Pošto je Predlog ograničen na B2C ugovorni odnos, taj način transponovanja neće biti moguć. Konačno, iako transponovanje predložene Direktive treba da predstavlja priliku da se potrošačko pravo približi opštem ugovornom pravu, čini se da transponovanje u okviru posebnog potrošačkog zakona, na primer hrvatskog Zakona o zaštiti potrošača više odgovara cilju predložene direktive.

4. Transponovanje predložene Direktive o pravima potrošača u makedonsko pravo

Makedonski Zakon o obligacionim odnosima[412], usvojen u 2001 godini na osnovu fundamentalnih principa Zakona o obligacionim odnosima SFR Jugoslavije, je zakonodavan akt

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[409] Član 2 (2) Zakona o zaštiti potrošača, *NN* br. 79/07, 125/07, 79/09, 89/09, 133/09.

[410] Zakon o obveznim odnosima, *NN* br. 35/05, 41/08.

[411] Zakon o potrošačkom kreditiranju, *NN* br. 75/09.

[412] Zakon o obligacionim odnosima, *Sl. list RMak* Br. 18/2001, 4/2002, 5/2003, 84/2008, 81/2009 i 161/2009.

koji na neki način služi kao Zakonik o obligacionim odnosima. Zakonodavac je u okviru Zakona o obligacionim odnosima usvojio tradicionalni sistem i metod regulisanja obligacionih odnosa, tako da su specifičnosti potrošačkih odnosa regulisane Zakonom o zaštiti potrošača[413] kao *lex specialis*[414].

Izmene načinjene u Zakonu o obligacionim odnosima u 2008. godini su načinjene između ostalog da obezbede odgovarajuće transponovanje Direktive 85/374, Direktive 93/13, Direktive 99/34 i Direktive 99/44. Zakon o zaštiti potrošača kako je opisan u Delu I ovog Izvoda je generalno približan postojećim direktivama u oblasti zaštite potrošača.

Nacionalni program usvajanja *Acquis Communautaire*[415] predviđa, za drugu polovinu 2010, izmene Zakona o zaštiti potrošača, tako da se u potpunosti približi Direktivi 2005/29/EC i Direktivi 98/27/EC. Usvajanjem Zakona o marketingu na daljinu potrošačkih finansijskih usluga predviđeno je transponovanje Direktive 2002/65/EC u nacionalno zakonodavstvo. Takođe se planiraju izmene relevantnog zakonodavstva u oblasti bezbednosti namirnica, NPAA takođe predviđa kao jedan od kratkoročnih prioriteta usvajanje Zakona o praćenju tržišta, koji treba da obezbedi pravni okvir za osnivanje koordinacionog tela koje će pratiti ispunjenje zakonskih uslova za obezbeđivanje visokih standarda između ostalog i zaštite potrošača.

Iako odgovarajući programi i planovi za usvajanje *Acquis Communitaire* ne predviđaju nikakve druge zakonodavne aktivnosti u oblasti zaštite potrošača, eventualno usvajanje predložene Direktive o pravima potrošača će uticati na nacionalno zakonodavstvo usled stalne obaveze države da svoje zakonodavstvo približava zakonodavstvu Evropske Unije. Međutim, kako će taj proces biti izvršen je pitanje koje će zahtevati ozbiljno razmatranje. Prateći postojeći pristup u regulisanju specifičnih pitanja o zaštiti potrošača putem *lex specialis*, za očekivati je da će glavni metod transponovanja biti izmenama Zakona o zaštiti potrošača ili eventualno usvajanjem novog zakona. Bez obzira na to, treba očekivati da će biti kontrolisano kako (predložena) Direktiva o pravima potrošača generalno utiče na ugovorne odnose tako da se razmotre izmene Zakona o obligacionim odnosima.

5. Transponovanje predložene Direktive o pravima potrošača u crnogorsko pravo

Crna Gora ostaje verna pristupu da većina direktiva o zaštiti potrošača treba da se transponuje u poseban zakon o zaštiti potrošača, dok će neke od njih biti transponovane u drugo generalno ili specifično zakonodavstvo. To je način na koji će u 2011 godini biti pokrenuta velika intervencija i, umesto izmena, planira se da ceo novi tekst Zakona o zaštiti potrošača bude pripremljen i usvojen.

U odnosu na predloženu Direktivu o pravima potrošača, opšte mišljenje u Crnoj Gori je da takav horizontalni instrument može da ponudi mogućnost za rešavanje važnih potrošačkih prava i obezbeđivanje njihove konzistencije, dok u isto vreme može da doprinese pojednostavljivanju određenih pravila i podigne svest potrošača o njihovim pravima. Međutim, istovremeno, utisak je da s obzirom da je u pitanju maksimalna harmonizacija da može da ograniči praktične vrednosti koje potrošač uživa pod starim *acquis* režimom i smanji nivo zaštite u situacijama gde su zemlje učesnice imale slobodu da postave striktnija pravila.

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[413] Zakon o zaštiti potrošača, *Sl. list RMak* Br. 38/2004, 77/2007 i 103/2008.

[414] Članom 2. paragraf 2 Zakona o zaštiti potrošača, o ugovornim i drugim obligacionim odnosima o trgovini robe i usluga primenjivaće se odredbe Zakona o obligacionim odnosima, osim ako se drugačije na navede u Zakonu o zaštiti potrošača.

[415] Nacionalni program za usvajanje Acquis Communautaire, Revizija 2009, poglavlje 3.28; http://www.sep.gov.mk/content/Dokumenti/EN/00%20NATIONAL%20PROGRAMME%20FOR%20ADOPTION%20OF%20THE%20ACQUIS%20COMMUNAUTAIRE%202009.pdf

Između ostalog, u praksi to znači da još uvek treba posmatrati kako će izgledati odnos između zakonodavstva o zaštiti potrošača i opšteg ugovornog prava kada Predlog Direktive o pravima potrošača postane deo crnogorske obaveze predviđene Poglavljem VI „Približavanje zakona, primena zakona i pravila konkurentnosti", i članom 72 SAA. To se između ostalog odnosi na razmatranja kako izbeći situaciju gde bi odredbe crnogorskog opšteg ugovornog zakona bile povoljnije potrošačima od posebnih pravila o zaštiti potrošača, jer prvi osim B2B, C2C i P2P ugovora se mogu primeniti i na B2C.

U svakom slučaju Crna Gora kao zemlja koja je već predala zvanične odgovore na Upitnik za pripremu Mišljenja o prijavi za članstvo, koja čeka na status kandidata, i harmonizacija zakonodavstva u prioritetnoj oblasti kao što je zaštita potrošača će biti izazovna ali je obavezna i može se postići.

6. Transponovanje Predloga Direktive o pravima potrošača u srpsko pravo

Usvajanjem okvirnog Zakona o zaštiti potrošača iz 2005. godine, srpski zakonodavac je pokušao, bez naročitog uspeha, da u srpsko pravo transponuje pojedine potrošačke direktive.[416] Činjenica što zakon uređuje neka pitanja na koja se odnose i potrošačke direktive, ne znači da je on sa tim direktivama usklađen. Odredbe Zakona o zaštiti potrošača koje se mogu svrstati u domen ugovornog prava reflektuju sasvim površna znanja o postojanju i sadržini osnovnih principa evropskog potrošačkog prava.

Nema indicija da bi moglo da dođe do izmena i dopuna Zakona o obligacionim odnosima[417] u cilju transponovanja u srpsko pravo bilo koje evropske potrošačke direktive.[418]

Ideje o načinu na koji bi trebalo poboljšati Zakon o obligacionim odnosima uglavnom su inspirisane *Skicom za zakonik o obligacijama i ugovorima*. Reč je o nacrtu zakona koji je napisao, i 1969. godine objavio, profesor Mihailo Konstantinović, osnivač Beogradske škole građanskog prava. Jugoslovenski Zakon o obligacionim odnosima rađen je po ugledu na Skicu. Komisija za izradu građanskog zakonika razmatra usvajanje upravo onih pravila iz Skice koja je 1978. godine izostavio jugoslovenski zakonodavac. Pored toga, Komisija razmatra prihvatanje određenih rešenja domaće sudske prakse i uporednog prava. Međutim, u izveštajima Komisije nema traga o uzimanju potrošačkih direktiva u obzir.

Međutim, u vreme pisanja ovog teksta (jun 2010. godine), srpsko Ministarstvo trgovine i usluga, kao ministarstvo nadležno za poslove zaštite potrošača, okončalo je rad na Nacrtu zakona o zaštiti potrošača, koji bi trebalo da uđe u zakonodavnu proceduru tokom jeseni 2010. godine. Nacrt ima za cilj transponovanje evropskih potrošačkih direktiva i harmonizaciju srpskog prava sa pravom Evropske unije u oblasti zaštite potrošača. Tokom rada na pomenutom Nacrtu uzeta su u obzir rešenja sadržana u Predlogu Direktive o pravima potrošača.[419]

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[416] Zakon o zaštiti potrošača, Sl. glasnik RS 79/05.

[417] Zakon o obligacionim odnosima, Službeni list SFRJ br. 29/78, 39/85, 45/89 – odluka USJ i 57/89, Službeni list SRJ No. 31/93, 22/99, 23/99, 35/99 i 44/99, Službeni list SCG br. 1/03 – Ustavna povelja.

[418] Cf. Vlada Republike Srbije. Komisija za izradu Građanskog zakonika, Rad na izradi Građanskog zakonika. Izveštaj Komisije sa otvorenim pitanjima, Pravni život, Tom III, 11/2007, 5–407. Komisija za izradu Građanskog zakonika, Prednacrt. Građanski zakonik Republike Srbije. Druga knjiga. Obligacioni odnosi, Vlada Republike Srbije, Beograd 2009, 1-451.

[419] Predlog Komisije za Direktivu o pravima potrošača, COM(2008) 614/3.

C. MEĐUNARODNO PRIVATNO PRAVO U POTROŠAČKIM UGOVORIMA

Zlatan Meškić

Zaštita potrošača u međunarodnom privatnom pravu Evropske Unije većinski je zasnovana na članu 6., Regulative Rim I[420], članovima 15.-17. Regulative Brisel I[421] i kolizionim normama nove generacije potrošačkih direktiva[422]. Sa jedne strane međusobno usaglašeni Rim I i Brisel I obezbeđuju zaštitu potrošača propisujući nadležnost sudova države članice koja je domicilna za potrošača, neovisno o činjenici da li je potrošač tužitelj ili tuženi, koji onda primenjuju domaće pravo[423]. U cilju obezbeđenja prekogranične zaštite potrošača, član 15. Regulative Brisel I i član 6. Regulative Rim I sadrže zajednički minimalni uslov, da profesionalac usmerava svoje aktivnosti prema državi prebivališta/redovnog boravišta potrošača, a ugovor spada u područje tih aktivnosti. Sa druge strane kolizione norme potrošačkih direktiva imaju za cilj da obezbede primenljivost nacionalnih odredbi koje transponuju direktive kada postoji „bliska veza" sa teritorijom (jedne ili više) država članica, a potrošački ugovor sadrži odredbu o izboru prava u korist države koja nije članica. Pošto te odredbe pokušavaju da garantuju nivo zaštite potrošača koga predviđaju direktive naspram pretpostavljenog nižeg nivoa zaštite u državama koje nisu članice, njihovo transponovanje u zakone država koje učestvuju u ovom projektu će dobiti smisao kada države učesnice postanu članice EU. Njihova obaveza da transponuju kolizione norme iz potrošačkih direktiva takođe zavisi od budućnosti „horizontalne direktive". U „Direktivi Evropskog Parlamenta i Saveta o pravima potrošača"[424] nema kolizionih normi a nova direktiva sa konceptom „maksimalne harmonizacije" će na osnovu svog člana 47. ukinuti četiri direktive koje su bile predmet ove analize. To bi rešilo tekuće diskusije o hijerarhiji normi između transponovanih kolizionih normi iz direktiva i regulative Rim I. Trenutno na osnovu člana 23. regulative Rim I kolizione norme iz direktiva imaju prioritet nad odredbama iz Rima I[425].

Regulative Rim I i Brisel I ne moraju da se transponuju pošto će one postati direktno primenljive čim države učesnice postanu članice EU. Međutim, njihova primena je već moguća

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[420] Regulativa (EZ) br. 593/2008 Evropskog Parlamenta i Saveta od 17. juna 2008. o mjerodavnom pravu za ugovorne obaveze (Rim I), *Sl. list EU* L 177/6, 04/07/2008, str. 6-16.

[421] Regulativa Saveta (EZ) br. 44/2001 od 22. decembra 2000. o nadležnosti, priznavanju i izvršenju presuda u građanskim i trgovačkim stvarima, *Sl. list EU* L 12, 16/01/2001, str. 1-23.

[422] Član 6 (2) Direktive Savjeta 93/13/EEZ od 5. aprila 1993., o nepravičnim uslovima u potrošačkim ugovorima, *Sl. list EU L* 095, 21/04/1993, str. 29-34; član 12 (2) Direktive 97/7/EZ Evropskog Parlamenta i Saveta od 20. maja 1997. o zaštiti potrošača u pogledu ugovora na daljinu, *Sl. list EU* L 144, 04/06/1997, str. 19-27, izmijenjene Direktivom 2002/65/EZ, Direktivom 2005/29/EZ, Direktivom 2007/64/EZ; član 7 (2) Direktive 1999/44/EZ Evropskog Parlamenta i Saveta od 25. maja 1999. o određenim aspektima prodaje robe široke potrošnje i povezanim garancijama, *Sl. list EU* L 171, 07/07/1999, str. 12-16.

[423] Ova tvrdnja je istinita u slučajevima gde se koncept „domicila" korišćenog u Regulativi Brisel I preklapa sa manje zahtevnim konceptom „redovno boravište" upotrebljenog u Regulativi Rim I. Vidi M. Stanivuković, "Ugovori sa potrošačima sa inostranim elementom – merodavno pravo i nadležnost", *Zbornik radova Dvadeset godina Zakona o Međunarodnom privatnom pravu*, Pravni fakultet Univerziteta u Nišu, Niš 2004, 251.

[424] COM(2008) 614 final.

[425] Takva hijerarhija je oštro kritikovana u pravnoj nauci, jer kolizione norme Direktiva imaju za cilj samo da obezbede primenu potrošačkog prava jedne od država članica, bez utvrđivanja mjerodavnog prava. Pored toga, većina država članica je različito transponovala te odredbe i time ugrozila pravnu sigurnost stvorenu Rimskom Konvencijom; vidi E. Jayme, "Zum Stand des IPR in Europa", *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)*, 1996, 65.

u tim državama. Brisel I može samo da utvrdi nadležnost sudova država članica EU, inače bi prekršio međunarodno javno pravo mešanjem u suverena prava trećih zemalja.[426] Bez obzira na to, u slučajevima kada je tuženom domicilna država članica EU, na osnovu presude *Owusu*[427], Brisel I se primenjuje čak kada su činjenice slučaja povezane sa samo jednom državom članicom i jednom ili više država koje nisu članice. Shodno tome na osnovu člana 16. Brisela I potrošač sa državljanstvom jedne od zemalja koje učestvuju u ovoj analizi može pokrenuti postupak pred sudovima države članice koja mu je domicilna. [428] *Prorogatio fori* koji odstupa od nadležnosti određene članom 16. Brisela I može da se zaključi samo *post litem natan*. U tim slučajevima na osnovu člana 6. (1) Rima I, primenilo bi se pravo države potrošačevog redovnog boravišta, bez obzira na činjenicu da li se nalazi na teritoriji države članice EU ili ne. Kada potrošač ima redovno boravište na teritoriji jedne od država članice, na osnovu člana 6. (2) Rima I odredba o izboru prava u korist jedne od država koja učestvuje u ovoj analizi bi se primenila u meri u kojoj pruža viši nivo zaštite potrošača nego „unutrašnji" prinudni propisi države potrošačevog redovnog boravišta. Kada ugovor ne spada u područje primene člana 6. Rima I, na osnovu člana 3. (3) i (4) Rima I u slučaju kada svi elementi situacije nalaze u državi članici, njeni „unutrašnji" prinudni propisi se primenjuju bez obzira na odredbu o izboru prava u korist prava druge države (članice ili nečlanice).[429] Novi razvoj naveden u presudi Evropskog Suda Pravde *Ingmar* dodatno sugeriše da neke nacionalne odredbe o zaštiti potrošača koje transponuju potrošačke direktive mogu da se smatraju za „međunarodne" prinudne propise i primenjuju bez obzira na mjerodavno pravo određeno Rimom I[430]. Odredbe o zaštiti potrošača većine država učesnica ovog projekta se jasno deklarišu kao (barem) „unutrašnji" prinudni propisi[431]. Članovi 6. (2) Rima I i 3. (3) i (4) Rima I samo obezbeđuju primenu prinudnih propisa država članica EU.

Države učesnice su već uložile puno truda da reformišu njihove kodifikacije Međunarodnog privatnog prava, koje su većim delom stare tri decenije ili više i ne sadrže odredbe o zaštiti potrošača[432]. Jedan od najvažnijih motiva za reformu je bio da usklade odredbe njihovog Međunarodnog privatnog prava sa gore opisanim Pravom EU. Makedonija je još uvek jedina

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[426] S. Leible, "Internationales Vertragsrecht, die Arbeiten an einer Rom I-Verordnung und der Europäische Vertragsgerichtsstand", *IPRax*, 2006, 370.

[427] Vidi Sud EU, 1. mart 2005., C-281/02 – *Andrew Owusu v N.B. Jackson, trading as 'Villa Holidays Bal-Inn Villas', Mammee Bay Resorts Ltd, Mammee Bay Club Ltd, The Enchanted Garden Resorts & Spa Ltd, Consulting Services Ltd, Town & Country Resorts Ltd* [2005] ECR I-01383, para. (26); Ova odluka je doneta o području primene Briselske Konvencije (Konvencija od 27. septembra 1968. o nadležnosti i izvršenju presuda u građanskim i trgovačkim stvarima) koja je zamenjena Briselom I.

[428] K. Sajko, *Međunarodno privatno pravo*, Narodne novine, Zagreb, 2009., str. 412.

[429] Formulacija člana 3. (4) Rima I sugeriše da u harmonizovanim oblastima Ugovornog prava EU, kao što je pravo potrošačkih ugovora, te odredbe deluju kao nacionalni prinudni propisi države (u ovom slučaju EU) i uključene su u ugovore bez obzira na izbor prava. Ta odredba imala je za cilj zamenu kolizionih normi Direktiva o zaštiti potrošača.

[430] Sud EU, 9. Novembar 2001., C-381/98 – *Ingmar GB Ltd and Eaton Leonard Technologies Inc.* [2000] ECR I-09305; See Z. Meškić, "Kolizione norme za zaštitu potrošača u direktivama Evropske zajednice i Uredbi Rim I – novi izazov za ZRSZ, Zbornik Pravnog fakulteta Sveučilišta u Rijeci", 2/2009, 1017.

[431] Član 5 (1) crnogorskog Zakona o zaštiti potrošača, *Sl. list RCG* br. 26/07; član 4. hrvatskog Zakona o zaštiti potrošača, *NN* br. 79/07, 125/07, 79/09, 89/09, 133/09; član 2 Zakona o zaštiti potrošača Bosne i Hercegovine, *Sl. glasnik BiH* br. 17/02.

[432] Albanski zakon o uživanju građanskih prava od strane stranaca i primeni stranog prava, *Sl. list Ral* br. 3920/64; Većina zemalja naslednica bivše Jugoslavije još uvek primenjuje skoro nepromenjenu verziju jugoslovenskog Zakonika o Međunarodnom privatnom pravu, to jest Zakon o rešavanju sukoba zakona sa propisima drugih zemalja u određenim odnosima, *Sl. list SFRJ* br. 43/82 i 72/82.

od država učesnica koja može da prezentuje rezultat svog procesa reformi, to jest makedonski Zakon o Međunarodnom privatnom pravu iz 2007.[433] Član 25. makedonskog Zakona o Međunarodnom privatnom pravu reguliše potrošačke ugovore i većinski je usaglašen sa članom 5. Rimske konvencije,[434] jer Regulativa Rim I nije bila usvojena u vreme njegove pripreme. U drugim državama učesnicama revizija je još uvek u toku i zbog toga se o njoj neće diskutovati[435]. Bosna i Hercegovina je jedina država koja ne razmatra reviziju svog zakona međunarodnog privatnog prava jer bi to moglo da ima za rezultat usvajanje dva različita Zakona o međunarodnom privatnom pravu, usvojena na nivou entiteta, i time uzrokuje dodatnu koliziju zakona.

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[433] Zakonik o međunarodnom privatnom pravu Republike Makedonije, *Sl. list Mac* br. 87; Prevod na nemački Ch. Jessel-Holst, IPRax 2008, 158.

[434] Konvencija o mjerodavnom pravu za ugovorne obaveze otvorena za potpisivanje u Rimu 19. juna 1980., *Sl. list EU L 266*, 09/10/1980, *str. 1 –19.*

[435] Na primer u Hrvatskoj već u 2001., grupa profesora je izradila "Teze za Međunarodno privatno pravo" koje treba da se koriste kao osnova za Nacrt novog Međunarodnog privatnog prava Hrvatske (videti K. Sajko, H. Sikirić, V. Bouček, D. Babić, N. Tepeš, *Teze za Zakon o Međunarodnom privatnom pravu*, Izvori hrvatskog i europskog međunarodnog privatnog prava, Informator, Zagreb, 2001., str. 255-340); Videti E. Čikara, *Gegenwart und Zukunft der Verbraucherkreditverträge in der EU und in Kroatien*, LIT Verlag, Wien (*et al.*), 2010.

4. deo:
SPISAK SKRAĆENICA I BIBLIOGRAFIJA

Dodatak A: SPISAK SKRAĆENICA

Al	Albanija
BiH	Bosna i Hercegovina
BNZOO	Nacrt zakona o obligacionim odnosima Bosne i Hercegovine
br.	Broj
B2B	Između privrednih subjekata (*business-to-business*)
B2C	Između privrednih subjekata i potrošača (*business-to-consumer*)
BZOO	Zakon o obligacionim odnosima Bosne i Hercegovine
cca.	cirka (otprilike; oko)
CG	Crna Gora
čl.	Član
ECU	Evropska novčana jedinica
ed.	Urednik
ESP	Sud pravde Evropskih zajednica, koji je Lisabonskim ugovorom promenio ime u Sud pravde Evropske unije
et al.	et alia (i drugi)
et. seq.	et sequentes (i sledeći)
EU	Evropska unija
EUR	Evro
EZ	Evropske zajednice
FN	Fusnota
GTZ	Nemačko društvo za tehničku saradnju - GTZ d.o.o. (Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH)
HR	Hrvatska
HRK	Hrvatska kuna
HZOO	Zakon o obveznim odnosima (Hrvatske)
i.e.	id est (odnosno)
IES	Izveštaji Evropskog suda

itd. (etc.)	I tako dalje (et cetera)
infra	Ispod
IPRax	Praxis des Internationalen Privat- und Verfahrensrechts
JIE	Jugoistočna Evropa
lit.	litera (slovo)
M	Makedonija
MFI	mikrofinansijske institucije
MS	međunarodni sporazumi
npr. (e.g.)	na primer (exempli gratia)
NVO	nevladine organizacije
NZOO	Nacrt zakona o obligacionim odnosima (Bosne i Hercegovine)
P2P	između javnih i privatnih subjekata (Public to Private)
RAl	Republika Albanija
RCG	Republika Crna Gora
ref.	Upućivanje
RH	Republika Hrvatska
RM	Republika Makedonija
RS	Republika Srbija
SFRJ	Socijalistička Federativna Republika Jugoslavija
Sl.list	Službeni list
SRB	Srbija
SRJ	Savezna Republika Jugoslavija
SSP	Sporazum o stabilizaciji i pridruživanju
st.	Stav
str.	Strana (strane)
supra	Iznad
v.	Protiv
Vol.	Tom
VSRH	Vrhovni sud Republike Hrvatske
VTSRH	Visoki trgovački sud Republike Hrvatske
ZKI	Zakon o kreditnim institucijama
ZOO	Zakon o obligacionim odnosima
ZZP	Zakon o zaštiti potrošača

Dodatak B: BIBLIOGRAFIJA

1. Izvori prava Evropske unije:

Konvencija o mjerodavnom pravu za ugovorne obaveze otvorena za potpisivanje u Rimu 19.06.1980., *Sl.list L 266*, 09/10/1980, *str. 0001 – 0019*

Direktiva Saveta br. 85/577/EEZ od 20.12.1985. za zaštitu potrošača u pogledu ugovora sklopljenih van poslovnih prostorija, *Sl.list L 372*, 31.12.1985, *str. 0031 – 0033*

Direktiva Saveta 93/13/EEZ od 05.04.1993. godine, o odredbama koje se protive načelu savesnosti i poštenja (nepravičnim odredbama) u potrošačkim ugovorima**,** *Sl.list L 095*, 21/04/1993, *str. 0029 – 0034*

Direktiva Saveta (EZ) br. 44/2001 od 22.12.2000. o nadležnosti i priznavanju i izvršenju presuda u građanskim i trgovačkim stvarima, *Sl.list L 012*, 16/01/2001, *str. 0001 – 0023*

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Direktiva Evropskog parlamenta i Saveta 1999/44/EZ od 25.05.1999. godine, o određenim aspektima prodaje robe široke potrošnje i pratećim garancijama, *Sl.list L 171*, 07/07/1999, *str. 0012– 0016*

Zelena knjiga Komisije o opcionim politikama na putu ka Evropskom obligacionom pravu za potrošače i privredne subjekte, COM(2010) objavljena 1.07.2010.

Predlog Direktive Evropskog parlamenta i Saveta o potrošačkim pravima, COM(2008) 614 final

Uredba Evropskog parlamenta i Saveta (EZ) br. 593/2008 od 17.06.2008. o pravu merodavnom za ugovorne obaveze (Rim I), *Sl.list L 177/6*, 04/07/2008., *str. 0006-0016*

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– Presuda ESP od 16.05.1989, u predmetu C-382/87 – *R. Buet i SARL Educational Business Services protiv Ministère Public* [1989] ECR I-01235

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c) **Direktiva Evropskog parlamenta i Saveta 97/7/EZ od 20.05.1997. godine, o zaštiti potrošača kod sklapanja ugovora o prodaji na daljinu, *Sl.list L 144*, 04/06/1997, *str. 0019 – 0027*, izmenjena i dopunjena Direktivom 2002/65/EZ, Direktivom 2005/29/EZ i Direktivom 2007/64/EZ:**

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Zakon o zaštiti potrošača br. 9135 od 11.09.2003, *Sl.list R. Albanije* br. 84/03

Zakon o zaštiti potrošača br. 9902 od 17.04.2008., *Sl.list R. Albanije* br. 61/08

Odluka Banke Albanije „O usvajanju Propisa o potrošačkim kreditima i hipotekarnim kreditima za fizička lica", *Sl.list R. Albanije* br. 30/09

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Odluka Saveta ministara br.64 od 21.01.2009. „O ugovorima na daljinu", *Sl.list R. Albanije br.* 08/09

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Zakon o elektronskoj trgovini br. 10128 od 11.05.2009., *Sl.list R. Albanije br.* 85/09

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Sporazum u stabilizaciji i pridruživanju između Republike Albanije, s jedne strane, i Evropskih zajednica i njihovih država članica, s druge strane, - Zakon o potvrđivanju br. 9590 od 27.07.2006 - *Međunarodni sporazumi Republike Albanije Sl.list R. Albanije br.* 87/06

Odluka Saveta ministara „Nacionalni akcioni plan u vezi sprovođenja Sporazuma o stabilizaciji i pridruživanju" br. 463 od 05.07.2006, *Sl.list R. Albanije br*. 80/06

Odluka Saveta ministara „O usvajanju međusektorske strategije za zaštitu potrošača i nadzor nad tržištem, za period 2007-2013" br. 797 od, 14.11.2007, *Sl.list R. Albanije br*. 171/07

Bosna i Hercegovina:

Zakon o rešavanju sukobu zakona sa propisima drugih zemalja u određenim odnosima, *Sl.list SFRJ br*. 43/82 i 72/82, *Sl.glasnik BiH br*. 2/92 i 13/94

Zakon o zaštiti potrošača 2002, *Sl.glasnik BiH br*. 17/02

Zakon o zaštiti potrošača 2006, *Sl.glasnik BiH br*. 25/06

Zakon o obligacionim odnosima Federacije Bosne i Hercegovine, *Sl.list SFRJ br*. 29/78, 39/85, 46/85, 45/89, 57/89, *Sl.list Republike Bosne i Hercegovine*, 2/92, 13/93, 13/94 i *Sl.glasnik Federacije Bosne i Hercegovine*, *br*. 29/03

Zakon o obligacionim odnosima Republike Srpske, *Sl.list SFRJ*, *br*. 29/78, 39/85, 46/85, 45/89, 57/89 i *Sl.glasnik Republke Srpske*, *br*. 17/93, 57/98, 39/03, 74/04

Zakon o elektronskom pravnom i poslovnom prometu, *Sl.glasnik BiH br*. 88/07

Zakon o elektronskom potpisu, *Sl.glasnik BiH br*. 91/06

Zakon o opštoj bezbednosti proizvoda, *Sl.glasnik BiH br*. 102/09

Zakon o nadzoru nad tržištem u Bosni i Hercegovini, *Sl.glasnik BiH br*. 45/04, 44/07 i 102/09

Sporazum o stabilizaciji i pridruživanju između Bosne i Hercegovine, s jedne strane, i Evropskih zajednica i njihovih država članica, s druge strane, Sl. glasnik - *Međunarodni sporazumi Bosne i Hercegovine, b*r. 5/08.

Hrvatska:

Zakon o pravu na pristup informacijama, *NN br.* 172/03

Zakon o elektroničkoj trgovini, *NN br.* 173/03, 67/08, 36/09

Zakon o pružanju usluga u turizmu, *NN br.* 68/07

Zakon o rješavanju sukoba zakona s propisima drugih zemalja u određenim odnosima, *Sl.list SFRJ br*. 43/82 i 72/82, *NN br.* 53/91 i 88/01

Zakon o konačnosti namire u platnim sustavima i sustavima za namiru financijskih instrumenata, *NN br.* 117/08

Zakon o obveznim odnosima, *NN br.* 35/05, 41/08

Zakon o potrošačkom kreditiranju, *NN br.* 75/09

Zakon o zaštiti potrošača, *NN br.* 79/07, 125/07, 79/09, 89/09, 133/09

Zakon o zaštiti potrošača, *NN br.* 96/03

Zakon o kreditnim institucijama, *NN br.* 117/08, 74/09, 153/09

Zakon o elektroničkim komunikacijama**,** *NN br.* 73/08

Zakon o institucijama za elektronički novac**,** *NN br.* 117/08, 74/09

Zakon o elektroničkom potpisu, *NN br.* 10/02, 80/08

Zakon o deviznom poslovanju**,** *NN br.* 96/03, 140/05, 132/06, 150/08, 92/09, 153/09

Zakon o općoj sigurnosti proizvoda, *NN br.* 30/09

Uredba o određivanju osoba ovlaštenih za pokretanje postupka radi zaštite kolektivnih interesa potrošača, *NN br.* 124/09

Uredba o određivanju pravnih osoba ovlaštenih za podnošenje tužbe u vezi sa zabranom korištenja nepoštenih ugovornih odredaba u potrošačkim ugovorima, *NN br.* 41/08

Pravilnik o minimalnim tehničkim uvjetima za poslovne prostorije u kojima se obavlja trgovina i posredovanje u trgovini i uvjetima za prodaju robe izvan prostorija, *NN br.* 37/98, 73/02, 153/02, 12/06

Sporazum o stabilizaciji i pridruživanju između Republike Hrvatske i Evropskih zajednica i njihovih država članica, *NN MU* br. 14/01

Zakon o Državnom inspektoratu, *NN br.* 116/08, 123/08

Zakon o trgovini, *NN br.* 87/08, 96/08, 116/08

Zakon o obveznim odnosima, *NN br.* 53/91, 73/91, 111/93, 3/94, 107/95, 7/96, 91/96, 112/99, 88/01, kojim je preuzet jugoslovenski Zakon o obveznim odnosima, *Sl list SFRJ br*. 29/78, 39/85, 46/85, 45/89, 57/89, putem Zakona o preuzimanju Zakona o obveznim odnosima, *NN br.* 53/91

Makedonija:

Zakon o rešavanju sukoba zakona sa propisima drugih zemalja u određenim odnosima, *Sl.list SFRJ br*. 43/82 i 72/82, *Sl.list RM br.* 52/1991

Zakon o međunarodnom privatnom pravu, *Sl.list RM br. 87/2007*

Zakon o zaštiti potrošača 2000, *Sl.list RM br.* 63/2000 i 4/2002

Zakon o zaštiti potrošača 2004, *Sl.list RM br.* 38/2004, 77/2007 i 103/08

Zakon o obligacionim odnosima, *Sl.list RM br*. 18/2001, 4/2002, 5/2003, 84/2008., 81/2009. i 161/2009

Zakon o zaštiti potrošača u ugovorima o potrošačkim kreditima, *Sl.list RM br. 63/2007*

Zakon o elektronskoj trgovini, *Sl.list RM br. 133/2007*

Zakon o podacima u elektronskoj formi i o elektronskom potpisu, *Sl.list RM br.* 34/2001, 6/2002 i 98/2008

Zakon o trgovini, *Sl.list RM br.* 16/2004, 128/2006, 63/2007, 88/2008, 159/2008, 20/2009, 99/2009 i 105/2009

Zakon o lizingu, *Sl.list RM br.* 4/2002; 49/2003; 13/2006; 88/2008

Zakon o državnom tržišnom inspektoratu, *Sl.list RM br.* 24/2007 i 81/2007

Zakon o bezbednosti proizvoda, *Sl.list RM br.* 33/2006 i 63/2007

Program za zaštitu potrošača Vlade Republike Makedonije za 2009 - 2010, *br.* 33/2009 i 5/2010

Sporazum o stabilizaciji i pridruživanju između Republike Makedonije, s jedne strane, i Evropskih zajednica i njihovih država članica, s druge strane, Sl.list - *Međunarodni sporazumi Republike Makedonije, br 28*/01

Crna Gora:

Ustav Crne Gore, *Sl.list CG br. 01/07*

Sporazum o stabilizaciji i pridruživanju između Evropskih zajednica i njihovih država članica, s jedne strane, i Republike Crne Gore, s druge strane, Sl.list CG *br* 07/07

Zakon o zaštiti potrošača, *Sl.list RCG br.* 26/07

Zakon o obligacionim odnosima, *Sl.list CG br* 47/08

Zakon o spoljnoj trgovini, *Sl.list RCG br.* 49/08

Zakon o elektronskom potpisu, *Sl.list RCG br. 84/04*

Zakon o elektronskim komunikacijama, *Sl.list CG b*r. *50/08*

Zakon o inspekcijskom nadzoru, *Sl.list RCG br. 39/03 i Sl.list CG b. 76/09*

Zakon o izvršnom postupku, *Sl.list RCG br. 23/04*

Zakon o rešavanju sukobu zakona sa propisima drugih zemalja u određenim odnosima, *Sl.list SFRJ br*. 43/82 i 72/82, *Sl.list SRJ* br. 46/96, i *Sl.list RCG br. 06/02*

Zakon o bankama, *Sl.list CG br. 17/08*

Zakon o lekovima, *Sl.list RCG br. 80/04 i Sl.list CG br. 18/08*

Zakon o obligacionim odnosima i osnovama svojinsko-pravnih odnosa u vazdušnom saobraćaju, *Sl.list SRJ br. 12/98 i 15/98*

Zakon o privrednim društvima, *Sl.list RCG br. 6/02 i Sl.list CG br. 17/07 i 80/08.+*

Zakon o opštoj bezbednosti proizvoda, *Sl.list CG br. 48/08*

Zakon o tehničkim zahtevima za proizvode i ocenjivanju usaglašenosti proizvoda s propisanim zahtevima, *Sl.list CG br.14/08*

Uredba o zahtevima za organizaciju javne i aukcijske prodaje, *Sl.list CG br. 01/10*

Pravilnik o arbitražnom odboru za rešavanje potrošačkih sporova, *Sl.list CG br. 28/08*

Zakon o obligacionim odnosima, *Sl.list SFRJ br*. 29/78, 39/85, 57/89 i *Sl.list SRJ br*. 31/93

Zakon o zaštiti potrošača, *Sl.list SRJ br*. 37/02

Zakon o trgovini, *Sl.list SRJ br*. 46/90

Zakon o trgovini, *Sl.list SRJ br*. 32/93, 50/93, 41/94, 29/96

Srbija:

Ustav Republike Srbije, Sl. glasnik RS 83/06

Zakon o obligacionim odnosima, Sl. list SFRJ br. 29/78, 39/85, 45/89 – odluka USJ i 57/89, Sl. list SRJ No. 31/93, 22/99, 23/99, 35/99 i 44/99, Sl. list SCG br. 1/03 – Ustavna povelja

Zakon o zaštiti potrošača, Sl. glasnik RS 79/05

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Zakon o rešavanju sukoba zakona sa propisima drugih zemalja u određenim odnosima, Sl. list SFRJ br. 43/82 i 72/82, Sl. list SRJ br. 46/96

Zakon o zaštiti potrošača, Sl. list SRJ br. 37/02

Zakon o turizmu, Sl. glasnik RS br. 36/09

Zakon o odgovornosti proizvođača stvari sa nedostatkom, Sl. glasnik RS br. 101/05

Zakon o elektronskom potpisu, Sl. glasnik RS br. 135/04

Zakon o elektronskoj trgovini, Sl. glasnik RS br. 41/09

Zakon o opštoj bezbednosti proizvoda, Sl. glasnik RS br. 41/09

Zakon o telekomunikacijama, Sl. glasnik RS br. 44/03, 36/06

Zakon o zaštiti podataka o ličnosti, Sl. glasnik RS br. 97/08

4. Nacionalna sudska praksa u zemljama učesnicama:

Albanija:

U Albaniji ne postoji sudska praksa u vezi potrošača i ZZP. U rešavanju sporova sudovi se pre opredeljuju za korišćenje opšteg obligacionog prava nego ZZP.

Bosna i Hercegovina:

Ustavni sud Bosne i Hercegovine, AP-1385/06, 26.06.2007, *Sl.glasnik BiH br*. 60/05 (potrošački ugovori)

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Hrvatska:

Županijski sud u Varaždinu, Gž. 1074/08–2 od 4.08. 2008. (prodaja robe)

Županijski sud u Varaždinu, Gž. 1052/08–2 od 12.06.2008. (potrošački kredit)

Viši trgovački sud Republike Hrvatske (VTSRH), Pž 2222/92 od 27.04.1993 (nepoštene ugovorne odredbe)

Odluka Agencije za zaštitu tržišnog natjecanja, UP/I 030-02/2004-01/66, *NN br*. 135/05 (zaštita kolektivnih interesa potrošača)

Vrhovni sud Republike Hrvatske (VSRH), Rev 2458/90 od 13.02.1991. (prodaja robe)

Makedonija:

Nema podataka o sudskim odlukama koje su Vrhovni ili Upravni sud donosili na osnovu postojećeg Zakona o zaštiti potrošača. Na građanske sporove koji bi se mogli uvrstiti u potrošačke sporove Vrhovni sud primenjuje Zakon o obligacionim odnosima kao i posebne sektorske zakone.

Crna Gora:

Vrhovni sud RCG, Rev. 252/87, od 29.04.1987. (prodaja robe široke potrošnje, javne izjave)

Vrhovni sud RCG, Rev. 346/93 od 29.06.1993. (prodaja robe široke potrošnje, pravo na nadoknadu)

Vrhovni sud RCG, Rev. 220/93 od 09.12.1993. (pravo na odštetu)

Savezni sud SRJ, Gsz. 19/94 od 24.11.1994. (nepravične ugovorne odredbe, posledice po ugovor u celini)

Vrhovni sud RCG, Rev. 299/03 od 23.11.2006. (prodaja robe široke potrošnje, zahtevi saobraznosti u slučaju nepokretne imovine)

Vrhovni sud RCG, Rev. 29/06, od 28.02.2007. (prodaja robe široke potrošnje, zahtevi saobraznosti u slučaju usluga)

Arbitražni odbor za vansudsko rešavanje potrošačkih sporova, Protokol o sporazumnom rešenju spora, od 13.05.2009. (prodaja robe široke potrošnje, zahtevi saobraznosti)

Arbitražni odbor za vansudsko rešavanje potrošačkih sporova, Protokol o sporazumnom rešenju spora, od 04.11.2009. (prodaja robe široke potrošnje, zahtevi saobraznosti)

Srbija:

U domenu ugovornog prava praktično nema sudske prakse koja bi se oslanjala na važeći Zakon o zaštiti potrošača. U sporovima o postojanju i sadržini onih ugovora koji bi se mogli kvalifikovati kao potrošački i dalje se primenjuje Zakon o obligacionim odnosima.

5. Nacionalna pravna literatura

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