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'Serbian Consumer Law: out with the old, in with the new'

Consumer law has developed to form a coherent area of the law in most European countries. In a large number of countries, it is the subject of specialist codes or specific codifying laws³ or has been integrated in a civil code.⁴ Consumer law is taught at universities and it is the subject of numerous textbooks.⁵ Most importantly, it has a clear scope: the protection of the weaker party, the consumer, in its relations with businesses (although definitions may vary).⁶ But while consumer protection is now at the forefront of policy development in the EU⁷, this state of play is the result of a long drawn process of political negotiations and incremental changes alongside national systems of protection. Indeed, the Treaty of Rome 1957 remained silent on the protection of consumers with only a few indirect mentions.⁸ As a result, the European Community had no constitutional basis for action in this

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³ For example France (1993), Italy (1998), Luxembourg (2011), Portugal (2012), Spain (2012).

⁴ In Germany, consumer law is part of the BGB. In the Netherlands, consumer law is also integrated in the New Civil Code. For more details, see Martijn W. Hesselink, 'The ideal of codification and the dynamics of Europeanisation: The Dutch Experience' (2006) 12(3) *European Law Journal* 279-305. Note that in Germany, discussions amongst academics focus on a reform and a stand-alone code. See on this topic Hannes Rösler, *Europäisches Konsumentenvertragsrecht/ Grundkonzeption, Prinzipien und Fortentwicklung* (Beck 2004); Hans-W Micklitz, 'Do Consumers and Businesses Need a New Architecture of Consumer Law - A thought Provoking Impulse' (2013) 32 *Yearbook of European Law* 266; For a view against such codification, see Ewoud Hondius, 'Against a New Architecture of Consumer Law - A Traditional View', in Kay Purnhagen, Peter Rott (eds.), *Varieties of European Economic Law and Regulation, Liber Americium for Hans Micklitz* (Springer 2014) 599.

⁵ Woodroffe & Lowe, *Consumer Law and Practice* (98th edn, Sweet & Maxwell 2013); Iain Ramsay, *Consumer Law & Policy, Text and Materials on Regulating Consumer Markets* (3rd ed. Hart Publishing 2012); Geraint Howells and Stephen Weatherhill, *Consumer Protection Law* (2nd edn, Ashgate 2005). Similar textbooks exist in the area of European Consumer Law. See for example, Norbert Reich, Hans-W Micklitz, Peter Rott and Klaus Tonner, *European Consumer Law* (2nd edn, Intersentia 2014); Hans-W Micklitz, Jules Stuyck, Evelyne Terryn, *Cases, Materials and Texts on Consumer Law* (Hart 2010).

⁶ Christine Riefa, 'Codification: The Future of English Common Law?' (2015) 1 *EuCML* (forthcoming xx).

⁷ Communication from the Commission, A European Consumer Agenda – boosting confidence and growth, COM(2012) 225 final,1.

⁸ See for example, Article 39 and 40 of the Treaty of Rome which concerned ensuring reasonable prices in delivery to consumers and excluding all discrimination between producers or consumers in the field of agricultural policy.

area. It was in the early 1970's that political momentum started to gather, in the wake of the Molony Committee report in the UK, the Kennedy Speech in the US⁹ and a number high profile cases concerning the safety of consumers, most notably the Thalidomide tragedy in which the drug given to mothers to alleviate morning sickness resulted in babies born with severe birth defects.¹⁰ Political momentum paved the way for constitutional acceptance and recognition, first in the Single European Act in 1986 where consumer law became an integral part of the policy concerning the completion of the Single European Market¹¹, and subsequently, the introduction of a specific consumer protection chapter in the Maastricht Treaty of 1993.¹² The Treaty of Lisbon in 2007 rubber-stamped the EU advances in consumer policy and gave it a clear legal basis¹³ and some prominence¹⁴ although consumer policy remains an area of shared competence¹⁵ between the member states and the EU.

By contrast, consumer protection in Serbia is a rather new concept, with little identity. In June 2014, the Serbian Parliament adopted the new Law on Consumer Protection ('LCP 2014'). It entered into force in September 2014.¹⁶ The LCP 2014 is the fourth piece of specialised legislation on consumer protection adopted in just over a decade. The history of contemporary Serbian consumer law in effect starts in 2002 with the adoption of Serbia's first Law on Consumer Protection¹⁷. This law was quickly repealed and followed by a second Law on Consumer Protection in 2005.¹⁸

⁹ In 1959 in the UK, the Molony Committee on Consumer Protection was charged to consider and report what changes needed to be made to protect consumers. The report published in 1962 was intended to provide a foundation for policy making and is at the origin of modern legislative changes in consumer law. The report identified an imbalance between consumer and suppliers, due to evolving methods of manufacture that was to serve as a basis for intervention not only in the UK, but also in the USA when in 1962 president Kennedy famously declared that 'consumers by definition include us all' in his special message to Congress.

¹⁰ For more on the development of European Consumer Policy, see Luke Nottage, Kate Tokeley, Christine Riefa, 'Comparative consumer law reform and economic integration' in Justin Malbon and Luke Nottage (eds.), *Consumer Law & Policy in Australia & New Zealand* (The Federation Press 2013) 52-94.

¹¹ On this point, see Hans-W Micklitz, 'Do Consumers and Businesses Need a New Architecture of Consumer Law - A thought Provoking Impulse' (2013) 32 Yearbook of European Law 266.

¹² Article 153 gave constitutional basis to the adoption of consumer protection measures based on the achievement of the internal market as well as consumer protection per se. However, this latter constitutional basis has only been used once since its adoption, for the adoption of Directive 98/6/EC on Consumer protection in the indication of the prices of products offered to consumers [1998] OJ L80/27.

¹³ Article 169 TFEU is the key basis for consumer protection and is contained in a single-article title (Title XV on Consumer Protection).

¹⁴ Article 12 TFEU indeed states: 'consumer protection requirements shall be taken into account in defining and implementing other Union Policies and activities'.

¹⁵ Article 4 TFEU.

¹⁶ Official Gazette No 62/2014

¹⁷ Official Gazette of FRY No 37/02. At the time, Serbia was part of the Federal Republic of Yugoslavia and consumer protection was part of the competences of the federal state.

¹⁸ Official Gazette of RS No 79/2005.

Neither the first, nor second incarnation produced any significant effects in practice¹⁹ leaving Serbian consumers in more or less the same situation they were in, prior to the new laws being adopted. It was only the third Law on Consumer Protection, adopted in 2010, that started to have some impact on the ground with the application of some specific consumer rules. However such application was of a limited extent²⁰ because the 2010 law had some material shortcomings. The upshot of this was that whatever rules could be applied in practice, they were unsatisfactory, leaving consumers with little or no redress in cases where it should have been available. The law thus required modifications to be truly effective. Those changes came with the drafting of an entirely new law, the LCP 2014, thanks to an EU financed project.²¹

Those rapid changes in Serbia denote some instability in the way consumer law and consumer rights have developed. The instability of consumer legislation is a phenomenon which is not limited to Serbia, but is also characteristic of the majority of the Western Balkan countries.²² Typically, consumer protection regimes in these countries are characterised with *'mistransposition, slow or non-existent uptake, insufficient enforcement, and various sources of institutional non- or malfunctioning'*.²³ This phenomenon is the consequence of a lack of understanding in these countries, including Serbia, of what is meant by the idea of consumer protection and why there is a need for the existence of a separate regulatory regime for consumer protection. This may well be at the root of the poor application of consumer legislation in practice. For example, the struggle of consumer law in Serbia and the Balkans is anchored in the fact that this is a law in mutation, struggling for recognition.

1. Necessary shift in mainstream legal thinking: towards recognising consumer law as an autonomous branch of the law?

Very few are the academics and legislators that are indeed willing to recognise consumer law as an autonomous branch of the law in Serbia. This in turn may explain the lack of resources devoted to enforcement (whether lack of training for judges or market surveillance authorities), and the underfunding of consumer associations.²⁴ In Europe, consumer law has achieved full recognition by becoming an independent policy of the European Union.²⁵ But EU Consumer law was not made

¹⁹ See M Djurovic and N Lazarevic, *Towards European Union: The Serbian Law on Consumer Protection and the Position of the Serbian Consumer*, euvr Vol 3 No 1 (2014), 18-19.

²⁰ Official Gazette RS No 73/2010; The drafting of the Law was part of ZAP Project funded by the EU.

²¹ *Strengthening of consumer protection in Serbia*.

²² for a detailed overview, see M Karanikic/HW Micklitz/N Reich under collaboration of R Buttner/M Djurovic/T Roethe/D Trbojevic, "Modernising Consumer Law" (Nomos 2012).

²³ Y Svetiev, 'How Consumer Law Travels' (2013) 36 *Journal of Consumer Policy* 209, 228.

²⁴ T Bourgoignie, 'Consumer protection policy and consumer law: the real challenges' in T Bourgoignie, T Jovanic *Strengthening Consumer Protection in Serbia* (Beograd 2013) 50.

²⁵ Article 169(1) TFEU. See Norbert Reich and Hans-W. Micklitz, 'Economic law, consumer interest, and EU integration' in N Reich, HW Micklitz, P Rott and K Tonner, *European Consumer Law* (2nd edn,

in a day. It evolved through a number of phases. It emerged via activism from the European Court of Justice²⁶, now known as the CJEU, before being formally recognised in the Treaty of Maastricht and developed via secondary legislation (Directives in particular). In Serbia, consumer law or the idea of protecting consumers only started to develop in very recent years. It is still, to a large extent, emerging. By contrast to the EU, the way consumer law is evolving in Serbia in the statute books is very fast paced and possibly faster than the legal system and its associated professions are able to absorb the change. Indeed the emergence of consumer law comes with fully fledged legislation rather than be developed incrementally. In Serbia, the development of a separate regulatory regime for the protection of the consumers, conceptualised as the weaker party in their relationship with traders, is an idea which was imposed from the outside and does not reflect mainstream legal thinking.

Yet, it is one that Serbian lawyers will need to get familiar with because the adoption of an efficient consumer protection regime is a condition for Serbian progress in the process of European integration. Namely, all countries willing to become EU Member States need to align their regulatory systems of consumer protection with EU Law. That represents a mandatory requirement.²⁷ The four successive legislative pieces that have been dealing with consumer protection in recent years are the outcome of Serbia's attempt to align its consumer legislation, but also to establish a workable system of consumer protection to satisfy the European requirements.

In that sense, the alignment of consumer legislation is, together with health issues, the subject of a separate chapter of the regular Progress Reports that the European Commission adopts every year and where it assesses the progress of each of

Intersentia 2014) 19-65; see also L Nottage, C Riefa and K Tokeley, 'Comparative Consumer Law Reform and Economic Integration' in Malbon, Nottage, *Consumer Law & Policy in Australia and New Zealand* (The Federation Press 2013) 72.

²⁶ Through creative intervention the CJEU helped prepare the ground for the Maastricht Treaty in 1993 and the creation of a formal basis for intervention in consumer policy matters. It did so primarily via the use of what is coined negative law, 'an indirect form of consumer policy in its capacity to remove national impediments to integration' (Geraint Howells and Stephen Weatherill, *Consumer Protection Law* (Ashgate 2005) 119). For example, in *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* (ECJ Case 120/78 of 20 February 1979) Germany had banned the sale of Cassis de Dijon, a French liquor on the grounds that its weaker alcohol content was threatening to consumers' health. Under Article 28 of the Treaty measures having equivalent effect to quantitative restrictions were banned and the Court remained unconvinced by the public health argument put forward, preferring instead that consumer be given a choice as to what type of alcohol to buy. It therefore ordered that the national law be 'negated' and barriers to import removed to allow French liquor to reach the shelves and consumers to make a choice. The same level of protection could be achieved, according to the CJEU, by labelling the product adequately and informing consumers. Consumer choice, a recurrent theme in consumer protection policy today, had been excavated out of the free movement of goods agenda and given a prominent role in determining the contour of what Member States were able to do in imposing protectionist measures.

²⁷ See on that: J. Stuyck/M. Djurovic, "External dimension of EU Consumer Law" in M. Cremona/H. Micklitz (eds.) *External dimension of EU Private Law* (Oxford University Press 2015 forthcoming)

(potential) candidate countries in its process of the European integration. The obligation of Serbia to fully align its legislation was formalised by the Stabilisation and Association Agreement that Serbia signed with the European Union, which entered into force in 2013. The Stabilisation and Association Agreement is the main instrument for regulation until the accession of Serbia into the European Union. This Agreement imposes a formal obligation on Serbia to fully align its regime of consumer protection with that of the consumer *acquis*.²⁸

While Europe had decades to slowly adapt to the idea of protecting consumers' economic rights, Serbia is confronted with a mature body of laws already implemented into its legal order. As a result, while resistance on the ground may be strong, it is necessary to find ways of accelerating acceptance of a consumer law that is already in force in Serbia. One important way of doing so is to first of all spread understanding about the law, its main features and benefits for Serbian consumers. Another key avenue to force a change on the ground is to bolster enforcement to make the law in the books a reality on the ground. If consumer law and its benefits are seen in action, they are more likely to gather pace and supporters.

3. Benefits and drawbacks of the legislative technique used to bring changes to consumer law

The LCP 2014 offers a high level of alignment with EU Consumer Law, providing thus a step forward, in comparison to its predecessor, the LCP 2010.²⁹ All of the EU Consumer Law Directives have been consolidated into this one piece of legislation. The only exception are the rules contained in Directive 2008/48/EC on consumer credit and Directive 2002/65/EC on distance marketing of financial services that have remained outside the scope of this Law. This is because they are covered by a separate piece of legislation, namely the Law on the protection of users of financial services, which is currently under revision as a result of its material discrepancies with EU Law.³⁰

From a formal perspective, Serbia has decided to follow a dualistic approach, and regulate on consumer protection through a separate body of rules, independent from general civil law, and in particular independently of its Law of Obligations of 1978.³¹ The Serbian Law on Obligations is currently under reform, as part of the drafting of the new Serbian Civil Code. However, consumer protection is beyond its

²⁸ See Articles 72 and 78 of the SAA between Serbia and the EU

²⁹ for an overview of major shortcomings of the Law of 2010, see: M Karanikic-Miric, *Understanding the Enforcement Malfunction of Consumer Legislation in Serbia*, Journal of Consumer Policy 3/2013, 231-246

³⁰ Official Gazette 36/2011

³¹ for an overview of the approaches of Member States of the European Union, see: S Grundmann and M Scauer (eds), *The Architecture of European Codes and Contract Law*, (Kluwer Law International 2006)

scope.³² In this regard, the incorporation of consumer law rules into the law of obligations might have been a better solution. While the solution adopted gives consumer law some autonomy (being carved away from Civil law), it is also the source of its current demise. Indeed, since the professions are unfamiliar with consumer law, the incorporation of consumer law rules into existing laws may have been more useful during a transition period. This is simply because it would have been more visible for judges and practitioners if it were placed in the piece of law all are already accustomed to. This in turn may have encouraged more use of the law and resulted in consumer law being more likely to get applied in practice.

The lack of familiarity of the judges with consumer law is noticeable, for example, in the recent judgements of the Serbian courts dealing with unfair contract terms in consumer credit agreements. In those decisions, these terms were not annulled by the Court on the grounds on provisions on unfair contract terms and unfair commercial practices. Instead the judges favoured the application of the rules of the general Law on Obligations of 1978.³³

This is somewhat reminiscent of the practice in the UK in the late 1970s'.³⁴ Having carved some protection via the doctrine of incorporation of terms to deal with issues of unfairness in contracts, judges first appeared reluctant to make wide use of the Unfair Contract Terms Act 1977 (UCTA). However, litigants and judges quickly became familiar with the benefit of using the statute and migrated. Within only three years, judges started to show a strong preference for the application of statute rather than the common law. In *Photo Production Ltd v Securicor Transport Ltd*³⁵, Lord Diplock explained: *'the reports are full of cases in which what would appear to be very strained constructions have been placed upon exclusion clauses, mainly in what to-day would be called consumer contracts and contracts of adhesion. As Lord Wilberforce has pointed out, any need for this kind of judicial distortion of the English language has been banished by Parliament's having made these kind of contracts subject to the Unfair Contract Terms Act 1977'*.³⁶

The UK experience also illustrates that while codification in pre-existing norms may be helpful to spread consumer law, it is also possible to infer that the passing of time and the training of judges may also reach the same outcomes. However, in Serbia, the issue may be that, unlike England in the late 1970s', there is a deadline for being compliant with EU law. Back then in England, the pressure did not come from Europe. It was a piece of national legislation and Parliament had already shown a preference for protecting consumers. Besides, Directive 1993/13/EEC on unfair

³² M. Djurovic, *Serbian Contract Law: its development and the new Serbian Civil Code*, European Review of Contract Law 1/2011, 65-77, 72

³³ Judgements of the court on file with the authors.

³⁴ Christine Riefa, 'Consumer Law in England: from common law to codification?' in Jorge Luis Tomillo Urbina, Julio Alvarez Rubio (eds), *La Protección Jurídica de los consumidores en el espacio euroamericano* (Editorial Comares 2014) xx.

³⁵ [1980] UKHL 2.

³⁶ Diplock LJ, at page 9.

contract terms³⁷ was quickly implemented into UK law at a time where member states also had much more freedom on how to protect consumers, thanks to the use of minimum harmonisation directives.

Indeed, practice in the EU was first to use minimum harmonisation directives. This is for example, the case in Directive 1999/44/EC on consumer sales³⁸ or Directive 1993/13/EEC on unfair contract terms.³⁹ Those directives enabled Member States to make appropriate variations in order to offer their national consumers more protection than the EU legislation required. Serbia has benefited, however, only to a very limited extent, from the freedom to establish a higher level of protection than the one secured by these directives. In case of minimum harmonisation requirements, only the minimum standards of protection are defined and Serbia is allowed to adopt any higher level in accordance with its need, policy and particularities of legal system and society.

However, legislative practice in the EU is evolving and in recent years, maximum harmonisation directives have become more common. Those directives set a floor and a ceiling to the protection that can be afforded to consumers. Serbia has fully respected this obligation in its implementation of Directive 2011/83/EU on consumer rights⁴⁰ or Directive 2005/29/EC on unfair commercial practices.⁴¹ Maximum harmonisation therefore requires Member States to fully adapt to European standards. This can, in the Serbian experience, be more difficult to deal with than minimum harmonisation. This is because the legislator is constrained to change the national legal order at a time where the development of the law does not come from a natural evolution of public opinion and the mapping onto consumer needs, but rather is received as an imposition, an artificial exercise. With minimum harmonisation, at least, the national legislator continues to have some control over the degree to which it wants to make changes and may choose to start with only conforming with the lowest common denominator.

4. Innovations in law serving Serbian consumers

The LCP 2014 only brings limited changes to the Consumer Protection Act of 2010. This is because the substantive content of the Act was already largely aligned with EU consumer law. The biggest contribution of the LPC 2014 is therefore to bring clarifications or to reformulate some elements as well as to provide adequate regulatory response to the latest development of EU Consumer Law. This was for example the case of Article 43 LPC 2014 that clarifies the general fairness clause of a

³⁷ Directive 93/13/EEC on unfair terms in consumer contracts, OJ L 095, 21.04.1993, 29 - 34.

³⁸ Directive 99/44/EC on certain aspects of the sale of consumer goods and associated guarantees, OJ L 171, 07.07.1999, 12 - 16.

³⁹ Directive 93/13/EEC on unfair terms in consumer contracts, OJ L 095, 21.04.1993, 29 - 34.

⁴⁰ Directive 2011/83/EU on consumer rights, OJ L 304, 22.11.2011, 64 - 87.

⁴¹ Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market, OJ L 149, 11.06.2005, 22 - 39.

contract term.⁴² The most significant changes concern the incorporation into the LPC 2014 of Directive 2011/83/EU on consumer rights. This is easily explained because at the time the Consumer Protection Act of 2010 was drafted, this Directive did not yet exist. The Directive on consumer rights remodels quite substantively and further develops the rules on distance and doorstep sale and also incorporates uniform rules on the passing-off the risk and delivery in the area of consumer sales.

The LPC 2014 notably brings some improvements in the area of consumer sales, a fundamentally important part of consumer law.⁴³ The preceding provisions in Serbia were implementing the narrow and imprecise provisions of Directive 1999/44/EC, leaving Serbian consumers without viable solutions. For instance, an example of improvement is the introduction of a concrete number of days in the LPC 2014, through which the legislator wished to remedy the previous misuse by sellers of the *'reasonable period of time'* given by the Law of 2010 to repair the goods.⁴⁴ According to the LPC 2014, the seller has now an obligation to solve any problem referred by a consumer within a strictly limited time period of 15 or 30 days (depending on the type of goods), as of the date when the consumer made a complaint.⁴⁵ The repair of defective goods is allowed within the first period of six months only, and if the consumer explicitly allows so.⁴⁶ The aim of this provision is to secure the consumer's right to replacement of goods which are not in conformity with the contract. Until now, the practice was to force consumers to accept a repair rather than a replacement because when required from the seller, the good in question was *'conveniently'* out of stock.

Another key feature of the LPC 2014 is the introduction of more developed provisions on services of general economic interest (i.e. the areas of telecommunications, supply of energy and water, etc).⁴⁷ The implementation of those provisions was done taking into account the particularities of the Serbian market and society. This is a field where Serbian consumers have traditionally been faced with significant problems, partially as a consequence of rather limited choice in the selection of providers, where traders would typically profit from consumer's necessity for the usage of a particular service of general economic interest. The worse practices were forcing consumers to pay unrealistically high bills for their consumption of energy or telecommunication services or face cut-offs. In response, one of the new rules of the LPC 2014 provides that traders are prohibited from cutting supply of services of general economic interest to a consumer who has not paid certain services for a particular period of time, but submits a claim against such a bill before the competent authority, under the condition that the consumer

⁴² Article 43 of the LPC 2014.

⁴³ A Wiewiorowska-Domagalska, *Consumer Sales Guarantees in the European Union* (Sellier 2012) xx.

⁴⁴ Article 54(5) of the LPC 2010

⁴⁵ Article 56(7) of the LPC 2014

⁴⁶ Article 52(8) of the LPC 2014

⁴⁷ Chapter X of the LPC 2014

continues with the payment of his current services.⁴⁸ Moreover, all providers of services of general economic interest must establish a special committee in charge with dealing with consumer complaints and include a representative of consumer organisations. This provision is designed to secure that consumer interests will also be taken into consideration while deciding on a consumer complaint related to the provision of services of general economic interest.⁴⁹

5. Promoting a stronger enforcement of consumer law

'Consumer law is only as good as its enforcement'.⁵⁰ It is therefore necessary, to encourage the wide adoption of consumer law in Serbia, that it is also seen to work in practice, rather than simply appear as window dressing. Consumers must benefit from the advances the law carves out for them. Besides, the principle of effective protection of consumers is one of the fundamental principles of EU Law, identified in articles 6 and 13 European Charter of Human Rights (ECHR). All Member States of the EU, as well as Serbia, are a part to the ECHR. This principle is also protected in Article 47 of the Charter of Fundamental Rights of the European Union. In *Alassini*, the CJEU confirmed a mandatory obligation of Member States to secure consumer's right to effective protection and access to justice.⁵¹ This obligation also applies to Serbia as a country wanting to join the European Union.

Accordingly, consumers need to have guaranteed effective means in Serbia to enforce their rights established by consumer legislation. Despite the existence of considerably developed European consumer legislation, the regulation of enforcement of consumer law has still remained primarily the competence of Member States. Only a few pieces of European legislation are exclusively dealing with the question of enforcement of consumer law. In particular, Directive 2009/22/EC on injunctions⁵² as well as Regulation 2006/2004 on consumer protection cooperation⁵³ offer tools for a better enforcement of consumer rights. In addition, Directive 2013/11/EU on alternative resolutions of consumer disputes⁵⁴

⁴⁸ Article 86(3) of the LCP 2014

⁴⁹ Article 92(1) of the LCP 2014

⁵⁰ G. Howells and S. Weatherill, *Consumer Protection Law*, second edition, Ashgate 2005, p. 660, n° 14.10.

⁵¹ Joined Cases C-317/08 to C-320/08 *Rosalba Alassini e.a. v. Telecom It Spa e.a.* [2010] ECR I-02213, para 61

⁵² Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (Codified version) [2009] OJ L110/30

⁵³ Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation) [2004] OJ L 364/1

⁵⁴ Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) [2013] OJ L165/63

and Regulation 524/2013 on online resolutions of consumer disputes⁵⁵ were adopted in order to provide unified rules and promote alternative means to resolve consumer disputes, providing common principles on which all mechanism for alternative resolution throughout the European Union have to be based.

Through scarcely regulating enforcement of consumer law, the EU respects the procedural autonomy of the national legal systems in the regulation of enforcement enabling them to establish the rules in accordance with their needs and particularities of their national legal systems and society.⁵⁶ Accordingly, Serbia is also given a chance to establish a mechanism that suits best to its local needs and particularities.

However, the previous system envisaged by the Law on Consumer Protection in 2010, turned out to be improper and not at all functional as a legal basis for enforcement. The power of enforcement was taken from the Ministry in charge of consumer protection as well as from market inspectors. The civil law courts became the main pillar of enforcement curtailing the important role that administrative authorities play in the process of enforcement. Indeed, consumers are often timid and apathetic using the courts. In addition, in Serbia, the response of the courts was barely noticeable and hardly any judgements were adopted on the basis of the Law on Consumer Protection 2010. This was considered as one of its biggest shortcoming.⁵⁷

Consequently, one of the main goals of the new Law was to remedy these deficiencies and provide an adequate legal basis for the establishment of an efficient system of enforcement. The entire system of enforcement was redesigned in order to secure effective protection of all consumers. That explains the shift from judicial enforcement (private enforcement) back towards administrative enforcement. Accordingly, the Ministry in charge of consumer protection, currently the Ministry of Trade, Tourism and Telecommunications, became the main pillar of enforcement. Also, as of 2014, Serbia has, for the first time, an Assistant Minister, exclusively in charge of consumer protection, whereas previously the same Assistant Minister was in charge of consumer protection and trade matters. The political shift could not be more obvious and should help raise awareness as well as encourage change in Serbia. Enabling public enforcement, despite its usual limitations, such as budget restrictions, could be a step in the right direction to elevate consumer protection in the Serbian legal order. Political backing is indeed essential for this area of law to be fully embraced. Nevertheless, courts still have a role to play and private enforcement remains a possible avenue.

⁵⁵ Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR) [2013] OJ L165/1

⁵⁶ V. Trstenjak, Procedural Aspects of European Consumer Protection Law and the Case Law of the CJEU' (2013) 21 European Review of Private Law 451

⁵⁷ M Djurovic and N Lazarevic, *Towards the European Union: The Serbian Law on Consumer Protection and the Position of the Serbian Consumer*, euvr Vol 3 No 1 (2014), 24

Incentives for the use of Serbian Courts in consumer disputes

The LCP 2014 has introduced an exemption from the court taxes for consumer disputes whose value is below 500 000 Serbian dinars (around 4 150 EUR).⁵⁸ The goal is to overcome the financial obstacle for initiation of a potential dispute before the court in cases when consumer seeks to enforce their rights before the court. Consumers often do not have sufficient financial resources to initiate litigation. Such provision should somewhat improve the position of individual consumers when it comes to accessing justice. Certainly, for a more effective system of private redress, additional efforts are needed in order to develop consumer awareness about the existence and content of their rights and how to enforce them.

Alternative methods of resolution of consumer disputes in their infancy

Court procedures, even in Europe, have their limitations in the way they can assist consumers solve their disputes. As a result, consumers in the European Union are also encouraged to resolve disputes through alternative means of dispute resolution (the so-called ADR). ADR is not new in Serbia and the operations of the Mediation Centre and the National Bank of Serbia are already well-established forms (although they may not always be well known from consumers, nor cover all industry or Serbia as a whole). ADR is composed of a number of techniques, the most adapted and popular for consumer disputes being mediation and conciliation. Those are typically more advantageous for consumers since they tend to be more efficient, easier and cheaper to use than the courts. For traders, the discrete character of ADR, in so much as it is not public and remains very much unformalised, also avoids bad publicity and can be a strong incentive for their use. Those means of dispute resolution also preserve the relationship between parties as they work together towards a satisfactory resolution as opposed to being pitched against one another as in a court setting. If performed in a fair and fast manner, alternative way of resolving consumer disputes is likely to be consumer's preferred choice over other offered means.⁵⁹

Directive 2013/11/EU on alternative resolution of consumer disputes provides a harmonised framework and some rules destined to preserve the quality and impartiality of ADR. The directive was partially transposed in the Serbian legal system through the LCP 2014, primarily through its articles 141 and 142 LPC. The Regulation on ODR will be implemented at a later stage through a by-law once the European Commission develops the online platform envisaged by Regulation.⁶⁰

⁵⁸ Article 140(2) of the LCP 2014

⁵⁹ S Weatherill, *EU Consumer law and Policy* (2nd edn Edward Elgar Publishing 2013), 294

⁶⁰ Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR) [2013] OJ L165/1

While this is a first step, ADR in Serbia is very much in its infancy. As it is also a relatively recent development in many EU countries, Serbia has less ground to cover to catch up. However, more work is awaiting as the LPC is simply acting as an enabling legislation and by-laws are still needed to make the control of ADR a reality on the ground. Without some guarantees of the quality of the system, it is unlikely to attract traders and consumers alike. Given the slow adoption by judges of consumer law in Serbia however, ADR may be a good opportunity to obtain some results fast.

The use of collective redress to bolster consumer protection

The significance of collective redress

Collective redress is one of the most significant modifications brought by the LCP 2014.⁶¹ Collective redress plays an essential role in securing effective protection of consumer rights. In her Opinion in *Invitel*, the Advocate General Trstenjak explained the purpose of collective redress from a perspective of consumer law. She pointed out that '[t]he successful enforcement of rights by way of a collective action creates a just balancing of the interests of consumers and undertakings, ensures fair competition and shows that collective actions are just as necessary as individual actions in order to protect the consumer'.⁶² Accordingly, there is a noticeable trend towards the increase and further emphasis being placed on the role of collective redress as a redress mechanism in the countries of the European Union.⁶³ To serve Serbian consumers well, such a system should also be developed, not only to bring Serbian law in line with the EU, but also to ensure consumers have access to effective means of redress and give consumer law its rightful place in the national legal order.

Collective redress is very useful because it allows bypassing six of the most fundamental issues that normally explain consumer apathy when it comes to seeking redress. First, consumers' knowledge about the existence and content of their rights is normally rather limited. Second, even in cases when they are familiar with their rights, inconstant willingness and motivation of consumers to enforce their rights remains. Further, the familiarity and accessibility of the mechanisms they may use to enforce their rights may remain limited. Third, a particularly important element of accessibility is of a financial nature. The costs of enforcement, in particular if it is litigation before a court, often pre-empts action. Fourth, the value of the product which would be the subject of the claim is typically of a low value. This in turn, tends to decrease the motivation of an individual consumer to pursue the matter in front of the courts. Fifth, fighting for one's rights can be time consuming. Sixth, consumers

⁶¹ for further information, see: B Babovic, *Legislative changes in the field of consumer collective redress*, *Anali Pravnog fakulteta u Beogradu* 2/2014, 215-228

⁶² Opinion of Advocate General Trstenjak in Case C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt* (2012) ECR I-0000, para 41

⁶³ See C Hodges, 'Collective Redress in Europe: The New Model' (2010) *Civil Justice Quarterly* 370

may have doubts against whom they should complain to in certain cases: (for example, seller, producer, importer or distributor). If they do know against whom they should file an action this diminishes their incentive to fight for their rights.⁶⁴ Collective redress is designed to overcome all these shortcomings. This explains why Serbian law is also making use of this redress mechanisms and caters for it in the LPC 2014.

The shift from judicial to administrative enforcement

To be able to benefit from collective redress, the collective interest of consumers needs to be hurt. 'Collective interest' is an abstract notion, that does not mean a simple accumulation of individual interests, but it is more than that.⁶⁵ The innovative character of this notion was pointed out as being potentially incomprehensible to the national courts and the existing frameworks of civil procedure laws.⁶⁶ There was therefore a danger that this area may be another where judges, unfamiliar with the notion, side with civil law already in existence rather than explore more viable ways of delivering a remedy to consumers in instances where single lawsuits make little sense. Thankfully, the LCP 2014 has devised two mechanisms to ensure a more widespread adoption of collective redress mechanism.

First, it provides a definition of the collective interest of consumer.⁶⁷ This will assist all parties involved in understanding the remit of such action. Second, Serbian law shifted from courts to administration as a way to action collective actions. In accordance with the European approach and Directive 2009/22/EC on injunctions, the mechanism of collective protection of the consumer interest is included in the Serbian consumer legislation. The previous Law on Consumer Protection of 2010 envisaged that the procedure of collective redress, in case of breach of consumer's collective interest, should take place before the court, i.e. collective redress was to be performed as a judicial instrument.⁶⁸ Such feature was not popular and not a single case is recorded, therefore pointing towards an inefficient system as well as perhaps the lack of awareness of the public and legal professionals. However, the LCP 2014 changed that approach. In Serbia today, a breach of the collective interest of consumers can be protected via an administrative mechanism. The competent authority before which the procedure is to take place is the Ministry in charge of consumer protection.

⁶⁴ P Spiller and K Tokeley, 'Individual consumer redress' in G Howells, I Ramsay and T Wilhelmsson with D Kraft (eds), *Handbook of Research on International Consumer Law* (Edward Elgar 2010), 483-484

⁶⁵ B Babovic, *Legislative changes in the field of consumer collective redress*, *Anali Pravnog fakultetat u Beogradu* 2/2014, 215-228, 219

⁶⁶ C Poncibo, 'The Reform of Directive 98/27/EC' in F Cafaggi and HW Micklitz (eds), *New Frontiers of Consumer Protection – The Interplay Between Private and Public Enforcement* (Intersentia 2009), 288

⁶⁷ Article 145 of the LCP 2014

⁶⁸ Article 139 LCP 2010

Both approaches are legitimate and in line with EU Law, in particular with Directive 2009/22/EC on injunctions. Directive 2009/22/EC just requires that there shall always be an action for injunction possible when the collective interests of consumer have been harmed, as a consequence of a breach of consumer legislation.⁶⁹ Consequently, Serbia has the option to establish a system that best suits its needs. The reason behind the shift from judicial to the administrative enforcement in Serbia is based on the fact that the court system is traditionally slow and inefficient. It may also have to do with the reluctance the judiciary has shown for using consumer law. The administrative mechanism should secure that any kind of (potential) breach of consumer rights is sanctioned efficiently and adequately.⁷⁰ It is still to be seen how this will work in practice. At the time of writing, the Ministry in charge of consumer protection is strengthening its capacities and collective actions are not yet a practical reality. They however should remain a powerful threat to businesses and reassure consumers that in future, their rights can be better defended, even in cases where individual action would be illusory.

Qualified entities to initiate collective redress

But what the law gave with one hand it took with another. In comparison to the Law of Consumer Protection of 2010, a noticeable difference in the LCP 2014 is that an individual consumer is no longer entitled to start a procedure for the protection of the collective interest of consumers. Now, only registered consumer organisations⁷¹ and the Ministry in charge of consumer protection are enlisted as the parties allowed to initiate such procedure. In accordance with the freedom given by Directive 2009/22/EC on injunctions, Serbia has a discretionary power to recognise the status of qualified entities. This may have an impact on the accessibility of such actions, although it does make some economic sense. It would not be viable to enable a single consumer to require the full administrative machinery to start.

From a European perspective, it is possible to make a distinction between three approaches towards qualified entities in Member States as parties which are entitled by the law to initiate such collective procedure. The first group includes countries that recognise consumer organisation(s) as the only qualified entities, for instance the Netherlands or Portugal. The second one includes countries that consider only a State body as a qualified entity, as is the case for Ireland or Sweden. The third category is a mixed one, both consumer organisations and State entities have the recognised right to ask for injunctions, as it is the case with Spain or Cyprus.

⁶⁹ Article 1(1) of Directive 2009/22/EC on injunctions

⁷⁰ T Jovanic, *Uloga Uprave u Zastiti kolektivnih interesa potrosaca*, in: T Bourgoignie, T Jovanic *Strengthening Consumer Protection in Serbia* (Beograd 2013) 309-326

⁷¹ The LCP 2014 makes a distinction between registered and non-registered consumer organisations. Registered consumer organisations are those which are entered in the Register of consumer organisations run by the Ministry in charge of consumer matters. In order to be registered, the consumer organisations must fulfil some conditions guaranteeing their capacities, skills and knowledge.

Moreover, among the countries, the number of qualified entities differ, between one to several dozens. For instance, in Sweden only the Consumer ombudsman has capacity, whereas there are seventy-seven entities able to start proceedings in Germany and seventy-one in Greece.⁷² Serbia belongs in this third category and has adopted a mixed approach. In the case of Serbia where the idea of consumer protection is relatively new and not yet properly accepted, this strikes as a good policy option since it enables a wider number of stakeholders to initiate the process for protection of collective interest of consumers.

Conclusion

Serbian consumer law is still in its infancy but is already a perfectly formed body of law. The LPC 2014 has all the workings of an autonomous body of rules and is on par with law on the books in other countries in the EU. Indeed, the law, modelled on European Law has been able to benefit from the experience of European countries and the last 50 years or so of developments towards the recognition of more rights for consumers. However, it may be too much too soon for Serbia.

While European counter-parts debated many protective features and refined the laws in parliamentary debates, ensuring widespread public agreement as well as much needed business support, Serbia has simply inherited an already made solution. This may have many benefits and ensure strong protection from the outset. It also ought to bypass a lot of issues that evolved from a piece meal and ad hoc design of the system of protection. However, it is important to note that the legal and administrative infrastructures that accompany such consumer protection in Europe also developed incrementally. The view of the law as an autonomous legal discipline also contributed to its success in many European countries.

In Serbia by contrast, the doctrine is still very much anchored in civil law and many of the institutions needed to enable the consumer law defined in the LPC 2014 to function need to be put in place or given the necessary tools. It is a big ask. Consumer law 'EU style' is still rather unfamiliar to Serbian lawyers and the judiciary alike. Consumer associations are present, but remain weak and lack adequate resources. The Ministry, in charge of most of the enforcement framework is also getting familiar with its new duties. Most important of all, consumers and businesses remain un-educated about consumer rights and their new corollary obligations. This means that this law has not yet been able to spread its wings and truly affect consumers on the ground. Some innovative features, such as a reduction in the cost of bringing an action in front of the courts, or the use of ADR and collective mechanisms are welcome additions to the Serbian legislative order but are not yet fully functional. While major progress has been made, Serbia has lots to do before it

⁷² Commission Communication concerning Article 4(3) of Directive 2009/22/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interests, which codifies Directive 98/27/EC, concerning the entities qualified to bring an action under Article 2 of this Directive, OJ C 115 of 15 April 2014

achieves EU standards of consumer protection and provide consumers with protection on par with the rest of Europe.